Tax Transparency

2018 EATLP Congress Zurich
7 – 9 June 2018

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Chapter 2
Thematic Report

Purpose and Problems of Tax Transparency:
The Legal Perspective

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2.1. Basic insights

2.1.1. Three-dimensional protection through tax transparency

10 years ago, the EATLP congress in Santiago de Compostela discussed the instruments and scope of information exchange in tax matters between states for the first time. In the midst of an economically globalized world, the most urgent question seemed to be how the enforcement of legal tax can be guaranteed while the powers of tax authorities are limited to their national borders by international law. At that time, the tax-relevant information that tax authorities were receiving from other countries was rather rare and coincidental. Over the following decade, the OECD and the European Union enacted systematic instruments to enhance cross-border transparency between states at a remarkable speed, especially by means of automatic exchange of information (AEOI). This new exchange of information has raised the question of how the fundamental rights of taxpayers will be protected in a world that automatically exchanges big tax data. Only 6 years later, the EATLP congress in 2014 in Istanbul analysed this new development and looked for tax solutions of equivalent effect. It seems obvious that an increase in international tax transparency between tax authorities has a tense relationship with tax secrecy. Next to information exchange

1. See R. Seer & I. Gabert (eds.), Mutual Assistance and Information Exchange (IBFD 2010), Online Books IBFD.
2. The substantially growing number of legal European and multinational sources are named in sec 2.1.3.
4. See the huge research organized by the Vienna University of Economics and Business (Austria) and Örebro University (Sweden) in E. Kristoffersson et al. (eds.), Tax Secrecy and Tax transparency: The Relevance of Confidentiality in Tax Law (PL Academic Research 2013).
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by the tax authorities of states, a network of investigative journalists is increasingly looking for tax evasion schemes. With the Panama Papers, 11.5 million documents with detailed financial and attorney-client information about more than 214,000 offshore entities were leaked and published in 2016. 1 year later, in 2017, the so-called “Paradise Papers” followed, with a set of 13.4 million confidential documents relating to offshore investments and more than 120,000 people and companies. The sensitivity of the public regarding tax havens and tax equality has been significantly sharpened by such activities of investigative journalism supported by non-governmental organizations (NGOs).

In times when countries pass legislation to get more and more information about the taxpayer and the automatic exchange of information for tax purposes is constantly growing, it is important to emphasize the meaning of tax transparency in this process. As the General Report rightly points out (see chapter 1), there is not a single country in the European Union that has not participated in this trend. However, the meaning of tax transparency is manifold and has to be clarified. Protection through tax transparency can be classified into three dimensions, explained in sections 2.1.1.1.-2.1.1.3.

2.1.1.1. First dimension: Protection of the state and taxpayers through tax transparency of the taxpayer and third parties

The taxpayer is the one who has to be transparent towards the tax authorities and, consequently, the state. Especially in the field of direct individual taxation, only the taxpayer himself knows the tax-relevant facts and circumstances. This information is rooted in his sphere. Without cooperation

6. The confidential data had been stolen by a cyberattack against the offshore law firm Appleby (see https://www.applebyglobal.com (accessed 1 Aug. 2018)).
7. Furthermore, in 2013-2015, the ICIJ published the so called “Offshore Leaks”, “Luxembourg Leaks” and the “Swiss Leaks”. The list of supporters is published on the website of the ICIJ, available at https://www.icij.org/about/our-supporters (accessed 1 Aug. 2018).
8. For the meaning of “tax transparency”, see Part I, ch. 1, General Report: Notion and Concept of Tax Transparency, sec. 1.2.1.
9. See id., at sec. 1.2.3.2.
and information from the taxpayer (provided on tax returns), legal taxation will not be possible. This is not only the case in self-assessment tax procedure systems, but even in ex officio tax procedure systems, because the tax authority will not be able to properly assess the tax ex officio without compliance by the taxpayer. Therefore, tax transparency of the taxpayer can be named as a sine qua non condition for an effective tax procedure system based on the fundamental principles of legality and equality.

However, the taxpayer will not safeguard legal and equal taxation in procedure law solely by himself. Additionally, third parties (e.g. employers, pension funds, banks and other financial institutions or e-business providers) are almost constrained to submit tax information regarding their employees, pensioners, customers, deliverers or other business partners in information returns. The sum of information provided by the taxpayer and third parties offers tax authorities a high level of transparent tax data on each taxpayer, which is close to the picture of a "glassy citizen". In general, this is justified by principles of legal and equal taxation and the general public interest. However, the general public interest does not solely protect itself. Regardless of the public financial budgetary interests, it also protects all other taxpayers as a collection of compliant taxpayers who have a vital interest in other taxpayers fulfilling their obligations just like they do. Therefore, transparency of the taxpayer not only protects the state, but also the community of all compliant taxpayers.

2.1.1.2. Second dimension: Protection of the taxpayer through transparency of the tax authorities

It is part of the fundamental rights of individuals that their personal data will be protected by the tax authorities (article 8, paragraph 1 of the Charter of Fundamental Rights of the European Union (CFR)). The tax authorities may use the data that have been provided by the taxpayer only for specified purposes on a legitimate basis laid down by law (see article 8, paragraph 2, sentence 1 of the CFR). According to article 8, paragraph 2, sentence 2 of the CFR, the taxpayer has the right of access to data that has been collected concerning him. The cooperation duties of taxpayers are accompanied by their rights to information and hearing, exemplifying their position in the legal relationship with the tax authorities.

As taxpayers and third parties are obliged to apply tax law in order to file proper tax returns, the provisions of tax codes must be quite clear in order to make tax self-regulation by taxpayers and third parties possible. If doubts still remain, taxpayers need effective assistance, possibly even a binding single ruling, ex ante, to reach legal certainty and file proper tax returns. The high level of tax compliance, which is enforced by the law, is only proportional in relation to the freedom rights of the affected private persons if these persons are informed about their duties in detail and have an idea about the use of their disclosed personal data in the sphere of the tax authorities. Under the rule of law, a high level of transparency of the taxpayer has to be linked to a high level of transparency of the state and tax authorities themselves.

2.1.1.3. Third dimension: Protection of democracy and the general public through a naming-and-shaming approach by using investigative journalism

The public is becoming more and more sensitive regarding fair and equal taxation. Society partly mistrusts the ability (and the willingness) of state governments to guarantee equal tax legislation and enforcement. As a new dimension of transparency, the publication of so called “leaks” by investigative journalists exerts pressure on tax politicians and authorities to effectively fight tax avoidance and tax evasion. This instrument is a part of a naming-and-shaming approach to protect society and democracy. Because of these new tendencies, the government – and especially the effectiveness of the tax administration – might be more controlled by the general public. However, this new dimension of tax transparency also carries risks. The naming-and-shaming approach might threaten lawfully acting (i.e. compliant) taxpayers who have a legitimate interest in the protection of tax secrets. If the tax authorities do not protect them prudently, the proportionality principle might be violated.

2.1.2. Constantly growing obligations of taxpayers and third parties

Recent developments in the context of tax transparency show a concerning, one-sided line of tax transparency to the disadvantage of the taxpayer. Be-

11. See, for a relatively new implementation of the naming-and-shaming approach, e.g. Spanish national report, sec. 36.4.3.
12. See sec. 2.6.2.; and Part III, ch. 7, General Report: Transparency and Publicity, sec. 7.3.2.2.
sides annual tax returns, tax procedure systems around the world contain a multitude of withholding taxes, information returns and even further-reaching reporting duties that encumber private persons and entities without any financial compensation. This triggers remarkable liability risks and enhances compliance costs for taxpayers. As a consequence, tax compliance management systems have to be installed in companies all over the world to control heavy tax risks.

One recent example of this development is the extension of the transfer pricing documentation obligations of the taxpayer, which are now three-fold: (i) a “Local File”, which provides specified transfer pricing documentation for the specific country; (ii) a “Master File”, which shows the international business operations and transfer pricing policies; and (iii) as a new third component for enhanced tax transparency, an obligation for large multinational enterprises (MNEs) with a consolidated revenue of at least EUR 750 million to file a country-by-country-report (CbCR), which, among other information items, includes information about the amount of revenue/profit before income tax and the income tax paid and accrued for each tax jurisdiction in which the respective MNE does business.\(^{13}\)

### 2.1.3. Legal framework of tax transparency

From a legal perspective, it is important to clarify the legal framework of tax transparency. Tax transparency and AEOI are two sides of the same coin. In fact, the term “tax transparency” can be historically linked to international exchange of information.\(^ {14}\) Therefore, it is not at all surprising that the legal framework of tax transparency finds its origin in the legal basis of AEOI. The European legislation on tax transparency is mainly based on the Directive on Administrative Cooperation 2011/16/EU (DAC 1),\(^ {15}\) which

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has been (and is still being) constantly amended. This Directive first regulated AEOI with a limited, tax-relevant scope (article 8 of DAC 1) for EU Member States. The first amendment of DAC 1 was brought by Directive 2014/107/EU (DAC 2), which implemented the Common Reporting Standard for financial accounts with a comprehensive AEOI standard equal to the Multilateral Competent Authority Agreement (MCAA) standard. From 2016 on, DAC 2 substituted the former Savings Directive 2003/48/EC. As a consequence of the so-called "Luxembourg Leaks", Directive 2015/2376/EU (DAC 3) set up AEOI on advance cross-border rulings (ACBRs) and advance pricing agreements. The application of DAC 3 is far-reaching and covers not only regulatory ACBRs, but also the law interpreting ACBRs with cross-border content. DAC 3 followed a two-step approach, combining AEOI on general tax risk-related matters with exchange of information on request in specific cases. With Directive 2016/881/EU (DAC 4), the CbCR and the extension of transfer pricing documentation (see section 2.1.2.) were enacted. On 6 December 2016, Directive 2016/2258/EU (DAC 5) implemented the possibility for the tax authorities to gain access to taxpayer information for the purpose of tackling money laundering. DAC 1 was most recently amended on 25 May 2018 - ironically on the same day that the General Data Protection Regulation 2016/679/EU (GDPR) entered into force – by Directive 2018/882/EU (DAC 6) as

16. For the development from DAC 1 to DAC 4, see R. Seer, Exchange of Information between Tax Authorities: Structures and Recent Developments, in Practical Problems in European and International Tax Law: Essays in Honour of Manfred Mössner pp. 457-463 (H. Jochum et al. eds., IBFD 2016), Online Books IBFD.
20. Id., at p. 462.
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regards to mandatory automatic exchange of information in relation to reportable cross-border tax arrangements.\(^{25}\)

In addition, there are several further multilateral and bilateral agreements in the field of AEOI in tax matters. The Multilateral Convention on Mutual Administrative Assistance in Tax Matters from 1988 (CMAA, amended in 2010) is one such multilateral agreement, with 124 jurisdictions currently participating.\(^{26}\) The CMAA is complemented by the MCAA, which is based on article 6 of the CMAA. The MCAA provides a multilateral, standardized and efficient framework for the automatic exchange of information in tax matters. Since the Berlin signing ceremony on 29 October 2014, 61 jurisdictions have signed the MCAA. Furthermore, many countries have entered into bilateral agreements containing AEOI provisions, such as double tax conventions and tax information exchange agreements.

The Anti-Money Laundering Directive 2015/849/EU (4th AMLD) is also part of the legal framework of tax transparency. This may be confusing at first sight because the 4th AMLD primarily aims at tackling money laundering and terrorist financing.\(^ {27}\) However, tax offences are also included in the broad definition of “criminal activity” (article 3, No. 4 lit. f) of the 4th AMLD,\(^ {28}\) and information on beneficial ownership shall be more transparent through a central register (article 30, paragraphs 1 and 3 of the 4th AMLD). The 5th AMLD 2018/843/EU of 30 May 2018 points out that tax authorities also have access to this central register concerning beneficial ownerships.\(^ {29}\)

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28. With special emphasis, see Recital no. 11 4th AMLD.
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2.2. Participants in tax transparency

The relationship between the tax authority and the taxpayer is traditionally bipolar: the tax authority on the one side and the taxpayer on the other. However, this picture is not complete. Especially in the context of tax transparency, there are more participants in the process to ensure tax transparency and be protected by it at the same time. First, there is the taxpayer who has always had to be transparent towards the tax authorities. Nowadays, however, it is also the tax administration's turn to be transparent. This is the case even more so in light of the recent leaks and papers (see sec. 2.1.1.) and the pressure that these publications place on the tax administration. In addition, third parties as a source of tax-relevant information play an increasingly important role in enhancing tax transparency, as the tax authorities often cannot get all of the (tax) relevant information from the taxpayer alone.30 As a fourth group of participants in the process of increasing tax transparency, other branches of administration and courts have to be mentioned.31 Finally, the general public and society as a whole have to be named as new participants in tax transparency. Through the investigative work of NGOs and investigative journalists, the general public automatically becomes part of tax transparency by either controlling the actions of tax administrations or being the subject of the investigative work itself.

2.3. The legal perspective from a European point of view

Legal provisions that aim at increasing tax transparency in the European Union in most cases also limit the rights of the taxpayer. However, tax transparency can only take place within the legal requirements set forth by the European legislator. Therefore, sections 2.3.1.-2.3.5. shall elaborate on the legal requirements for legal provisions concerning tax transparency.32

30. See Austrian national report sec. 16.2.2.2.1.; and German national report, sec. 23.2.2.2.1. In Denmark, a new law has been proposed as of 1 January 2019 that will exclusively regulate the information obligations of third parties; see Danish national report sec. 20.2.2.2. An interesting current – but also general – problem in the context of tackling aggressive tax planning is the relationship between the reporting obligations of tax advisers (as third parties) and legal professional privilege, which is correctly pointed out in J. Voje, EU Implementation of BEPS Action 12 in Light of Human Rights Requirements, 57 Eur. Taxn. 5, p. 197 et seq. (2017), Journals IBFD.


32. For a sophisticated overview, see B. Krihenhihl, Personal Data Protection Rights within the Framework of International Automatic Exchange of Financial Account Information, 58 Eur. Taxn. 8 (2018), Journals IBFD.
2.3.1. Reservation of law and the proportionality principle

As fundamental principles of any limitation on personal rights, article 52, paragraph 1 of the CFR names the reservation of law (sentence 1) and the principle of proportionality (sentence 2). According to article 52, paragraph 1 of the CFR, every provision that limits the fundamental rights of the taxpayer guaranteed by the CFR has to be based on a legal provision that respects the very essence of these rights; and in addition, the limitation has to be proportional. In accordance with the principle of proportionality, such restrictions may only be made if they are necessary and in the public interest, which the European Union also has to recognize for the protection of the rights and freedoms of third parties.

These principles are in accordance with the European Convention for the Protection of Human Rights (ECHR) of 4 November 1950. Under the title “Right to respect for private and family life”, article 8 of the ECHR states the following:

Everyone has the right to respect for his private and family life, his home and his correspondence. An authority may intervene in the exercise of this right only to the extent provided for by law and necessary in a democratic society for the national or public security, for the economic well-being of the country, for the maintenance of order, for the prevention of criminal offences, for the protection of health or morals or for the protection of the rights and freedoms of others.

Article 52, paragraph 3, sentence 1 of the CFR states that insofar as the CFR contains rights that correspond to the rights guaranteed by the ECHR, the meaning and scope of the rights should be based on those of the ECHR. Accordingly, the ECHR sets a minimum standard for rights and freedoms. However, this does not preclude protection by EU law going beyond this minimum standard (see article 52, paragraph 3, sentence 2 of the CFR).\(^\text{33}\)

In the context of tax transparency, the importance of the proportionality principle has to be acknowledged more. Even though tax transparency is an important aspect to ensure the equal and legal taxation of taxpayers, it cannot be pursued at any cost. The obligations of the taxpayer based on legal provisions concerning tax transparency have to be measured by the proportionality principle. This means that only the data that is absolutely necessary for the legal and equal taxation of the respective taxpayer should be subject to AEOI and the use of such data.

\(^{33}\) See Seer, supra n. 23, at p. 75.
2.3.2. Right to the protection of personal data

As part of primary EU law, article 7 of the CFR states that private and family life have to be respected. Article 8 of the CFR specifically refers to the protection of personal data. Article 8, paragraph 2 of the CFR stipulates that "these data may only be processed in good faith for specified purposes and with the consent of the data subject or on any other legal basis. Everyone has the right to obtain information about the data collected concerning him/her and to obtain the rectification of the data."

In respect of the protection of personal data, the case law of the Court of Justice of the European Union (ECJ) should be taken into account. The ECJ does not grant protection of personal data for natural persons and legal persons equally. It rather distinguishes between these two subjects and allows for the protection of personal data with respect to legal persons as far as the legal entity of the respective legal person enables the identification of one or more natural persons. In the case that article 8 of the CFR is interfered with, this interference can be justified. Generally, article 52, paragraph 1 of the CFR allows for limitations on the protection of personal data of article 8 of the CFR as long as the limitations (i) are based on a legal provision; (ii) respect the essence of the rights and freedoms guaranteed by article 8 of the CFR; and (iii) fulfill the requirements of the principle of proportionality. These general justification rules are specified by the ECJ when a justification for the interference with the protection of personal data of article 8 CFR is in question. The ECJ applies a three-step approach in order to determine if a specific case of interference with article 8 CFR is justified:

1. Is a law in place that allows for the limitation of the fundamental right?
2. Does a public interest acknowledged by the European Union exist, and does this public interest justify the limitation of the fundamental right?

34. Treaty on European Union, art. 6, para. 1, OJ C 221 E/12, EU Law IBFD.
35. The Court of Justice of the European Union (ECJ) combines arts. 7 and 8 of the CFR in the case that the protection of personal data is an issue; see DE: ECJ, 9 Nov. 2010, Joined Cases C-92/09 and C-93/09, Schecke/Eifert v. Land Hessen, para. 47; and IE: ECJ, 8 Apr. 2014, Joined Cases C-293/12 and C-594/12, Digital Rights Ireland a.o. v. Minister for Communications a.o. for a general overview of data protection in art. 8 of the CFR, see J. Reinhardt, Konturen des europäischen Datenschutzgrundrechts: Zu Gehalt und horizontaler Wirkung von Art. 8 GRCh., 142 Archiv des öffentlichen Rechts 4 (2017).
36. Schecke/Eifert, supra n. 35, at para. 53. The identification of a natural person is possible when the name of the legal entity directly contains the name of a member of that legal entity (see para. 54 of the same case).
37. Schecke/Eifert, supra n. 35, at para. 66 et seq.; and Seer, supra n. 16, at p. 77.
(3) Is the limitation of the fundamental right proportional with regard to the pursued aim?

The third step represents a general principle of European law that ensures that the collection and publication of personal data is limited to the necessary amount with regard to the fulfilment of the purpose that the collection and publication of the personal data is based on. With regard to legal persons, however, this arguably strict protection of personal data is only applicable to legal persons whose names refer to one or more natural persons. This limited protection of legal persons with respect to the protection of personal data is justified by the ECJ for legal persons already being subject to more extensive publication obligations regarding their personal (business) data as compared to natural persons. Furthermore, the ECJ argues that the examination of every legal person and its name to determine whether it refers to a natural person is an unreasonable administrative burden.

2.3.3. Specific problems of application of the GDPR

On 25 May 2018, the GDPR entered into force and set a new European framework for the protection of personal data. Even though the GDPR with its overall 99 articles, sets forth a very detailed regulation on the protection of personal data, there are still a few loopholes. In this section, two of these loopholes in connection with the fields of application of the GDPR – namely the personal and objective fields of application – will be discussed.

With respect to the personal field of application, the GDPR makes it abundantly clear that only the personal data of natural persons are protected by the GDPR. This consequently begs the question of the protection of the personal data of legal entities (corporations and partnerships) by the GDPR. At first sight, this distinction between natural persons and legal entities may seem clear. A closer look, however, reveals that this distinction

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40. This probably means that only individualized partnerships are able to receive the same standard of protection as natural persons. Corporations, however, are excluded in most cases.
42. See art. 1, para. 1 GDPR.
43. See also sec. 2.3.4.
can be problematic in an individual case.\textsuperscript{44} These distinction problems can be solved by also protecting legal entities without differentiation between corporations and partnerships.\textsuperscript{45}

In addition, the objective field of application of the GDPR in tax procedures – which does not seem to be getting much attention – is also not that clear. According to article 2, paragraph 2, lit. a) of the GDPR, it does not apply to the processing of data "in the course of an activity which falls outside the scope of Union law". Therefore, it is important to know what "activity which falls \textit{inside} the scope of Union law" in the course of processing personal tax-relevant data of the taxpayer means. On the one hand, it can be argued that article 51 of the CFR is essential for the determination of which activity falls inside or outside the scope of EU law.\textsuperscript{46} Article 51, sentence 1 of the CFR regulates the objective scope of application of the CFR and states that "[t]he provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law".

This means that the GDPR would only be applicable if the respective Member State executed already existent EU law in the course of processing personal tax-relevant data. As a consequence, the GDPR would only be applicable in cases in which tax authorities executed national VAT acts, which basically means that tax authorities would execute the EU VAT Directive.\textsuperscript{47} Because of the execution of the EU VAT Directive, this would be an activity that falls within the scope of EU law. In contrast, if the tax authority executed a national Inheritance and Gift Tax Act or Income Tax Act, the GDPR would not be applicable because the execution of EU law is missing. Consequently, the objective field of application is very narrow according to this point of view. To ensure a broader field of application, the GDPR has to be applicable when the legal basis for the processing/exchange of tax-relevant personal data of the taxpayer is EU law. For example, DAC 1\textsuperscript{48} includes all direct taxes, especially income tax, which has to lead to the application of the GDPR as soon as tax-relevant information is exchanged on the basis of DAC 1.\textsuperscript{49}

\begin{itemize}
\item \textsuperscript{44} M. Krumm, \textit{Grundfragen des steuerlichen Datenverarbeitungsrechts}, 70 Der Betrieb 38, p. 2185 (2017) mentions private relationships between a corporation and its stockholder as a natural person.
\item \textsuperscript{45} See sec. 2.3.4.
\item \textsuperscript{46} See Krumm, supra n. 44, at p. 2186.
\item \textsuperscript{47} Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L 342/1, EU Law I.BFD.
\item \textsuperscript{48} Art. 2, para. 1 DAC 1.
\item \textsuperscript{49} The GDPR sets a minimum standard of data protection for taxpayers in the field of automatic exchange of information; see X. Huang, \textit{Ensuring Taxpayer Rights in the
2.3.4. Protection of personal data of legal entities in the European Union

As the personal field of application of the GDPR has already made clear, the protection of "personal" data of legal persons is not satisfactory. In contrast to the data protection standard of legal persons provided by the European Union, in Germany, the Federal Constitutional Court (Bundesverfassungsgericht) has extended the right to informational self-determination on legal persons. This may seem confusing at first glance because a legal person does not have a "personal sphere". However, it cannot be ignored that legal persons also have sensible data like natural persons (e.g. business, professional and company secrets) and that legal persons are as worthy of protection of this data as natural persons.

The primary law of the European Union does not disallow the protection of data of legal persons per se. Article 16 and article 17 of the CFR have to be considered in this context. According to article 16 of the CFR, the freedom to conduct business in accordance with EU law and national laws and practices is recognized. Article 17, paragraph 2 of the CFR states that "[i]ntellectual property shall be protected". The aforementioned secrets of legal entities are part of the freedom to conduct business in the sense of article 16 of the CFR and can also be qualified as intellectual property of legal entities in the sense of article 17, paragraph 2 of the CFR. Even though the CFR explicitly mentions legal persons as carriers of particular fundamental rights, an argumentum e contrario that legal persons consequently cannot be carriers of other fundamental rights guaranteed by the CFR is not acceptable. This is especially the case for the fundamental rights guaranteed by articles 16 and 17 of the CFR. The sensible data of legal entities that are able to distort competition in the case that they are made publically available, without any restrictions have to be subject to data protection in order to ensure competitive equality. Otherwise, arti-
classes 16 and 17 of the CFR are just empty shells with regard to the protection of the personal data of legal entities.\(^55\)

2.3.5. Tax secrecy standards across Europe according to national report

A closer look at the tax secrecy standards in Europe reveals that there are different understandings of the importance of tax secrecy. Consequently, one finds different levels of protection of the data of taxpayers through tax secrecy provisions. In this section, a differentiation will be made between high, medium and low standards of tax secrecy according to the information provided by national reports.

Switzerland is globally known for its strong protection of taxpayer data. This is mainly based on strong tax secrecy provisions.\(^56\) Hence, every person who is either working with the tax authorities or is otherwise responsible for enforcing tax law is not allowed to disclose information on taxpayers according to article 110 of the Swiss Federal Tax Act.\(^57\) Violation of this tax secrecy provision is penalized with up to 5 years in prison.\(^58\) Therefore, Switzerland can be qualified as a country with a high standard of tax secrecy. In addition, Germany is also a country that falls under the category of a country with high tax secrecy standards.\(^59\)

Spain can be qualified as a country with a medium standard of tax secrecy. In Spain, tax secrecy has no constitutional basis.\(^60\) Even though a constitutional basis for tax secrecy is missing, this does not mean that all data concerning an individual tax case of the respective taxpayer can be disclosed without any limitations. According to the Spanish national report, a current regulation for tax secrecy might be found in article 34.1.1 and article 95 of


\(^56\) Swiss national report, sec. 39.3.2. See also S. Raas & M. Winiger, Switzerland, in The practical protection of taxpayers' fundamental rights, vol. 100B, p. 794 et seq. (IFA Cahiers 2015).

\(^57\) Swiss national report (ch. 39). However, it shall not remain unsaid that art. 110, sentence 2 of the Swiss Federal Tax Act allows for the disclosure of tax-relevant information on a legal federal basis.

\(^58\) Swiss national report (ch. 39).

\(^59\) German national report, sec. 23.3.2. For exemptions from tax secrecy in Germany, see German national report, sec. 23.3.2.2.

\(^60\) Spanish national report, sec. 36.3.2.
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the Spanish General Tax Act (GTA). These articles of the GTA basically say that data has a confidential nature, as well as reports or any other records obtained by the tax authorities, which means that data can only be used for tax purposes. However, article 95 of the GTA lists 13 exemptions from this rule and allows that data can be used for other purposes. Because of this broad list of exceptions in Spain, which shows that a guarantee for tax secrecy is quite limited, critics come to the conclusion that there is a "non-confidential nature of data related to taxes".61

The Scandinavian countries are well known for a high level of tax transparency, which consequently leads to a low standard of tax secrecy. A prime example of this low standard of tax secrecy is in Sweden.62 The principle of public access to official records is a cornerstone of the Swedish tax procedure.63 Taxation decisions are public documents in Sweden. Although the principle of tax secrecy is regulated in section 27 of the Swedish Public Access and Secrecy Law and applies to all direct and indirect taxes, this does not prevent information from being given to an individual or other authorities without the consent of the taxpayer if a law exists that allows this.64 The income tax return is secret; however, decisions and justifications of the tax authorities are public, except for decisions on audit and control.65

These different standards of tax secrecy lead to the conclusion that there is a split standard of tax secrecy across Europe.

2.4. Tax secrecy standards on the basis of multilateral agreements

The significance of tax secrecy also has to be analysed in the context of multilateral agreements. The minimum standard of tax secrecy should be that the gathered tax information should only be used for tax purposes and that a certain level of protection of taxpayer data is provided by the obtaining state. The MCAA (see sec. 2.1.3.) is based on the opening clause of ar-
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ticle 6 of the CMAA (see sec. 2.1.3.). Article 22, paragraph 1 of the CMAA contains an international tax secret66 and states the following:

Any information obtained by a Party under this Convention shall be treated as secret and protected in the same manner as information obtained under the domestic law of that Party and, to the extent needed to ensure the necessary level of protection of personal data, in accordance with the safeguards which may be specified by the supplying Party as required under its domestic law.

To elaborate on this provision, imagine the following simple scenario: Sweden (with a low domestic tax secrecy standard; see section 2.3.5.) supplies tax information, on the basis of a multilateral agreement, to Switzerland (with a high domestic tax secrecy standard; see section 2.3.5.). In this case, the tax secrecy standards of Switzerland have to be applied because Switzerland is the obtaining state (see first part of the sentence of article 22, paragraph 1 of the CMAA). In the opposite case, in which Switzerland supplies tax information to Sweden, the tax secrecy standards of Switzerland also apply because of the second part of the sentence of article 22, paragraph 1 of the CMAA ("to ensure the necessary level of protection of personal data") in accordance with the safeguards under Swiss domestic law. In addition, the obtaining state is only authorized to use the received information for tax or tax crime purposes including the respective court proceedings (article 22, paragraph 2 of the CMAA). Furthermore, according to article 22, paragraph 4 of the CMAA, the utilization of such received information may be extended if it is allowed by the domestic law of the supplying state and if the supplying state authorizes such usage.

As a result, article 22, paragraph 1 of the CMAA leads to a split level of tax secrecy in purely domestic cases as well as in international cases. A country with a low level of tax secrecy of course applies its domestic tax secrecy legislation in domestic cases. In contrast, if the same country receives tax information from a country with a higher level of tax secrecy, the higher tax secrecy standard of the supplying country has to be applied by the obtaining country.

In comparison to the CMAA, it is interesting to point out the tax secrecy safeguards provided by DAC 1 (see sec. 2.1.3.). Article 16, paragraph 1, sentence 1 of DAC 1 stipulates that "[i]nformation communicated between Member States in any form pursuant to this Directive shall be covered by the obligation of official secrecy and enjoy the protection extended

66. See Seer, supra n. 13, at p. 1137.
to similar information under national law of the Member State which received it.

Therefore, if Sweden communicates tax-relevant information to Germany (with a high domestic tax secrecy standard; see section 2.3.5.) on the basis of DAC 1, the national tax secrecy provisions of Germany as the receiving state have to be applied. Hence, this case is treated equally as it would be under the CMAA. However, if Germany supplies tax-relevant information to Sweden, it is not clear as to which standard is applicable. According to article 16, paragraph 1, sentence 1 of DAC 1, the (low) tax secrecy standards of Sweden generally have to be applied, as Sweden is the receiving state in this scenario. However, article 17, paragraph 2 of DAC 1 makes it clear that the supplying Member State is not obliged to communicate information if it would be contrary to its legislation. Therefore, DAC 1 does not provide an ipso iure safeguard (in contrast to the CMAA) to ensure the necessary level of protection of communicated information, but rather waives the obligation to communicate the information.

2.5. Information rights of the taxpayer

"All taxpayers are persons, and all persons are holders of rights". This statement, made by Baker and Pistone in 2015, is important in general, but even more important in the context of tax transparency. Tax transparency is always closely linked to obligations of the taxpayer. To ensure that these obligations do not unilaterally overburden the taxpayer, the taxpayer has to have the right equipment to be able to meet the tax authorities at eye level. Significant parts of this equipment are the information rights of the taxpayer.

2.5.1. Different levels of information rights

The information rights of the taxpayer can be subdivided into four categories:

- the right to be heard;
- the right to be notified about the basis of taxation;

68. See sec. 2.1.2.
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- the right to personal information held by the tax authorities; and
- the right to access one's own tax file.\(^{69}\)

The right to be heard before issuing a tax assessment is the minimum level of protection that a taxpayer should have in the tax procedure. The right to be notified about the basis of taxation is, as far as can be seen by the information provided by national reports, a unique right of taxpayers in Germany.\(^{70}\)

2.5.2. Reasons for denial of information rights

Even though the taxpayer provides most of the information by cooperating with the tax authorities, the tax authorities find different reasons to deny taxpayers their individual rights. Two reasons that the tax authorities seem to use as the most prominent grounds for the denial of taxpayer rights are (i) the general public interest; and (ii) the protection of the personal data of third parties.

The reason of the general public interest is too abstract to be recognized as a reason for denying taxpayers' rights. The tax authorities must consider the individual tax cases of the taxpayers as the basis for denying taxpayer rights. It is not the taxpayer's job to state a legitimate interest in order to claim his information rights. The taxpayer does not even have to give reasons for why he has an interest in knowing what the tax authorities know about him. Quite the contrary, it is the tax authorities that have to bear the burden of substantiating why they want to deny taxpayer rights.

Furthermore, the argument of the protection of personal data of third parties is, in many cases, not accurate because third parties in general are already in a voluntary business relationship with the taxpayer. Consequently, in these cases, the respective third party does not have a sufficient interest in protecting his data. Only when tax authorities have investigated the personal data of third parties that do not have such a relationship with the

\(^{69}\) In Sweden, this is the rule. This right can only be denied in exceptional cases; see Swedish national report, sec. 38.4.3. However, in Germany and Romania, as the General Report correctly points out (see Part III, ch. 7, General Report: Transparency and Publicity, sec. 7.2.1.), there is no such formal right of the taxpayer to access his own tax file. See German national report, sec. 23.4.2.1.; and Romanian national report sec. 33.4.2.

\(^{70}\) See DE: Abgabenordnung (General Tax Act), sec. 364.
taxpayer may the argument of the protection of personal data of third parties be valuable.

In addition to the already mentioned reasons for granting taxpayers information rights, article 41 of the CFR has to be considered. As article 41, paragraph 2 of the CFR, with the title "Right to good administration", clearly states, every person shall have the right to be heard before any individual measure is taken that would affect him adversely, and every person shall have the right of access to his file. In the context of tax transparency, a good (tax) administration grants the taxpayer the right to (ex ante) single tax rulings if the taxpayer’s legitimate dispositions depend on it.71 To increase tax transparency in favour of the taxpayer, the tax administration could (and should) also think about implementing the publication of case-by-case rulings.

2.5.3. Freedom of Information Acts

Another tool in the toolbox of the taxpayer may be the freedom-of-information legislation of some countries.72 However, it is open to question as to whether the Freedom of Information Acts (FoIAs) are the right instruments for the taxpayer in relation to tax transparency. The FoIAs primarily aim at strengthening the confidence of citizens in the state. The government shall know that their actions are constantly subject to public scrutiny.73 As a consequence, the protection of individual (information) rights of the citizens (or in this case, the taxpayers) is not the focus of the FoIAs. However, the FoIAs give the citizens/taxpayers the possibility to participate in governmental processes on behalf of the public.

2.6. Open questions concerning new tendencies in tax transparency

Tax authorities seem to have discovered a new instrument to get the taxpayer to pay his taxes: the naming-and-shaming approach.74 With the nam-

71. E.g. in VAT issues.
72. See Turkish national report, sec. 40.3.3. In contrast, the United Kingdom and Germany explicitly do not apply their Freedom of Information Acts in tax matters; see UK national report, sec. 42.3.2.; and German national report, sec. 23.4.3.3.
73. Baker & Pistone, supra n. 67, at p. 33.
74. See Part I, ch. 1, General Report: Nation and Concept of Tax Transparency, sec. 1.1; and See Part III, ch. 7, General Report: Transparency and Publicity, sec. 7.3.2.2.
ing-and-shaming approach, tax authorities publicly disclose the tax information of the taxpayer. The goal is that the taxpayer fails to withstand the public pressure and pays the owed tax. This approach, however, also carries risks. Especially the proportionality principle has to be emphasized in relation to the naming-and-shaming approach.

2.6.1. Naming-and-shaming approach according to national reports

Not every country participates in publicly naming and shaming taxpayers. Austria, Belgium, France and Germany are only a few examples of countries that do not publicly disclose information on the taxpayer at all. In contrast, other countries with a naming-and-shaming policy utilize the naming-and-shaming approach in different ways. Spain, for example, just recently implemented a naming-and-shaming approach that allows the tax authorities to publish a list of tax debtors for tax debts or tax penalties exceeding EUR 1 million. Hungary, Ireland and Portugal also publish lists of tax debtors. At the top of the hill, the Scandinavian countries again take the lead with an extensive culture of public disclosure of tax-relevant information of taxpayers.

Contrary to this naming-and-shaming approach, Japan, in the past, published lists of taxpayers who paid the most income tax in the previous income tax year. One might call this approach “naming and honouring”. However, this sort of public disclosure led to criminal activity (e.g. kidnapping), which is why these lists were eliminated in 2005.

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76. German national report, sec. 23.4.3. French national report, sec. 22.4.3.; Austrian national report, sec. 16.4.3.; and Belgian national report, sec. 17.4.3. See also Luxembourg national report, sec. 29.4.3.; and Japanese national report, sec. 28.4.3.
77. Spanish national report, sec. 36.4.3.
78. Portuguese national report, sec. 32.4.3.; Hungarian national report, sec. 25.4.3.; and Irish national report, sec. 26.4.3. See also Croatian national report, sec. 18.4.3., where natural and legal persons are subject to the naming-and-shaming approach.
79. Swedish national report, secs. 38.2.8. and 38.4.3.; and Finnish national report, sec. 21.1.1.
80. Japanese national report, sec. 38.4.3. The taxpayers on this list were called “millionaire taxpayers”.
81. Id.
2.6.2. Naming and shaming and the protection of personal and business data

The publication of tax-relevant information of the taxpayer by way of naming and shaming is always connected to publishing sensible data of the taxpayer. The amount of income, the amount of paid taxes or the individual tax debts of the taxpayer are all personal or business data that concern a sensible sphere of the taxpayer. The naming-and-shaming approach cannot ignore the fact that these data are worthy of protection. Therefore, the use of the naming-and-shaming approach must be limited. One limitation – and this is probably the most important one – must be the proportionality principle. The application of the proportionality principle prevents the naming-and-shaming approach from being used in a way that one-sidedly pursues fiscal purposes. A possible guideline on the basis of the proportionality principle for the use of the naming-and-shaming approach might be the following: public companies should be subject to a lower standard of data protection of business data, whereas natural persons should enjoy a higher standard of data protection. As public companies are already open to the public, these different levels of data protection are adequate.

2.6.3. Further questions

Another interesting question in relation to the consequences of the naming-and-shaming approach is the impact on tax morality. Many things can influence the morality of the taxpayer in a positive but also in a negative way. The influence of the naming-and-shaming approach on tax morality can be of two kinds:

- the taxpayer is intimidated by the publication of his tax information and will decide to act in a tax-compliant manner, e.g. by settling his tax debts; or
- the taxpayer will be motivated to act in a non-tax compliant manner, e.g. by evading taxes (according to the motto: “If my neighbour is evading taxes, so am I!”).\(^\text{82}\)

The role of investigative journalism is also relevant in the context of tax transparency, as the last few years have clearly shown (see sec. 2.1.1.).\(^\text{83}\) The problem with this kind of independent form of tax transparency is that

\(^{82}\) See Part III, ch. 7, General Report: Transparency and Publicity, sec. 7.3.2.2.

there is no control mechanism in place that limits the work of investigative journalists and NGOs.\textsuperscript{84} As a consequence, investigative journalism is able to scandalize even ordinary businesses or target prominent taxpayers and leave a negative mark on these business and taxpayers in the public eye without having to face any consequences.\textsuperscript{85}

2.7. Conclusion and outlook

Tax transparency has several legal dimensions. Its rapid development in this decade, however, must not lead to a disregard of the legal perspective of tax transparency and the legal requirements that the legislator of tax transparency provisions must take into account. When tax authorities have big-data access to a multitude of personal and business data, the affected taxpayers (and even companies) have to be protected by data protection rules. Especially the proportionality principle has to be considered more in this regard in the future by applying the GDPR in an effective manner. AEOI must not end with the exchange itself. Tax authorities have to justify for which purposes and in which ways they use the gathered data. Conversely, taxpayers have the right to be informed about what happens with their data. A minimum standard of tax secrecy has to be elaborated within the European Union. In relation to third countries, taxpayer data should only be submitted if the non-EU Member State guarantees safeguarding this minimum standard of tax secrecy.\textsuperscript{86} Even though tax transparency is a way of ensuring, or rather strengthening, equal and legal taxation, the risks and disadvantages of tax transparency have to be part of an open discussion on this topic. This is the case even more so for the new ways in which the tax authorities are enforcing taxes, such as the naming-and-shaming approach. Non-governmental and investigative journalism work may have an impact on tax authorities by stimulating them to improve their tax systems. However, the right of free press and journalism has to be balanced with the private rights of named-and-shamed taxpayers. A code of conduct, which leads journalism to objective and fair reporting, could be helpful. Arbitrary reporting, which causes severe damage to taxpayers, should have financial consequences. Therefore, the liability of journalists and their organizations is at least open for new discussion.

\textsuperscript{84} See Part III, ch. 7, General Report: Transparency and Publicity, sec. 74.
\textsuperscript{86} See 1E: ECJ, 5 Oct, 2015, Case C-362/14, Schrems, para. 75 et seq. ("safe harbour decision"); Huang, supra n. 49, at p. 236 et seq.; and Krähenbühl, supra. n. 32, at pp. 358 and 362.