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Chapter 23

Germany

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23.1. Concept of tax transparency and new tendencies

23.1.1. Concept of tax transparency in Germany: Tax transparency in both directions

In the modern age of digitalization, with automatic exchange of information[1] and high taxpayer mobility, a constant flow of data is taking place. The relevance of transparency in this process cannot be more emphasized. This is especially so in the context of tax law, in which it is assuming greater importance within tax procedures. It is an interesting fact that the word "transparency" is often understood as an obligation of the state with respect to taxpayers. However, transparency is a neutral term and can apply just as well to taxpayers with respect to the state; in fact, the latter is just as important as the former. Hence, in this chapter, tax transparency is to be understood in its broader sense: transparency on both sides.

In Germany, there is no specific concept of tax transparency. Nevertheless, there are different aspects of German tax law that ensure that the taxation procedure is transparent. Tax compliance, notes of checks (*Kontrollmitteilungen*) and the cooperation of the taxpayer with the tax authorities (*see* section 23.2.2.1.) are key factors in ensuring a transparent tax procedure. Tax compliance from the taxpayer's point of view means implementing a system that guarantees adherence to tax provisions. In contrast, tax authorities have a different understanding of tax compliance. Tax authorities view their tax compliance systems as a means to encourage cooperation from the taxpayer without having to use sovereign force.[2]

1. As Malherbe eloquently put it, a new "era of exchange of information" has begun; *see* J. Malherbe, *New EOI vs. Tax Solutions of Equivalent Effect*, in *New Exchange of Information versus Tax Solutions of Equivalent Effect* p. 102 (G. Marino ed., IBFD 2015), Online Books IBFD.

2. R. Seer, *Tax Compliance und Außenprüfung*, in *Festschrift für Michael Streck* p. 404 et seq. (B. Binnewies & R. Spatscheck eds., Otto Schmidt 2011); and R. Seer, *Reform der Steuerveranlagung*, in *Steuerberater-Jahrbuch (StbJb.) 2004/2005* p. 57

Recently, new measures adopted in the name of tax transparency (*see* section 23.1.2.) have prompted a growing discussion about the excessive demands being made of the taxpayer and the insufficient consideration of data protection.[3]

23.1.2. Recent perceptions of new tax transparency measures and public awareness

The recent benchmarks for tax transparency set by the international community and the European Union are the Foreign Account Tax Compliance Act (FATCA), automatic exchange of information (AEoI), the Multilateral Competent Authority Agreement (MCAA) and country-by-country reporting (CbCR), and they have generally been well received in Germany. On 31 May 2013, Germany signed a FATCA agreement with the United States,[4] which was enacted by the German parliament (*Deutscher Bundestag*) on 10 October 2013.[5] The agreement stipulates that Germany

et seq. (N. Herzig et. al eds. Otto Schmidt 2005). With special reference to the compliance system of tax authorities, *see* E. Schmidt, *Moderne Steuerungssysteme im Steuervollzug*, in *Steuervollzug im Rechtsstaat* p. 41 et seq. (W. Widmann ed., Otto Schmidt 2008). Concentrating on the tax compliance of foreign tax authorities, *see* A. Kaiser, *Tax Compliance in ausländischen Finanzverwaltungen*, Internationale Wirtschaftsbriefe (IWB) 20, p. 775 et seq. (2010).

3. One example of such an excessive demand is the extension of the requirements of transfer pricing documentation, which now have to be threefold: (i) a Local File, which shall provide information on the specified transfer pricing documentation for the specific country; (ii) a Master File", which shall show the international business operations and transfer pricing policies; and (iii) a country-by-country report (*see* secs. 23.1.2 and 23.4.3.1.). Further, *see* R. Seer, *The Limitation of Tax Transparency of Multinational Companies*, in *New Taxation – Studies in Honour of Jacques Malherbe* p. 1132 (C.H. Jiménez, C.G. Novoa & J. Fernández C. eds., ICDT 2017); B. Binnewies & A. Zapf, *Die neuen Anforderungen an Verrechnungspreisdokumentationen international tätiger Konzerne*, 62 Die Aktiengesellschaft (AG) 13/14, p. 477 et seq. (2017); K. van Lück, *Verrechnungspreisdokumentation und Country-by-Country-Reporting – erhöhte Anforderungen an multinationale Unternehmen*, 72 Betriebs-Berater (BB) 43, p. 2524 et seq. (2017); R. Seer, *Informationsaustausch innerhalb der EU über sog. Advance Tax Rulings/Advance Pricing Arrangements*, in *Festschrift für Dietmar Gosch* p. 397 et seq. (R. Mellinghoff et al. eds., C.H. Beck 2016); S. Grotherr, *Automatischer Informationsaustausch im Steuerrecht über länderbezogene Berichte von Konzernunternehmen*, 63 Recht der Internationalen Wirtschaft (RIW) 1/2, p. 1 et seq. (2017); and R. Hamacher, *Datenschutz und internationaler Informationsaustausch*, 25 Internationales Steuerrecht (IStR) 5, p. 171 et seq (2016).

4. *See* E. Czakert, *Neue Entwicklungen bei der steuerlichen Amtshilfe*, Institut Finanzen und Steuern, vol. 514, p. 54 et seq. (Institut Finanzen und Steuern e.V. 2017).

5. DE: *Gesetz zu dem Abkommen vom 31. Mai 2013 zwischen der Bundesrepublik Deutschland und den Vereinigten Staaten von Amerika zur Förderung der Steuerehrlichkeit bei internationalen Sachverhalten und hinsichtlich der als Gesetz über die*

is obligated to automatically exchange, with the United States, the account information of taxpayers who are tax liable in the United States and have bank accounts in financial institutions in Germany. For the effective implementation of FATCA in national law, the German parliament enacted section 117c of the German General Tax Act (*Abgabenordnung*, or AO), which allows the Federal Ministry of Finance (*Bundesministerium der Finanzen*) to pass a statutory order. The Federal Ministry of Finance passed such an order on 23 June 2014.[6] However, section 117c of the AO is not limited to a statutory order concerning FATCA, but also applies to AEoI in general.[7] More recently, on 21 December 2015, the German parliament paved the way for the AEoI of financial account data with the so-called *Finanzkonten-Informationsaustauschgesetz*.[8] The MCAA was also enacted in Germany on that same day.[9] Furthermore, CbCR (*see* section 23.2.2.1.2.), which is based on Action 13 of the BEPS initiative of the OECD and the G20 countries,[10] was implemented in the AO, namely in section 138a.[11]

These new measures have made the public more aware of the aggressive tax-avoiding tactics of multinational enterprises, such as Google, Apple and Amazon. The growing public awareness was also sparked by the so-called "Panama Papers" (which were disclosed in April 2016 by journalists from the *Sueddeutsche Zeitung* (South German Newspaper) and the International Consortium of Investigative Journalists) and, more recently the leaking of millions of documents – the so-called "Paradise Papers" – in November 2017, concerning the aggressive tax avoidance plans of high-

Steuerehrlichkeit bezüglich Auslandskonten bekannten US-amerikanischen Informations- und Meldebestimmungen, Bundesgesetzblatt (BGBl.) II 2013 (10 Oct. 2013), p. 1362.

6. DE: Federal Ministry of Finance, *FATCA-USA-Umsetzungsverordnung*, BGBl. I 2014 (23 June 2014), p. 1222.

7. M. Marquardt & M. Betzinger, *Internationaler Informationsaustausch in Steuersachen*, 69 BB 50, p. 3034 (2014). For a critical view on automatic exchange of information and special regard to data protection, *see* Hamacher, *supra* n. 3, at p. 171 et seq.

8. DE: *Finanzkosten-Informationsaustauschgesetz* (FKAustG), BGBl. I 2015 (21 Dec. 2015), p. 2531. According to sec. 6, para. 3 of the FKAustG, tax year 2016 shall be the first year of application.

9. DE: *Gesetz zu der Mehrseitigen Vereinbarung vom 29. Oktober 2014 zwischen den zuständigen Behörden über den automatischen Austausch von Informationen über Finanzkonten*, BGBl. II 2015 (21 Dec. 2015), p. 1630.

10. OECD, *Transfer Pricing Documentation and Country-by-Country Reporting – Action 13: 2015 Final Report* (OECD 2015), International Organizations' Documentation IBFD.

11. DE: *Gesetz zur Umsetzung der Änderungen der EU-Amtshilferichtlinie und von weiteren Maßnahmen gegen Gewinnkürzungen und –verlagerungen*, BGBl. I 2016 (20 Dec. 2016), p. 3001 et seq.

profile people all over the world. Against this background, it was not at all surprising when, following the failure of the Federal Ministry of Finance's initial introduction of a bill for a legal notification obligation regarding tax schemes in 2007[12] and a series of inconclusive discussions about a general duty to disclose tax schemes,[13] the Financial Committee of the German Federal Council (*Bundesrat*) suggested a legal notification obligation for such tax schemes.[14] In addition, the Max Planck Institute for Tax Law and Public Finance (*Max-Planck-Institut für Steuerrecht und Öffentliche Finanzen*) published a survey in 2016 following a research assignment by the Federal Ministry of Finance in 2015, in which the institute basically vouched for the implementation of a legal notification obligation for tax schemes.[15] At the same time, the European Union was also discussing such an obligation for declaring tax schemes in cross-border situations, which has since been implemented.[16] A legal basis for such disclosure, however, has not yet been enacted in Germany. However, due to the new article 8ab of Directive 2011/16/EU and article 2 of Directive 2018/822/EU, Germany has to enact a legal basis until 31 December 2019.[17] In addition, a national legal basis for such an obligation is currently being discussed in Germany between the federal states.[18]

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12. DE: Federal Ministry of Finance, *Gesetzentwurf zur Anzeigepflicht von Steuergestaltungen* (25 June 2007), available at http://gmbhr.de/heft/15_07/StGestAnzPflG_RefEntw.pdf (accessed 22 Dec. 2017).

13. *See* T. Beuchert & C. Osterloh-Konrad, *Anzeigepflichten bei Steuergestaltungen in Deutschland*, 23 IStR 18, p. 643 et seq. (2014); and T. Rödder, *Steuergestaltung aus der Sicht der Beratungspraxis* in: *Gestaltungsfreiheit und Gestaltungsmissbrauch im Steuerrecht* p. 93 et seq. (R. Hüttemann ed., Otto Schmidt 2010).

14. DE: *Bundesrat-Drucksache* (German Federal Council official records), No. 816/16, p. 3.

15. DE: Federal Ministry of Finance, *Anzeigepflicht für Steuergestaltungsmodelle in Deutschland: Hinweise für eine zulässige und zugleich effiziente gesetzliche Regelung* (2016), available at http://www.tax.mpg.de/fileadmin/TAX/docs/TL/MA/Gutachten_Anzeigepflichten_MPI.pdf (accessed 22 Dec. 2017). *See also* T. Beuchert, *Anzeigepflichten bei Steuergestaltungen* (Otto Schmidt 2012); and C. Osterloh-Konrad, C. Heber & T. Beuchert, *Anzeigepflichten für Steuergestaltungen in Deutschland* (Springer 2017).

16. Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements, OJ L 139, EU Law IBFD.

17. For a legal and especially constitutional framework in which such an obligation would be possible, *see* J. Debus, *Anzeigepflicht für Steuergestaltungen, die (verfassungs-)rechtlichen Rahmenbedingungen in Deutschland*, 55 Deutsches Steuerrecht (DStR) 47, p. 2520 et seq. (2017). *see also*, generally, Beuchert, *supra* n. 15.

18. *See* H. Hermenns & L. Münch, *Anzeigepflicht für Steuergestaltungen – Eine rechtliche Würdigung verschiedener Entwürfe unter besonderer Berücksichtigung des Verhältnisses zu § 42 AO*, 525 Institut Finanzen und Steuern (2018).

23.2. Information procurement and data usage by the tax authorities

23.2.1. Principle of tax assessment

Today, over two thirds of all taxes are assessed and levied on the basis of self-assessment. This situation is described by Seer as "controlled self-regulation" (*kontrollierte Selbstregulierung*).[19] Nevertheless, section 88 of the AO stipulates that the assessment has to be ex officio. This is formally the case for the taxation of personal income. However, according to a recently added paragraph in section 155 of the AO (namely section 155(4), which was added through the Tax Modernization Act in 2016,[20] the tax authorities are allowed to levy tax *automatically*. This ipso facto leads to self-assessment unless the information given by the taxpayer triggers an investigation into his individual tax case. In contrast to ex officio assessment, VAT returns are levied by monthly or quarterly self-assessment.[21]

23.2.2. How do the tax authorities obtain information?

23.2.2.1. From the taxpayer

23.2.2.1.1. *Regular tax returns and reporting obligations*

Due to the fact that the tax assessment procedure is a mass phenomenon, taxation without cooperation by the taxpayer is, in reality, not possible. Consequently, the assessment ex officio is completed by the cooperation – namely, the information – of the taxpayer. This special relationship of mutual cooperation between the tax authorities, on one side, and the taxpayer, on the other, is called the "cooperation principle" (*Kooperationsmaxime*).[22] Section 90(1) of the AO establishes a general cooperation duty of the taxpayer. The taxpayer has to file a tax return for personal income according to the first sentence of section 149(1) of the AO and the first sentence of

19. R. Seer, *Reformentwurf der Bundesregierung zur Modernisierung des Besteuerungsverfahrens*, 105 DStZ 16, p. 607 (2016).
20. DE: *Steuermodernisierungsgesetz* (StModG), BGBl. I 2016 (18 July 2016), pp. 1679 and 1690.
21. *See* DE: *Umsatzsteuergesetz*, sec. 18.
22. R. Seer, in *Steuerrecht*, sec. 21, para. 4 (K. Tipke & J. Lang eds., Otto Schmidt 2018). In detail, *see* K.-D. Drüen, *Kooperation im Besteuerungsverfahren*, 93 Finanz-Rundschau (FR) 3, p. 101 et seq (2011). Examples of more specific cooperation duties can be found in DE: *Abgabenordnung*, secs. 93, 200 and 211 [hereinafter AO].

section 25(3) of the German Income Tax Act (*Einkommensteuergesetz*). Furthermore, the same obligation is established for VAT by section 18(1) of the German VAT Act (*Umsatzsteuergesetz*, or UStG). These tax returns can be filed electronically; in fact, since tax year 2011, corporations, entrepreneurs and self-employed taxpayers are obliged to do so.[23] The platform for transmitting a tax return for personal income electronically is called ELSTER (short for *Elektronische Steuererklärung*). ELSTER is an online platform provided by the tax authorities to easier facilitate the submission of tax returns and is linked to the electronic data program of the tax authority. To be able to use ELSTER, the taxpayer has to create an online profile, after which the taxpayer will receive a letter from the tax authority with an individual ELSTER Key. With this ELSTER Key, the taxpayer is able to fill out the forms provided by ELSTER online and transmit the tax return electronically to the tax authorities. In addition, it is worth mentioning that the aforementioned Tax Modernization Act (*see* section 23.2.1.) has made a huge step towards the digitalization of the tax assessment procedure. The information asked from the taxpayer is limited to the information needed for the individual tax assessment at hand. Other information, e.g. for statistical purposes or for the evaluation of tax reforms, may be demanded by the tax authority as well. Section 150(5) of the AO provides the possibility to ask, in the tax return, questions that are only relevant for statistical purposes. Nevertheless, the taxpayer, at the same time, declares the legal assessment by filling out the forms with the relevant facts, e.g. by declaring income-related or business expenses. The taxpayer has to carefully check whether the expenses are actually income-related or business-related. As a result, the taxpayer makes his own legal assessment by declaring income-related or business expenses.

The taxpayer is obligated to report different types of events according to section 137 et seq. of the AO. For example, according to section 138(1) of the AO, a taxpayer has to inform as to the particular community in which he wants to open a business. Section 138(2), No. 1 indicates an obligation for the taxpayer to inform the competent tax authority if he wants to establish a legal entity in a foreign country. Section 138(2), No. 2-5 of the AO provides additional reporting obligations for the taxpayer in respect of

23. *See* R. Seer, *Commentary on sec. 150 AO*, in *Abgabenordnung (AO) und Finanzgerichtsordnung (FGO)* para. 21 (K. Tipke & W. Kruse eds., Otto Schmidt 2017), with a list of the tax law provisions. Furthermore, corporations are required to file an electronic balance sheet (*E-Bilanz*) because of DE: *Einkommensteuergesetz*, sec. 5b [hereinafter Income Tax Act], which was enacted with DE: *Steuerbürokratieabbaugesetz*, BGBl. I 2008 (21 Dec. 2008), p. 2850 [hereinafter Tax Bureaucracy Reduction Act].

foreign relationships. Special reporting obligations are present in, e.g. the German Inheritance and Gift Tax Act (*Erbschaft- und Schenkungsteuergesetz*), namely in section 30.[24]

23.2.2.1.2. *Special procedures*

As mentioned in section 23.1.3., CbCR as a special instrument for providing tax transparency was transposed into domestic law in section 138a of the AO. Right after section 138a of the AO, the German parliament enacted section 138b of the AO with the Tax-Avoidance Abatement Act on 23 June 2017,[25] which states a notification obligation for third parties, especially financial institutions, towards the competent tax authorities in the case that the third party has established or mediated a relationship between domestic taxpayers and third-country companies. However, it is not clear as to what exactly "establishing" or "mediating" a relationship means in this context.[26] Moreover, section 4a of the German Tax Audit Order (*Betriebsprüfungsordnung*) regulates a special form of tax audit, i.e. the so-called "contemporary tax audit" (*zeitnahe Betriebsprüfung*). A tax audit often takes place long after the actual situation occurs that is the subject of the investigation by the auditor. Consequently, the auditor will have trouble investigating the facts of the case. However, with the contemporary tax audit, this frustrating situation for the tax authorities and the taxpayer can be resolved, because this type of tax audit generally takes place within a year after the actual situation occurs. In other words, the contemporary tax audit is a "win-win" situation for both the tax authorities and the taxpayer.[27] Last but not least, section 89(2) of the AO gives the taxpayer the possibility of requesting an advance tax ruling.[28] This is an instrument for more tax transparency in both directions: the taxpayer has to declare the

24. According to sec. 30, para. 1 of DE: *Erbschaft- und Schenkungsteuergesetz* [Inheritance and Gift Tax Act], the taxpayer has to inform the competent tax authority within 3 months of attaining knowledge of the taxable event.

25. DE: *Gesetz zur Bekämpfung der Steuerumgehung und zur Änderung weiterer steuerlicher Vorschriften (Steuerumgehungsbekämpfungsgesetz)*, BGBl. I 2017 (23 June 2017), p. 1682. *See* C. Schmidt & A. Ruckes, *Das Steuerumgehungsbekämpfungsgesetz – Hintergrund, Inhalte und Praxisaspekte*, 26 IStR 12, p. 473 et seq. (2017); P. Talaska, *Steuerumgehungsbekämpfungsgesetz*, 70 Der Betrieb (DB) 32, p. 1803 et seq. (2017); and D. Welker, *Was bringt das Steuerumgehungsbekämpfungsgesetz?*, IWB 14, p. 513 et seq. (2017).

26. *See* Schmidt & Ruckes, id., at p. 476.

27. C. Dorenkamp, *Zeitnahe Betriebsprüfung – Win Win für Unternehmen und Finanzverwaltung*, in *Steuerberater-Jahrbuch (StbJb.) 2015/2016*, p. 585 et seq. (T. Rödder & R. Hüttemann eds., Otto Schmidt 2016); and Seer, *supra* n. 2, at p. 406 et seq.

28. Sec. 204 of the AO has a similar provision for an advance tax ruling after a tax audit.

object of the advance tax ruling as precisely as possible according to the first sentence of section 89(2) of the AO, and in general, the tax authorities have to issue an advance tax ruling, even though the first sentence of section 89(2) of the AO leaves the decision to the sole discretion of the tax authorities.[29]

23.2.2.2. From other sources

23.2.2.2.1. *Third-party reporting obligations*

Tax authorities often cannot get all the information needed from the taxpayer alone. Therefore, third parties play a key role – next to the taxpayer, of course – in ensuring the gathering of all necessary information to ensure a lawful tax assessment. Section 93 of the AO states an obligation for the taxpayer and third parties to provide relevant information to the tax authorities. Although section 93 of the AO mentions both the taxpayer and third parties, this provision generally affects third parties.[30] The information-gathering from third parties is limited by the rule of law (article 20(3) of the German Constitution), namely the reservation of the law (*Vorbehalt des Gesetzes*). Section 93 of the AO allows information to be demanded from any third person. However, according to German tax law, third persons can only be demanded to provide tax information on the taxpayer after the taxpayer has been unsuccessfully contacted by the tax administration. This principle of subsidiarity has its national legal basis in the third sentence of section 93(1) of the AO. Complementary to this general provision are also special provisions in German tax law on reporting obligations of third parties (duties to provide information returns). Employers have to keep withholding income tax (*Lohnsteuer*) and have to report the amount of salaries and wages (section 41b of the German Income Tax Act). A further example is the obligation of private life insurance companies to inform the Federal Insurance Institution for Employees (*Bundesversicherungsanstalt für Angestellte*) of when pensions and other benefits accrued to the taxpayer.[31] This central agency has to submit the received data to the Federal Central Tax Office (*Bundeszentralamt für Steuern*, or BZSt) in order to provide it for a tax assessment and for matching purposes. An-

29. R. Seer, *Commentary on sec. 89 AO*, in *Abgabenordnung und Finanzgerichtsordnung* para. 40 (K. Tipke & W. Kruse, Otto Schmidt 2017).
30. For a more detailed illustration, *see* K.-D. Drüen, *Inanspruchnahme Dritter für den Steuervollzug* in *Steuervollzug im Rechtsstaat* p. 175 et seq. (W. Widmann ed., Otto Schmidt 2008).
31. Sec. 22a Income Tax Act.

other example of such a special provision concerning third parties is section 138b of the AO.

German tax law does not provide for individual information requests of the tax administration for the possibility that this information may be used for future taxation. However, the consideration of tax-relevant information for future tax procedures is not completely prohibited. The German Federal Constitutional Court (*Bundesverfassungsgericht*, or BVerfG) has allowed the Federal Central Tax Office to collect tax-relevant information on the taxpayer concerning foreign relations.[32] This data can then be used for future tax procedures by the tax administration.[33]

23.2.2.2.2. *Information obtained from courts, other branches of administration and central databanks*

Section 111 et seq. of the AO codifies the obligation of courts and other branches of administration to provide the tax authorities with relevant information for the tax assessment by way of administrative assistance (*Amtshilfe*). Financial institutions are exempt from this obligation (section 111(2) of the AO). According to section 112(1) of the AO, this obligation of administrative assistance becomes active only by request. Furthermore, the first sentence of section 111(1) of the AO states that the administrative assistance has to be *necessary*. This means that the tax authorities can only request administrative assistance when they are not actually or legally able to acquire the relevant information on their own.[34] Consequently, the claiming of administrative assistance is secondary.[35] Section 116 of the AO codifies a special reporting obligation for courts and other authorities towards the Federal Central Tax Office or the competent tax authorities in the case of knowledge of tax offences. Central data banks are located and supervised at the Federal Central Tax Office, e.g. the Central Data Bank for the Detention and Evaluation of VAT Fraud Cases and the Creation of Risk Profiles (*Zentrale Datenbank zur Speicherung und Auswertung von Umsatzsteuer-Betrugsfällen und Entwicklung von Risikoprofilen*).

32. DE: *Bundesverfassungsgericht* [Federal Constitutional Court, BVerfG], 10 Mar. 2008, 1 BvR 2388/08, BVerfGE 120, p. 351 (the so-called "IZA decision").
33. *See* sec. 88a AO.
34. *See* sec. 112, para. 1, No. 1 and 2 AO.
35. H. Söhn, *Commentary on sec. 111 AO*, in *Hübschmann/Hepp/Spitaler, Abgabenordnung und Finanzgerichtsordnung* para. 117 (Otto Schmidt 2016); P. Brandis, *Commentary on sec. 111 AO*, in Tipke & Kruse, *supra* n. 29, at para. 3.

23.2.2.2.3. *Information gathered for other purposes (e.g. preventing of money laundering and tackling terrorism financing)*

Section 31b of the AO breaks through the tax secrecy provision of section 30 of the AO and allows the tax authorities to inform – without request, in contrast to section 111 et seq. – the competent authorities about indications of money laundering and terrorism financing that arise from the tax assessment procedure. This statute prohibits taxpayers from laundering money or financing terrorism under the protection of section 30 of the AO.

For example,[36] say that during a tax audit, the auditor finds out from a bank that six-figure amounts were transferred to a bank account of the taxpayer from foreign countries, which could possibly be used for an act of terrorism against German authorities.

In addition, a new Money Laundering Act (*Geldwäschegesetz*, or GwG) was passed by the German parliament on 23 June 2017,[37] which, among other obligations, includes the obligation to form a special transparency register of the beneficial owners of companies, trusts and other legal entities. This register shall provide a more transparent and easy way of fighting money laundering and stopping the financing of terrorism.[38]

23.2.2.2.4. *Information from private stakeholders (e.g. acquisition of stolen data)*

Private stakeholders with the purpose of acquiring stolen data or providing information to the tax authorities do not exist in Germany, nor does a whistle-blower system. However, the acquisition of stolen data in terms of, for example, purchasing a CD with stolen data about bank customers on it plays an important and growing role in Germany. Especially in Nordrhein-Westphalia, the tax authorities have purchased the most so called

36. H. Tormöhlen, *Mitteilungen der Finanzverwaltung bei Geldwäscheverdacht*, 15 AO-Steuerberater (AO-StB) 8, p. 236 (2015).

37. The Money Laundering Act (DE: *Gesetz zur Umsetzung der Vierten EU-Geldwäscherichtlinie, zur Ausführung der EU-Geldtransferverordnung und zur Neuorganisation der Zentralstelle für Finanztransaktionsuntersuchungen (Geldwäschegesetz)*, BGBl. I 2017 (23 June 2017), p. 1822 et seq. [hereinafter GwG]) transposed Directive (EU) 2015/849 of the European Parliament and the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, OJ L 141/73; EU Law IBFD. This act also modified sec. 31b of the AO in certain aspects.

38. Sec. 18 et seq. GwG.

"tax CDs" (*Steuer-CDs*) in recent years. This ongoing behaviour of the tax authorities has led to a vital discussion about the legal obstacles of the acquisition of tax CDs (*see* section 23.2.4.3.).

23.2.3. International exchange of information

The transformation of the new standards of tax transparency was already broadly clarified in section 23.1.3. As of yet, there has been no real experience with it. AEoI will tremendously enlarge the data sources that are kept by the tax authority. However, the coordination of the data distribution to the competent tax authorities of the federal states in Germany will be a huge problem.

23.2.4. Legal and practical obstacles to information procurement

23.2.4.1. Banking secrecy

Theodor Waigel, a previous German Minister of Finance, referring to disputes of financial origin, said, "A bank customer is like a shy deer." Nevertheless, tax banking secrecy never really existed in the German tax law system. However, the German parliament enacted section 30a of the AO in 1988,[39] with the title "Protection of bank customers". This misleading title of the provision did not mean that there was general "banking secrecy" – with which this provision falsely was associated in many aspects[40] – that allowed banks to refuse all sorts of cooperation with the tax authorities. As a matter of fact, banks were still obligated to cooperate and had no right to refuse disclosure.[41] The meaning of this provision was rather that the tax authorities had to respect the special relationship and bond of trust between a customer and his bank. Meanwhile, section 30a of the AO has been eliminated by the aforementioned Tax-Avoidance Abatement Act[42] (*see* section 23.2.2.1.2.) in order to ensure more tax transparency.

39. DE: *Steuerreformgesetz 1990*, BGBl. I 1988 (25 July 1988), pp. 1093 and 1127.
40. R. Rüsken, *Commentary on sec. 30a AO*, in: *Klein, Abgabenordnung* para. 2 et seq. (F. Klein ed., C.H. Beck 2016).
41. O.V. Schweinitz & I. Schneider-Deters, *Der Entwurf des Steuerumgehungsbekämpfungsgesetzes*, 26 IStR 9, p. 345 (2017).
42. DE: *Steuerumgehungsbekämpfungsgesetz* [Law Combating Tax Evasion], BGBl. I 2017, p. 1682.

23.2.4.2. Inviolability of the home

The obligation to pay taxes is an obligation towards the community, which is why this obligation is generally allocated within the social sphere of the taxpayer.[43] However, tax authorities are often forced to enter the personal sphere of the taxpayer to be able to fully investigate the tax case. This requires, above all, an adequate and sufficient cause.[44] This also means that the tax authorities occasionally have to enter the home of the taxpayer. The home of a citizen, however, is under constitutional protection by article 13 of the German Constitution (the Basic Law (*Grundgesetz*, or GG)). It is worth mentioning that the range of protection of article 13 of the GG was expanded to business premises by the German Federal Constitutional Court.[45] According to article 13 of the German Constitution, only a judge can grant a search warrant. In the case of exigent circumstances (*Gefahr im Verzug*), other institutions are also allowed to grant and execute a search warrant, e.g. the prosecution. The more the investigation affects the personal sphere of the taxpayer, the higher the requirements of justification become.[46]

23.2.4.3. Restrictions to using unlawfully acquired information in the tax procedure (e.g. CDs with stolen bank data)

As soon as information is acquired in an unlawful way, the question of restrictions to using this information becomes very relevant. Not every violation of a law per se leads to the inadmissibility of evidence.[47] In fact, the requirements for affirming an exclusion of evidence concerning information that was gathered in an unlawful way are quite high. According to the German Federal High Tax Court (Federal Fiscal Court (*Bundesfinanzhof*, or BFH)) the public interest in legal and equal taxation has to be balanced with the intensity of the violation. Because of the fundamental meaning of "equal and legal taxation" in the tax procedure, an exclusion of evidence is the exception.[48]

43. K. Tipke, *Die Steuerrechtsordnung*, vol. I, p. 428 (Otto Schmidt 2000).
44. R. Seer, *supra* n. 29, at para. 25.
45. DE: BVerfG, 13 Oct. 1971, 1 BvR 280/66, BVerfGE 32, pp. 54 and 68 et seq. For a list of premises protected by art. 13 of the German Constitution, *see* H.-J. Papier, *Commentary on art. 13 GG*, in *Grundgesetz-Kommentar* para. 10 (T. Maunz & G. Dürig eds., C.H. Beck 2014).
46. R. Seer, *Commentary on sec. 88 AO*, in Tipke & Kruse, *supra* n. 29, at para. 25 (Otto Schmidt 2017).
47. Id., at para. 26.
48. *See* DE: *Bundesfinanzhof* [Federal Fiscal Court, BFH], 4 Oct. 2006, VIII R 53/04, BStBl. II 2007, pp. 227-228; DE: BFH, 3 Apr. 2007, VIII B 110/06; and DE: BFH, 4 Dec. 2012, VIII R 5/10, BStBl. II 2014, pp. 220-221.

In the context of gathering information by acquiring tax CDs with stolen bank data, the aspect of using such information plays a key factor, amongst many other questions around this type of information retrieval. In the so-called "Liechstenstein Affair", the Federal Intelligence Service (*Bundesnachrichtendienst*) purchased a CD with stolen data from Liechtenstein on it. This purchase was made with the sole purpose of revealing tax offences and initiating a tax offence procedure. Even though there was – and still is – no legal basis for such an acquisition[49] and the stealing of this data itself can be seen as a criminal offence,[50] the Federal Constitutional Court and the Federal Fiscal Court did not see a (constitutional) reason for denying the use of such data.[51] The majority of the voices in literature also do not exclude these data from evidence.[52] However, this point of view of the Federal Courts is not convincing. By purchasing these tax CDs, the tax administration actively and knowingly tries to acquire illegal information. Consequently, the tax administration creates excitement about illegal information retrieval. In a tax offence procedure, which is defined by the rule of law (*Rechtsstaatsprinzip*),[53] the investigation cannot focus on acquiring the relevant information at all costs (*keine Wahrheitsfindung um jeden Preis*). Therefore, unlawfully acquired information has to lead to an exclusion of evidence (*Beweisverwertungsverbot*) in the tax offence pro-

49. *See* W. Haensle & R. Reichold, *Heiligt der Zweck die Mittel? Zur rechtlichen Zulässigkeit des Ankaufs von Steuerdaten*, 125 Deutsches Verwaltungsblatt (DVBl.) 20, p. 1279 (2010).

50. In Germany, according to DE: *Gesetz gegen unlauteren Wettbewerb* (UWG), BGBl. I 2010 (3 Mar. 2010), sec. 17. *See* G. Trüg & J. Habetha, *Die "Liechtensteiner Steueraffäre" – Strafverfolgung durch Begehung von Straftaten?*, 61 Neue Juristische Wochenschrift (NJW) 13, p. 888 (2008); and U. Hellmann, *Ermittlungsprobleme bei grenzübersehreitender Steuerhinterziehung und "kreative" Lösungen bei der Informationsbeschaffung*, in *Festschrift für Erich Samson* p. 675 et seq. (W. Joecks et al. eds, Kuselit 2010). With a different view, *see* I. Kaiser, *Zulässigkeit des Ankaufs deliktisch erlangter Steuerdaten*, 31 Neue Zeitschrift für Strafrecht (NStZ) 7, p. 387 (2011). In detail, *see* K. Beckemper, *Gewinnung und Verwertung von Erkenntnissen Dritter – im Grenzbereich der Legalität?!*, in *Steuerstrafrecht an der Schnittstelle zum Steuerrecht* p. 343 et seq. (R. Mellinghoff ed., Otto Schmidt 2015).

51. DE: BVerfG, 9 Nov. 2010, 2 BvR 2101/09, para. 50 et seq.; DE: BVerfG, 4 Apr. 2017, 2 BvR 2251/12; and DE: BFH, 15 Apr. 2015, VIII R 1/13. On the other hand, DE: VerfGH Rheinland-Pfalz [Constitutional Court of Rhineland-Palatinate], 24 Feb. 2014, VGH B 26/13, 67 NJW 20, p. 1436 hints at the possibility that restrictions in such cases of acquiring information by purchasing a tax CD can be possible.

52. Kaiser, *supra* n. 50, at p. 390; H. Söhn, *Verwertungsverbote im Besteuerungsverfahren*, in *Festschrift für Werner Beulke*, p. 1352 et seq. (C. Fahl et al. eds., C.F. Müller 2015); and H. Söhn, *Commentary on sec. 85 AO*, in *Abgabenordnung und Finanzgerichtsordnung* para. 22 et seq. (W. Hübschmann, E. Hepp & A. Spitaler eds., Otto Schmidt 2016).

53. DE: *Grundgesetz* [Basic Law], art. 20(3) [hereinafter GG].

cedure.[54] This exclusion of evidence in the tax offence procedure does not automatically lead to an exclusion of evidence in the tax procedure. This is a fortiori the case in light of the high standards set forth by the Federal Fiscal Court.

23.2.5. The use of information by the tax administration, especially in respect of automatization and digitalization of the tax assessment procedure

Part of the Tax Modernization Act in 2016 was the implementation of a federal risk management system (RMS) in section 88(5) of the AO.[55] The legal history behind this provision, however, is long. In November 1996, the superior tax authorities of the federal states and the Federal Ministry of Finance issued a so-called "identical decree" (*gleichlautender Erlass*), which allowed the tax authorities to concentrate on "tax-relevant" cases.[56] In addition, Seer already proposed the idea of such an automatic RMS at the turn of the century.[57] In January 2007, the federal states of Germany signed an administrative agreement that included the development of an electronic RMS.[58] The responsibility for developing this RMS was held by Nordrhein-Westphalia and Bavaria. With the so-called *Steuerbürokratieabbaugesetz* (Tax Bureaucracy Reduction Act) in 2008, the German parliament introduced the authorization of the Federal Ministry of Finance to pass a regulation for an RMS in section 88(3) of the AO.[59] The Federal Ministry of Finance, however, never made use of this pro-

54. R. Seer, *Commentary on sec. 88 AO*, in Tipke & Kruse, *supra* n. 29, at para. 31; and R. Seer, *Commentary on sec. 85 AO*, in Tipke & Kruse, *supra* n. 29, at para. 36.; K. Tipke, *Zur Steuerfahndung bei Banken und Bankkunden*, 53 BB 5, p. 245 (1998); G. Trüg & J. Habetha, *supra* n. 50, at p. 890; B. Schünemann, *Die Liechtensteiner Steueraffäre als Menetekel des Rechtsstaats*, 28 NStZ 6, p. 309 (2008); B. Spilker, *Gleichmäßige Besteuerung im Spannungsverhältnis mit dem völkerrechtlichen Territorialitätsprinzip – Zur Unzulässigkeit des Einkaufs von Steuerdaten-CDs*, 52 DStR 50, p. 2490 et seq. (2014); and J. Höring, *Die Verwertung einer angekauften Steuerdaten-CD im strafrechtlichen Ermittlungsverfahren*, 103 DStZ 9, p. 341 et seq. (2015).

55. StModG, pp. 1679 and 1684.

56. DE: *Gleich lautender Erlass der obersten Finanzbehörden der Länder* [Uniform Decree of the Supreme Tax authorities of the Federal States], 19 Nov. 1996, BStBl. I 1996, 1391 (also known as GNÖFA 1997).

57. R. Seer, *Reform des Veranlagungsverfahrens*, 80 Steuer und Wirtschaft (StuW) 1, p. 40 (2003).

58. *Koordinierte Neue Softwareentwicklung der Steuerverwaltung*, or KONSENS. *See* R. Seer, *Der Untersuchungsgrundsatz im heutigen Besteuerungsverfahren*, Steuer und Studium (SteuerStud) 8, p. 374 (2010).

59. Tax Bureaucracy Reduction Act, p. 2850.

vision. Section 88(5) of the AO now has set the legal groundwork for a federal, uniform, automatic RMS. In the context of tax transparency, the fourth sentence of section 88(5) of the AO is relevant, as it allows the tax authorities not to publish any RMS parameters as far as the legality and equality of taxation are endangered.[60] This paints the picture of an opaque (non-transparent) tax administration.[61] By implementing this provision, the legislator missed the chance to strengthen the confidence of the taxpayer in the tax administration. From a tax transparency point of view, it would be reasonable for the tax authorities to at least publish the kind of RMS parameters that they use to determine whether a tax case carries risk (e.g. relevant types of income and personal circumstances). It is worth mentioning that the aspect of data protection was obviously ignored by the legislator.[62] Currently, the tax administration is discussing the RMS parameters with a shadow of secrecy over the discussion.

Recently, the administrative agreement (*Koordinierte neue Software-Entwicklung der Steuerverwaltung*, or KONSENS) was transformed into a n act, i.e. the so-called "KONSENS ACT".[63] With 29 sections, this act provides detailed and very specific regulations concerning the planning, application and evaluation of uniform software for electronic regulation of the tax procedure.

The most important technical guarantee for data protection is the individual ELSTER Key (*see* section 23.2.2.1.1.).

23.3. Protection of the taxpayer

23.3.1. Constitutional law (also in comparison to human rights)

The general right to the freedom of action (article 2(1) of the GG) and the protection of human dignity (article 1(1) of the GG) constitute the general

60. Seer calls this a "conditioned secret reservation" (*konditionierter Geheimnisvorbehalt*); *see* Seer, *Commentary on sec. 88 AO*, *supra* n. 29, at para. 82.
61. U. Höreth & B. Stelzer, *Gesetz zur Modernisierung des Besteuerungsverfahrens*, 104 DStZ 14, p. 521 (2016); and R. Seer, *Reformentwurf der Bundesregierung zur Modernisierung des Besteuerungsverfahrens*, 104 DStZ 16, p. 608 (2016).
62. *See* N. Braun Binder, *Ausschließlich automationsgestützt erlassene Steuerbescheide und Bekanntgabe durch Bereitstellung zum Datenabruf*, 104 DStZ 14, p. 533 (2016).
63. DE: *Gesetz über die Koordinierung der Entwicklung und des Einsatzes neuer Software der Steuerverwaltung (KONSENS-Gesetz)*, BGBl. I 2017 (14 Aug. 2017), pp. 3122 and 3129.

right of personality, which includes the right to informational self-determination. This right empowers the individual to decide himself about the disclosure and use of his personal data.[64] According to article 19(3) of the GG, not only individuals, but also entities can invoke the right to informational self-determination.[65] However, as human dignity – at least as a legal concept – only applies to humans, in these cases, the right to informational self-determination is only based on article 2(1) of the GG. While the Basic Law only implicitly protects personal data, article 8(1) of the Charter of Fundamental Rights of the European Union, article 39 of the Treaty on European Union[66] and article 16 of the Treaty on the Functioning of the European Union[67] explicitly guarantee the protection of personal data.

Article 12(1) and (2) of the GG guarantee the right to choose and practice an occupation. Article 14(1) of the GG guarantees the right to property. According to article 19(3) of the GG, both rights can also be invoked by entities.[68] However, they are only of minor significance in taxation. The right to property only protects the individual against taxes with confiscatory effects.[69] Apart from this rather special case, the general yardstick for taxation is the general right to freedom, which, according to article 2(1) of the GG, is subject to restrictions imposed by the constitutional order; therefore, it offers relatively weak protection against taxation.

Generally, every restriction of fundamental rights imposed by the state must be consistent with the proportionality principle. This means that restrictions not only have to pursue a legitimate aim, but also have to be suitable, necessary and reasonable regarding the aim pursued.[70]

64. DE: BVerfG, 7 Nov. 2017, 2 BvE 2/11, juris, para. 236.
65. Id., at para. 236 et seq.
66. Treaty on European union of 13 December 2007, OJ C 306 (2007), EU Law IBFD.
67. Treaty on the Functioning of the European Union, OJ L 115 (2008), EU Law IBFD.
68. H.-J. Papier, *Commentary on art. 14 GG*, in *Grundgesetz-Kommentar* para. 217 (T. Maunz & G. Dürig eds., C.H. Beck 2017).
69. F. Kirchhof, *Das Leistungsfähigkeitsprinzip nach dem Grundgesetz – Zustand und Zukunft*, 72 BB 12, p. 665 (2017).
70. J. Hey, in *Steuerrecht*, sec. 3, para. 180 (K. Tipke & J. Lang eds., Otto Schmidt 2018).

23.3.2. Tax secrecy

23.3.2.1. Legal basis and scope

"Tax secrecy" in terms of section 30 of the AO is the counterpart to the duty to reveal every taxable affair.[71] In protecting the taxpayer against the transfer of personal data to third parties, tax secrecy is an emanation of the constitutional right to informational self-determination. It prevents the taxpayer from refusing to submit data, gives rise to trust in the fiscal authorities and facilitates tax proceedings.[72] Tax secrecy protects both individuals and entities.[73]

23.3.2.2. Exemptions

Tax secrecy does not absolutely prevent the fiscal authorities from transferring information. Under certain circumstances, section 30(4) et seq. of the AO allows the disclosure of information. According to section 30(4) of the AO, information can be disclosed if (i) it facilitates the implementation of certain proceedings; (ii) it is expressly permitted by law; (iii) the persons concerned give their consent; (iv) it serves the implementation of criminal proceedings for a crime other than a tax crime; and (v) there is a compelling public interest. Furthermore, according to section 30(4) of the AO, wilfully false statements by the person concerned may be disclosed to the law enforcement authorities. Especially section 30(4), No. 5 of the AO, which allows the disclosure of information due to a compelling public interest, is rather vague and has been referred to as the "Achilles' heel" of tax secrecy in Germany.[74] The EU General Data Protection Regulation[75] requires an adjustment of the tax secrecy regulations, especially the exemptions.[76]

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71. A. Heine, *Steuerdaten im Fokus des Datenschutzes*, 41 Datenschutz und Datensicherheit (DuD) 6, p. 368 et seq. (2017).
72. K.-D. Drüen, *Commentary on sec. 30 AO*, in Tipke & Kruse, *supra* n. 29, at para. 10.
73. H. Tormöhlen, *Commentary on sec. 30 AO*, in *Abgabenordnung Finanzgerichtsordnung* para. 9.1 (D. Gosch & A. Hoyer eds., Stollfuß 2016).
74. R. Seer, in Tipke & Lang, *supra* n. 70, at sec. 21, para. 21.
75. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119 (2016), EU Law IBFD.
76. M. Baum, *Datenschutz im Steuerverwaltungsverfahren ab dem 25.5.2018 – Teil II: Zulässigkeit der Verarbeitung personenbezogener Daten durch Finanzbehörden*, Neue Wirtschaftsbriefe (NWB) 42, p. 3208 et seq. (2017); and M. Myßen & F. Krans,

23.3.2.3. The legal consequences of violation

The violation of tax secrecy is a criminal act and can be punished according to section 355 of the German Penal Code (*Strafgesetzbuch*), possibly triggering disciplinary proceedings.

23.3.3. Data protection laws

The Federal Data Protection Act (*Bundesdatenschutzgesetz*) generally protects personal data. However, in fiscal matters, it can only be applied if section 30 of the AO is not applicable. In addition to these provisions, the new EU General Data Protection Regulation also offers data protection. Furthermore, the EU General Data Protection Regulation requires a revision of the Federal Data Protection Act, which was repealed on 25 May 2018.[77]

In certain cases and under certain conditions, the scope of the obligations and rights provided for by the General Data Protection Regulation can be restricted according to its article.[78] Article 23(1) of the General Data Protection Regulation allows for such a restriction in order to safeguard "an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters, public health and social security". The new sections 29b, 29c and 32a et seq. of the AO aim at adapting the AO to the requirements of the General Data Protection Regulation. In doing so, they make use of the possibility to restrict the scope of the Regulation's rights.[79] Important examples are section 32c of the AO, which restricts the right to information granted by article 15 of the General Data Protection Regulation,[80] and section 32f of the AO, which restricts the rights to rectification and erasure granted by articles 16 and 17 of the General Data Protection Regulation.[81]

Steuerliches Datenschutzrecht: Verfahrensrechtsanpassung an die Datenschutz-Grundverordnung, 70 Der Betrieb (DB) 33, p. 1866 et seq. (2017).

77. *See* DE: *Gesetz zur Anpassung des Datenschutzrechts an die Verordnung [EU] 2016/679 v. 30.6.2017*, BGBl. I 2017 (30 June 2017), p. 2097.

78. Myßen & Kraus, *supra* n. 76, at p. 1867 et seq.

79. M. Baum, *Datenschutz im Steuerverwaltungsverfahren ab dem 25.5.2018 – Teil III: Informationspflichten der Finanzbehörden und Auskunftsrechte der betroffenen Personen*, NWB 43, p. 3281 et seq. (2017).

80. M. Krumm, *Grundfragen des steuerlichen Datenverarbeitungsrechts*, 70 DB 38, p. 2187 et seq. (2017).

81. Myßen & Kraus, *supra* n. 76, at p. 1869.

23.3.4. Compensation for damages and judicial protection

If a person, in the exercise of a public office, violates the right to informational self-determination or tax secrecy, according to the first sentence of article 34 of the GG, in conjunction with section 839(1) of the German Civil Code (*Bürgerliches Gesetzbuch*), the public body (in tax matters, the state) that employs him must compensate the individual for damage arising from this violation. In addition, article 82 of the General Data Protection Regulation guarantees compensation for damages.

Furthermore, article 77 et seq. of the General Data Protection Regulation grants the right to lodge a complaint with a supervisory authority, the right to an effective judicial remedy against a supervisory authority and the right to an effective judicial remedy against a controller or processor. Disputes concerning the protection of data by the fiscal authorities are dealt with by the tax courts.[82] According to section 32i(9) of the AO, pre-trial proceedings are not necessary.

23.4. Transparency of the tax administration

23.4.1. Publication habits of the tax administration

The tax administration can issue statements of practice. These statements give guidance to lower tax authorities on how certain provisions are to be applied, and thereby secure the coherent enforcement of tax laws.[83] The statements are often made in response to rulings of the Federal Fiscal Court. On the federal level, they are issued by the Federal Ministry of Finance (*Schreiben des Bundesministeriums für Finanzen*) and published in the federal gazette (*Bundessteuerblatt*). Furthermore, the federal government can issue tax guidelines. These guidelines are administrative directives interpreting tax provisions. They are also published in the federal gazette.

82. Id., at p. 1870.
83. R. Seer, in Tipke & Lang, *supra* n. 70, at sec. 21, para. 36; and D. Nose, *Die Schreiben des Bundesministers der Finanzen (BMF-Schreiben) – eine verfassungsrechtliche Untersuchung* (DWS 2006).

23.4.1.1. Process of risk management

Section 155(4) of the AO allows for a fully automated tax assessment.[84] However, this is subject to the condition that there is no reason for occupying an officer with the case.[85] Section 88(5) of the AO allows the use of automated RMSs.[86] In using these systems, the tax administration can identify high-risk and low-risk tax cases and subsequently decide on whether to give a certain case to an officer instead of processing it automatically.[87] The tax administration does not provide any information about the algorithm that the RMS is based on.[88] Consequently, the taxpayer does not know which data the risk management is based on and whether it takes into consideration his complete fiscal situation or only certain aspects.[89] In other words, the RMS is a "black box" for the taxpayer.[90] The tax administration's secrecy regarding the parameters of its risk management is in line with the fourth sentence of section 88(5) of the AO, which bars the tax administration from disclosing any information on the RMSs if this could endanger the equality and legality of taxation. However, at least the fiscal courts need to understand the operating mode of tax risk management in order to control the equality of taxation.[91]

23.4.1.2. Publication of advance tax rulings, mutual agreements and arbitration procedures

Exchange of information on advance tax rulings can help establish more fiscal transparency.[92] Therefore, the Act on Administrative Cooperation in

84. J. Schwenker, *Das Gesetz zur Modernisierung des Besteuerungsverfahrens – ein Meilenstein auf dem Weg der weiteren Digitalisierung im Steuerrecht*, 69 DB 7, p. 375 et seq. (2016).
85. M. Maier, *Verfassungsrechtliche Aspekte der Digitalisierung des Besteuerungsverfahrens*, 72 Juristenzeitung (JZ) 12, p. 614 (2017).
86. S. Deckers & L. Fiethen, *Finanzverwaltung 2.0 – Schlaglichter, Entwicklungslinien und Trends*, 97 FR 20, p. 913 et seq. (2015); S. Baldauf, *Gesetz zur Modernisierung des Besteuerungsverfahrens – Kritische Betrachtung des Regierungsentwurfs*, 54 DStR 15, p. 835 (2016); P. Zaumseil, *Die Modernisierung des Besteuerungsverfahrens*, 69 NJW 38, p. 2772 (2016); and C. Ahrendt, *Alte Zöpfe neu geflochten – Das materielle Recht in der Hand von Programmierern*, 70 NJW 8, p. 537 et seq (2017).
87. *See* the motives of the legislator: Bundestag Drucksache No. 18/7457, p. 82.
88. Zaumseil, *supra* n. 86, at p. 2772.
89. R. Seer, *Die Rolle des Steuerberaters in einer elektronischen Finanzverwaltung*, 46 DStR 32, p. 1555 (2008).
90. Maier, *supra* n. 85, at p. 614 et seq.
91. Id., at p. 617.
92. E. Czakert, *Der Informationsaustausch zu Tax Rulings*, 25 IStR 24, pp. 988 and 991 (2016).

the Field of Taxation between the Member States of the European Union (*EU-Amtshilfegesetz*) has been changed.[93] However, information on advance tax rulings is only exchanged between states;[94] the taxpayer is not informed, and the results of mutual agreements and arbitration procedures are not published.

23.4.1.3. Publication of blacklists of tax haven lists

The Panama Papers and Paradise Papers have given rise to the desire to fight tax havens with transparency (*see* sec. 23.1.3.).[95] According to section 138(2) of the AO, taxpayers have to inform the tax administration about holdings in companies and corporations abroad.[96] The Anti-Tax Avoidance Act (*Steuerumgehungsbekämpfungsgesetz*) extends the taxpayers' informational duties.[97] According to the third sentence of section 90(2) of the AO, the taxpayer shall, upon request, make a sworn statement affirming the correctness and completeness of the details provided by him and authorize the authority to assert, on his behalf, both in and out of court, the possible entitlement to information against the credit institutions named by the revenue authority if he has business relations with financial institutions in a tax haven. A former draft of the Anti-Tax Avoidance Regulation (*Steuerhinterziehungsbekämpfungsverordnung*) even empowered the Federal Ministry of Finance to publish blacklists and greylists of tax havens.[98] However, this empowerment has never been enacted.[99] Consequently, a blacklist of tax havens does not exist.[100]

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93. DE: *Gesetz über die Durchführung der gegenseitigen Amtshilfe in Steuersachen zwischen den Mitgliedstaaten der Europäischen Union (EU-Amtshilfegesetz)*, BGBl. I 2013 (26 June 2013), p. 1809. *See*, for the motives of the legislator: Bundestag-Drucksache 18/9536, p. 12 et seq.

94. B. Binnewies & C. Esteves Gomes, *Die AG im Fokus des internationalen automatischen Informationsaustauschs*, 61 AG 21, p. 784 et seq.; and Czakert, *supra* n. 92, at p. 987 et seq.

95. M.H. Seevers & T. Handel, *"Panama-Gesetz" – schneller Wurf mit Schwächen*, 55 DStR 10, p. 522 (2017).

96. C. Dürr, *Die Anzeigepflicht nach § 138 Abs. 2 AO bei Auslandsbeteiligungen*, 71 BB 36, p. 2140 et seq (2016).

97. M. Baum, *Änderung der AO durch das Steuerumgehungsbekämpfungsgesetz*, NWB 29, p. 2192 et seq. (2017); Talaska, *supra* n. 25, at p. 1803 et seq.; and Schmidt & Ruckes, *supra* n. 25, at p. 473 et seq.

98. Motives of the legislator: Bundesrat-Drucksache No. 681/09, p. 5.

99. DE: *Steuerhinterziehungsbekämpfungsverordnung*, BGBl. I 2009 (18 Sept. 2009), p. 3046.

100. R. Seer, *Commentary on sec. 90 AO*, *supra* n. 29, at para. 29.

23.4.2. Transparency towards the taxpayer

23.4.2.1. Access to the tax file

German tax law usually does not grant the taxpayer access to his record.[101] This restrictive approach is based on the reason that access to the record could harm the investigations of the tax authorities as well as third parties' interest in confidentiality, as the records often contain information that does not only affect the taxpayer.[102] Against this background, the tax administration grants access to the record only in exceptional cases and at its own discretion.[103]

23.4.2.2. Notifications

Notifications are an important instrument to establish tax transparency. According to section 397(3) of the AO, the accused taxpayer shall be informed of the initiation of criminal proceedings at the latest when he is called upon to reveal facts or supply documents that are related to the crime of which he is suspected.[104] This notification aims at preventing the taxpayer from self-incrimination.[105] Section 93(7) and (8) of the AO authorize the administration to retrieve account details pursuant to section 93b of the AO.[106] According to the first sentence of section 93(9) of the AO, prior to such a retrieval, the person concerned shall be advised that account data may be retrieved.[107] Furthermore, according to the second sentence of section 93(9) of the AO, the person concerned shall be notified once the retrieval has been conducted. If a third party electronically transfers fiscal data to the tax administration or plans to do so according to the first two sentences of section 93c(1), No. 3 of the AO, it shall notify the taxpayer concerned that data has been or will be transferred. This especially applies to financial

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101. DE: BFH, 5 Dec. 2016, VI B 37/16, DStRK 2017, p. 153. *See also* H. Tormöhlen, *Akteneinsicht im Steuerstrafverfahren*, 17 AO-StB 2, p. 53 et seq. (2017).
102. Motives of the legislator: Bundestag-Drucksache No. 7/4292, pp. 24 et seq.
103. DE: Finanzgericht München [Tax Court Munich], 11 May 2016, 3 K 385/13, EFG 2016, pp. 1045 and 1047 et seq.
104. *See* U. Pflaum, *Steuerstrafrechtliche Belehrungen, Mitteilungen und Hinweise nach der Abgabenordnung in der Außenprüfung*, 57 Steuerliche Betriebsprüfung (StBp.) 6, p. 163 et seq. (2017).
105. F. Peters, *Der strafrechtliche Anfangsverdacht im Steuerrecht*, 53 DStR 47, p. 2585 (2015).
106. S. Beukelmann, *Kontenabfragen und Akteneinsicht*, 11 NJW-Spezial 20, p. 632 (2015).
107. R. Seer, *Commentary on sec. 93 AO*, in Tipke & Kruse, *supra* n. 29, at para. 57 (Otto Schmidt 2018).

institutions, which, according to section 138b of the AO, have to report the relations between a domestic taxpayer and certain third-country companies and corporations to the tax administration.[108] In addition to these national provisions, articles 13 and 14 of the General Data Protection Regulation require certain information to be provided to the data subject when personal data are collected from the data subject or third parties. Section 32a et seq. of the AO restricts this right. If the tax administration transfers data to other institutions or foreign tax administrations, the taxpayer is not informed.

23.4.3. Use of information towards the public, especially the naming-and-shaming approach

Different from other branches of the administration, the tax administration does not have the authority to inform the public about illegal fiscal behaviour. The new sections 31a and 31b of the AO allow for the disclosure of tax data to other public authorities in order to fight illegal employment, money laundering and the funding of terrorism.[109] However, they do not authorize the tax administration to disclose data to the public. German tax law still does not make any use of naming and shaming or the public disclosure of tax data in order to improve tax compliance. Presumably, this is due to the rather strong protection of the right to informational self-determination.

23.4.3.1. Public CbCR

CbCR is supposed to enable the national fiscal authorities to examine the transfer prices of multinational companies.[110] The aim is to combat base erosion and profit shifting by means of transparency. According to section 138a of the AO, the German parent company of a multinational group, under certain conditions, is required to transfer a CbCR to the BZSt; however, it does not have to disclose this report to the public.[111] The reluctance to introduce public CbCR reflects the rather strong protection of private data.

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108. D. Welker, *Was bringt das Steuerumgehungsbekämpfungsgesetz?*, IWB 14, p. 516 (2017).

109. S. Rütters, *Behördliche Mitteilungen nach § 31a AO und Freiheit vom Zwang zur Selbstbelastung*, 33 Zeitschrift für Wirtschafts- und Steuerstrafrecht (wistra) 10, p. 378 et seq. (2014).

110. B. Groß, *Dokumentationspflichten für Verrechnungspreise*, 25 IStR 9, p. 359 et seq. (2016); in detail, *see* K. van Lück, *supra* n. 3, at p. 2524 et seq.

111. S. Rasch,K. Mank & S. Tomson, *Die finale Fassung des neuen OECD Kapitels zur Dokumentation und zum "Country-by-Country Reporting" – Neue Herausforderungen für Unternehmen*, 24 IStR 12, p. 428 (2015); and S. van der Ham & S. Tomson

23.4.3.2. Register of beneficial ownership

Section 18 et seq. of the GwG establish a centralized register of beneficial ownership called the "transparency register" (*Transparenzregister*). The register is run by the *Bundesanzeiger Verlag* (a German federal gazette publisher); however, public access to the register is restricted.[112] According to the first sentence of section 23(1), No. 3 of the GwG, access is only granted in the case of a legitimate interest, and even then, according to the second sentence of section 23(1) of the GwG, access to the register is limited to certain information.[113] Furthermore, the beneficial owner can file for a further restriction of access to the register according to section 23(2) of the GwG.[114]

23.4.3.3. Freedom of Information Acts

Germany does have a federal Freedom of Information Act (*Informationsfreiheitsgesetz*). Furthermore, various federal states have enacted their own Freedom of Information Acts. The question of whether the federal or state (*Bundesländer*) Freedom of Information Acts are applicable in tax issues has been very controversial.[115] By enacting of the new General Data Protection Regulation on 25 May 2018, the German legislator has tried to "clarify", in section 2a(1) of the AO, that other data protection acts issued by the federal government or by states are only applicable if the AO explicitly stipulates this. This provision provides evidence that no external information acts shall effect the German tax administration. However, uncertainty still remains because the federal Freedom of Information Act is not a specific data protection act.

& M.J. Chwalek, *Grenzüberschreitender Informationsaustausch in Steuersachen – ein Überblick*, 7 Internationale SteuerRundschau (ISR) 1, p. 31 (2018).

112. C. Bochmann, *Zweifelsfragen des neuen Transparenzregisters*, 70 DB 23, p. 1310 et. seq. (2017); A. Friese & C. Brehm, *Das neue Transparenzregister: Effektiver Kampf gegen Geldwäsche oder Bürokratie-Monstrum?*, 9 Gesellschafts- und Wirtschaftsrecht (GWR) 14, p. 273 (2017); and S.J.M. Longrée & K. Pesch, *Das neue Transparenzregister in der Praxis*, 20 Neue Zeitschrift für Gesellschaftsrecht (NZG) 28, p. 1086 (2017).

113. H.-D. Assmann & H. Hütten, *Das elektronische Transparenzregister – Mitteilungs- und Angabepflichten*, 62 AG 13/14, p. 452 (2017).

114. J. Kotzenberg & K. Lorenz, *Das neue Transparenzregister – beantwortete und noch offene Fragen nach Veröffentlichung der "FAQs" des Bundesverwaltungsamts vom 22.9.2017*, 20 NZG 34, p. 1330 (2017).

115. *See* K.-D. Drüen, *Commentary on sec. 30 AO*, in Tipke & Kruse, *supra* n. 29, at para. 92 for an overview of the different jurisdictions of the tax courts and the administrative courts.

23.4.3.4. Further information

There is no publication of information about tax subsidies and tax-exempt organizations. Furthermore, there is no disclosure of tax information on the demand of public interest groups or competitors. Section 16(6) of the Federal Statistics Act (*Bundesstatistikgesetz*) may enable the anonymized scientific use of tax data.