



FIELD COURT TAX CHAMBERS

# International Conference on Taxpayer Rights

## The Rights to Confidentiality and Privacy in an Age of Transparency: a European Perspective

PHILIP BAKER QC

Field Court Tax Chambers

3 Field Court Gray's Inn

London WC1R 5EP

Visiting Professor, University of Oxford

e-mail: [pb@fieldtax.com](mailto:pb@fieldtax.com)



## Outline

- Council of Europe and European Union: Exchange of Information and Data Protection
- The IFA General Report on Practical Protection of Taxpayers' Rights



# Exchange of Information and Data Protection



## Exchange of information - A short history

- Provisions for exchange of information in tax treaties – Article 26 OECD Draft (1963) and Model
  - Exchange on request
  - Spontaneous exchange
  - Automatic exchange
- Council of Europe/OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters of 25<sup>th</sup> January 1988 (in force, 1<sup>st</sup> April 1995) (Strasbourg: Council of Europe, 1989 – convention no. 127) – now 87 signatories (30<sup>th</sup> June 2015, most since 2009)



## A short history

- Mid-2000s: Revelation of undisclosed Swiss bank accounts of US citizens
- Foreign Account Tax Compliance Act (became law, March 2010) – plus regulations
- Inter-governmental Agreements (IGAs)
  
- 2013: UK-FATCA
- 2013: France, Germany, Italy, Spain and UK = EU-FATCA



## A short history

- By summer 2013 – new International Standard based on Automatic Exchange of Information
- Standard for Automatic Exchange of Financial Account Information – Common Reporting Standard
  - Approved by OECD Council 15<sup>th</sup> July 2013
  - Endorsed by the G20, September 2013
- 29<sup>th</sup> October 2014 – Multilateral Competent Authority Agreement (61 signatories as at 4<sup>th</sup> June 2015) – early adopters from September 2017



## A short history

### EU Mutual Assistance Directive:

- Council Directive 77/799/EEC of 19th December 1977
- replaced by Council Directive 2011/16/EU of 15 February 2011
- 6<sup>th</sup> December 2012 - Commission Action Plan to fight Tax Fraud and Tax Evasion (COM 2012) 722 final
- October 2014 ECOFIN Council – agrees to extend AEOI under Mutual Assistance Directive



## A short history

### EU Directive on Administrative Cooperation:

- Directive 2014/107/EU of 9<sup>th</sup> Dec 2014 amending the Directive on Administrative Cooperation, to give effect to automatic exchange of financial information
- 18<sup>th</sup> March 2015 – Tax Transparency Package
- Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (COM(2015) 135 final)





## A short history

- We have moved very far and very fast from exchange of information on request to automatic exchange of information
- We have several, non-identical systems for exchange – Bilateral DTCs, TIEAs, FATCA, UK-FATCA, EU Mutual Assistance Directive, Common Reporting Standard
- Little attention has been given to effective safeguards



## ECHR and ECFR

# Article 8, ECHR (Convention for the Protection of Human Rights and Fundamental Freedoms, 1950)

### **Article 8 – Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.



## ECHR and ECFR

Article 7, ECFR (Charter of Fundamental Rights of the European Union)

### **Article 7, Respect for private and family life**

Everyone has the right to respect for his or her private and family life, home and communications.



## ECHR and ECFR

- X (Hardy-Spirlet) v Belgium (7<sup>th</sup> December 1982 – European Commission on Human Rights)
- Funke etc v France (appln 10828/84, 25<sup>th</sup> February 1993, European Court of Human Rights)
- The collection / transmission of personal information must be proportionate
- Note: other rights potentially engaged
  - Art 6 ECHR – right to a fair trial
  - Art 14 ECHR – enjoyment of rights to be non-discriminatory



## ECHR and ECFR

- FS v. Germany (appln no 30128/96, 27 Nov 1996) – Art 8: exchange of information under Mutual Assistance Directive
- Janyr v Czech Republic (appln no 42937/08, 31<sup>st</sup> Oct 2013) – Art 6: inability to secure exchange of information
- Jiří Sabou v Finanční ředitelství pro hlavní město Prahu (Case C-276/12, 22<sup>nd</sup> Oct 2013, CJEU) – participation in the formulation of requests and the examination of witnesses



# ECHR and ECFR

## Summary

- All gathering, retention and exchange of information is prima facie a breach of Art 8 ECHR / Art 7 ECFR
- The exchange must be
  - In accordance with the law
  - Necessary in a democratic society – a fair balance
  - Not disproportionate
- Successful challenges will be rare
- Best practice is to use exchange also for exonerating information



# Data Protection

## **Article 16, TFEU (Treaty on the Functioning of the EU)**

1. Everyone has the right to the protection of personal data concerning them.
2. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data by Union institutions, bodies, offices and agencies, and by the Member States when carrying out activities which fall within the scope of Union law, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.



# Data Protection

## **Article 39 TEU (Treaty on European Union)**

In accordance with Article 16 of the Treaty on the Functioning of the European Union and by way of derogation from paragraph 2 thereof, the Council shall adopt a decision laying down the rules relating to the protection of individuals with regard to the processing of personal data by the Member States when carrying out activities which fall within the scope of this Chapter, and the rules relating to the free movement of such data. Compliance with these rules shall be subject to the control of independent authorities.





# Data Protection

## **Article 8, ECFR**

Everyone has the right to the protection of personal data concerning him or her.

Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

Compliance with these rules shall be subject to control by an independent authority.

No ECHR equivalent

[pb@fieldtax.com](mailto:pb@fieldtax.com)



## Data Protection

- **Directive 95/46/EC** of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data
- Art 1(1) “Member States shall protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data.”



# Data Protection

Directive 95/46/EC

- Art 11 – right of data subject to know of collection of data from third party
- Art 12 – right of access and to rectify the data
- These rights may be modified for important economic and taxation reasons, when it is a necessary measure
  
- Art 23 – right to compensation for unlawful processing of data



# Data Protection

Directive 95/46/EC

- Art 25 – transfer of personal data to third countries
- “the transfer to a third country of personal data ... may only take place if ...the third country in question ensures an adequate level of protection”
- Procedure for determining if third country ensures adequate level of protection



# Data Protection

## Article 29 Data Protection Working Party

- Letter of 21<sup>st</sup> June 2012 with regard to FATCA and Directive 95/46

**“16.1 The WP29 shares the concerns expressed by some in relation to dual compliance with FATCA and the Directive. Without an appropriate legal basis justifying both sets of obligations imposed on European FFIs would result in the unlawful processing of personal data.”**



# Data Protection

## Article 29 Data Protection Working Party

- Letter of 18<sup>th</sup> September 2014 with regard to the OECD Common Reporting Standard (plus detailed Annex)

**“The practical roll-out of CRS in Europe based on existing FATCA IT solutions currently lacks adequate data protection safeguards, notwithstanding the EU proposal to amend the Directive 2011/16/EU regarding mandatory automatic exchange of information in the field of taxation. This Directive – which could be considered as transposition of the US FATCA and CRS in EU law – so far falls short of data protection safeguards.”**



# Data Protection

## **Article 29 Data Protection Working Party**

- Statement of the WP29 on automatic inter-state exchanges of personal data for tax purposes, 4<sup>th</sup> February 2015
  - **1. The automatic exchange of personal data for tax purposes should meet data protection requirements, namely the principles of purpose limitation and necessity**
  - **2. Member States that roll out the model of automatic massive storage and then forward this data for tax purposes, should be aware that they may incur increased (security) risks and liability under EU data protection laws**
  - **3. The WP29 confirms its approach on providing additional guidance to increase data protection safeguards in this area**



# Data Protection

Note:

- **Digital Rights Ireland Ltd** (Cases C-293/12 and 594/12) – CJEU, Grand Chamber, 8<sup>th</sup> April 2014
- The retention of and access data relating to telephone usage and internet access for anti-crime and anti-terrorist purposes
- Declared invalid Directive 2006/24/EC ... on the retention of data generated or processed in connection with the provision of publicly available electronic communications services
- Directive was a disproportionate interference with the right to privacy inter alia because it required retention and access to data of entirely innocent persons, not under suspicion





# Data Protection

## The Data Protection Directive and the Directive on Administrative Cooperation

- Original Article 25 of the Directive on Administrative Cooperation
  - “All exchange of information pursuant to this Directive shall be subject to the provisions implementing Directive 95/46/EC. However, Member States shall, for the purpose of the correct application of this Directive, restrict the scope of the obligations and rights provided for in Article 10 [*informing the data subject*], Article 11(1) [*providing information to the data subject*], Article 12 [*right of access*] and 21 [*publicising of processing operations*] of Directive 95/46/EC to the extent required in order to safeguard the interests referred to in Article 13(1)(e) [*safeguarding important economic or financial interests, including taxation matters*] of that Directive.” (Additional explanation in [ ] added).



# Data Protection

## **The Data Protection Directive and the Directive on Administrative Cooperation**

- Article 25 of the Directive on Administrative Cooperation as amended by Directive 2014/107/EU, Art 1(5):

- (a) the current text of Article 25 becomes paragraph 1;

- (b) the following paragraphs are inserted:

- ‘2. Reporting Financial Institutions and the competent authorities of each Member State shall be considered to be data controllers for the purposes of Directive 95/46/EC.



## Data Protection

- 3. Notwithstanding paragraph 1, each Member State shall ensure that each Reporting Financial Institution under its jurisdiction informs each individual Reportable Person concerned that the information relating to him referred to in Article 8(3a) will be collected and transferred in accordance with this Directive and shall ensure that the Reporting Financial Institution provides to that individual all information that he is entitled to under its domestic legislation implementing Directive 95/46/EC in sufficient time for the individual to exercise his data protection rights and, in any case, before the Reporting Financial Institution concerned reports the information referred to in Article 8(3a) to the competent authority of its Member State of residence.
- 4. Information processed in accordance with this Directive shall be retained for no longer than necessary to achieve the purposes of this Directive, and in any case in accordance with each data controller's domestic rules on statute of limitations.'



## Data Protection

- Data protection is concerned with much more than just confidentiality
- It covers: notifying the data subject of processing; allowing access and correction of data; identifying the purpose for which data is collected and processed; destruction of data after the purpose is achieved; controls over transmission of data



## Data Protection

- How will this work in practice?
- What are the purposes for which information is exchanged?
- Can information be used for taxpayer profiling?
- For how long may data be retained?
- What about transmission of data to countries with inadequate data protection?
  - E.g. Art 29 WP: Opinion 7/2014 on the protection of personal data in Quebec
- What would happen if [a country] was denied data because of data protection legislation?



# The IFA General Report: Practical Protection of Taxpayers' Rights

International Fiscal Association

2015 Basel Congress

**cahiers** de droit fiscal  
international

**VOLUME 100B** Offprint

The practical protection  
of taxpayers'  
fundamental rights



1938-2015



# The IFA General Report

- Background: practical protection
- 12 areas: identifying taxpayers and communicating; issuing assessments; confidentiality; normal audits; more intensive audits; review and appeals; criminal and administrative sanctions; enforcement of taxes; cross-border procedures; legislation; revenue practice and guidance; institutional framework





# The IFA General Report

- Methodology – branch reports
- List of minimum standards / best practices
- The questionnaire
- Results



# The IFA General Report

## **Confidentiality and Cross-border procedures**

Part 3 on confidentiality

Part 9 on cross-border procedures



# Minimum Standards and Best Practice

## Cross-border procedures: Exchange of Information

### Minimum standard

The requesting state should notify the taxpayer of cross-border requests for information, unless it has specific grounds for considering that this would prejudice the process of investigation. The requested state should inform the taxpayer unless it has a reasoned request from the requesting state that the taxpayer should not be informed on grounds that it would prejudice the investigation.



# Minimum Standards and Best Practice

## Cross-border procedures: Exchange of Information

### Best practice

Provisions should be included in tax treaties setting specific conditions for exchange of information



# Practical protection of Taxpayers' Rights in the various countries

- Luxembourg – 48
- Norway – 48
- ....
- UK – 29
- Sweden – 29
- Venezuela – 24
- Russia – 18
- Singapore – 18



## What further can be done?

- Monitoring group
- No complacency
  - Erosion of protection with regard to exchange of information and notification / rights to challenge
- Oppose further erosion



FIELD COURT TAX CHAMBERS

# International Conference on Taxpayer Rights

## The Rights to Confidentiality and Privacy in an Age of Transparency: a European Perspective

PHILIP BAKER QC

Field Court Tax Chambers

3 Field Court Gray's Inn

London WC1R 5EP

Visiting Professor, University of Oxford

e-mail: [pb@fieldtax.com](mailto:pb@fieldtax.com)