

E.U. DATA PROTECTION AND THE FIGHT AGAINST TAX EVASION: A DELICATE BALANCE

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INTRODUCTION

In recent years, the tax world has seen an important shift in global policies, with an emphasis on tax transparency and exchange of information. It is well known that recent tax legislation, such as the U.S. Foreign Account Tax Compliance Act (“F.A.T.C.A.”) and the more European-driven B.E.P.S. Action Plan, has played an active part in this shift. What is less often addressed is how the shift has indirectly resulted from other non-tax-driven legislation, including anti-money laundering provisions and legislation enacted to fight terrorism. These measures often have a far broader scope than more limited tax-driven legislation.

The question then becomes whether non-tax-driven measures enacted to achieve tax transparency do not infringe on other rights, such as data protection or the European fundamental human right to privacy. This can be particularly critical in countries in which the sharing of personal data may not only result in an infringement of one’s private life but in actual security threats to that person’s life.

This article, while not aiming to provide a qualitative evaluation of the global policy shift, examines the E.U.’s non-fiscally-driven approach to tax transparency, including the consequences of the legislation with respect to individuals and, more precisely, the legal limits of such transparency.

TAX-DRIVEN EXCHANGE OF INFORMATION AND DATA PROTECTION UNDER E.U. LAW

On the European side of the Atlantic, personal data can only be gathered under strict requirements and for a legitimate purpose.¹ E.U. Member States that collect and manage personal information must assure the protection of certain fundamental rights by, *inter alia*, protecting the data so collected from misuse.

Directive 95/46/E.C.² (the “Data Protection Directive”), as currently in effect, constitutes the current European keystone in terms of personal data protection.³ It seeks

¹ [“Protection of Personal Data.”](#) European Commission, last modified November 24, 2016.

² Directive 95/46/E.C. on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, dated October 24, 1995.

³ The new E.U. data protection framework, in the form of the General Data Protection Regulation (“G.D.P.R.”) (Regulation (E.U.) 2016/679), has been adopted and is directly applicable in all Member States without the need for implementing national legislation (Article 99 of Regulation 2016/679). The G.D.P.R. entered into force on May 24, 2016, and shall apply as of May 25, 2018. Directive

to balance the protection of individual privacy and the free movement of personal data within the E.U. Essentially, the Data Protection Directive establishes limits on the collection and use of personal data and requires that every Member State set up an independent national body in charge of the supervision of any activity relating to personal data processing.

The content of Article 8 of the European Convention on Human Rights⁴ (the “E.U. Charter”) is incorporated into the Data Protection Directive. As a result, the Data Protection Directive guarantees an individual’s right to privacy of his or her (i) personal and family life, (ii) home, and (iii) personal correspondence.

For purposes of the Data Protection Directive, personal data is defined as:

[A]ny information relating to an identified or identifiable natural person; an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity.⁵

Unrelated to these data privacy concerns, Directive 2011/16/E.U.,⁶ as amended by Directive 2016/881/E.U.,⁷ (together the “Administrative Cooperation Directive”), provides for administrative cooperation in the field of direct taxation. In order to achieve administrative cooperation, Member States must share “foreseeably relevant” information regarding direct taxes.⁸ A Member State must exchange information upon request of the competent authority of another Member State.⁹

Both the E.U., through its Administrative Cooperation Directive, and the O.E.C.D., through its explanatory memorandum to Article 26 of the O.E.C.D. Tax Model Treaty¹⁰ use the following broad phrasing when defining the key concept of “foreseeable relevance:”

The standard of ‘foreseeable relevance’ is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States [or Member

“The Data Protection Directive establishes limits on the collection and use of personal data and requires that every Member State set up an independent national body in charge of the supervision of any activity relating to personal data processing.”

95/46/EC is repealed with effect from May 26, 2018. In addition, since the G.D.P.R. does not apply to the processing of personal data in the course of activities in the areas of judicial cooperation in criminal matters and police cooperation, the E.U. Commission also adopted Directive 2016/680/E.U. on the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences, or execution of criminal penalties, dated April 27, 2016.

⁴ Charter of Fundamental Rights of the European Union, December 18, 2000.

⁵ Article 2 of Directive 95/46/E.C.

⁶ Directive 2011/16/E.U. on administrative cooperation in the field of taxation and repealing Directive 77/799/E.E.C, dated February 15, 2011.

⁷ Directive 2016/881/E.U. amending Directive 2011/16/E.U. as regards mandatory automatic exchange of information in the field of taxation, dated May 25, 2016.

⁸ Article 1 sec. 1 and Article 2 sec. 2 of Directive 2011/16/E.U.

⁹ *Id.*, Article 5.

¹⁰ O.E.C.D., *Update to Article 26 of the O.E.C.D. Model Tax Convention and Its Commentary*, (Paris: O.E.C.D. Publishing, 2012).

States] are not at liberty to engage in ‘fishing expeditions’ or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.¹¹

This broadly drafted requirement of foreseeability for tax purposes, both at the E.U. and O.E.C.D. levels presents a potential violation of an individual’s European privacy rights when examined in the data protection context.

Furthermore, the O.E.C.D. commentary on the Tax Model Treaty¹² adds an additional broad requirement to the one regarding foreseeable relevance. The O.E.C.D. comments provide that an information request can only be made if a “reasonable possibility” exists that the information will be relevant.¹³ To assure that the exchange be efficient, the memorandum provides that:

[O]nce the requesting State has provided an explanation as to the foreseeable relevance of the requested information, the requested State may not decline a request or withhold requested information because it believes that the information lacks relevance to the underlying investigation or examination.

Where the requested State becomes aware of facts that call into question whether part of the information requested is foreseeably relevant, the competent authorities should consult and the requested State may ask the requesting State to clarify foreseeable relevance in the light of those facts. At the same time, paragraph 1 does not obligate the requested State to provide information in response to requests that are ‘fishing expeditions’, *i.e.* speculative requests that have no apparent nexus to an open inquiry or investigation.

PERSONAL DATA PROTECTION AND THE RIGHT TO AN EFFECTIVE JUDICIAL REMEDY

The E.U. Charter, legally binding since the entry into force of the Treaty of Lisbon in December 2009, enshrines in E.U. law a range of personal, civil, political, economic and social rights of E.U. citizens and residents, commonly shared by European countries.¹⁴

Article 47 of the E.U. Charter provides for the right to an effective judicial remedy against violations of an individual’s fundamental rights, such that “everyone whose rights and freedoms guaranteed by the law of the [European] Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.”

Exchange of Information Among Member States

Berlioz Investment Fund SA v. Directeur de l’administration des Contributions

¹¹ *Id.*, para. 5; Whereas (9) of Directive 2011/16/E.U.

¹² *Id.*

¹³ *Id.*

¹⁴ European Parliamentary Research Service, *The Role of the Charter after the Lisbon Treaty*, (2015), p. 10.



directes,¹⁵ illustrates how article 47 of the E.U. Charter can be used by taxpayers to protect their fundamental rights. In this case, a French subsidiary, Cofima S.A.S., paid a dividend free of French withholding tax to its Luxembourg parent company, Berlioz Investment Fund (“B.I.F.”). Based on the Administration Cooperative Directive, the French tax authorities requested their Luxembourg counterpart to collect information from the parent company in order to determine whether French tax law requirements granting the claimed exemption from withholding tax were met. B.I.F. provided all requested documentation except the names and addresses of the shareholders and the percentages and amounts of share capital held by each shareholder. In response, the Luxembourg tax authorities charged a penalty of €250,000 for failing to cooperate under Article 5(1) of the domestic law transposing the Administration Cooperative Directive.¹⁶

B.I.F. appealed the authorities’ decision to the Administrative Tribunal of Luxembourg, which reduced the fine to €150,000. This decision did not address the substance of the Luxembourg company’s complaint about the application of E.U. law, nor whether the information sought by the French authorities was relevant to their investigation. B.I.F. appealed this decision to the Administrative Court of Luxembourg claiming that the requested information was not foreseeably relevant and constituted a breach of its right to an effective judicial remedy guaranteed by the E.U. Charter. The court refused to determine whether the information order was well founded and requested a preliminary ruling from the E.C.J.

In a related opinion,¹⁷ Advocate General Wathelet reached the following conclusion:

- A Member State’s national legislation providing for penalties in the event individuals refuse to communicate information requested by application of the Administration Cooperative Directive, definitely entails the application of E.U. law, and consequently the E.U. Charter.
- Article 47 of the E.U. Charter is enforceable when the penalty is based on a request that may be unlawful.
- The foreseeable relevance of the information is a necessary requirement, which the requesting Member State must meet in order for the requested Member State to honor the request.

From the advocate general’s opinion, it can be understood that the foreseeable relevance of the requested information must be demonstrated prior to the information request, as it “is a condition which the request for information must satisfy in order for the requested Member State to be required to comply with it.”¹⁸

Domestic Recourse

One internal mechanism available to taxpayers whose personal information is at risk

¹⁵ *Berlioz Investment Fund SA v. Directeur de l’administration des Contributions directes*, Case C-682/15.

¹⁶ The Law of 25 November 2014 “Laying Down the Procedure Applicable to the Exchange of Information on Request in Tax Matters and Amending the Law of 31 March 2010 Approving the Tax Conventions and Laying Down the Procedure Applicable Thereto in Relation to the Exchange of Information on Request.”

¹⁷ Opinion of Advocate General Wathelet, delivered on January 10, 2017.

¹⁸ *Id.*

of being exchanged is to request that a domestic judge rule on the matter prior to the information being delivered to the requesting Member State. To ensure the effective and uniform application of E.U. law across the Member States, domestic courts may then refer the matter to the European Court of Justice (“E.C.J.”) to clarify how the relevant E.U. law must be interpreted.

Another protective mechanism for individuals is available under Article 17 of the Administrative Cooperation Directive, which states the following:

A requested authority in one Member State shall provide a requesting authority in another Member State with the information referred to in Article 5 [*i.e.*, information that is foreseeably relevant] provided that the requesting authority has exhausted the usual sources of information which it could have used in the circumstances for obtaining the information requested, without running the risk of jeopardising the achievement of its objectives.

Under this second safeguard, if the taxpayer shows that the requesting Member State had internal means for collecting the information sought in a particular context, the request can be challenged in front of domestic courts.¹⁹

NON-TAX-DRIVEN EXCHANGE OF INFORMATION AND THE PROPORTIONALITY PRINCIPLE

The European “proportionality principle” is intended to create an acceptable balance between the greater public interest and an individual’s fundamental rights. As a result, legislation driven by the fight against terrorism, or the fight against money laundering, justify a violation of fundamental rights to a higher degree than legislation enacted to fight against tax evasion.

The Proportionality Principle

Article 52(1) of the E.U. Charter states that:

Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others.

According to the E.C.J., only measures limiting the most serious crimes may restrict the fundamental right to privacy.²⁰ Since individuals do not have an absolute right to privacy, the courts are prompted to examine whether the violation is proportionate

¹⁹ The effective application of E.U. law is not only ensured by the E.U. courts; it also depends upon domestic courts and individuals to initiate proceedings in order to enforce individual rights under E.U. law. In its decision in *Costa v. Enel* in 1964, the E.C.J. ruled that E.U. law must be applied and protected by the domestic judge because it has direct effect if it is sufficiently clear and unconditional. See also E.C.R., *Van Gend & Loos* [1963], Case 26/62.

²⁰ E.C.J., *Al-Aqsa v. Netherlands*, November 15, 2012, C-539/10 (fight against terrorism).

“The E.C.J. underlined that objectives of general interest, such as the fight against international terrorism and serious crime, are acceptable hampers to fundamental rights, if they respect the principle of proportionality.”

and, thus, justifies a breach of fundamental rights.

In the *Digital Rights Ireland* case, the E.C.J. underlined that objectives of general interest, such as the fight against international terrorism and serious crime, are acceptable hampers to fundamental rights, if they respect the principle of proportionality.²¹

Non-Tax-Driven Legislation

While recent E.U. Commission initiatives seek to refocus attention on tax evasion, the Anti-Money Laundering Directive²² (the “A.M.L. Directive”) and Directive 2009/101/E.C. were initially directed at fighting money laundering practices and the financing of terrorism through the use of illegal financial channels. Financial scandals, including the *Panama Papers* scandal, have shed yet a new light on tax avoidance and have incited the E.U. Commission to propose amendments to these directives (the “Proposed Amendments”), laying out new tools to enhance transparency in this context.²³

In relevant part, the Proposed Amendments give Member States the choice to grant tax authorities and the public broader access to beneficial ownership information of trusts and similar legal structures. Member States, in transposing the finalized proposal, could allow every person “with a legitimate interest” to access such data.

While fighting terrorism and money laundering are goals that contain a strong justification for violating certain privacy rights, the balance between anti-tax-evasion measures and an individual’s fundamental right to privacy is not always clear. As a result, when anti-tax-evasion measures are provided for by legislation that is not tax driven, the rights to data protection and privacy are at risk of being violated.²⁴

Legislative Safeguards

When E.U. institutions draw up measures that relate to the processing of personal data, the E.U. Commission must submit those measures to the European Data Protection Supervisor (“E.D.P.S.”) for consultation.²⁵ The E.D.P.S.’s recommendations are generally presented in E.U. Parliamentary Committees and relevant working groups, where they are used to improve the proposed regulations and form part of

²¹ E .C.J., *Digital Rights Ireland*, April 8, 2014, Cases C-293/12 and C-594/12.

²² Directive 2015/849/E.U. of the European Parliament and of 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, Amending Regulation No. 648/2012 of the European Parliament and of the Council, and Repealing Directive 2005/60/E.C.

²³ Proposal for a Directive of the European Parliament and of the Council Amending Directive 2015/849/E.U. on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing and Amending Directive 2009/101/E.C., C.O.M./2016/0450 final.

²⁴ Article 7 states that “everyone has the right to respect for his or her private and family life, home and communications,” and Article 8.1 states that “everyone has the right to the protection of personal data concerning him or her.”

²⁵ Article 28(2) of Regulation No. 45/2001 on the Protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, dated December 18, 2000.

the overall legislative process.²⁶

In a response opinion,²⁷ the E.D.P.S. analyzed the Proposed Amendments. More precisely, it focused on their impact on fundamental rights to privacy and data protection by highlighting that the data transfers must serve a well identified purpose (as opposed to “a legitimate interest”) and that the principle of proportionality must guide any limitation to the fundamental rights to privacy and data protection. More precisely, the E.D.P.S. concluded that:

- . . . [A]ny processing of personal data [must] serve a legitimate, specific and well identified purpose and be linked to it by necessity and proportionality. The data controller performing personal data processing shall be identified and accountable for the compliance with data protection rules.
- . . . [A]ny limitation on the exercise of the fundamental rights to privacy and data protection [must] be provided for by law, [must] respect their essence and, subject to the principle of proportionality, [must be] enacted only if necessary to achieve objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
- . . . [A] proper assessment of the proportionality of the policy measures proposed in relation to the purposes sought [must be carried out], as emergency-based measures that are acceptable to tackle the risk of terrorist attacks might result excessive when applied to prevent the risk of tax evasion.
- . . . [S]afeguards [must be maintained] that would have granted a certain degree of proportionality (for example, in setting the conditions for access to information on financial transactions by FIUs).
- . . . [A]ccess to beneficial ownership information [must be designed] in compliance with the principle of proportionality, *inter alia*, ensuring access only to entities who are in charge of enforcing the law.²⁸

The E.U. Commission will provide information to the E.D.P.S. on the implementation of the recommendations made in the opinion.²⁹

CONCLUSION

Transparency has certainly become the norm in today’s tax world. However, when implemented to the extreme, these measures can have an adverse effect on an individual’s privacy. In a world where sharing personal data may not only result in an infringement of one’s rights but in an actual threat to one’s safety, the need for tax transparency most certainly reaches its limit. Fortunately, for individuals in Europe several remedies are available, such as under E.U. law, to address privacy violations.

²⁶ “Data Protection,” E.D.P.S.

²⁷ E.D.P.S., “EDPS Opinion on a Commission Proposal amending Directive 2015/849/EU and Directive 2009/101/EC, Access to Beneficial Ownership and Data Protection Implications,” February 2, 2017.

²⁸ *Id.*

²⁹ Article 25(2) of the Decision of the European Data Protection Supervisor on the adoption of Rules of Procedure, dated December 17, 2012.