EXCHANGE OF INFORMATION
The Challenge Ahead
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FRANCE

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I. INTRODUCTION

1. History

States have all progressively implemented – in more or less developed ways – internal mechanisms of information gathering in order to organise and monitor tax collection.

The principle of tax sovereignty has, however, long prevented States from organising their right to collect tax information beyond their national borders, although certain States have gradually found ways to obtain such information through alternative mechanisms – such as reporting requirements, the failure to comply with which triggers taxation and/or penalties (for example, the French 3% tax based on the market value of real estate held by foreign entities, trustees reporting requirements, or the FATCA regulations in the United States, etc).

In the contemporary context of globalization and the proliferation of international transactions, the question has increasingly arisen how States may access information relating to foreign situations that may involve a liability to domestic taxation.

State tax authorities have consequently sought ways to reach an overall transparency of information worldwide by legal and operational means, particularly in order to combat tax evasion.

Pursuing this ambitious goal involves cooperating to identify the nature of the necessary information to be exchanged, to develop a standardized format and medium for such information (IT tools in particular), and to develop rules that allow for easy and effective communication of such information between tax authorities.

For almost 20 years now, the work of the OECD has helped to develop ways of improving the exchange of information, initially on a bilateral basis through its Model Tax Convention. In parallel with this, the European Union also developed various legal means of which the purpose was to draw up a framework for the exchange of information between its Member States for tax purposes.

As so often, however, the implementation of an efficient global system of information exchange finally owed its conception to one or more events that acted as catalysts.

It is quite clear that the attacks of 11 September 2001, and the subsequent efforts to fight terrorism (particularly its financing) on a worldwide basis, significantly contributed to the acceleration of this process.

Within this new context, the combination in the years 2008/2009 of the global financial crisis and several financial scandals (of which the UBS case was the most prominent) led States and global institutions to respond even more effectively in this direction.

In order to do so, practical means (i.e. legal and operational instruments) had to be found in order to allow States to work together on a worldwide basis.

On the one hand, following the so-called "UBS affair" of 2009, the United States introduced a unilateral and binding mechanism of automatic exchange of information, the Foreign Account Tax Compliance Act (FATCA), by virtue of which a whole set of bilateral agreements were signed between the US and other States. Its objective was, in substance, for the US tax authorities to be able to identify whether the beneficial owner of an account with a financial institution is a US taxpayer.

In parallel with this, the joint conclusions of the G20 summit which took place in 2009, declaring war on tax havens, led the OECD to set up a legal framework for global financial and tax transparency, of which one of the more effective weapons would be the automatic exchange of information between the State's tax authorities.

The recent OECD / G20 work relating to the BEPS project (in particular Action 13 introducing a country-by-country reporting obligation), as well as the work of the OECD / Global Forum aimed at implementing effective transparency of financial and tax information worldwide, represent two facets of the same objective.

On the basis of this gradual development of regulatory frameworks, State tax authorities now have the legal and operational means to access financial and tax information that is shared globally.

In addition, more recent financial scandals and data leaks, in particular the "Panama papers", have shown that public opinion (and inevitably the media) tend to pay even closer attention to these issues, thereby putting further pressure on State tax authorities not to leave fraudulent situations unpunished.

As they begin to implement these new legal means (and answer the concerns of public opinion for worldwide transparency), States have been left with almost no obstacles.

The question which arises above all is how the tax authorities will manage exchanging and processing such a huge wealth of information, and how they will use it. In the face of this challenge, numerous risk areas appear: the improper use of information, breach of confidentiality, etc.

2. Multiple texts applicable to the exchange of information

In recent years, given the government's emphasis on combating international tax evasion, the international texts relating to the exchange of information have multiplied, without always being perfectly coherent with each other. The subject of the exchanges, the form and content of the exchanges and the guarantees of the taxpayers are, however, largely common.

2.1. OECD sources

Provisions relating to the exchange of information on request, spontaneous and automatic are issued by various sources. The first set of rules organizing the exchange of information between States was negotiated in the twentieth century, particularly through the proliferation of bilateral tax treaties signed using the model developed by the early work of the OECD.

The first comprehensive multilateral instrument addressing the issue of tax cooperation between jurisdictions in order to combat tax avoidance is the Convention on Mutual Administrative Assistance in Tax Matters ("CMAAT"), developed by the OECD and the Council of Europe in 1988. This Convention was amended in 2010 in order to comply with the joint conclusions of the G20 summit in 2009 with the aim of raising standards for the exchange of information upon request, and opening it up to a greater number of jurisdictions (in particular developing countries) which, until that date, had not always entered into such types of information exchange commitment.

2.2. EU sources

The European Union also gradually developed and implemented its own body of rules which applied in parallel. Articles 2, 3 and 4 of the Council Directive n°77/799 of 19 December 1977 provided for the possibility for Member States' tax authorities to exchange information for tax purposes either upon request, automatically or spontaneously, for categories of cases to be determined through consultation.

This Directive was subsequently repealed and replaced by the Directive n°2011/16 of 15 February 2011 which strengthened the mechanisms of exchange of information between Member States and has been applicable since 1 January 2013. This Directive implements the OECD standard and prohibits, in particular, a Member State from refusing to transmit information for reasons relating to the absence of a national tax interest or bank secrecy.

The EU "Savings Directive" n°2003/48 of 3 June 2003 introduced a multilateral mechanism of which a particular consequence was that, where the beneficiary of interest resides in a Member State other than that in which the paying agent is established, the latter is automatically required to report a minimum amount of information to the tax authorities of the Member State of the beneficiary.

With a view to align its pre-existing system of information exchange with the new OECD standard as seen in the Berlin Multilateral Agreement of October 2014, on 9 December 2014 the EU adopted Council Directive n°2014/107 (amending its Directive n°2011/16) in order to incorporate the Common Reporting Standard ("CRS"). Since the adoption of Directive n°2015/2376 of 8 December 2015, automatic exchange of information within the EU also covers advance cross-border rulings and advance pricing arrangements.

In addition to the above, the EU entered into bilateral agreements extending the CRS standard to the exchange of information with non-EU member States, namely Switzerland (Agreement of 27 May 2015) and Liechtenstein (Agreement of 8 December 2015).

2.3. The Foreign Account Tax Compliance Act ("FATCA")

The US Fatca law of March 18, 2010, which has only been in force since July 1, 2014, aims to combat the non-declaration by US taxpayers of their foreign accounts. The system is based on a very comprehensive mechanism of declarative obligations imposed on foreign financial institutions. To implement the scheme, the United States has undertaken signing agreements with the rest of the world so that the financial institutions of each partner country identify the US taxpayer accounts and provide the required information.

Most of the tax treaties based upon the OECD Model and the UN Model contains provisions relating to the exchange of information. The Directive on Administrative Cooperation in Tax Matters of 19th December 1977 (77/799/EEC) redrafted and replaced in 2011 by the Directive 2011/16/EU also contains provisions relating to the exchange of information on request, spontaneous and automatic.

3. The three forms of exchange of information (exchange of information upon request, spontaneous exchange of information, automatic exchange of information)

The exchange of information can take three forms (Article 26 of the OECD comments):

- Exchange upon request, when, in the course of an audit, an administration needs specific information;

- Spontaneous exchange, when an administration knows information which could be useful to the other State;

- Automatic exchange, when the transmission of information is done without prior request for certain categories of income (interest, dividends, pensions etc.)

4. The lack of guarantees provided to the taxpayers in order to prevent a misuse of the information obtained by the tax authorities

The question of the legitimacy of the exchange of information is in our view outdated and it is now necessary to take note of its existence and focus on finding ways to protect taxpayers against the misuse of information collected.

Given the ease with which tax administrations can obtain tax information, it is more than necessary that taxpayers benefit from important guarantees to protect them against the risk of misuse of their information. However, we will see in the following developments that, at least in France, the safeguards are largely insufficient.

Indeed, France very rarely refuses to transmit the information requested by other states and taxpayers concerned by the request are almost never informed. It is however essential that taxpayers be informed of the request of information made by States in order to make sure their fundamental rights are respected.

We will study the means available to the tax authorities in different countries to gather information before discussing the existing safeguards for taxpayers.

II. WAYS AND MEANS OF THE STATE'S TAX AUTHORITIES TO OBAIN INFORMATION FROM ABROAD AND FOR USING THE INFORMATION RECEIVED

1. Domestic legal and procedural tools (typologies and comparisons)

As we will see below, the French tax authorities ("FTA") has many options when it comes to choosing its sources of information.

The tools available to a State under domestic law are essential as a requested State may refuse to transmit information which the requesting State may not obtain in application of its own legislation and the requested State does not have to transmit information to the requesting State if its legislation does not allow it.

Consequently, the more internal tools available to a State to collect information, the easier it will be for it to collect information held by other States and the more difficult it will be for it to refuse to transmit information.

Pursuant to article L. 81 of the tax procedure handbook, the FTA have the right to obtain documents and information held by third parties in order to audit the declarations filed by taxpayers. The right to request information provided by article L. 81 of the tax procedure handbook allows the FTA to request information relating to the professional activity of a taxpayer from a third party or the taxpayer himself.

The categories of people subject to the right to request information given to the FTA (incurring a € 10,000 fine if they refuse to communicate the information) are exhaustively listed in the law.

However, this does not prevent the administration from requesting information from people who are not obligated to respond.

Because of the FTA's extensive scope when requesting information, France can hardly ever refuse a request for information from another State on the grounds that it could not obtain this information in application of its internal law.

The legislator has also stipulated that certain income or certain situations must be declared and communicated to the tax authorities. This is the case of salaries, wages and pensions (Article 87 of the French tax code), fees (Article 240 of the French tax code) or even investment income paid to French residents (Article 242 ter, 1 of the French tax code). This is also the case of the declarations relating to the French 3% tax based on the market value of real estate held by foreign entities (article 990 E of the French tax code) as well as trust returns that must be filed by trustees of trusts with a French connecting factor (article 1649 AB of the French tax code).

Indeed, all French and foreign entities (including companies, foundations, trusts, or any other "organizations" which, directly or indirectly, hold real estate properties located in France having a market value on January 1st of each year which exceeds the market value of other French movable assets they own are, as a general rule, subject to an annual tax amounting to 3% of the market value of the French properties.

They benefit from an exemption, granted by article 990 E, 3°-d of the French Tax Code, provided they are not registered in a non-cooperative State and they disclose the identity of their shareholders. In practice, the annual 3% tax is only collected in case of lack of reporting within the delay. It is a huge penalty which allows the French tax authorities to have a perfect knowledge of the ownership structures of real estate located in France. It also allows to levy French tax due on real estate companies ("*société à preponderance immobilière*") registered outside France, such as wealth tax, gift and inheritance tax and capital gain tax on the sale of their shares.

On the other hand, French or foreign trustees are also subject to reporting obligations in France, according to article 1649 AB of the French Tax Code, when the trust has a connecting factor with France. This includes trusts, regardless their characteristics, having either a French resident settlor, a French resident trustee or at least one French resident beneficiary. The last French connecting factor is the ownership of French located assets through the trust. This includes, among others, foreign "real estate company" shares.

Every year, trustees should report the market value of trusts' funds on January 1st, as well as the identity of the settlors and potential beneficiaries. Trustees should also report all modifications altering the trusts, including changes in its terms, distributions, removals and appointments of beneficiaries or trustees, the death of any settlor or beneficiary, or any change in the law applicable to the trust. Foundations are considered as "trusts" for reporting obligations purposes. An 80% penalty applies to all taxes due in France avoided due to the unreported trust with a minimum amounting to 20,000 € for each missing return.

We are of the opinion that the trustees' reporting obligations, as well as the 3% tax' reporting obligations do not comply with the principle of sovereignty under which France cannot organize its right to collect tax information beyond its national borders. This position is clearly reinforced since the FTA can obtain all information they need through the international exchange of information.

Moreover, Article 101 of the tax procedure handbook also provides that the judicial authority must communicate to the French tax authorities any indication relating to tax fraud that it may collect.

In the fight against money laundering and in accordance with European directives, France has instituted a centralized financial intelligence system, called TRACFIN, responsible for collecting information which is then transmitted to the FTA when it relates to potential tax evasion or money laundering. This information can then be used in tax or criminal procedures.

Finally, the information is sometimes transmitted anonymously by whistleblowers. Numerous tax audits in France are started following an anonymous report.

2. International exchange of information (from bilateral exchanges of information upon request to multilateral automatic exchanges)

2.1. Bilateral exchange of information

Several reasons allow a State to refuse to transmit the information requested by the other State. First, when the information requested by the requesting State is not "foreseeably relevant". The notion of foreseeably relevant information is derived from the 2005 OECD model revision. The comments of the OECD's Tax Affairs Committee on the notion of foreseeably relevant information have been substantially developed through the update of the Article 26 adopted by the OECD Council on 17 July 2012. The purpose of this was to expressly authorize requests for information aimed at groups of taxpayers. According to the comments, the purpose of the notion of foreseeably relevant information is to provide for the widest possible exchange of information in tax matters, while at the same time clearly indicating that it is not possible for Contracting States to go on fishing expeditions or to ask for information that is unlikely to be relevant to elucidating the tax affairs of a specific taxpayer[1]. The fishing expedition relates to a request of information that is unlikely to be relevant to an ongoing investigation or control[2]. For example, it would be considered a fishing expedition if a requesting State requested data on all its residents with an account on file at a bank in the requested State on the grounds that the bank is known to have many foreign holders, without providing additional information[3].

It appears from the OECD's comments that the "foreseeably relevance" condition is essentially intended to protect Contracting States (and not directly the taxpayers) by allowing them to refuse to transmit information to the requesting state. However, in a decision of the European Court of Justice ("ECJ") of May 16, 2017[4], the Court of Justice recognized a person's right to invoke the absence of foreseeable relevance and oppose the communication of information when interviewed by the requested State's authorities.

The requested State may also refuse to respond to a request for information when it would involve taking administrative measures derogating from its law and administrative practice[5].

This limit has never been an obstacle to the provision of information by France, given the extent of the right of communication available to the administration in the internal context (Article L. 81 of the tax procedure handbook).

The requested State may also decline a request for information when the requesting State, by virtue of its own law or administrative practice, is not in a position to obtain the requested information itself even though it would be legally possible for the requested State to obtain such information.

Thus, in terms of banking information, France is not required to respond to a request for assistance from a State or territory where bank secrecy is enforceable against the tax administration.

As stated in Article 26 of the OECD model, the principle of exchange on the basis of the more restrictive of the two legislations is also enshrined in Article 21 of the Multilateral Convention and in Article 17 of Directive n°2011/16 / EU.

Moreover, under Article 26.3 of the OECD Model Convention, a Contracting State is not obligated to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process. The comments on Article 26 of the OECD Model Convention indicate that before invoking this provision, a Contracting State must carefully consider whether the interests of the taxpayer really justify its application with the risk that an overly broad interpretation of these stipulations would render the exchange of information ineffective.

Some third parties, such as banks, may be in possession of confidential documents such as patents that may be part of loan applications or contracts. In principle, financial information, including books and accounting documents, does not constitute a commercial or industrial secret.

On the contrary, some other reasons do not allow a State to refuse to transmit the information requested by the other State. The OECD standard now prohibits the requested State from hiding

[1] comments OECD, C (26) No. 5
[2] comments OECD, C (26) No. 5
[3] comments OECD, C (26) No. 8.1
[4] ECJ, 16 May 2017, Berlioz, C-682/15
[5] Article 26 (3) a and b of the OECD Model Convention

behind banking secrecy to oppose a request for information[6]. This principle is reflected in the multilateral convention[7], in the information exchange model[8] and in the Directive 2011/16/EU[9]. The recent tax treaties concluded by France are based on the OECD standard. The agreements with jurisdictions initially favorable to bank secrecy, such as Switzerland, Belgium and Austria, have been accordingly renegotiated.

The evolution of the OECD standard has led States to no longer be able to invoke the absence of a national tax interest to oppose a request for information. Consequently, requested States must transmit information to requesting States even though they do not need the information requested for their own purposes. However, under French law, Article R. 114 A-2 of the tax procedure handbook provides that the French tax authorities are not obliged to provide information which could not be used for the establishment or recovery of French taxes. This provision is no longer in line with the OECD standard as mentioned above.

There is also the question of communicating information obtained from the requested State to a third State. Article 22.4 of the Multilateral Convention provides that the communication must be authorized by the State at the origin of the information. Article 16,4 of the Directive n°2011/16/EU provides that the requested State may object to the communication to a third State within a period of 10 days after receiving the request from the requesting State. In any case, the use of information in the third State is subject to the authorization of the first State.

2.2. Automatic exchange of financial information

On February 13 2014, the OECD Tax Affairs Committee proposed a new global standard for the automatic exchange of information (OECD report "Standard for Automatic Exchange of Financial Account Information - Common Reporting Standard"). This standard requires that States and Territories obtain various information from their financial institutions and that it is exchanged automatically with each other on a yearly basis. It was adopted by the G20 Finance Ministers at the Sydney meeting on 22 and 23 February 2014, before being published by the OECD on 21 July 2014 and is subject to a multilateral agreement between competent authorities.

The OECD has developed a mutual competent authority agreement which was signed by France in Berlin on October 29, 2014 and which came into force on February 24, 2016, the purpose of which is to allow the implementation of the new global standard for automatic exchange of information.

Under the Mutual Competent Authority Agreement ("MCAA"), the competent authorities exchange the required information according to a predefined computer and security scheme, on an annual basis, within nine months of the end of the calendar year in which the information relates.

This involves reporting requirements that relate to investment income, such as interest, dividends, proceeds from certain insurance contracts and similar income and account balances. The information identified will have to be collected by financial institutions in the broad sense (banks, some insurance companies, and some types of collective investment structures, custodians, management companies, etc.). They apply to all persons holding a financial account or a life insurance policy in a financial institution established in a country other than the one in which they are tax resident, provided that the two States are bound by the MCAA. The information collected

[6] Article 26 (5) of the OECD Model Convention
[7] Article 21.4
[8] Article 5.4
[9] Article 18.2

by the financial institutions is transmitted digitally once a year to their national tax authority, which in turn transmits it to the tax authority of the country of residence.

In practice, France has ratified the MCAA by the law n°2015-1778 of December 28, 2015. The competent French authority transmits to its partners the required information on the taxpayers of the participating States and territories according to their fiscal residence. Identification items (name, address, tax identification number, date and place of birth), bank account numbers and life insurance or annuity contracts, balances or surrender values are transmitted, but also financial income determined according to the nature of the financial accounts (interest, dividends, other income).

Even though requests for information made by other Contracting States to France are almost never refused, some safeguards have been put in place. However, regarding automatic exchange of information, as indicated by its name, the Contracting States cannot oppose to the communication of information. This situation is problematic as it inevitably leads to situations where the rights of the taxpayers are not fully respected.

III. HOW TO PROTECT THE TAXPAYER AGAINST NEGLIGENCE OR ABUSE IN THE USE OF AUTOMATIC EXCHANGES OF INFORMATION BY THE STATES' TAX AUTHORITIES AND HOW TO CHALLENGE INCORRECT INFORMATION COMING FROM ABROAD?

1. A disadvantageous situation for taxpayers

In order to allow the administration, in the event of an audit, to be able to effectively use the information it can obtain from other countries in the framework of administrative assistance, article L. 188 A of the tax procedure handbook provides for an extension of the limitation period when certain conditions are met.

The extension of the limitation period requires that the FTA send request for assistance to a foreign State or territory within the initial limitation period. In addition, the limitation period can only be extended if the taxpayer is informed within 60 days of the request for information sent by the FTA. The taxpayer must also be informed of the answer given by the requested State within 60 days of it reception by the FTA.

Article 26 of the OECD Model Convention provides that information obtained in the context of administrative assistance may be disclosed to persons "concerned" with the establishment and collection of taxes. This expression is broad enough to encompass the taxpayer. As a consequence, secrecy clauses in accordance with the OECD standard do not preclude the application of article L. 76 B of the tax procedure handbook, according to which "the administration is obliged to inform the taxpayer of the content and origin of the information and documents obtained from third parties on which it relied to establish the imposition" subject to a tax reassessment. The FTA must then provide the taxpayer who requests it with a copy of the documents obtained from the requested State before sending the assessment notices.

However, a number of older tax treaties (notably with Germany, Brazil or Greece) contain a clause inspired by the OECD model of 1963 which mentioned, among the authorized recipients of the information exchanged, the persons or authorities "responsible" for the establishment or collection of taxes. This wording excludes the taxpayer from the scope of the authorized recipients of the information. The French Administrative Supreme Court ("*Conseil d'Etat*") ruled that these restrictive clauses precluded the communication to the taxpayer of documents obtained from the other Contracting State[10].

In the presence of such an agreement, the tax administration specifies in its doctrine that the lack of communication to the taxpayer does not affect the regularity of the tax procedure.

However, even if the FTA is not required to disclose to the taxpayer the content of the information obtained in the course of the exchange of information, the judge cannot base his decision on elements that have not been communicated to the taxpayer[11].

At the EU level, the ECJ has judged that there is no obligation to inform the taxpayer before sending a request for information[12]. The ECJ concluded that EU law must be interpreted as not conferring on a taxpayer of a Member State either the right to be informed of a request for assistance from a Member State addressed to another Member State, in particular in order to verify the information provided by that taxpayer in his income tax return, or the right to take part in formulating the request addressed to the requested Member State, or the right to take part in examinations of witnesses organized by the requested Member State.

Moreover, insofar as French law does not grant the taxpayer with the right to be informed of a request for information of which he is the subject, it is almost impossible for him to have all the elements that would allow him to oppose a fishing expedition. The prohibition of fishing expeditions must therefore be regarded primarily as a rule aimed at preventing the requested State from bearing the cost of the investigation which the requesting State should have previously carried out internally.

Besides, in principle, the information transmitted by the requested State can only be used for the establishment or collection of the taxes concerned by the exchange even if they may be of interest to other regulations or administrations or to reveal non-tax infringements. However, this framework was considered too rigid by the OECD Tax Committee, which, following the revision of Article 26 in July 2012, added the possibility of using the information for other purposes subject to the dual condition that this possibility results from the laws of both States and that the competent authority of the State providing the information authorizes such use.

Article R. 114 A-3 of the tax procedure handbook provides that information received from the administration of another EU Member State shall be used under the conditions and within the limits laid down in Articles L. 103 et seq. of the tax procedure handbook (i.e. taking into account all the exemptions from secrecy for the benefit of the other administrations). Under French law the FTA do not have to obtain the prior consent of the requested State before communicating the information to another non-tax French administration. French legislation does not comply with the OECD norm in this respect.

Besides, the requested State does not necessarily know the purpose of the information request. In order to ensure that this right is respected, taxpayers should be informed of requests for information emanating from the requesting State. This would enable them in certain cases to oppose it, with supporting evidence, proving that information is requested for a purpose other than taxation (persecution in the country, criminal prosecution etc.).

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[10] CE, 5 March 1993, n° 105069, Rohart with regard to Article 26 of the bilateral tax treaty signed between France and the USA on July 28, 1967; CE, June 30, 1995, n° 140891 with regard to Article 28 of the bilateral tax treaty signed between France and Switzerland on September 9, 1966

[11] CE, 26 January 2011, n°311808

[12] ECJ, 22 October 2013, Sabou, C-276/12

Finally, France is at the forefront of the exchange of information and, moreover, refuses to sign tax treaties that do not contain the entire Article 26 of the OECD model. France has many tools in its domestic law allowing for the collection of almost any information. It is therefore virtually impossible for France to refuse to provide information to a requesting State on the pretext that it cannot obtain it under its domestic law. It is also almost impossible for a requested State to refuse to transmit information to France under the pretext that French domestic law would not allow it.

This situation may, in extreme cases, pose considerable risks when, for example, the legislation of the requesting country provides for the death penalty for tax evasion offenses (in particular China for certain, most serious offenses) or for homosexual couples. The communication of information may also be problematic in States with high risk of blackmail or kidnapping. In such a case, sending information to the requesting State without informing the taxpayer (a fortiori when the information sent can be erroneous) could have irremediable consequences.

2. Domestic procedures

Very few domestic procedures aim at protecting the taxpayer and some tools may be used in this regard.

Indeed, provided that the tax treaty does not contain a clause of restrictive secrecy, the FTA are required to communicate information to the taxpayer obtained from the requested State on which they based their tax reassessment.

However, in practice, the FTA may very well base the tax reassessment on information obtained from abroad without informing the taxpayer that a request for information has been sent and answered. Since the FTA do not have to inform the taxpayer before sending a request for information (except if they want to extend the limitation period), he may never be informed of its existence. The FTA could then pretend to base their reassessment on information collected internally while the information obtained abroad has given them a reason to reassess the taxpayer.

In the event that a request for information was made by France and that the FTA did not find it necessary to inform the taxpayer, it is possible that incorrect information was transmitted to the FTA without the taxpayer having the right to question them.

Another apparent protection of the taxpayer is the prohibition made to the French tax authorities to rely on information obtained illegally. However, the fact that information reaches the administration through the exchange of information purges the illegality of the information if the exchange of information's procedure has been duly respected.

Moreover, not communicating the information exchanged to the taxpayer could be considered as contrary to the constitutional principle of the right to a defense, which could be the subject of a priority preliminary ruling on constitutionality ("*question prioritaire de constitutionnalité*"). However, it is difficult to consider this option since the question of constitutionality must relate to a legislative provision. It is unclear which legislative provision could be deemed to be unconstitutional in the context of the exchange of information because of the international nature of the rules governing it. Indeed, the Constitutional Court ("*Conseil Constitutionnel*") is not competent to make a judgement regarding an international convention's conformity with the Constitution.

Besides, it would be possible, theoretically, to engage the requesting State's responsibility for having requested a fishing expedition or having asked for not foreseeably relevant information. It would also be theoretically possible to engage the requested State's responsibility if the latter sent erroneous information or information obtained illegally. However, a taxpayer who wishes to engage the FTA's responsibility would have to prove the existence of a fault, a damage and a causal link between the fault and the damage. French case law is very demanding in this matter. For example, it has been judged that the damage caused to a taxpayer by German courts was not a direct consequence of the conduct of the FTA in a case in which the German courts had partially based their judgement on the information provided by the FTA[13]. The State could not be ordered to make reparation for the injury that the person concerned would have suffered because of the absence of a causal link between the fault and the damage.

Considering the fact that the taxpayer does not have to be informed of the content of the request made by the FTA it would be very difficult for the taxpayer to prove the existence of a fault by the FTA as a requesting authority. Regarding the responsibility of the FTA as the requested State position, the success of the action would depend on the legislation of the requesting State that may provide the taxpayer with more information on the information requested and obtained from the FTA.

Finally, in the event that the information transmitted to the requested State by an informant was incorrect, it should be possible to engage the responsibility of this person.

In French law, engaging a person's responsibility requires proving that a fault, causing injury, has been committed.

Thus, it will first of all be necessary to establish the fault of the informant, which appears obvious in the event that the information transmitted has been stolen, but which is less clear if the informant has transmitted erroneous information by mistake. For example, a trustee's responsibility could be engaged in the case where they transmitted incorrect information. The responsibility of a foreign company could also be engaged if it reported an incorrect information to the FTA about its shareholders in respect of the 3% French tax based on the market value of foreign real estate held by foreign entities.

However, even in the case where the fault would be obvious, the taxpayer will very often not be able to invoke a fault insofar as they will not be informed of the request for information and especially of the person who transmitted the information to the required State.

Moreover, given the international nature of the exchange of information, this will almost always be the responsibility of the resident of a State A that would be engaged by a resident of a State B, which inevitably adds some complexity (determination of the applicable law, determination of the competent court, difficulties raised by a judicial action before the Court of a foreign country).

Therefore, only prior and immediate information from the taxpayer is able to provide sufficient protection.

[13] CAA Nancy, 13 February 1990, n°89-231

3. International instruments

Some bilateral conventions with a wide scope of secrecy are contrary to European law. This is the case, for example, of article 22 of the Convention signed between France and the Republic of Germany, which covers persons "in charge" of the tax base and the recovery of the tax, which is therefore not in conformity to the Council Directive of 19 December 1977 which provides that the information exchanged "shall be accessible only to persons directly concerned with the establishment of the tax", including de facto the taxpayer.

The European Convention on Human Rights and, more precisely, article 8 relating to the right to respect for family and private life, home and correspondence, and article 6 relating to the right to a fair trial may be useful in protecting the taxpayer’s rights in the context of the exchange of information. However, as a general rule, the European Court of Human Rights has judged that article 6§1 of the European Convention on Human Rights was not applicable to tax matters[14] to the extent that they cannot be considered as “civil rights” or “criminal charges”. However, the European Court of Human Rights has also judged that certain penalties may fall within the category of criminal charges depending on their classification in domestic law, the nature of the offence and the degree of severity of the possible penalties[15].

A decision of the European Court of Human Rights based on Article 8 of the European Convention of Human Rights must be mentioned[16]. This was the case of a taxpayer who had challenged in the German courts an administration’s decision to respond to a request for information from the Netherlands’ administration under Directive No 77/799/EEC. The Court concludes that the disclosure of information about the taxpayer's assets constitutes an infringement of the right to respect his private life which is nevertheless justified in the present case due to the fact that the decision was in accordance with the law, that it was proportionate and legitimate and that it pursued a goal of combating tax evasion.

In a decision of 26 September 1996[17], the European Court of Human Rights admitted that Article 6§1 could be invoked to oppose the lack of communication of documents obtained from a foreign tax administration. In this case, however, the grievance was not retained because of the particular circumstances of the case.

However, no French court has judged on the conformity with Article 6§1 of the information exchange procedure.

Bilateral instruments might also be used with the possible recourse to the Mutual Agreement procedures generally provided by tax treaties entered into between States under the OECD Model Convention, Article 25.

The Charter of Fundamental Rights of the European Union (article 7 relating to the respect for private and family life, article 8 about protection on personal data and article 47 relating to the right to an effective remedy and to a fair trial) may be invoked before a Court in order to challenge an exchange of information. These articles are all applicable before French courts, but here again the same conclusion must be made: without the taxpayer’s prior knowledge about the information exchanged, it would be impossible in practice to challenge it.

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[14] ECnHR, 12 July. 2001, Ferrazzini v. Italy, No 44759/98
[15] ECnHR, 8. June. 1976, Engel and Others v. the Netherlands, No 5100/71
[16] ECnHR, 27 nov. 1996, F.S. v. Germany, Application No. 30128/96
[17] ECnHR, 26 sept. 1996, Miailhe. v. France

Conclusion

In order to face the risks of the inappropriate use of exchange of information by the tax authorities, the taxpayer's advisors located in the different countries involved should cooperate and unify their force and determination.

From the point of view of guaranteeing the rights of the taxpayer, the right to be heard should be granted before a decision is taken at the end of the administrative phase in the requesting State. In addition, the taxpayer should be able to challenge the relevance and reality of the information obtained by the requesting State.

In its Sabou decision, the Court of Justice ruled that member States are free to extend the rights they intend to confer on their taxpayers. It is therefore at the level of the internal laws of the States that the rights of taxpayers can be extended. This is already the case in many countries (e.g. Andorra, Belgium, Luxembourg, Portugal, Switzerland and the Netherlands) which have set up participation rights in order to protect the interests of taxpayers on the subject of request of information. This participation right includes, in particular:

- the notification of the request for information to the taxpayer;
- the right to be heard before transmitting the information to the requesting State;
- the right to challenge the decision of the requested State concerning the transmission of the information collected.

In conclusion, the administrative assistance procedures do not place sufficient emphasis on the protection of taxpayers' rights. The jurisprudence of the Court of Justice of the European Union is not very helpful since in the current context of the will to fight tax evasion, the main objective expressed by the Global Tax Forum is not to hinder the exchange information.

One must bear in mind that although the exercise of the taxpayer's right of defense against the administrative acts of the requesting State depends on the domestic law of that State, it is only if the taxpayer is aware of the details of the sources, safeguards and procedures used in the requested State that its right to defense can truly be exercised.