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The rule of law and the effective protection of  
taxpayers' rights in developing countries

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# The rule of law and the effective protection of taxpayers' rights in developing countries<sup>1</sup>

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<sup>1</sup> This article forms part of the comparative research conducted in terms of the DeSTaT Research Project (Sustainable Tax Governance in Developing Countries through Global Tax Transparency). In terms of this project the "South Antennae" (Brazil, Colombia, South Africa and Uruguay) provided reports based on questionnaires drafted by the "North Research Units" (Norway and Austria). The Heads of the North Antennas include Frederik Zimmer (Norway) and Pasquale Pistone (Austria). The Heads of the South Antennas include Addy Mazz (Uruguay), Natalia Quiñones (Colombia), Luís Eduardo Schoueri (Brazil), Jennifer Roeleveld (South Africa). The choice for these countries as South Antennae has been addressed in the DeSTaT Grant Application. In a nutshell, Brazil, Colombia and Uruguay represent three different countries within the same region: Brazil as one of the advanced economies in the region with a complex tax system, Colombia a country with the desire to cooperate but with limited resources, and Uruguay as one of the countries that have been striving to comply with the OECD standards. South Africa represents one of the most advanced economies in the region, with a fairly sophisticated tax framework and extensive tax treaty network.

Questionnaires on topics agreed by all institutions party to the project are drafted (primarily by the North Research Units Norway) and submitted to the South Antennae. Questionnaires are addressed through local seminars which aim at engaging all potential relevant stakeholders. Questionnaires encompass a legal-descriptive function as well as a more policy-oriented dimension. The questionnaires intend to highlight convergences and divergences between the selected pool of jurisdictions. Convergences and divergences are monitored in relation to both specific challenges/needs and to potential solutions. Questionnaires have incorporated survey sections, aimed at providing an accurate representation of the current state of affairs together with more policy-oriented sections. Funding for the Project is provided by the Research Council of Norway. Further information about the Project can be retrieved on the following website: <http://www.jus.uio.no/ior/english/research/projects/global-tax-transparency/>

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## **ABSTRACT**

The overall aim of this article is to analyse the taxpayers' rights in relation to the emerging standard of transparency with specific reference to Brazil, Colombia, South Africa and Uruguay. Exchange of information between tax authorities is increasing rapidly all around the world. This global development is largely the result of the introduction of the standard of transparency by the Organization for Economic Cooperation and Development ("OECD") with the political mandate of the G20 and more recently, in 2013, the introduction of the global standard of automatic exchange of information. Governments have agreed that exchange of information is necessary to prevent tax evasion and to tackle tax avoidance including aggressive tax planning. All surveyed countries have accepted the standard of transparency including the standard of automatic exchange of information. Furthermore, it is evident that the development of such standards appears to have taken place in a coordinated manner, led mainly by international organizations comprising governmental officials.

This article has first provided a comparative overview of the rules that Brazil, Colombia, South Africa and Uruguay have introduced to protect the taxpayers' rights in the exchange of information process being the right to access to public information, the right to confidentiality, the right to privacy, and the procedural rights (right to be informed, the right to be notified and right to object and appeal). Thereafter, this article has assessed whether the rules introduced by the surveyed countries to protect these rights are consistent with the fundamental taxpayers' rights that belong to the rule of law of these countries and with the principles of good governance and fiscal transparency.

The main conclusion is that the countries have introduced to some extent similar rules to protect the right to confidentiality, right to privacy and the procedural rights in the exchange of information. However, some differences may be found in the detail level of protection of confidentiality in South Africa and in respect of the procedural rights in Uruguay. One of the drawbacks of these rules is that the rules introduced by the surveyed countries do not ensure that the protection of the right to confidentiality and the right to privacy is effectively guaranteed. The results of the analysis show that these rules do not protect the taxpayer in case of breach of confidentiality or misuse of the information exchanged.

This article argues that the differences among rules and the lack of protection for taxpayer information may hinder the effective protection of the taxpayer and the tax administration should guarantee the protection of the taxpayer rights as part of the rule of law. Therefore, this article provides in Section 4 three recommendations addressing the right to confidentiality, the right to privacy and the taxpayers' procedural rights. These recommendations may be extended (as best practices) to other developing countries on a similar economic and legal scale. However, further research will be needed to see whether the conclusions of this article are also applicable to (other) developing countries.

## TABLE OF CONTENTS

1. INTRODUCTION .....	4
2. RIGHT TO ACCESS TO PUBLIC INFORMATION, RIGHT TO CONFIDENTIALITY AND RIGHT TO PRIVACY IN TAX INFORMATION EXCHANGE IN THE SURVEYED COUNTRIES .....	6
2.1. The right to access to public information, the right to confidentiality and the right to privacy in tax information exchange .....	6
2.2. International instruments addressing the right to confidentiality and right to privacy in exchange of information in the surveyed countries .....	9
2.3. Access to public information, right to confidentiality and the right to privacy in the domestic framework of the surveyed countries .....	13
2.4. Intermediate summary.....	32
3. TAXPAYERS' PROCEDURAL RIGHTS IN TAX INFORMATION EXCHANGE IN THE SURVEYED COUNTRIES.....	34
3.1. Taxpayer procedural rights in bilateral tax treaties concluded by the surveyed countries ..	34
3.2. Taxpayer procedural rights in the domestic framework of the surveyed countries .....	34
3.3. Intermediate summary.....	39
4. CONCLUSION, ASSESSMENT AND RECOMMENDATIONS .....	41
4.1. Conclusion and assessment.....	41
4.2. Recommendations .....	44

## 1. INTRODUCTION

The overall aim of this article is to analyse the taxpayers' rights in relation to the emerging standard of transparency with specific reference to Brazil, Colombia, South Africa and Uruguay.

Exchange of information between tax authorities is increasing rapidly all around the world. This global development is largely the result of the introduction of the standard of transparency by the Organization for Economic Cooperation and Development ("OECD") with the political mandate of the G20 and more recently, in 2013, the introduction of the global standard of automatic exchange of information.<sup>9</sup> Governments have agreed that exchange of information is necessary to prevent tax evasion and to tackle tax avoidance including aggressive tax planning. Therefore, in addition to bilateral instruments such as double tax conventions ("DTCs") and Tax Information Exchange Agreements ("TIEAs"); several multilateral instruments to exchange information have been introduced by the OECD.<sup>10</sup>

All surveyed countries i.e. Brazil, Colombia, South Africa and Uruguay have concluded DTCs and TIEAs, largely in accordance with the OECD Model.<sup>11</sup> Furthermore, all surveyed countries have ratified the Multilateral Administrative Convention on Mutual Administrative Assistance in Tax Matters ("MAC").<sup>12</sup> All surveyed countries have endorsed the Common Reporting Standard and signed the Multilateral Competent Authority Agreement ("CRS MCAA").<sup>13</sup> Therefore, the provisions regarding confidentiality in respect of Automatic Exchange of Financial Account Information in the CRS and the MCAA are also applicable to the surveyed countries. Apart from Colombia,<sup>14</sup> the surveyed countries

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<sup>9</sup> The standard of transparency including exchange of information on request was endorsed in the G20 Summits in Washington, London and Pittsburgh, and G8 Summits in L'Aquila and Lecce (Italy) and Hokkaido (Japan). The G20 meeting of September 2013 in St. Petersburg endorsed the development of a new global tax standard i.e. automatic exchange of information, see the Tax Annex to the St. Petersburg G20 Leader's Declaration. September 2013, para 3. Available at <http://www.mofa.go.jp/files/000013928.pdf>

<sup>10</sup> These instruments are the 1988 OECD-Council of Europe Multilateral Convention on Mutual Administrative Assistance in Tax Matters and its 2010 Protocol, the Common Reporting Standard and its Multilateral Competent Authority Agreement for Automatic Exchange of Financial Account Information (CRS MCAA), and the Multilateral Competent Authority Agreement on the Exchange of Country by Country reports (CbC MCAA). These instruments are available at <http://www.oecd.org/tax/exchange-of-tax-information/>

<sup>11</sup> The analysis of the use of double tax treaties (DTCs) and Tax Information Exchange Agreements (TIEAs) is contained in another article from the DeSTaT Project (Article General Tax Treaties vs. T.I.E.A.s: Assessing Tools to Ensure Transparency in a Globalised World from the Perspective of Developing Countries <http://www.jus.uio.no/ior/english/research/projects/global-tax-transparency/publications/general-tax-treaties-vs-t-i-e-a-s-assessing-tool-html>). Therefore, this article will only focus on the introduction of the right to confidentiality and privacy in the DTCs.

<sup>12</sup> At the time of writing (August 2017), more than 110 countries have signed the MAC. [http://www.oecd.org/tax/exchange-of-tax-information/Status\\_of\\_convention.pdf](http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf)

<sup>13</sup> At the time of writing (August 2017) more than 90 countries have signed the CRS MCAA. <http://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/MCAA-Signatories.pdf>

<sup>14</sup> At the time of writing (August 2017), more than 60 countries have signed the CbC MCAA. <https://www.oecd.org/tax/beps/CbC-MCAA-Signatories.pdf>

have signed the Multilateral Competent Authority Agreement on the Exchange of Country by Country Reports (“CbC MCAA”).<sup>15</sup>

Following from the endorsement and participation in these instruments, it can be safely argued that all surveyed countries have accepted the standard of transparency including the standard of automatic exchange of information. Furthermore, it is evident that the development of such standards appears to have taken place in a coordinated manner, led mainly by international organizations comprising governmental officials. However, the safeguards and protection of taxpayers’ rights have not received the necessary attention during the development and implementation of the global standard of transparency. Baker and Pistone argue (correctly) that, “international tax coordination at the global level must be accompanied by a corresponding global convergence in the exercise of legal remedies. Accordingly, if States have decided to approximate the exercise of taxing jurisdiction, they should also do so in respect of legal remedies, with a view to preserving the effectiveness of legal protection of taxpayers in cross-border situations and overcoming the need to seek for a consistent outcome of two or more national procedures”.<sup>16</sup>

Against this background, this article will first provide a comparative overview of the rules that Brazil, Colombia, South Africa and Uruguay<sup>17</sup>, have introduced to protect the taxpayers’ rights in the exchange of information process being the right to access to public information, the right to confidentiality, the right to privacy, (section 2.) and the procedural rights (right to be informed, the right to be notified and right to object and appeal) (section 3.). Thereafter, this article will assess whether the rules introduced by the surveyed countries to protect these rights are consistent with the fundamental taxpayers’ rights that belong to the rule of law of these countries and with the principles of good governance and fiscal transparency (section 4).<sup>18</sup>

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<sup>15</sup> The CbC MCAA owes its origin to Action 13 in the Base Erosion Profit Shifting Project. Action 13 addresses transfer pricing documentation and requires exchange of documentation, to be drafted, such as master file, local file and country-by-country reports among countries. To obtain the information, not only from the local affiliate under examination but also from the multinational group of companies, countries may use any of the exchange of information mechanisms including automatic exchange of information. Para. 15 OECD (2014), Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris. DOI: <http://dx.doi.org/10.1787/9789264219236-en>

<sup>16</sup> P. Baker and P. Pistone. *BEPS Action 16: The Taxpayers’ Right to an Effective Legal Remedy Under European Law in Cross-Border Situations*, EC Tax Review 5/6 (2016) p. 335.

<sup>17</sup> The comparative overview follows the structure of the questionnaires drafted by the University of Vienna and the University of Oslo in the framework of the DeSTaT Project. With regard to the specific topic addressed in this paper, the following persons acted as reporters for the respective South Antennae. Brazil: Reporter: Paulo Victor Vieira da Rocha; Colombia: Diego Quiñones; South Africa: Jennifer Roeleveld, C R West; Uruguay: Addy Mazz.

<sup>18</sup> In the framework of the DeSTaT project, the approach of this paper combines good governance and fiscal transparency based on the argument that global fiscal transparency supplements the establishment of good tax governance, insofar as it allows each country to effectively exercise its sovereignty on cross-border situations falling within the boundaries of the jurisdiction. Project Grant Application. DeSTaT Research Project. See *supra* n. 1.

## **2. RIGHT TO ACCESS TO PUBLIC INFORMATION, RIGHT TO CONFIDENTIALITY AND RIGHT TO PRIVACY IN TAX INFORMATION EXCHANGE IN THE SURVEYED COUNTRIES**

This comparative overview of the rules that Brazil, Colombia, Uruguay and South Africa have introduced to protect taxpayers' rights in exchange of information such as the right to confidentiality and the right to privacy is divided in three sub-sections. Firstly, the right to access public information, the right to confidentiality and the right to privacy in tax information exchange are introduced (section 2.1.). Secondly, the international instruments concluded by the surveyed countries addressing the right to confidentiality and the right to privacy in the exchange of information are described (section 2.2.). Lastly (section 2.3.), the legal and administrative framework to ensure the right to access public information, the right to confidentiality and the right to privacy in Brazil, Colombia, South Africa and Uruguay are addressed, including the remedies and sanctions in the event of a breach of the right to confidentiality and the right to privacy. In addition, the practical application of the protection of the right to confidentiality and privacy is considered, including descriptions of the financial resources, administrative capacity and technological equipment to process the information and to guarantee that the information will be secured and protected in Brazil, Colombia, South Africa and Uruguay.

### **2.1. The right to access to public information, the right to confidentiality and the right to privacy in tax information exchange**

The right to access public information, the right to confidentiality and the right to privacy are three important rights for taxpayers with respect to tax information exchange. For this paper, it is necessary to develop the boundaries between these rights. The following paragraphs provide a description, by no means exhaustive, of the content of these rights in respect of tax information exchange.<sup>19</sup>

In general, exchange of information is protected by the right to confidentiality and the right to privacy. The right to confidentiality requires that a person's information is not disclosed to an unrelated third party, whether intentionally or by accident. In tax information exchange the right to confidentiality means that the taxpayer should have confidence that "the information exchanged is used and disclosed only in accordance with the agreement on the basis of which it is exchanged".<sup>20</sup> Therefore, countries have, in their domestic and international framework, provisions to ensure that the right to confidentiality is respected and that there is no unauthorized disclosure of information. For the surveyed countries, their frameworks are provided in section 2.2. and 2.3. below.

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<sup>19</sup> See also D. Bentley, D., *Taxpayers' Rights. Theory, Origin and Implementation*, The Netherlands: Kluwer Law International, 2007) and F. Debelva and I. Mosquera. *Privacy and Confidentiality in exchange of information procedures: some uncertainties, many issues, but few solutions*. Intertax: International Tax Review. vol.45 (5), pp. 362-381.

<sup>20</sup> OECD, *Keeping it Safe: The OECD Guide on the Protection of Confidentiality of Information Exchanged for Tax Purposes*, (OECD 2012). p. 5.

The information pertaining to the taxpayer is also protected by the right to privacy. Privacy is sometimes defined as the right to have one's affairs kept secret. Within the broad scope of the definition of privacy,<sup>21</sup> for taxation, Cockfield has argued that the right to privacy should protect "tax information which often includes a taxpayers' income and other details about an individual's personal circumstances".<sup>22</sup> To safeguard the right to privacy in a more general sense, human right conventions have included the right to privacy as a fundamental right (art. 12 of the 1948 United Nations (UN) Declaration of Human Rights and art. 17(1) of the International Covenant on Civil and Political Rights (ICCPR).

In respect of exchange of information, the right to privacy has been addressed by instruments aiming to protect the personal data of an identified or identifiable individual (data subject). This protection is only applicable insofar as the data to be disclosed is classified as private individual data or it results in the automatic processing of personal data (i.e. information relating to an identified or identifiable individual). One binding instrument is the OECD Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data 1981 and its Additional Protocol of 8 November 2001. However, the scope of this Convention is limited since only 3 countries outside the Council of Europe have ratified the Convention.<sup>23</sup> A non-binding instrument is the 2013 OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data. In addition, the right to privacy and the protection of the automatic process of personal data have been addressed in the Commentary to the OECD Model, in the Commentary to the UN Model and in the Commentary to the Multilateral Administrative Convention on Mutual Administrative Assistance in Tax Matters (MAC).<sup>24</sup>

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<sup>21</sup> As stated by Cockfield, "privacy can be a surprisingly difficult concept to define as there are many definitions within the literature generated by different academic disciplines that examine this concept. With respect to potential government intrusion on an individual or group's right to privacy, the concept of privacy is sometimes divided into discrete but related categories such as personal privacy (i.e. the right to maintain bodily integrity to not have states agents explore our bodies or force the disclosure of objects or matters that we wish to conceal and territorial privacy (i.e. the right to maintain privacy within our homes or other property we own such as automobiles)". A. Cockfield. *Protecting taxpayer privacy rights under enhanced cross-border tax information exchange: Toward a multilateral taxpayer bill of rights*. 2 U.B.C. Law Review 42 (2010). p. 437.

<sup>22</sup> For Cockfield "tax information may reveal, among other things, information about income, spending and savings, employment status, personal belongings, disability status, associations and club memberships, donations to charities, mortgage costs, child support and alimony, and the amount and size of gifts to family members and others. This detailed personal information may be used to construct a detailed profile of an individual's identity, including her religious beliefs, political alliances, and personal behavior". Ibid., p. 437-438.

<sup>23</sup> 6 countries have expressed their intention to ratify the Convention (i.e. Cabo Verde, Senegal, Morocco, Mauritius, Tunisia and Uruguay) but the Convention is only in force in Uruguay, Mauritius and Senegal Information available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108>  
See F. Debelva and I. Mosquera. *supra* n. 19 p. 368.

<sup>24</sup> Para. 10 Commentary to para. 26(1) of the OECD Model (2014); para. 5.2. Commentary to art. 26 UN Model (2011) and in para. 216 of the Commentary to art. 22 of the Multilateral Administrative Convention on Mutual Administrative Assistance in Tax Matters (MAC). Para. 216 of the Commentary to the MAC also referred to the domestic laws regarding data protection. Furthermore, the Commentary stated that "when revising the Convention in 2010, it was therefore decided to make it clear that the Party receiving the information shall treat them in compliance not only with its own domestic law, but also with safeguards that may be required to ensure data protection under the domestic law of the supplying Party. Such safeguards, as specific by the Supplying



In some countries, the right to privacy includes bank secrecy and professional secrecy. Bank secrecy refers to the right to have the business information disclosed to the financial institution kept confidential. Professional secrecy refers to the right to have the personal and business information disclosed to the professional consultant (e.g. auditor, accountant, tax advisor, lawyer, notaries, trustee, etc.) kept confidential. This right equally refers to taxpayer information received by the professional in the course of their duties (e.g. information obtained either before, during or after judicial proceedings, or in the course of ascertaining the legal position for a client) being protected by professional privilege. Nowadays, and mainly due to the introduction of the standard of exchange of information, countries have limited the scope of the professional secrecy to legal privilege.

Since the 1998 Harmful Tax Report,<sup>25</sup> bank secrecy has been considered an obstacle to the efficient and effective exchange of information. Countries have been requested or pressured by the global peer review forum or by organizations (EU, G20, OECD) to repeal their bank secrecy laws.<sup>26</sup> In response, most countries have repealed or have reduced the right to banking secrecy to the minimum level of protection. The implications of professional secrecy and bank secrecy will be described for the surveyed countries in Section 2.3.3.2. below.

The right of confidentiality and the right to privacy may conflict with the right of individuals to access public information. Access to public information implies disclosure of information. However, in some countries, access to public information may be limited by domestic provisions (such as the Constitution and other Laws) addressing the right to confidentiality, the right to privacy and the laws governing personal data protection. This means that access to the information will be granted insofar as the data is not regarded as confidential or protected as private (individual) data. In other countries, the right of public access to information is broader and therefore business information, personal information and other related information can be disclosed to anyone (public) that requires such information. However, the data protection rules and the protection against processing of personal

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Party, may for example relate to individual access, independent oversight or redress. The specification of the safeguards may not be necessary if the supplying party is satisfied that the receiving party ensures the necessary level of data protection with respect to the data being supplied. In any case, these safeguards should not go beyond what is needed to ensure data protection". The Multilateral Convention on Mutual Administrative Assistance on Tax Matters. Amended by the 2010 Protocol. (OECD Publishing 2010). Available at [10.1787/9789264115606-en](https://www.oecd.org/tax/mutual-administrative-assistance-on-tax-matters/)

<sup>25</sup> At the time of the 1998 report, countries with bank secrecy rules i.e. Switzerland and Luxembourg abstained from approving the report. Subsequently, these countries have repealed their bank secrecy rules mainly to the pressure of the OECD global peer review forum, G20 and the EU. See for an overview Section 2.2. M.F. Huber & F. Duss, *Recent Developments in International Tax Law* – Part 1, 63 Bull. Intl. Taxn. 12 (2009), Journals IBFD.

<sup>26</sup> See for instance G20 London Summit of April 2009 and the later OECD report: the Era of Bank Secrecy is Over. Report to the G20 of 26 October 2011 <https://www.oecd.org/ctp/exchange-of-tax-information/48996146.pdf> and for the EU the recent amended EU Directive on Administrative Cooperation and the repeal of the Savings Directive. [http://ec.europa.eu/taxation\\_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation\\_en](http://ec.europa.eu/taxation_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation_en)

data may still be applicable.<sup>27</sup> The application of the right to public access for the surveyed countries appears in Section 2.3.1. below.

Finally, while the OECD and/or countries have addressed the use of safeguards to protect the taxpayers' right to confidentiality, right to privacy and their procedural rights, the legal instruments for the protection of these rights differ. For instance, the right to confidentiality is addressed in the OECD multilateral instruments, DTCs, and domestic law. The right to privacy has been left to international human and civil rights conventions and domestic law. The procedural rights have been left to domestic law completely. These instruments are addressed in the following section.

## **2.2. International instruments addressing the right to confidentiality and right to privacy in exchange of information in the surveyed countries**

### **2.2.1. Right to confidentiality in the international instruments concluded by the surveyed countries**

#### **2.2.1.1. Right to confidentiality in the DTTs and TIEAs**

Brazil, Colombia, South Africa and Uruguay have introduced the standard of confidentiality provided in art. 26(2) of the OECD Model and art. 8 of the OECD TIEA Model respectively.<sup>28</sup> In addition, some DTCs (e.g. DTCs concluded by Colombia with Spain, Colombia with India, and Uruguay with Switzerland) state that the information may be exchanged for other purposes than tax purposes provided the use of the information is allowed under the laws of the state which provides the information and such use is authorized by the competent authority of that State.<sup>29</sup> The DTC concluded by Uruguay with Spain also provides that the information received by a contracting state may be used for other purposes than tax purposes when permitted by the laws of the country providing such information.<sup>30</sup> Unlike the DTCs mentioned above, the DTC concluded by Uruguay with Spain does not also require the authorization of the competent authority.

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<sup>27</sup> However, one recent case of the ECHR considered the publication of taxpayers' business information in a public accessible journal. Such publication was allowed under the freedom of expression, but the processing of data was not. According to the ECHR, the right to process that information was not allowed since, according to the court, the processing of the data would be against the data protection rules. The Court concluded that restriction to the freedom of expression were necessary in a democratic society and that the domestic court struck a fair balance between the competing interests at stake (i.e. freedom of expression vs. right to privacy). See ECtHR, 21 July 2015, *Satakunnan and Satamedia v. Finland*. European Court of Human Rights (Application no. 931/13). For other cases dealing with the right to confidentiality and the right to privacy, see F. Debelva and I. Mosquera. *supra* n. 19.

<sup>28</sup> In the peer review report for Uruguay, it was specifically noted that most of the treaties were not in force. It was recommended that Uruguay take all steps to bring the treaties into force as quickly as possible. Para. 173. *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Uruguay 2011: Phase 1: Legal and Regulatory Framework*, OECD Publishing, Paris.

<sup>29</sup> Art. 26 (2) final paragraph Colombia-Spain Income and Capital Tax Treaty (2005) and Colombia-India Income Tax Treaty (2011).

<sup>30</sup> See art. 26(2) final paragraph Uruguay- Spain Income and Capital Tax Treaty (2009).

In respect of the purpose of the exchange, some TIEA's also provide that the exchange of information may be carried out for other (non-tax) purposes. For example, the TIEA concluded by Colombia and the United States allows the exchange of information for money laundering and other criminal purposes.<sup>31</sup> Finally, the provision that allows exchange of information even where held by a financial institution or other third parties (art. 5(4) of the OECD TIEA Model<sup>32</sup>) is omitted from some of the concluded TIEAs, for example: the TIEA concluded (in force) by Brazil with the United States.<sup>33</sup> Prior to the conclusion of this TIEA, Brazil had removed its reservation to art. 25(6) corresponding to art. 5(4) of the TIEA. However, the limitation was retained in the TIEA with the United States. As this was the first TIEA concluded by Brazil, it met strong resistance during its ratification in the Brazilian Congress on the basis that the treaty was said to violate the right to privacy.<sup>34</sup>

Finally, some DTCs require information from the requesting state before information will be exchanged. For example, the DTC concluded by Uruguay with Switzerland (in force since 2012) specifically provides that the request should include the name and address of the person, and the particulars to facilitate identification (date of birth, marital status, tax identification number); the period of time for which the information is requested, the form in which the requesting state wishes to receive the information; the tax purpose for which the information is sought; and, the name and address of any person believed to be in possession of the requested information.<sup>35</sup>

#### **2.2.2.2. Review of the right to confidentiality by the Global Transparency Forum in the surveyed countries**

The Global Transparency Forum has reviewed all surveyed countries for both phase 1 and phase 2. All surveyed countries but for Uruguay were found compliant with the standard of confidentiality.<sup>36</sup> In respect of Uruguay, the peer review report stated that the special regime to access bank information did not comply with the standard of confidentiality since the special regime required the

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<sup>31</sup> Article 4(8) Colombia – United States Exchange of Information Agreement (2001) replicates art. 8 of the OECD TIEA Model, but adds the text *in italics*: “Any information received by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities of the applicant State, including judicial and administrative bodies involved in the determination, assessment, collection, and administration of taxes under this Agreement, the recovery of fiscal claims derived from such taxes, the enforcement of the tax laws, the prosecution of fiscal violations or the determination of administrative appeals in relation to such taxes, and the oversight of the above. Such persons or authorities may use the information only for such purposes and may disclose it in public court proceedings or in judicial decisions of the applicant State in relation to such matters”.

<sup>32</sup> Corresponding to art. 26(5) of the OECD Model (2014).

<sup>33</sup> Art. 5(3)e Brazil – United States Exchange of Information Agreement (2007).

<sup>34</sup> According to the Brazilian report, the TIEA with the United States was concluded in March 2007, but it took years for it to be approved by the Parliament, where it has met a stiff resistance lead by Senator Francisco Dornelles – former Minister of Economy and Chief of the Revenue Service – in whose opinion the TIEA, besides offending the constitutional data secrecy guarantee, would go far beyond tax issues by allowing information on the ownership of companies and settlors of foundations to be exchanged, so as to allegedly violate commercial secrecy rules. See also DeSTaT article: T. Dubut et al. General Tax Treaties vs. T.I.E.A.s: Assessing Tools to Ensure Transparency in a Globalised World from the Perspective of Developing Countries. *supra* n. 11.

<sup>35</sup> Para. 5 modifying art. 26. Switzerland-Uruguay Income and Capital Tax Treaty (as amended through 2011).

<sup>36</sup> Compliance ratings as of November 2016. Available at <http://www.oecd.org/tax/transparency/GFratings.pdf>

disclosure of certain information to the court, and to the relevant account holder (see section 2.3.3.2. below).

## **2.2.2. Right to privacy in the international instruments concluded by the surveyed countries**

### **2.2.2.1. Right to privacy in the DTCs**

In principle, the right to privacy has been left to the international human and civil rights conventions and the domestic laws of the surveyed countries. However, one interesting example pertaining to data protection has been addressed in the 2010 Protocol to the article dealing with exchange of information in the DTC between Uruguay and Germany. This 2010 Protocol specifically stated that in respect of data protection, personal data is supplied under the conditions provided by domestic law. In addition, some specific provisions apply to this data. These provisions aim:

- To protect the supply of the data,
- To protect the use of the data,
- The obligation to ensure that the data supply is accurate and necessary for and commensurate with the purpose for which the data is supplied, and
- The obligation of the receiving agency to bear liability in accordance with its domestic laws for the unlawful damage suffered by any person caused by the exchange of data.<sup>37</sup>

The specific reference to data protection in this Protocol shows the importance of data protection laws when dealing with exchange of information. The domestic rules dealing with data protection in the surveyed countries will be discussed in section 2.3.3.1. below.

### **2.2.2.2. Right to privacy in the International Human Right Conventions**

The right to privacy is protected in international Human Rights Conventions. For example, art. 12<sup>38</sup> of the 1948 United Nations (UN) Declaration of Human Rights and art. 17(1)<sup>39</sup> of the International Covenant on Civil and Political Rights (ICCPR) prohibit the interference with privacy. These instruments have been ratified by all the surveyed countries, apart from South Africa, in respect of the UN Declaration of Human Rights.<sup>40</sup>

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<sup>37</sup> Para. 5 modifying art. 25 Protocol Germany – Uruguay Income and Capital Tax Treaty (2010).

<sup>38</sup> Art. 12 states “No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”. UN Declaration available at <http://www.un.org/en/universal-declaration-human-rights/>

<sup>39</sup> Art 17 stating (1) “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation” and (2) Everyone has the right to the protection of the law against such interference or attacks. ICCPR available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

<sup>40</sup> Brazil, Colombia and Uruguay voted in favour of the UN Declaration whereas South Africa abstained from voting. Voting at the meeting of the General Assembly of the United Nations in which the Universal Declaration of Human Rights was adopted (10 December 1948). Voting details available at the UN library: <http://libraryresources.unog.ch/c.php?g=462664&p=3163053> Status of ratification of the ICCPR is available on the UN website: <http://indicators.ohchr.org/>

Regional instruments equally address the right to privacy. Examples include art. 8 of the European Convention on Human Rights (ECHR), referring to respect for private life<sup>41</sup> and ratified by European countries; and the Inter-American Convention on Human Rights, which contains the right to privacy in art. 11 and is ratified amongst others by Brazil, Colombia and Uruguay.<sup>42</sup> Interestingly, the African Charter of Human and People's Rights does not contain the right to privacy.<sup>43</sup> While South Africa has ratified this charter, it can be safely argued that the protection of the right to privacy may have a different dimension in the African region, including South Africa,<sup>44</sup> relative to the Inter-American region including Brazil, Colombia, and Uruguay.

Bygrave indicates that the UN Declaration and European Convention on Human Rights "have been authoritatively construed as required national implementation of the basic principles of data protection".<sup>45</sup> In both cases, the right to privacy entails the protection of the individual's own affairs and of their family and business. This is submitted to equate to the scope of the right to privacy used in taxation.<sup>46</sup>

Finally, the Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981) and its Additional Protocol of 8 Nov. 2001 has been extended for ratification for countries outside the Council of Europe. However, up till the time of writing and of the surveyed countries, only Uruguay has been invited to ratify the Convention. This Convention entered into force, for Uruguay, in 2013.<sup>47</sup>

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<sup>41</sup> A right to confidentiality may be derived from the general right to privacy. In respect to ECHR article 8, the ECHR case of *Lundvall v. Sweden* provides a general illustration of this point, specifically regarding tax information. The court stated that publication of tax information was an interference with the right to private life. However, the court found that the interference in question was justifiable. Also, in its general comments to International Covenant on Civil and Political Rights (ICCPR) article 17, the Office of the High Commissioner of Human Rights have stated that article 17 embodies a general right to confidentiality of personal information in possession of State authorities. Considering the personal and possibly sensitive nature of tax information, it's likely that the ICCPR provides a right to confidentiality of tax information. In specific regard to TIE, the right to confidentiality is applicable in the exchanging State if competent authorities have information and in the requesting State when it receives information". ECHR, *Lundvall c. Sweden*. 10473/83. 01/12/1985.

<sup>42</sup> The text of the Inter-American Convention including art. 11 is available at: <http://www.cidh.org/Basicos/English/Basic3.American%20Convention.htm>

<sup>43</sup> Text of the charter available at [http://www.achpr.org/files/instruments/achpr/banjul\\_charter.pdf](http://www.achpr.org/files/instruments/achpr/banjul_charter.pdf)

<sup>44</sup> For the implications of the right to privacy in South Africa see Jonathan Burchell, *The Legal Protection of Privacy in South Africa: A Transplantable Hybrid*, 1 *Electronic Journal of Comparative Law*, 13 (March 2009) <http://www.ejcl.org/131/art131-2.pdf>

<sup>45</sup> L. Bygrave, *International Agreements to Protect Personal Data*, in James B., Rule and Graham Greenleaf (Eds.), *Global Privacy Protection. The First Generation*, Edward Elgar Publishing Ltd., 2008, pp.19, 45.

<sup>46</sup> See section 2.1. above.

<sup>47</sup> Information available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/108>

## **2.3. Access to public information, right to confidentiality and the right to privacy in the domestic framework of the surveyed countries**

### **2.3.1. Legal and administrative framework to ensure the access to public information**

Legislation to regulate the access to public information held by public authorities has been introduced by all the surveyed countries.<sup>48</sup> These rules aim to provide transparency of public information except in cases where the documents are designated as confidential by the Law or the Constitution.

There are practical problems in the application of these laws. For instance, in Brazil, Law 12.527 of 2011 is not specific to taxpayers' rights, but it has been used in practice as grounds for accessing tax information. The administration, however, seems far from accepting its application in the tax field. Reports by the government indicate that requests to access tax information are often denied as the information designated as secret in terms of specific legislation, or is information protected under the tax secrecy duty or bank secrecy.

The Brazilian Tax Code could be classified as 'specific legislation'. Under art. 198 of the Tax Code, disclosure by the Public Treasury or its officers, of information obtained due to their functional activity about the financial or economic situation of the taxpayer or third parties and about the nature and status of their business or activities is prohibited. The duty to maintain tax secrecy has been claimed by the Ministry of Finance when rejecting a taxpayer's request under Law 12527 to access the tax inspection register, an internal document of the Tax Administration registering all activities as regards the taxpayer in the course of a tax inspection.<sup>49</sup> Given these difficulties, the application of Law 12527 for accessing tax information appears unclear and may have to be ultimately decided by Court. In obiter dictum, the Superior Court of Justice has already deemed 'possible' under Law 12527, the access by taxpayers to the information concerning a taxpayer's own case which is available on the tax inspection register.<sup>50</sup>

In Brazil, Colombia and Uruguay, some exceptions have been addressed in their laws, for example, where the disclosure of the information may constitute a risk for the country. In Brazil, such risks include those impacting the financial, monetary or economic stability of the country;<sup>51</sup> for Colombia, the national security, international relations and information to guarantee the due process and effective administration of justice;<sup>52</sup> and in Uruguay, the defence, national security, financial, monetary or economic stability.<sup>53</sup> For Brazil, Colombia and Uruguay, information concerning the protection of privacy, life, and industrial, professional and commercial secrets may also not be disclosed.

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<sup>48</sup> Brazil (Law 12527 of 2011); Colombia (Constitution art. 74 and Law 1712 of 2014); South Africa (Promotion of Access to Information Act (2000)) and Uruguay (Law 18381 of 2008).

<sup>49</sup> General Controllershship of the Union, Technical Note no. 16853.006354/2012-17.

<sup>50</sup> Appeal no. 1.411.585/PE of 5.08.14.

<sup>51</sup> Art. 23 Law 12527 of 2011.

<sup>52</sup> Art. 19 Law 1712 of 2014.

<sup>53</sup> Art. 9 of Law 18331 of 2008.

South Africa has developed detailed grounds for refusal of access to records in chapter 4 of the Promotion of Access to Information Act (section 33 to 46). These grounds include: public interest; defence; security and international relations; and, protection of privacy and commercial secrets. Such grounds are, to a large extent, similar to those of Brazil, Colombia and Uruguay. However, South Africa also introduced additional grounds with a broader scope such as the protection of commercial information of third parties (e.g. trade secrets, financial, commercial, scientific, technical information), confidential information of third parties, mandatory protection of safety of individuals and protection of property, and operations of public bodies among others.<sup>54</sup> It is submitted that these limitations will also apply to requests for exchange of information by a third country.

South Africa has established, for some confidential information, a period during which the records cannot be disclosed, for example, a period of 20 years in case of defence security and international relations.<sup>55</sup> Brazil has different fixed periods confidentiality depending on the level of secrecy of such records: ultra-secret documents are confidential for 25 years; secret documents for 15 years, and “reserved” documents for 5 years.<sup>56</sup> In Colombia, documents can be held in “reserve” for 15 years which can be extended for 15 years more for a total maximum period of 30 years.<sup>57</sup> In Uruguay, no specific period for the documents to be considered confidential is provided.

The domestic laws of Brazil, Colombia and Uruguay state that information will be protected if the disclosure of such information can harm the individuals and/or legal entities. These laws do not specifically mention taxpayer information or information held by the tax administration. However, in Colombia, the Administrative Court and the Constitutional Court have ruled that documents classified as confidential (e.g. tax documents) can only be accessed by public officials.<sup>58</sup>

South Africa has specifically regulated the protection of information held by the tax administration (SARS). Section 35 of the Promotion of Access to Information Act states that a SARS official must refuse a request for access to a record held by SARS if it contains information which was obtained or is held by SARS for the purposes of enforcing legislation concerning the collection of revenue. One exception is if the record consists of information about the requesting person or the person on whose behalf the request is made. This appears to mirror the obiter dictum of the Superior Court of Justice in Brazil, whereas Colombia, South Africa and Uruguay directly refer to the right by the

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<sup>54</sup> Promotion of Access Act [http://www.dfa.gov.za/departament/accessinfo\\_act.pdf](http://www.dfa.gov.za/departament/accessinfo_act.pdf)

<sup>55</sup> Section 41(3) Promotion of Access Act to Information Act, 2000.

<sup>56</sup> Art. 23 Law 12527 of 2011.

<sup>57</sup> Art. 19 and 22 Law 1712 of 2014. In addition, concepts from the “*Sala de Consulta y Servicio Civil*” of the Council of State are understood to be reserved for 6 months that can be extended to 4 years by the government (art. 112 paragraph 4 Law 1437 of 2011) and certain documents related to the Nation’s public treasury operations are also held in reserve for 6 months (art. 24 Law 1437 of 2011)

<sup>58</sup> Administrative Court Ruling of 19 August 1994 and Constitutional Ruling T-473 of 14 July 1992. <http://www.corteconstitucional.gov.co/relatoria/1992/t-473-92.htm>

taxpayer to have access to the information related to him/her available in public or private databases.<sup>59</sup>

### **2.3.2. Legal and administrative framework to ensure the right to confidentiality in the surveyed countries**

#### **2.3.2.1. Legal provisions and scope of confidential information**

The right to confidentiality for tax information is regulated in all surveyed countries i.e. in the Tax Codes of Brazil, Colombia, and Uruguay and in the Tax Administration Act in South Africa. While each provide that confidential information cannot be disclosed unless allowed by law or an international agreement, the definition of confidential information and the persons bound by the duty of confidentiality differ among the surveyed countries.

The domestic rules to regulate confidentiality may be less or more restrictive than the rules provided in the tax treaty or TIEA. In such cases and since the treaties are attributed a '*lex specialis*' status in Brazil and South Africa, the provisions of the tax treaty or TIEA will apply. In Brazil, as a result of the '*lex specialis*' status, the Federal Supreme Court has stated in several cases that if the provisions of the tax treaty or TIEA are more restrictive than the broad scope of the provision of confidentiality in art. 198 of the Brazilian Tax Code, these provisions will take precedence over domestic law.<sup>60</sup>

With respect to tax matters, in Brazil, Colombia and Uruguay, confidential information specifically refers to information held or obtained by the tax administration. In Brazil, art. 198 and 199 of the Tax Code state that information obtained by the public administration regarding the economic or financial situation of taxpayers and third parties and the nature and state of their business or activities is to be kept confidential. In Colombia, art. 583 read with art. 693 of the Tax Code provides for the confidentiality of tax information regarding taxable bases, the private assessment of taxes and tax deficiency assessments.<sup>61</sup> In Uruguay, under art. 47 of the Tax Code, the Internal Revenue Service of Uruguay and the officials are required to keep all information, which they have as a result of their administrative or judicial functions, confidential.

South Africa recently moved the rules of confidentiality from the Income Tax Act to Chapter 6 of the Tax Administration Act (Act 28 of 2011).<sup>62</sup> The rules regarding confidentiality are now provided in

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<sup>59</sup> Brazil (Law 12527 of 2011); South Africa (section 73 Tax Administration Act 28 of 2011); Uruguay (art. 14 Law 18.331 of 2008).

<sup>60</sup> This is the position of the Supreme Federal Court decision in decisions RE 229.096-RS of 16 August 2007; RE 84.759-SP of 24 August 1976; RE 86.035-PN of 19 November 1976 and RE 114.063-SP of 16 April 1991. See also para. 329 and 330 *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2013. Phase 2: Implementation of the Standard in Practice*. OECD.

<sup>61</sup> In general, a deficiency assessment is "an assessment of an additional income tax to cover a deficiency in income revealed upon an audit of the return made by the taxpayer. It is the amount that a taxpayer owes in back taxes" as determined by the tax administration. <http://definitions.uslegal.com/d/deficiency-assessment/>

<sup>62</sup> For many years, the rules regarding the preservation of secrecy of information divulged to SARS by a taxpayer and the exceptions to the rule were laid down in s. 4 of the Income Tax Act. With the coming into force of the Tax Administration Act of 2011, s. 4 was repealed and has been replaced by a far more expansive treatment in chapter 6.



Chapter 6 of the latter Act. Unlike Brazil, Colombia and Uruguay, South Africa has stratified the confidential information into two main categories. The first category is ‘SARS confidential information’ which essentially refers to confidential information held by SARS in relation to its own affairs and the administration of tax statutes (S. 67(1)(a)). The second category is ‘taxpayer information’ which means information provided by taxpayers or held by SARS in respect of a taxpayer including biometric information<sup>63</sup> (S. 67(1)(b)).

The persons bound by the duty of confidentiality are those employed by the tax administration (Colombia, Uruguay, and South Africa) and any civil servant employed by the tax administration (Brazil). In Colombia and Uruguay, the duty of confidentiality is explicitly extended to people working for the Tax Administration under contract. Colombia further requires such external parties to make a deposit as warranty against maintaining confidentiality.<sup>64</sup> South Africa<sup>65</sup> extends the obligation to maintain confidentiality to persons to whom confidential information was improperly disclosed. This provision may have consequences or result in sanctions where, for instance, the information used is stolen or improperly disclosed.<sup>66</sup> Such a provision does not appear in Brazil, Colombia and Uruguay.

Countries have introduced different safeguards to guarantee that the confidentiality rules are being met. Uruguay established, in two Resolutions of the Tax Administration, that the Head of the Tax Administration is responsible for supervising and assessing the confidentiality of all proceedings.<sup>67</sup> Colombia requires, in terms of its Tax Code, a declaration of confidentiality from the other country for any exchange of information. This declaration will contain the other country’s commitment to use the information for the purposes indicated in the request and to ensure that adequate protection of the confidentiality of the information is required.<sup>68</sup>

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<sup>63</sup> The 2011 Tax Administration Act defines biometric information as “biological data used to authenticate the identity of a natural person by means of—(a) facial recognition; (b) fingerprint recognition; (c) voice recognition; (d) iris or retina recognition; and (e) other, less intrusive biological data, as may be prescribed by the Minister in a regulation issued under section 257”. Section 1 definitions 2011 Tax Administration Act. <http://www.sars.gov.za/AllDocs/LegalDoclib/AABC/LAPD-LPrim-Act-2012-01%20-%20Tax%20Administration%20Act%202011.pdf>

<sup>64</sup> The IFA 2015 Colombia reporter stated that “The law only requests DIAN to ensure that the outsourcing company makes a deposit high enough to warrant confidentiality”. *Colombian National Report 2015: The Practical Protection of Taxpayers’ Fundamental Rights*, IFA Cahiers – Volume 100B, p. 278.

<sup>65</sup> Section 67 (3) of the Tax Administration Act 28 of 2011.

<sup>66</sup> The question could be whether the confidentiality may also apply to the use by the tax administration of illegally obtained (i.e. stolen) information. In the KB-Lux case, the Belgian tax administration spontaneously forwarded to the Dutch tax administration information on financial accounts held in the names of Dutch residents at Kredietbank Luxembourg (KB-Lux). This information was stolen by five KB-Lux employees and given to the Belgium tax authorities. From a perspective of exchange of information, the use of stolen information by countries has been addressed in Section 4.4. X. Oberson, General Report, 2013 International Fiscal Association (IFA): Exchange of Information, Cahiers de droit fiscal international, (IBFD 2013), pp. 19-20, Online Books IBFD. See for an enforcement of tax law perspective, A.H. van Hoek Aujke and J.J.P. Michiel Luchtman. Transnational cooperation in criminal matters and the safeguard of human rights. *Utrecht Law Review*. Volume 1, Issue 2 (December) 2005, <http://www.utrechtlawreview.org/>

<sup>67</sup> Examples of these regulations are for instance in Uruguay, Resolution No. 1176 of 2013 and Resolution 1177 of 2013.

<sup>68</sup> Art. 693-1 Tax Code.

### **2.3.2.2. Disclosure of tax information and confidentiality**

The disclosure of tax information differs in relation to whether the information is being used by the tax administration, government officials and for any purpose authorized by law or by an international agreement. From the surveyed countries, South Africa is the most detailed in regulating disclosure of tax information in its domestic law, mainly chapter 6 of the Tax Administration Act.

All the surveyed countries regulate the disclosure of tax information in their Tax Code or in a Tax Administration Act. Colombia, South Africa and Uruguay specifically state the cases where the disclosure of tax information may take place, whereas Brazil provides for disclosure in the interest of the proper administration of justice. However, this test which is found in case law is not spread and consolidated. Courts will decide based on the proportionality test, the suitability and the necessity of the measure, in this case the disclosure.

In Brazil art. 198 of the Tax Code regulates confidentiality. The article allows for the disclosure of tax information in cases where the information is being requested by a judicial authority or an administrative authority. In both cases, the disclosure is allowed in the interest of “the proper administration of justice by the Brazilian court or to administrative proceedings connected to the investigation of administrative infringements committed by the taxpayer”.<sup>69</sup> There are other exceptions to disclosure; for instance, if the taxpayer is subject to a criminal prosecution for a criminal tax offence, the taxpayer owes taxes to the Treasury or has tax debt payable in instalments. This exception, however, does not allow the disclosure of information (e.g. facts, data, documents) concerning the transactions that originated a tax claim.<sup>70</sup>

In Colombia. art. 583 of the Tax Code states that tax information shall be only used by the tax administration for the control, calculation, determination and administration of taxes and for impersonal statistical information purposes. However, this provision contains exceptions for disclosure of confidential information: (a) in respect of criminal and money laundering authorities; (b) to government officials at national and sub national levels following a request of such information. Such disclosure represents risks to taxpayer information in that: (i) there is no specific provision to safeguard the confidentiality of information held by the criminal and money laundering authorities; and (ii) it is more difficult to guarantee confidentiality when the information control is not centralized.

Confidential information in Uruguay can only be submitted to the courts dealing with cases regarding criminal, children or customs matters, but only if the information is considered essential for the due performance of their functions and based on a well-founded request.<sup>71</sup>

The 2011 Tax Administration Act in South Africa, particularly sections 69 to 71, provides detailed limitations to the disclosure of taxpayer information. Before the introduction of the Tax Administration Act, under the former provisions of confidentiality available in the Income Tax Act, it

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<sup>69</sup> Para. 327 Peer review Brazil Phase 2., *supra* n. 60.

<sup>70</sup> Para. 328 Peer review Brazil Phase 2., *supra* n. 60

<sup>71</sup> Article 47 Tax Code.

was only possible at the request of the Court to the tax official to disclose information for the purposes of judicial proceedings.<sup>72</sup>

Finally, another situation where disclosure is allowed in South Africa is in the case that a taxpayer, or another person on his instructions, discloses information or makes false allegations or discloses information which is published in the media or in another manner (Section 67(5)). In this case, the Commissioner can, in order to protect the integrity and reputation of SARS and after giving the taxpayer at least 24 hours' notice, disclose taxpayer information to the extent necessary to counter or rebut such false allegations or information.

### **2.3.2.3. Background, checks and trainings of tax officials**

All surveyed countries have background and security checks regarding for instance the personal history of the candidate for being employed in the tax administration. However, in the case of ongoing investigations e.g. criminal offences, in Colombia the presumption of innocence will apply and therefore, a candidate with an ongoing investigation may still be hired.

Brazil and Colombia have introduced training programmes for tax officials where all confidential obligations, processes and procedures are outlined and explained. The training must be undertaken at the commencement of their employment. In addition, internal training is also periodically offered to remind and update employees on their confidentiality obligations and procedures. The Phase 2 peer review report<sup>73</sup> for Uruguay refers to training of the tax officials, however, in the absence of any specific domestic law addressed the training, such training is merely an internal practice of the tax administration.

The Tax Administration Act of South Africa does not legislate training at the commencement of employment. However, the peer review report indicates that Enforcement and Risk Planning Unit tax officials as well as officers from local offices are sent on domestic trainings on tax treaties in general, of which exchange of information forms an important part. These trainings aim to create awareness

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<sup>72</sup> The South African report refers to case law i.e. *Welz and Another v. Hall and Others*, the court summarized the policy guidelines for the purposes of (the now-repealed) s.4(1) as follows “it is well established law that a court will not lightly direct an official of the Revenue to divulge information imparted to him by a taxpayer. One reason for this reluctance is found in public policy. The legislature has thought it desirable to encourage full disclosure of their affairs by taxpayers, even by those who carry on illegal trades or have illegally come by amounts qualifying as gross income. This object might easily be defeated... if orders were freely made for disclosure of those communications. A second and subsidiary reason... for a court’s reluctance to make an order against the fiscus, is that it would cause great disruption in the revenue office if anyone who desired financial information concerning a party to litigation could subpoena an official to produce the necessary records” *Welz & Another v Hall & Others*, (1996) (SA) 1073, (59 SATC 49).

<sup>73</sup> Para. 379 states: “prior to any formal appointment with the DGI, all candidates are required to undergo comprehensive background and security checks to ensure that they will not pose any risk to security. Once appointed, all employees are subject to confidentiality obligations as set out in the terms of their employment. All confidentiality obligations, processes and procedures are clearly outlined and explained during the induction training that all employees must undertake at the commencement of their employment with the DGI Internal training is also systematically provided to remind and update employees on their confidentiality obligations and procedures” *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Uruguay 2015: Phase 2: Implementation of the Standard in Practice*, OECD Publishing, Paris

with tax officials of international tax issues and for them to acquire expertise to gather the information necessary to comply with an information exchange request. The peer review report of South Africa states, “in recent years, approximately 60 officers a year have received such a training, so that in every local revenue office there should be at least one office with the relevant training”.<sup>74</sup>

Finally, in South Africa, it is required of every new tax official and the Tax Ombudsman to take a prescribed oath or solemn declaration of secrecy before commencing duties or exercising any powers under a Tax Act.<sup>75</sup> The requirement to take an oath is not mentioned in Brazil, Colombia and Uruguay. However, in Colombia, for appointments to the positions of advisor, director or deputy director, the employee is required to undergo a polygraph test. In Brazil, tax officials are only required to sign a document during the appointment with general reference to their legal duties as tax officials.<sup>76</sup>

#### **2.3.2.4. Sanctions and remedies**

##### **2.3.2.4.1. Sanctions**

In all surveyed countries, sanctions are imposed in case of breach of confidentiality. These sanctions are not only for tax officials, but also former officials and other persons working for the Tax Administration under a contract (Colombia and Uruguay). These sanctions are disciplinary (e.g. dismissal) or criminal (imprisonment and/or fine) in all countries. In Uruguay, the breach of confidentiality can also result in civil liability.

The sanctions are contained in the Tax Laws, Criminal Code and/or in the Disciplinary Code. There have been no reported cases of breach of confidentiality in South Africa, Colombia or Uruguay. Whether the lack of cases is as a result of the effectiveness of the sanctions or lack of reporting is unclear. Equally, in Brazil, the sanctions are not made public. As a result, the effectiveness of these sanctions is not clear, with no evidence of the application of sanctions in the Brazilian Courts (e.g. Superior Court of Justice and the Federal Regional Court).

Processes are in place to consider any breach of confidentiality. For example, in Colombia, any citizen may report a breach of confidentiality. However, establishing the basis on which the public official disclosed the information and evidence for such basis remains difficult, potentially rendering the process less effective. Where a case is reported, the disciplinary authorities (Attorney General (*Procuraduría*) or Ombudsman) will investigate and, depending on the evidence found, will decide whether to admonish the tax official, suspend him, or dismiss him.

In South African, any form of corruption in terms of the Revenue Service is handled swiftly. In 2013, the then Commissioner for SARS resigned following the employment of a person without proper

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<sup>74</sup> Para. 257 phase 1 and phase 2 combined South Africa. See also paras. 258 and 259. OECD. (2013), *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: South Africa 2013: Combined: Phase 1 + Phase 2, incorporating Phase 2 ratings*, OECD.

<sup>75</sup> Section 67(2) Tax Administration Act 28 of 2011.

<sup>76</sup> Article 13 Law 8112 of 1990.

procedure. The actions of SARS officials are governed by codes of conduct. These documents were included as part of the media release concerning the then Commissioner's resignation in 2013.<sup>77</sup>

#### 2.3.2.4.2. Remedies

The remedies for breach of confidentiality differ among the surveyed countries. In Colombia and Uruguay, it may be possible to sue the State for wrongful action and to claim damages related to the disclosure of the information. However, at the time of writing, no action has been initiated by taxpayers regarding any breach of confidentiality for tax purposes. The right of access to the courts will be most likely mechanism for redress in South Africa,<sup>78</sup> however, it is not clear how this mechanism will apply in cases of a breach of confidentiality since the Tax Administration Act does not provide any rules in this regard. The taxpayer may also request the Tax Ombudsman to investigate, but the outcome is not binding.<sup>79</sup>

In Brazil, the breach of the duty of secrecy triggers the State's liability to compensate the taxpayer for damages, pecuniary (material) and non-pecuniary (moral). Compensation is claimed before the courts through ordinary civil proceeding. In 2005, the Federal Court of the 1<sup>st</sup> Circuit in a case concerning unauthorized disclosure by the tax authorities of classified taxpayer information to the media, decided that the tax administration had not only violated its secrecy duty but also the taxpayer's right to honour and to his/her image.<sup>80</sup>

The procedures for unauthorised disclosure of information related to the taxpayer in the international exchange of information has been considered by South Africa and Uruguay. While South Africa states that a procedure may exist in the memorandum of understanding with certain countries, such documents are kept confidential and not disclosed to the public. In Uruguay, unauthorised disclosure requires an administrative investigation to be undertaken and, once completed, the results must be published in a report. Such a report would include all recommendations to minimise a recurrence of such an incident and the actions to be taken against the persons responsible for the breach of confidentiality.<sup>81</sup> At the time of writing, no reports of unauthorized disclosure by the requested state or breach of confidentiality by the requesting and/or requested state have been issued. No instances of unauthorised disclosure of taxpayer information is reflected in the peer review reports of Brazil, Colombia, South Africa and Uruguay.

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<sup>77</sup> See more at: <http://www.bdlive.co.za/economy/2013/07/12/sars-boss-oupa-magashula-resigns-after-probe> and [http://www.treasury.gov.za/comm\\_media/press/2013/2013071201.pdf](http://www.treasury.gov.za/comm_media/press/2013/2013071201.pdf)

<sup>78</sup> The mechanism of redress makes possible to access to court to gain reparation for harm or injury or for a wrongdoing. <http://legal-dictionary.thefreedictionary.com/redress>

<sup>79</sup> The only reference is in Section 18 Chapter 2 General Administration Provisions that makes possible the filing of a complaint by the taxpayer before the Tax Ombudsman. In this case, since Section 17 does not specifically address the breach of confidentiality as one of the issues that cannot be reviewed by the Ombudsman, it can be safely argued that upon the breach of confidentiality the taxpayer may file a request before the Ombudsman.

<sup>80</sup> Appeal Federal Court of the First Circuit No. 199834000245820 dated 30 February 2005.

<sup>81</sup> Decree 500/991 Book II Section II and III.

### 2.3.3. Right to privacy in Brazil, Colombia, South Africa and Uruguay

#### 2.3.3.1. Legal provisions and scope of privacy

The right to privacy is specifically provided in the Constitutions of Brazil, Colombia, South Africa and Uruguay.<sup>82</sup> The right to privacy is also governed by the domestic laws regulating the protection of personal data. At the time of writing, domestic laws regulating the right to privacy were in force in Colombia (since 2012) and Uruguay (since 2008). In South Africa, the Protection of Personal Information Act of 2013 is partly in force, with some provisions to become effective on issue of a Government Gazette Notice.<sup>83</sup> In Brazil, the 2013 Preliminary Draft Bill for the Protection of Personal Data is (at the time of writing) still being discussed.<sup>84</sup>

These Laws (and the Draft Bill in Brazil) have been to a large extent based on the principles of the 1995 EU Data Protection Directive.<sup>85</sup> However, since the Directive has been repealed and replaced by a recently adopted<sup>86</sup> new Data Protection Directive<sup>87</sup> and the General Data Protection Regulation<sup>88</sup>, the question would be whether these Laws will change to include the recently EU adopted changes.

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<sup>82</sup> Brazil article 5, X and XII of the Constitution; Colombia art. 15 Constitution; South Africa art. 14 Chapter 2 Bill of Rights in the Constitution; Uruguay art. 28 Constitution.

<sup>83</sup> At the time of writing (August 2017), this Act is not completely in force, but some parts are in force as from 11 April 2014. “The Protection of Personal Information (POPI) Act has been signed into law by the President on 19 November and published in the Government Gazette Notice 37067 on 26 November 2013. Once the Act is made effective, companies will be given a year’s grace period to comply with the Act, unless this grace period is extended as allowed by the Act. The President has signed a proclamation declaring some parts of the Protection of Personal Information Act No 4 of 2013 effective from 11 April 2014. The sections that became effective deal with the appointment of the Information Regulator. On 11 November 2015, the Portfolio Committee on Justice and Correctional Services met to discuss the appointment of the Information Regulator. The members requested another workshop with the relevant stakeholders to discuss the following: importance of POPI, -the interaction of POPI with PAIA (Promotion of Access to Information Act) and the Protection of State Information Act, and whether the Act protects business / citizens / children / people in rural areas. Based on the request for a workshop it would not seem as if the effective date has been decided upon and we will have to wait until the Minister and Parliament provides us with guidance”. Information available at <https://www.saica.co.za/Technical/LegalandGovernance/Legislation/ProtectionofPersonalInformationAct/tabid/335/language/en-ZA/Default.aspx>

<sup>84</sup> Brazil Senate Bill of Law No. 330 of 2013 <http://www.dataprivacylaws.com.ar/2015/10/19/senate-bill-of-law-no-330-of-2013/>. The 2013 Bill was proposed by the Senate. In addition in 2016, a Bill was proposed by the President Data Protection Bill of Law No. 5276 of 2016. However, we refer in this article to the 2013 Bill since this Bill received much attention from the Congress than the 2016 Bill. In addition, three days later after the 2016 Bill was presented, Brazilian President was impeached by Congress. See <http://www.dataprivacylaws.com.ar/tag/brazil/>

<sup>85</sup> If one example may illustrate this it is for instance the conditions for lawful processing of data and the transfer of personal data to third countries. Text of the 1995 Directive available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=en>

<sup>86</sup> On 8 April 2016 the Council adopted the Regulation and the Directive. And on 14 April 2016 the Regulation and the Directive were adopted by the European Parliament. On 4 May 2016, the official texts of the Regulation and the Directive have been published in the EU Official Journal in all the official languages. While the Regulation entered into force on 24 May 2016, it shall apply from 25 May 2018. The Directive enters into force on 5 May 2016 and EU Member States have to transpose it into their national law by 6 May 2018. [http://ec.europa.eu/justice/data-protection/reform/index\\_en.htm](http://ec.europa.eu/justice/data-protection/reform/index_en.htm)

One of the drawbacks of these provisions to regulate the protection of personal data is that these provisions do not specifically address data protection in the exchange of information for tax purposes. However, since the type of information that is protected includes the taxpayer's address, identity number, civil status, and biometric information, one may argue that the data protection should apply to the exchange of information in tax matters.

While the definitions of the information to be protected differs between the surveyed countries, Brazil, Colombia,<sup>89</sup> South Africa and Uruguay<sup>90</sup> all make distinctions in their legislation between personal data and sensitive data or special personal data.

In general, personal data in all surveyed countries includes any type of information referring to individuals and legal entities (when applicable). South Africa provides in its Protection of Personal Information Act several examples of personal information.<sup>91</sup> Sensitive data (in South Africa "special personal information" and in the EU Directive "special categories of data") includes data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs trade-union membership, and the processing of data concerning health or sex life.<sup>92</sup> In Brazil, the 2013 Draft Bill defines sensitive data as "personal data that disclose the person's racial or ethnic origin, religious, philosophical, or moral beliefs, political views, affiliation to trade unions or religious, philosophical, or political organisations, data pertaining to the person's health or sexual life, as well as genetic data" (art. 5(3)).<sup>93</sup>

Brazil, Colombia and South Africa include as sensitive or special data, biometric data.<sup>94</sup> Colombia and South Africa have introduced the use of biometric data in the electronic signature for online filing of

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<sup>87</sup> One of the new changes is for instance the cooperation between law enforcement authorities and the better protection of personal data when processed for any law enforcement purpose. Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA

<sup>88</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

<sup>89</sup> Art. 5 Law 1581 of 17 October 2012.

Available at [http://www.secretariassenado.gov.co/senado/basedoc/ley\\_1581\\_2012.html](http://www.secretariassenado.gov.co/senado/basedoc/ley_1581_2012.html).

<sup>90</sup> Art. 4 Law 18331 of 2008.

<sup>91</sup> Personal information in South Africa is information related to for instance, the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health; information regarding the medical, financial, criminal or employment history of a person; any identifying number, symbol, e-mail address, physical address, telephone number, location information. Art. 1 Definitions Protection of Personal Information Act 28 of 2013. <http://www.justice.gov.za/legislation/acts/2013-004.pdf>

<sup>92</sup> Art. 23 to 33 Protection of Personal Information Act 28 of 2013.

Available at <http://www.justice.gov.za/legislation/acts/2013-004.pdf>

<sup>93</sup> Unofficial English translation of the Draft Bill available at [http://pensando.mj.gov.br/dadospeessoais/wp-content/uploads/sites/3/2015/02/Brazil\\_pdp\\_bill\\_Eng1.pdf](http://pensando.mj.gov.br/dadospeessoais/wp-content/uploads/sites/3/2015/02/Brazil_pdp_bill_Eng1.pdf)

<sup>94</sup> According to the EU Data Protection Working Party biometric data may be defined as "biological properties, behavioural aspects, physiological characteristics, living traits or repeatable actions where those features and/or actions are both unique to that individual and measurable, even if the patterns used in practice to

the income tax return by the taxpayer. However, in Colombia not only biometric data is included in the electronic signature but also passwords, codes, or cryptographic keywords<sup>95</sup> that allows identification of a person in respect of a data transmission.<sup>96</sup> In South Africa, the report also states that an electronic signature can be used for online filing and it is not essential to be biometric. In the 2013 Draft Bill, Brazil includes biometric data and genetic data but does not provide definitions of such data. Genetic data is included as sensitive data in the 2013 Draft Bill. In respect of biometric data, the competent authority will establish in which cases biometric data shall be regarded as personal sensitive data (art. 13(2)).<sup>97</sup>

A provision to safeguard the flow of personal data across borders is contained in the legislation of all the surveyed countries, apart from Brazil. Colombia<sup>98</sup> and South Africa<sup>99</sup> use the standard of ‘adequate level of protection’ similar to the 1995 EU Data Protection Directive.<sup>100</sup> Uruguay provides for the protection according to international or regional standards.<sup>101</sup>

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technically measure them involve a certain degree of probability. Typical examples of such biometric data are provided by fingerprints, retinal patterns, facial structure, voices, but also hand geometry, vein patterns or even some deeply ingrained skill or other behavioural characteristic (such as handwritten signature, keystrokes, particular way to walk or to speak, etc...)” Data Protection Working Party Opinion 4/2007 (WP 136) on the concept of personal data of 20 June 2007 [http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136\\_en.pdf](http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2007/wp136_en.pdf). See also Data Protection Working Party Opinion 3/2012 (WP 193) on developments in biometric technologies. [http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2012/wp193\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2012/wp193_en.pdf)

<sup>95</sup> Regulatory Decree 2926 of 2013 implementing art. 19 Law 1607 of 2012 and art. 579-2 of the Tax Code. Available at: <http://www.minhacienda.gov.co/portal/page/portal/HomeMinhacienda/elministerio/NormativaMinhacienda/Decretos/2013/DECRETO%202926%20DEL%2017%20DE%20DICIEMBRE%20DE%202013.pdf>

<sup>96</sup> The electronic signature is a computer generated number in Colombia. However, taxpayers that are not electronically filing will, in most cases, be required to use their fingerprint. Electronic signature includes codes, passwords, biometric data or cryptographic keywords that allows identification of a person in respect of a data transmission. Art. 1 Regulatory Decree 2364 of 22 November 2012 implementing art. 7 Law 527 of 1999. Available at: <http://wsp.presidencia.gov.co/Normativa/Decretos/2012/Documents/NOVIEMBRE/22/DECRETO%202364%20DEL%2022%20DE%20NOVIEMBRE%20DE%202012.pdf>

<sup>97</sup> Unofficial English translation of the Draft Bill available at [http://pensando.mj.gov.br/dadospessoais/wp-content/uploads/sites/3/2015/02/Brazil\\_pdp\\_bill\\_Engl.pdf](http://pensando.mj.gov.br/dadospessoais/wp-content/uploads/sites/3/2015/02/Brazil_pdp_bill_Engl.pdf)

<sup>98</sup> Colombia art. 26 Law 1581 of 17 October 2012 prohibits the exchange of information with countries that do not provide an adequate level of data protection except in the case that the individual referred to has expressly authorized the exchange or in the framework of an international treaty it is based on the principle of reciprocity.

<sup>99</sup> South Africa in art. 72 of the Protection of Personal Information Act (November 2013) states that data cannot be transferred to a third party in a foreign country unless the third party (recipient) “is subject to a law, binding corporate rules or binding agreement which provide an adequate level of protection”

<sup>100</sup> An example is the reference to exchange with third countries only if there is an adequate level of protection as included in the legislation of Colombia and South Africa. Para. 56 of the 1995 Directive.

<sup>101</sup> Uruguay states in art. 23 of the Law regulating the protection of personal data that, in principle, it is not possible to provide data to another country where that country does not provide for the protection of data in accordance with international or regional standards. However, some exceptions are noted, for example, if the interested party approves the transfer; it has been made possible by means of international agreements signed by Uruguay; and/or in the framework of international cooperation regarding the fight against organised crime, terrorism, and drug trafficking.



Brazil provides in the 2013 Draft Bill a specific provision authorizing the exchange of information in a treaty context (art. 19.IV) for purposes of public security, criminal investigation or filing of supporting documents in criminal, administrative, or tax matters. The exchange of information takes place in the following cases: (i) the exercise of legal prerogative (right); (ii) the prevention or repression of criminal, administrative or tax infractions; (iii) sharing of information for purposes of national security and (iv) the compliance with an international agreement, treaty or convention to which Brazil is party. However, the article of the Draft Bill does not refer to the level of protection and therefore in Brazil it is not clear whether the requirements of exchange of information (protection of the taxpayer and exercise of procedural rights (e.g. notification) and level of protection at destination) would remain applicable in a tax treaty context. More clarity on the Draft Bill will be needed in this regard.

### **2.3.3.2. Professional secrecy and bank secrecy**

In Brazil, Colombia, South Africa and Uruguay, professional secrecy is guaranteed either in the Constitution or in the Law or in common law.<sup>102</sup> However, in Colombia and South Africa, professional secrecy is extended only to the attorney-client information. In South Africa section 42A of the Tax Administration Act lays down procedures to be applied when legal professional privilege is asserted. The exact scope of professional secrecy has then been clarified in Colombia by the Constitutional Court<sup>103</sup> and in South Africa by the courts in several cases.<sup>104</sup>

Colombian professional secrecy does not prevent the tax administration from requesting information where the attorney has been acting in another capacity, such as nominee shareholder, a trustee, a settlor or as a company director.<sup>105</sup> In contrast, before 2012, in Uruguay, the information held by trustees was protected under the duty of confidentiality. However, this trustee confidentiality has been repealed by Law 18930 of July 2012.

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<sup>102</sup> In Brazil, art. 197 of the National Tax Code and art. 7 of Law 8906 of 1994; in Colombia art. 74 of the Constitution and Law 1123 of 2007; in Uruguay art. 7 and 72 of the Constitution. In South Africa, the right to claim privilege is not a statutory right but stems from common law. Further references L H Hoffmann & D T Zeffertt *The South African law of evidence* 4 ed (1989) ch 11 p236 et seq, and PhD Beric Croome *Taxpayer's rights in South Africa* pp. 107- 117. See also para. 174 of the OECD Global Forum Report for South Africa, *supra* n. 74.

<sup>103</sup> The Constitutional Court has confirmed the scope of professional secrecy (Writ no. 6 and Ruling C538 of 1997) as the knowledge obtained through the conduct of a professional activity. Further, in 2012, Ruling C301 of the Constitutional Court confirmed that attorney-client privilege was limited to the professional content of a lawyer/client relationship. Para. 291. OECD. *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Colombia 2015: Phase 2: Implementation of the Standard in Practice*. OECD Publishing, Paris. 2015.

<sup>104</sup> According to the OECD Global Forum Report for South Africa: case law shows that “the mere fact that an attorney is in possession of confidential information does not create a legal professional privilege, as the attorney was not consulted to obtain legal advice. Also, South African courts have refused to extend the privilege to other professional relationships, such as journalists, insurers and doctors” Case: 18 R v Davies 1956 (3) SA 52 (A); S v Cornelissen 1994 (2) SACR 41 (W); Howe v Mabuya 1961 (2) SA 635 (D); Botha v Botha 1972 (2) SA 559 (N). Para. 175. Peer review South Africa phase 1 and phase 2 combined, *supra* n. 72. See also IFA Cahiers 2013 - Volume 98B. Exchange of information and cross-border cooperation between tax authorities - South Africa (sec. 4.1.2).

<sup>105</sup> Para. 292. Peer review Colombia Phase 2, *supra* n. 103.

Despite the limitation of professional secrecy to the attorney-client privilege in Colombia, the OECD Global Forum peer review report Phase 1 referred to the “ample scope” of the professional secrecy rules.<sup>106</sup> A recommendation was “issued for Colombia to clarify the scope of attorney-client privilege to ensure that it is in line with the standard”.<sup>107</sup> In the OECD Global Forum peer review Phase 2, Colombia addressed the operation of secrecy provisions and attorney-client privilege in practice. Government officials reported that claims of attorney-client privilege do not arise often, even for domestic purposes in Colombia.<sup>108</sup> Therefore, the attorney-client privilege is not perceived to constitute an obstacle for the implementation of the standard of exchange of information. The OECD Global Forum peer review report Phase 2 stated that Colombia is compliant with the international standard. Likewise, in Uruguay, the OECD Global Forum peer review report Phase 2 stated that the attorney-client privilege does not prevent “tax authorities from accessing books of account, working papers and other documentation held by lawyers when they exercise their information gathering powers.”<sup>109</sup>

In Brazil, the scope of the application of the attorney-client privilege is broader than in Colombia, Uruguay and South Africa that applies this privilege only to the attorney-client legal communication. In Brazil, not only the communication, but also to the working documents and working (office) premises (Brazilian Attorney’s Statute) is protected by the attorney-client privilege.<sup>110</sup> The Phase 2 OECD Global Forum Report for Brazil recommended to Brazil to clarify whether the privilege “is limited to information obtained in the course of providing legal advice or legal representation”.<sup>111</sup>

Brazil, in art. 5 of the Constitution,<sup>112</sup> and Uruguay have or have had bank secrecy.<sup>113</sup> Even though the Constitution in Uruguay does not expressly mention, professional secrecy and bank secrecy, these

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<sup>106</sup> Para 150 Peer Review Phase 1 stated that “ the scope of attorney-client privilege is not clear in Colombia and may extend beyond that provided for in the international standard”. *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Colombia 2014: Phase 1: Legal and Regulatory Framework*. OECD Publishing. Paris.

<sup>107</sup> Ibid.

<sup>108</sup> Para. 293 and 294. Peer review Colombia Phase 2, *supra* n. 103.

<sup>109</sup> Furthermore, the peer review report states that in relation to domestic tax issues, the Uruguayan officials have confirmed that claims of attorney-client privilege have never arisen in practice Para. 395. Peer Review Uruguay Phase 2, *supra* n. 73.

<sup>110</sup> Law No 8906 of 1994 94, article 7, II, as amended by Law No 11767 of 2008.

<sup>111</sup> Para. 242 Peer review Brazil Phase 2, *supra* n. 60.

<sup>112</sup> In Brazil, bank secrecy is construed by literature and case law to derive from the general data secrecy rules set as an individual right by art. 5, XII of the Constitution. The provision established that “the secrecy of mailing and telegraphic communications, of data and of telephone communications is inviolable, except in the latter case, by judicial order, in the cases and in the manner prescribed by law for purposes of criminal investigation or criminal procedural finding of facts.

<sup>113</sup> The Constitution of Uruguay states the right to bank secrecy. However, in order to comply with the recommendations of the peer review forum, by means of Law 18718 of December 2010 (in force as of 2 January 2011) the lifting of bank secrecy is allowed for purposes of providing information in accordance with exchange of information agreements. In Uruguay, in cases of exchange of information, the taxpayer has the right to be notified and to have access to the preliminary reports of the administrative proceedings information that is going to be exchanged for five business days (Art. 10 Decree 378 of 26 November 2013 that modified art. 10 Decree 313 of 2011). Despite the existence of these rights, the Peer Review stated that the exchange of information was provided timeously. However, the Peer Review stated that in cases where the lifting of bank secrecy was

rights are deemed to be covered by these constitutional rights pursuant to article 72<sup>114</sup> of the Constitution, since this article concerns the protection of rights inherent to the individual, and by art. 7 of the Constitution, regulating professional secrecy which includes bank secrecy in art. 25 Decree Law 15.322 of 1982. With respect to professional secrecy, the Criminal Code states that the disclosure of professional secrets will be regarded as a criminal offence subject to the provisions of the Code. Some exceptions to bank secrecy were permissible, mainly for reasons of public interest.<sup>115</sup>

However, the OECD global Forum Report for Uruguay criticized the bank secrecy with respect to the notification to the taxpayer without any exceptions and the length of the procedure for the lifting of bank secrecy. Before this report, banks in Uruguay were not allowed to reveal any 'confidential information which had been received from their clients. The law has been subsequently amended.

Bank secrecy may now be lifted in Uruguay if the law so provides or for reasons of public interest. The procedure for the lifting of bank secrecy is provided in Law 18.718 of 2010 (in force from 2 January 2011). Art. 15 of this Law allows the lifting of bank secrecy when it is necessary for the determination of tax debts or concerning the breach of tax obligations, or if there is objective evidence indicating a tax evasion purpose of the taxpayer.<sup>116</sup> More recently, by means of Law 19.484 of 29 December 2016 (in force from 1 January 2017), bank secrecy has been lifted for residents and non-residents for tax purposes in Uruguay where an agreement for exchange of financial account information exists.<sup>117</sup>

While there appears to be no restriction or process to be followed for bank secrecy to be lifted for non-resident taxpayers in Uruguay, for resident taxpayers both an administrative process<sup>118</sup> and a judicial process<sup>119</sup> need to take place before bank secrecy may be lifted. The judicial process in

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required, then, the procedure would delay the exchange to approximately 180 days. Para. 398 and 399. Peer Review Uruguay Phase 2, *supra* n. 73.

<sup>114</sup>Article 72 of the Constitution states that "The express provision for rights, duties and guarantees made under this Constitution does not exclude the other fundamental rights inherent to human nature or derived from the republican way of government".

<sup>115</sup> Para. 130, 131 and 132 Peer Review Uruguay Phase 1, *supra* n. 28.

<sup>116</sup> This art. 15 of the Law 18718 of 2010 amended article 54 of the Tax Reform Law 18083 of 2006. The peer review states "that in terms of overriding the constitutional protection for professional secrecy, it is clear that Tax Reform Law is a 'specific law' and that the purpose of giving effect to Uruguay's information exchange provisions is a 'reason of public interest'". Para. 278 Peer review Uruguay phase 2. *supra* n. 73.

<sup>117</sup>The lifting of the bank secrecy is only applicable in respect of financial account information. See arts 1,2, 15 and 16 Law 19.484 of 5 January 2017. Available at [https://parlamento.gub.uy/documentosyleyes/ficha-asunto/130782/ficha\\_completa](https://parlamento.gub.uy/documentosyleyes/ficha-asunto/130782/ficha_completa)

Two reasons to lift bank secrecy is the the ratification by Uruguay of the MAC (Law 19.428 of 29 August 2016) and the endorsement of the CRS MCAA. See Section 1 above.

<sup>118</sup> Prior to the court proceedings, an administrative procedure is set forth in order to lift the bank secrecy, if the holder of the information grants authorisation. Pursuant to Article 2 of Decree no. 282 of 10 August 2011, the Tax Administration (DGI) must obtain the express authorisation in writing from the taxpayers to lift the bank secrecy, allowing them a five working-day period to view. The viewing period is only granted to resident for tax purposes in Uruguay.

<sup>119</sup> The judicial process is stated in Art. 54 of Law no. 18083 of 27 December 2006 (published 18 January 2007). Art. 54 establishes a fast-track court procedure to lift bank secrecy for domestic issues. This procedure is extended to the exchange of information between countries under Law no. 18718.

Uruguay requires the disclosure of certain information to the court and also to the relevant account holder (either the taxpayer or any other person). If the account holder is not the taxpayer (or its proxy) the release of information is considered to contravene the standard of confidentiality. This judicial process has been criticized in the OECD Global Forum Report for Uruguay. However, Uruguay has clarified that they are in the process of setting up a joint team “with attorneys to deal with cases where banking information has been requested and to prepare special guidelines for the collaboration with judges”.<sup>120</sup>

The South African Revenue Service (SARS) has also been receiving information from South African banks for some time, making such information held by SARS available for exchange. As a result, the OECD Global Forum Report for South Africa has not flagged any problems regarding the standard of confidentiality and the disclosure of bank information (seen by the Global Forum as a barrier to exchange of information).

Following the OECD Global Forum Phase 2 Report for Uruguay, one issue that needs to be clarified is whether, since the change in the law, the access to bank information is retroactive (i.e. for bank information before 2 January 2011) or not.<sup>121</sup> Due to the recent developments in respect of the lifting of bank secrecy in Uruguay, it is not clear the position of Uruguay regarding retroactive application of the access to bank information. In the past, the example of the TIEA between Uruguay and Argentina, which does not supply information retrospectively<sup>122</sup> would have implied that not retroactivity would take place.

Until 2001, bank secrecy was protected under article 38 of Law No.4.595 of 1964 in Brazil. One exception to bank secrecy was disclosure authorized by a court order for civil or criminal tax matters. To lift bank secrecy, art. 38 was repealed by art. 13 of Complementary Law No. 105 of 2001. This change made it possible for the tax administration to have access to data held by financial institutions in Brazil without requiring a judicial authorisation or a court order.<sup>123</sup>

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<sup>120</sup> According to para. 376 Peer review Phase 2, Uruguay has confirmed that “in the notice letter for voluntary disclosure, no information regarding the EOI request is disclosed to the account holder (in particular, the name of the requesting jurisdiction is not mentioned). It shall be noted that this procedure applies both for domestic tax purposes and for EOI purposes, and the notice only indicates the bank information needed. The EOI request may on occasion need to be disclosed to the judge upon his request, but would not be disclosed to the taxpayer”. Peer review Uruguay phase 2. *supra* n. 73.

<sup>121</sup> At the time of writing (August 2017), this issue had not yet been clarified. According to para. 240, peer review phase 2, requests for exchange of information regarding bank details have been made after 2 January 2011 only concerning periods after 2 January 2011. Peer review Uruguay phase 2. *supra* n. 73.

<sup>122</sup> Para. 356 Uruguay phase 2: The issues concern whether the treaty has retroactive effect for criminal tax matters and how it applies to information related to acts or facts predating the treaty but which are relevant for periods after the entry into force of the treaty. The two jurisdictions met twice in the first half of 2013 to establish general guidelines to complete the exchange of information effectively, but also to discuss the divergence of interpretation regarding the entry into force provision of the TIEA. No agreement was reached on the latter issue between the two jurisdictions. Peer review Uruguay phase 2. *supra* n. 73.

<sup>123</sup> In Brazil, Complementary Law 105 of 2001 introduced new rules on bank secrecy and extended the access powers of the tax administration to confidential data held by financial institutions. In addition, Law No.10.701 of 2003 provided the tax administration with a broader authority to obtain information from third parties and

The Phase 1 OECD Global Forum Report for Brazil addressed the potential conflict of Complementary Law 105 of 2001 with art 5 of the Brazilian Federal Constitution arising in case law.<sup>124</sup> In principle, access by the tax administration to data held by financial institutions required a court order in both civil and criminal tax matters. However, the Phase 2 report confirmed that in practice the requirement for a court order has not posed any impediment to effective exchange of information with other countries.<sup>125</sup> The Phase 2 report concluded that the Complementary Law 105 of 2001 produces the desired effect and entitles the tax administration to have direct access to bank information without the need of a prior court order.<sup>126</sup> Such application has been confirmed by the Federal Supreme Court in a decision of 24 February 2016.<sup>127</sup>

### **2.3.3.3. Sanctions and Remedies**

Taxpayer information that qualifies as sensitive data or special protected data, may be subject to the same safeguards for confidentiality, including the sanctions (disciplinary, criminal, administrative) for improper disclosure of information. Constitutional remedies or specific sanctions in the domestic law may also apply, such as the Draft Bill in Brazil to Regulate the Protection of Personal Data, where there has been disclosure of private data or misuse of information.

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created a national register of bank accounts. Paras. 35 and 37 OECD (2012), *Global Forum on Transparency and Exchange of Information for Tax Purposes Peer Reviews: Brazil 2012: Phase 1: Legal and Regulatory Framework*. OECD Publishing, Paris.

In Uruguay, article 25 of Decree Law 15322 of 1982 regulates bank secrecy and art. 19 (c) of Law No. 17 703 of 2003 (Trust Law) protects information held by trustees.

<sup>124</sup> This protection is given in art. 5 of the Constitution that requires for the disclosure of bank details a request of a judicial court during a judicial proceeding. The 1988 Constitution in art. 5 protects the transmission of personal data, and therefore taxpayers have argued that the bank secrecy is contrary to art. 5. These cases addressed the access powers for domestic purposes and, at the time of writing, there have been no cases involving bank information required under an EOI request. The outcome of these cases has not been uniform. In one case the decision was in favour of the taxpayer, preventing the tax administration from accessing the information concerning the taxpayer's bank account. In contrast, the Court has, in another case, stated that the Complementary Law 105 of 2011 entitles the tax administration to have direct access to bank information, unless the taxpayer challenges the direct access to bank information in court. Para. 153 and 154 Peer Review report Brazil phase 1, *supra* n. 123.

<sup>125</sup> Para. 289 of the peer review phase 2 states that "At least two peers reported requesting banking information from Brazil, which was provided without any issues arising". Peer review report Brazil phase 2. *Supra* n. 60.

<sup>126</sup> In cases where the bank information cannot be obtained from the taxpayer or where the requesting jurisdiction does not wish that the taxpayer be alerted to the request, the tax auditor can proceed to access this information directly from the financial institution by opening a Tax Procedure Warrant. In 2011, 1,995 Financial Operation Information Requests (RMF) were sent to financial institutions in order to access detailed banking information for domestic tax auditing purposes. Out of these 1,995 cases, the Brazilian authorities have confirmed that there were six cases where delays or refusal to comply with the request was experienced and fines were applied. To date, it has not been necessary to issue an RMF for EOI purposes as requested information has always been available either from the tax administration databases or the taxpayer. Para 234 and 236 Peer Review Brazil phase 2, *supra* n. 60.

<sup>127</sup> The Federal Supreme Court stated that there is no violation of taxpayers' right to bank secrecy as the tax authorities are obliged to respect fiscal secrecy. Therefore the exchange of bank information between tax authorities does not violate the right to bank secrecy as both authorities are bound by the same obligation of secrecy. Extraordinary Appeal Court Decision (*Recurso Extraordinário*, RE) 601,314 and Direct Actions for Unconstitutionality Court Decision (*Ação Direta de Inconstitucionalidade*, ADI) 2390, 2386, 2397 and 2859.

There are two constitutional remedies against violation of privacy rights in Brazil, being the writ of mandamus and the writ of passage. The writ of mandamus protects citizens against illegalities or abuses of power by public authorities. The writ of passage protects citizens where their individual freedom is threatened by any illegality or abuse of power from public authorities (e.g. unlawful detention). However, in Brazil, in practice it is difficult to safeguard these fundamental rights since the taxpayer will need to be informed or to have prior knowledge about the infringement of privacy.

In terms of Colombian Law regulating the Protection of Personal Data, which includes cases of misuse of information, the Superintendency of Industry and Commerce may suspend the activities of the entity misusing the information and, secondly disciplinary sanctions against the public official for the misconduct may be taken.<sup>128</sup>

#### **2.3.4. Technological equipment, financial resources and administrative capacity to ensure the protection of the right to confidentiality and privacy**

The manner in which information is stored, particularly information pertaining to requests for exchange of information; managed within the tax administration; use of emails restricted; and, access to tax information are handled differently by each of the surveyed countries. Some commonalities are evident.

For all surveyed countries, the servers and databases are housed at the headquarters of the tax administration so that the information cannot be accessed externally. Access to these headquarters is restricted and an official of the tax administration must accompany any visitor to non-public areas of the building. In some cases, such as in Colombia, laptops are registered and proof of identification must be supplied before entering the building.

Access by employees to the computers of the tax administration is restricted and additional safeguards have been introduced. For instance, in Brazil each agent has a unique 'ID' and 'password' and can only access his computer (and the network) by using a token. In Colombia and Uruguay, each employer has a unique user ID and password and cannot access their computer without the

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<sup>128</sup> See Circular 001 of 14 January of 2013 regarding the obligations of the public (tax) official in respect of data protection. The breach of the obligations stated in the circular will be regarded as a serious offense subject to disciplinary sanctions. Chapter 5 Circular 001 of 14 January 2013.

The IFA Report Colombia also refers to the provisions in the Statutory Law to Protect the data and their Constitutional review by the Constitutional Court. According to the IFA reporter, in "Opinion C-748 of 2011, the Constitutional Court held that public officials who manage and use information on taxpayers (including information of a tax nature) that states may be subject to two types of penalty for the misuse of information that generates a violation of the taxpayer's right to habeas data. The first type of penalty may be imposed by the Superintendence of Industry and Commerce and includes the suspension of activities related to the misuse of information or the temporary or permanent closure of the operations related to the use of the information. This first type of penalty would be imposed to protect the taxpayer's data or information. The second type of penalty is personal in nature and is designed to punish and discipline the public official for his/her misconduct involving misuse of the taxpayer's information" *Colombia, National Report. 2013 International Fiscal Association (IFA): Exchange of Information, Cahiers de droit fiscal international*. International Bureau of Fiscal Documentation, Amsterdam, the Netherlands. 2013. p. 216.

password. In South Africa, the access to the computers is also restricted and a unique user ID and password is necessary to see and deal with one's own tax information.

Taxpayer information is stored in both South Africa and Brazil in secured servers, with the Brazilian servers protected by firewalls. In Colombia, the taxpayer information is stored in the headquarters of the National Tax Administration (DIAN) and in the digital system MUISCA created specifically for the management of taxpayer information. The digital system MUISCA allows not only the management by the tax administration of tax information provided by the taxpayer, third parties and exchange of information but also the possibility for the taxpayer to communicate electronically with the tax authority.<sup>129</sup> Finally, a secure cabinet within the ITD which is locked with a key protects the taxpayer information in Uruguay.

Differences were noted between the surveyed countries in the procedures used to exchange the information with other tax units. In Brazil when required to supply information, to another agent, division or unit within the tax administration, a receipt must be signed by the recipient confirming that the document is in his custody. Exchange of information within the Colombian tax administration is made via secure internal email and, in respect of automatic exchange, the information will be encrypted and can only be accessed by 3 agents, who will extract the specific piece requested by the auditor or authority. In Uruguay, where the requests are of a sensitive nature or where extra confidentiality measures are required, all internal and external communications must be done with sealed envelopes with the administrative file number, the country requesting the information and the reference number written in front, and the words 'confidential' and 'urgent' written across the envelopes. If the document is sent to another unit, a receipt must be signed by its recipient confirming the document is under his custody.<sup>130</sup>

Additional processes have been introduced in all surveyed countries for the processing of the exchange of information, including manner in which information is sent to the requesting country (encrypted emails or WinZip encryption). Brazil introduced in 2008 a Manual on Exchange of Information based to a large extent on the 2006 OECD Manual on the Implementation of Exchange of Information for Tax Purposes.<sup>131</sup> South Africa issued detailed regulations for the automatic exchange

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<sup>129</sup> According to the Colombian 2015 IFA Reporter: "This platform manages information provided by the taxpayer, third parties, and exchange of information. It allows taxpayers to access their own information and to communicate electronically with the tax authority. The platform uses the service socket layer (SSI) protocol, as well as digital signatures. "Thawte" certifies all transactions and operations. The taxpayer is requested: (a) to access the http protocol using SSI; (b) to identify himself with his user name and password; and (c) to use a digital statement. DIAN functionaries are obliged to return immediately CDs or USB memory used by taxpayers to provide information. Taxpayers provide external information online or in person. Online submission requires the use of a digital signature and digital statement previously issued by DIAN" *Colombian National Report 2015*, *supra* n. 64. p. 277-278.

<sup>130</sup> Para. 385 Peer review Uruguay phase 2 *supra* n. 73.

<sup>131</sup> According to the peer review the Manual "establishes the limits, procedures, forms and other technical information to be observed by the officials concerned with the current EOI organisations process". Para. 363 peer review Brazil phase 2. 2 *supra* n. 60.

of information on the 29<sup>th</sup> February 2016.<sup>132</sup> For the other countries, guidance is issued via memoranda, rulings or other administrative documents of the tax administration.

Where requests for information have been received in each of the surveyed countries, each have processes with additional safeguards over both the request received and the information to be transmitted.

In Brazil, the request for exchange of information is received by courier or airmail and sent to the General Coordination of International Relations (CORIN) where it is filed and held in a secured place. Only two members of CORIN have access to such files, namely the person responsible for the exchange of information proceedings and the head of the Division of International Tax Affairs. The request details are stored in an electronic system (SIFE) and the access to this system is restricted to agents of the Exchange of Information Unit of the Brazilian Revenue Service. The request is also stored in COMPROT<sup>133</sup> but not all the details of the request are inserted in this system. After the information has been gathered, such information is provided to the requesting country by means of encrypted emails.

In Colombia, secure firewalls servers are in place and only authorized persons, being officials within the exchange of information (EOI) Unit in the International Taxation office at the DIAN, will have access to the information concerning all EOI requests. The information collected including a letter signed by the Commissioner are sent via encrypted mail to the named contact in the requesting competent authority.

When a request is received in South Africa, all documents are scanned and stored on a secure server. The paper files are destroyed. Only the personnel involved in exchange of information cases (part of the Division of Enforcement and Risk Planning) have access to the server. South Africa does use the WinZip encryption system (if supported by the receiving jurisdiction) to email documents. The email to the requesting authority will not contain any confidential information as the information will be contained in the WinZip encrypted file attached to the email. The password, in case of WinZip encryption, will be sent in a separate email.

Finally, in Uruguay, requests for exchange of information are received via courier and immediately forwarded to the International Taxation Department. A hard file is opened for each request and kept in a secured cabinet within the Department. Only two members of the staff have access to the secured cabinet, being the person responsible for exchange of information and the head of the Large Taxpayer Division. The information is placed in a closed envelop with the administrative file number written in front. The envelope is sent to the requesting country via registered mail (that includes a

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<sup>132</sup>Regulations available at [http://www.sars.gov.za/AllDocs/Documents/Automatic%20Exchange%20of%20Information%20\(AEOI\)/SARS\\_External\\_BRS\\_2014\\_Automatic\\_Exchange\\_of\\_Information\\_v\\_1\\_0\\_1.pdf](http://www.sars.gov.za/AllDocs/Documents/Automatic%20Exchange%20of%20Information%20(AEOI)/SARS_External_BRS_2014_Automatic_Exchange_of_Information_v_1_0_1.pdf)

<sup>133</sup> The COMPROT is the system for the digital file of any procedures within the Ministry of Finance. Should the procedure concern the taxpayer, he/she may consult any developments online via his/her tax number. This is not the case in EOI procedures, where the developments remain internal to the tax administration and only stored by the COMPROT.



mail tracking function). Copies of any documents requested are kept at the office of the International Tax Department which is separate from the general file location of the DTGI. A copy of the request and the cover letter is maintained for reference purposes at the office of the competent authority.

#### **2.4. Intermediate summary**

From the available international instruments and the legal and domestic framework dealing with the public access to information, the right to confidentiality and the right to privacy, it is noted that Brazil, Colombia, South Africa and Uruguay have introduced the standard of confidentiality stated in art. 26(2) of the OECD Model and art. 8 of the OECD TIEA Model respectively. All these countries have also been rated by the Global Transparency Forum as compliant in respect of the standard of confidentiality. Some issues regarding confidentiality when lifting bank secrecy still need to be addressed by Uruguay (See section 2.3.3.2. above).

The right to privacy in all the surveyed countries will be informed by the United Nations Declaration of Human Rights (ratified by all but South Africa), the International Covenant on Civil and Political Rights (ratified by all) and further by the Inter-American Convention as ratified by Brazil, Colombia and Uruguay. It is evident that the domestic frameworks to protect the right to confidentiality and right to privacy have changed in the last years due to the findings of the peer review reports regarding the compliance with the standard of confidentiality as well as the current developments globally and within the domestic systems regarding transparency and data protection.

Brazil, Colombia and Uruguay have, in the last decade, introduced laws to guarantee the access to public information. These countries have also introduced or clarified domestic tax laws regarding confidentiality and disclosure in the Income Tax Laws. South Africa has recently moved its rules of confidentiality from the Income Tax Act to the Tax Administration Act (2011). This has also made it possible for South Africa to expand these provisions. Chapter 6 of this Act now regulates confidentiality and disclosure. All the surveyed countries similarly address the manner in which the persons, including former officials and civil servants, authorised to use taxpayer information are bound by confidentiality. South Africa's law further obliges a person to whom confidential information was improperly disclosed to maintain confidentiality. This provision may have consequences or result in sanctions where, for instance, the information used is stolen or improperly disclosed.

All surveyed countries provide for background and security checks when hiring tax officials and have also developed training programmes where the confidential obligations, processes and procedures are outlined and explained. One best practice identified in South Africa is the implementation of domestic trainings of tax officials to make them aware of international tax issues and for them to acquire expertise to gather the information necessary to comply with an information exchange request. This also means an awareness of tax treaties enabling the exchange of information. This is to ensure that in each local revenue office there is at least one office with the relevant training.

All surveyed countries provide for sanctions and remedies against tax officials and former officials upon breach of confidentiality. Sanctions include, for example, disciplinary sanctions (dismissal), criminal sanctions (imprisonment and/or fine) and in some countries, such as in Uruguay, a civil liability for the tax official. These sanctions may be also imposed (South Africa) if the hiring of one person takes place without following the proper procedure (background checks, etc.). The remedies are for instance the possibility to sue the State for wrongful actions and to claim damages (Colombia and Uruguay) and the redress or the filing of a request before the Tax Ombudsman (South Africa). These countries have not reported any cases where these remedies have been applied.

In respect of the right to privacy, countries have amended their domestic procedures to deal with professional secrecy and bank secrecy to conform with the standards provided by the Global Forum. While taxpayers are protected in the surveyed countries in respect of the disclosure of trade, commercial secrets, professional secrecy (legal privilege), bank secrecy protection has been reduced, particularly in Brazil and Uruguay. Brazil had bank secrecy until 2001 when it was repealed by means of the Complementary Law of 2001. Uruguay has bank secrecy, but since 2011 has made it possible to lift bank secrecy if the law so provides or for reasons of public interest. More recently, by means of Law 19.484 of 29 December 2016 (in force from 1 January 2017), bank secrecy has been lifted for residents and non-residents for tax purposes in Uruguay. This Law 19.484 has made possible the lifting of bank secrecy in respect of exchange of financial account information.

Domestic laws to regulate data protection have been introduced in Colombia, Brazil (draft Bill), South Africa (partially in force) and Uruguay. These laws reflect the principles of the 1995 EU Data Protection Directive. Whether the Data Protections Laws of the surveyed countries will be updated in accordance with or be informed by the new rules dealing with EU Data Protection including the recently adopted (April 2016) Data Protection Directive and the General Data Protection Regulation remains to be seen.<sup>134</sup>

It appears that taxpayer information qualifying as sensitive or specially protected data may be further protected by domestic laws concerning confidentiality, including the relevant sanctions against improper disclosure of information. Some countries include constitutional remedies (e.g. Brazil writ of mandamus and writ of passage) or specific sanctions to regulate the protection of personal data in case of disclosure of private data or misuse of information.

Finally, Brazil, Colombia, South Africa and Uruguay utilize encrypted emails, secure servers and restrict access to computers, servers and databases to tax officials. However, the restrictions on the access of confidential information, the way to store information generally and with respect requests

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<sup>134</sup> On 8 April 2016 the Council adopted the Regulation and the Directive. And on 14 April 2016 the Regulation and the Directive were adopted by the European Parliament. On 4 May 2016, the official texts of the Regulation and the Directive have been published in the EU Official Journal in all the official languages. While the Regulation will enter into force on 24 May 2016, it shall apply from 25 May 2018. The Directive enters into force on 5 May 2016 and EU Member States have to transpose it into their national law by 6 May 2018. [http://ec.europa.eu/justice/data-protection/reform/index\\_en.htm](http://ec.europa.eu/justice/data-protection/reform/index_en.htm)

for information within the tax administration and obtaining the information required from another tax unit are addressed differently by the surveyed countries. Brazil introduced a Manual on Exchange of Information in 2008 based to a large extent on the 2006 OECD Manual on the Implementation of Exchange of Information for Tax Purposes and South Africa introduced detailed regulations for the automatic exchange of information in 2016. For the other countries, guidance is provided in memoranda, rulings or other administrative documents of the tax administration.

### **3. TAXPAYERS' PROCEDURAL RIGHTS IN TAX INFORMATION EXCHANGE IN THE SURVEYED COUNTRIES**

This Section addresses the legal and administrative framework to guarantee certain procedural rights, being the right to be informed, the right to be notified and the right to appeal in Brazil, Colombia, South Africa and Uruguay.

#### **3.1. Taxpayer procedural rights in bilateral tax treaties concluded by the surveyed countries**

In bilateral tax treaties, the procedural rights afforded to taxpayers with respect to an exchange of information are relegated to the domestic laws of the requesting and requested countries. However, procedural rights have been specifically addressed in the Protocol to art. 26 of the DTC concluded by Uruguay with Switzerland.<sup>135</sup>

Para. 5 of the Protocol states that “it is understood that in the case of an exchange of information, the administrative procedural rules regarding taxpayers’ rights provided for in the requested Contracting State remain applicable before the information is transmitted to the requesting Contracting State. It is further understood that this provision aims at guaranteeing the taxpayer a fair procedure and not at preventing or unduly delaying the exchange of information process”. As mentioned in Section 2.2.3.2. above Uruguay has reduced taxpayers’ rights mainly due to the findings of the peer review for Uruguay.<sup>136</sup> The procedural rights afforded to taxpayers must therefore be considered in light of the domestic legal framework.

#### **3.2. Taxpayer procedural rights in the domestic framework of the surveyed countries**

##### **3.2.1. Rights to be granted to the taxpayer by the requesting state before a request for exchange of information is made**

The right of the taxpayer to be notified by the requesting state before a request for exchange of information is made does not exist in Brazil, Colombia and South Africa. Uruguay provides for the right for the taxpayer to see the file for a specific period of time, however, this right to see the file is only applicable in respect of exchange of information on request.

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<sup>135</sup> Protocol dated 18<sup>th</sup> October 2010 and in force as of 28 December 2011.

<sup>136</sup> The Protocol was concluded in 2010 before the peer reviews (phase 1, supplementary phase 1 and phase 2) were made. The first peer review (phase 1) was published on 26 October 2011. See for an overview of the reviews of Uruguay <http://www.eoi-tax.org/jurisdictions/UY#latest>

The Colombian Tax Code contains a specific provision that allows the taxpayer to inspect the file (art. 193 (2) Law 1607 of 2012), however, this is not specific to the taxpayer's right as regards exchange of information.<sup>137</sup> However, to utilise this right in the context of an exchange of information, the taxpayer needs to have inside information or keen intuition to be aware that the exchange of information is taking place. It is therefore submitted that this provision does not provide effective protection of the taxpayers' rights. The Colombian legislation also contains the right to due process (art. 193 (6) Law 1607 de 2012). However, unlike Brazil and Uruguay, even though the right of the taxpayer to participate during the administrative process is regulated, this will only take place if the exchange of information involves witness examinations.<sup>138</sup>

In South Africa, the decision to request information from another tax authority could be seen as an administrative action. Section 3(2) of Promotion of Administrative Justice Act 3 of 2000 provides the conditions for a fair and administrative procedure which include: adequate notice of the nature and purpose of the proposed administrative action to the person affected by such action; a reasonable opportunity to make representations, adequate notice of any right of review or internal appeal where applicable. Such conditions support the right to be notified and to appeal. Section 3(3) of the Act states that the administration may give the person affected by such action an opportunity to present and dispute information and arguments (i.e. right to contradict) and to appear in person (i.e. to be heard).

However, according to Section 3(4) of the Act, the tax administration in South Africa may depart from the application of these conditions taking into account among others (i) the nature and purpose of the administrative action; (ii) the likely effect of the administrative action; (iii) the urgency of the matter; (iv) the need to promote an efficient administration and good governance. Therefore, even if the taxpayer becomes aware of the administrative action and decides to challenge this action, the tax administration (SARS) would take refuge in the provisions of Section (3(4)) of the Act.

The application of the due process clause differs between Brazil and Uruguay. In Brazil, there is no a specific provision addressing the notification to the taxpayer of a request for exchange of information.<sup>139</sup> However, it can be argued that in Brazil at least from a constitutional perspective,

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<sup>137</sup> The only document is an internal memorandum of the tax administration (Circular 001 of 14 January 2013) to describe the scope of the exchange of information, especially for the instances in which Colombia acts as a requested state. This internal memorandum contains the right of the taxpayers in respect of exchange of information and the limitations of the tax administration.

<sup>138</sup> The rationale behind the inclusion of the taxpayer where witness evidence is collected is the protection of due process, as non-documental evidence collected during a trial may be falsified, inaccurate or biased unless both parties are present. The taxpayer is granted the right to verify that the tax authorities are not pressuring witness or formulating biased or prejudiced questions, or even interviewing witnesses with no adequate knowledge of the transaction at hand.

<sup>139</sup> In a decision of the Supreme Court it is stated that the Brazilian Constitution has set forth the due process of law for both substantive and procedural aspects. ADI 1.611-MC decided on 10.16.96. In the decision, the Supreme Court stated that the substantive due process constitutes a limitation to the legislation in a sense that laws shall be written with justice, and be reasonable and rational. At the same time, the procedural due process of law grants the people the right to a fair judicial process, respecting the right of defence. Following this argument, the substantive due process resembles a principle, whereas the procedure itself creates a right.

such rights for the taxpayer ought to be granted as a consequence of the ‘due process of law’ clause and the publicity of administrative acts clause. In addition, in Brazil, Law 9784 of 1999 establishes that any administrative decisions should be officially published (art. 2 § 1, ‘V’) and ensure the formalities essential to the guarantee of rights of citizens (art. 2 § 1, ‘VIII’). These formalities include the rights to communication, presentation of arguments, presentation of proofs and appeal in procedures that may result in sanctions. Law 9784 also establishes the rights to be notified of administrative procedures in which one is interested, to access the content of the procedure, obtain copies of documents therein and to know any decisions taken. These rights are disregarded by the Tax Administration when it comes to exchange of information since the relevant procedure is not considered an administrative procedure within the meaning of Law 9784. The result is that the taxpayer is not notified before, during or after the information is exchanged.

In Uruguay, art. 43 of the Tax Code states that the due process applies to tax administrative procedures.<sup>140</sup> In general terms, Decree 500 of 1991 (art. 76) established the right of the defendant to see the file for a period of ten days before the issuance of an administrative resolution. This right will include the right to a hearing, the right to notification of the existence of these proceedings and to access any related administrative files and records. The scope of application is general. Thus, in principle, this right could be also made applicable to the administrative procedures regarding the exchange of information on request.

### **3.2.2. Rights to be granted by the requested state during the collection of information process**

Brazil, Colombia and South Africa<sup>141</sup> do not grant a right to the taxpayer to be notified of an exchange of information request nor do these countries grant any right to appeal or object to the request during the exchange of information. The Uruguayan legislation provides for the right to notification as the requested state but due to the findings of the peer review this right to notification has been reduced in order to comply with the terms of reference<sup>142</sup> of the OECD Global Forum peer review including the effective exchange of information.

In Uruguay, law 18718 passed in December 2010 (in force from 2 January 2011) permits the lifting of bank secrecy as required by an exchange of information agreement (art. 15(2)).<sup>143</sup> The lifting of the bank secrecy requires prior notification to the account holder. In case that the bank account holder does not voluntarily authorise the lifting of bank secrecy, Uruguay has in place a court-based system to lift the bank secrecy in Decree 313 of 2011 (modified by Decree 278 of 2013). The procedure could

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<sup>140</sup> See also art. 66 Constitution and art. 76 Decree 599 of 1991.

<sup>141</sup> In South Africa, only if there is an audit, will the taxpayer be notified in terms of the Tax Administration Act (Chapter 5). However, this is not a right during the exchange of information but a procedural right that will be exercised during the tax investigation.

<sup>142</sup> Peer review terms of reference available at <http://www.oecd.org/tax/transparency/about-the-global-forum/publications/terms-of-reference.pdf>

<sup>143</sup> As translated from Spanish to English in the peer review report para. 133 phase 1 Uruguay, art. 15(2) states that “15(2) *It [bank secrecy] may also be lifted anytime there is a request from the Tax Administration Agency, asking for access to information in order to respond to a foreign tax Administration Agency with which there is an agreement in place for information exchange or to avoid double taxation.*” This exception applies to account information from 2 January 2011. Peer Review report Uruguay Phase 1, *supra* n. 28.

take up to 180 days to be completed. According to the peer review phase 1, “Uruguay’s law generally ensures that there are no impediments to effective access to relevant information. However, as the judicial process for accessing bank information lacks any exceptions to the obligation of prior notification this means that effective access and exchange of information may be impeded and a recommendation is made for Uruguay to address this issue”.<sup>144</sup>

In respect of the right of notification for the taxpayer, in Uruguay art. 10 Decree 313 of 2011 has granted the right to be notified and to inspect the files to the taxpayer. Once the taxpayer has been notified, the taxpayer will have a right to inspect the files including the request for exchange of information for a period of 5 days. The decision to inspect the file will be regarded as an administrative action which can be subject to objection or appeal by the taxpayer. The peer review stated that this notification in principle complies with the standard since the opportunity to inspect the file is only available for five days. The inspection of the file does not delay or suspend the exchange of information. However, the fact that it is without any exceptions may constitute an obstacle to the effectiveness of the exchange of information since even in urgent cases, the right to inspect the file can be exercised by the taxpayer. In practice, the peer review phase 1 supplementary report stated that no person receiving such notification has exercised the right to inspect the file.

In addition, the Phase 1 supplementary report recommended to Uruguay that “the application of appropriate exceptions should be clarified to ensure that the notification requirement does not hinder effective exchange of information.”<sup>145</sup> This recommendation was implemented by Uruguay. By means of Decree 378 of 2013 of 26 November 2013, the scope of application of the notification has been reduced to Uruguayan residents. However, the peer review phase 2 stated that “even in such limited cases the lack of clear exceptions from this notification requirement potentially hinders effective exchange of information (e.g. in urgent cases and where such notification could harm the investigations of the requesting jurisdiction).<sup>146</sup>

Transfer pricing requests may result in the inclusion of information that may be otherwise considered as trade secrets. Therefore, it is recommended that all transfer pricing requests should be discussed with the taxpayer in order to reduce the risk of a breach of confidentiality and to test the validity of comparative data. Similarly, the taxpayer must be informed of any requests involving beneficiaries of payments made in a certain country, or consumption patterns and other sensitive information. There is a high risk at least in Colombia of exploiting such information for political purposes, and it may even become quite dangerous in the case, for example Venezuelan refugees supporting the opposition or high net worth individuals who may be easily targeted by illegal armed

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<sup>144</sup> Para. 121 Peer Review report Uruguay Phase 1, *supra* n. 28.

<sup>145</sup> Para. 247 Peer review Uruguay Phase 2, *supra* n. 73.

<sup>146</sup> The peer review report stated that “under the court process for accessing bank information, certain information must be provided to the Uruguayan court to which the relevant account-holder (often the taxpayer) will have access. There are no exceptions to this notification of the account-holder prior to exchange of information. Accordingly, the two existing Phase 1 recommendations remain for the application of appropriate exceptions to ensure that the notification requirement does not hinder effective exchange of information”. Para. 7 Peer review Uruguay Phase 2, *supra* n. 73.

groups. This increases the need to inform and allow the taxpayer to appeal any exchange that may put his fundamental rights in danger.

When considering the approval of the exchange of information, it is desirable to at least consult the taxpayer. The main reason is that the taxpayer may be the only one capable of providing valuable information such as why certain information may violate trade secret protection. Therefore, the taxpayer must be allowed to provide evidence and to actively engage with the requested State. Such an approach would be equally useful in respect of arbitration since the taxpayer could also guarantee greater financial equality between the parties in arbitration in the situation where the requested state is a developing country and the requesting state is a developed country with visibly larger resources and experience in arbitration.

Even though, there are no rights for the taxpayer during the exchange of information process in Brazil, in every case in which a procedure, like a trial or assessment of taxes is in process, hearing the interested person and letting that person produce proof should be regarded as an implication of the due process of law clause.<sup>147</sup> As a matter of constitutional principle, such right may be mitigated when it is proportionally justified. Should Brazil be the requested State, another reason to grant rights to the resident taxpayer is that it could be the last opportunity for the taxpayer to defend himself, since offshore there is no certainty as to whether he will be heard or if he will be allowed to produce and contest evidence. Such rights can be much more safely granted by the country of residence of the taxpayer than by the foreign country.<sup>148</sup>

Furthermore, the right to be informed ought to be afforded to the taxpayer but with certain limitations. For example, where it can be demonstrated that informing the taxpayer would impede or prejudice the purpose of the request, the requirement to inform the taxpayer may be waived. In addition, for automatic exchange of information, taxpayers should be informed as to the nature of the information to be automatically exchanged. While this provides a mechanism to inform the taxpayer, it should be coupled with a mechanism for a taxpayer to challenge the information accuracy before or after it is exchanged.

### **3.2.3. Rights to be granted by the requesting state after information has been provided by the requested state**

None of the surveyed countries has granted specific rights, specifically the right to be informed about the information received from the requested State, the right to receive information about the sources and methods used to provide the information and the right to challenge the correctness of the information provided to the taxpayer after information has been provided by the requested state.

There are some rights in Brazil, Colombia, South Africa and Uruguay mainly in respect of the tax procedure following the exchange of information. For instance, in Brazil the taxpayer has 30 days to

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<sup>147</sup> See section 3.2.1. above.

<sup>148</sup> In case of Brazil being the requesting state, there will be a tax assessment and a tax procedure. In this case, the due process of law will guarantee the protection of the taxpayer.

react to a tax assessment and during this period the tax claim is suspended. However, since the taxpayer was not notified during the period of the collection of the information, it is argued that the taxpayer should have a period longer than 30 days taking into account the period spent by the tax authorities to collect the information that may have exceeded 30 days. It may be argued to the contrary, subject to the assumption that the taxpayer is already in possession of all relevant information, that the taxpayer would immediately be in a position to dispute the assessment where inaccurate, therefore the 30 day window may be sufficient.

In Colombia, where the request for information is made in the course of a tax trial in the judiciary, the taxpayer will have the right to be informed of the request, of all witness examinations and to be part of witness examinations. Furthermore, since in Colombia the taxpayer has the right to inspect the file (art. 193 (2) Law 1607 of 2012), the taxpayer may have knowledge after the exchange of information has taken place. However, since the right to inspect does not mean notification, the taxpayer will need to be aware that there has been an exchange of information and also assumes that the information requested is available in his file.

In South Africa, a taxpayer selected for audit has a right to notification in terms of Chapter 5 of the Tax Administration Act. However, this right does not take place at the time of the exchange of information but during a tax audit. In this audit, the taxpayer has the right to a status update of the audit within 90 days after commencement of the audit and within 90 day intervals thereafter.<sup>149</sup> The Protection of Personal Information Act makes it possible for the taxpayer to request a correction of information. However, this request will require the taxpayer to first make the discovery of the information held by SARS, since there is no right to be informed before the information has been requested or sent by the other state.

### **3.3. Intermediate summary**

In general, tax treaties do not provide rules on procedural rights such as the rights to be notified, to inspect the files, to object and to appeal. This has been left to domestic legislation. The only exception is the DTC between Uruguay and Switzerland specifically addressing the application of the administrative procedural rights available in both countries.<sup>150</sup>

In principle, none of the 4 surveyed countries have specific domestic law provisions addressing the rights to be granted by the requesting state before a request for exchange of information is made. However, it is strongly argued that the taxpayer should be allowed to challenge the decision to supply requested information if he is aware (or made aware) of such decision.

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<sup>149</sup> Separate notice. GN 788 in *Gov Gaz* 35733 dated 1 October 2012. Available at <http://www.sars.gov.za/AllDocs/LegalDoclib/SecLegis/LAPD-LSec-TAdm-PN-2012-02%20-%20Notice%20788%20GG%2035733%201%20October%202012.pdf>

See also Croome, B. & Brink, J. 2013 SARS Audits and Taxpayer's Rights. ENSight newsletter, June 2013.

<sup>150</sup> This is in conformity with the OECD and the UN DTC Model stating that procedural rights including notification requirements should be made known to the other contracting party at the moment that the tax treaty is concluded.



Brazil, Colombia and South Africa do not grant a right to the taxpayer to be notified, to appeal or to object to the request for exchange of information during the collection of information phase. Uruguay is the only country from the surveyed countries that has granted any right to the taxpayer during the exchange of information where Uruguay is the requested state.

In Uruguay, the bank account holder has the right to be notified regarding the lifting of bank secrecy and the right to be notified and to inspect the file of the taxpayer in respect of an exchange of information. Both rights have been evaluated in the peer review report. In respect of the notification to the account holder, the peer review phase 1 stated that, “Uruguay’s law generally ensures that there are no impediments to effective access to relevant information. However, as the judicial process for accessing bank information lacks any exceptions to the obligation of prior notification this means that effective access and exchange of information may be impeded and a recommendation is made for Uruguay to address this issue”.<sup>151</sup>

Furthermore, in Uruguay, the taxpayer has the right to inspect the files for a period of 5 days and the right to be notified of the exchange of information request. Prior to 2013, the right to notification was available without any exceptions. However, with Decree 378 of 2013, the right to notification was reduced to Uruguayan residents but still without any exceptions for these Uruguay residents. The peer review (para. 247 phase 2) stated that the notification in principle complies with the standard but the fact that it is ‘without any exceptions’ may constitute an obstacle to the effectiveness of the exchange of information. One example could be where the notification may thwart the success of the exchange of information. The peer review, therefore, recommends that Uruguay clarifies that the notification requirement does not hinder effective exchange of information in practice. As of August 2017, this clarification has not yet taken place.

Despite Uruguay being the only country of the 4 surveyed countries which has granted taxpayers’ rights during the exchange of information, this right has been watered down following the peer review recommendations (phase 1 and phase 2). As a result of the recommendations, Uruguay has reformulated their scope of application of the right to notification for Uruguayan residents.

Finally, none of the 4 surveyed countries have specific domestic law provisions addressing the rights to be granted after information has been provided by the requested state. These countries have only granted rights to taxpayers during the tax procedure, for instance the 30 days in Brazil for the taxpayer to react to the tax assessment; the possibility to be part in witness examinations during a tax trial in Colombia, and the possibility in South Africa to an update of the audit and to request the correction of information in terms of the Protection of Personal Information Act (some parts in force). However, this latter right requires the taxpayer to firstly discover that the information is held by SARS and is not accurate. Since there is no right to be informed before the information has been requested or sent by another state, the application of this right is unlikely.

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<sup>151</sup> Para. 121 Peer review Uruguay Phase 1, *supra* n. 28.

## 4. CONCLUSION, ASSESSMENT AND RECOMMENDATIONS

### 4.1. Conclusion and assessment

Following the comparative overview of Brazil, Colombia, South Africa and Uruguay of the rules in their international and domestic framework to deal with taxpayers' rights such as the right to confidentiality, the right to privacy and procedural rights; the second question addressed in this paper was whether the measures taken by the surveyed countries Brazil, Colombia, South Africa and Uruguay to protect the taxpayer's rights are consistent with the fundamental taxpayers' rights that belong to the rule of law of these countries and with the principles of good governance and fiscal transparency.

Several questions have been asked in this article, in respect of exchange of information and the assessment of the rule of law, good governance and fiscal transparency. These questions are: How is the confidentiality and privacy of the taxpayer protected? What safeguards have been introduced to protect the confidentiality and privacy of the exchange of information? And what is the role of the taxpayer and their procedural rights in the exchange of information?

These questions have been answered in respect of Brazil, Colombia, South Africa and Uruguay in Section 2 (right to confidentiality and privacy) and in Section 3 (procedural rights). The main conclusion is that the countries have introduced different rules to protect the right to confidentiality, right to privacy and the procedural rights in the exchange of information. However, the rules introduced by the surveyed countries do not ensure that the protection of the right to confidentiality and the right to privacy is effectively guaranteed. The results in sections 2 and 3 above show that these rules do not protect the taxpayer in case of breach of confidentiality, or misuse of the information exchanged. Therefore, section 4.2. will provide recommendations for Brazil, Colombia, South Africa and Uruguay to safeguard the right to confidentiality, right to privacy and taxpayers' procedural rights.

As part of the rule of law, taxpayers need to trust that the tax administration will protect their rights to confidentiality, privacy and the right to participate in the exchange of information. As stated by Bentley in respect of the rise of soft law but also applicable to the developments in the rules to exchange information "revenue administrators have been placed in a position where they have to engage with and understand taxpayers as much as they can. To do this effectively they have to protect taxpayers and set up the frameworks that provide effective rule of law both under the law and through the daily operational administration of the law".<sup>152</sup>

In respect of fiscal transparency, this article agrees with Schoueri that transparency should work in both directions. For Schoueri transparency "should be used as a mechanism for the creation of a mature relationship between state and citizen, and the result is that taxpayers feel part of the

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<sup>152</sup> D. Bentley. *The Rise of 'Soft Law' in Tax Administration- Good News for Taxpayers?* Asia-Pacific Tax Bulletin, January/February. IBFD, Amsterdam, 2008 at 38.

community and therefore involved in the process of granting states the means for their activities”.<sup>153</sup> In this context, it is submitted that the rule of law, good governance and fiscal transparency needs to address the relationship between the taxpayer and the tax administration.<sup>154</sup> This relationship will ensure that tax administrations have access to the information regarding the activities of the taxpayer while enhancing the voluntary cooperation by the taxpayer with the tax authorities in the requested state.<sup>155</sup> Finally, the protection of taxpayers’ rights will enhance the legitimacy of the multilateral instruments to exchange information vis-à-vis the taxpayer.<sup>156</sup>

Exchange of information has developed rapidly in the last decade and therefore, new instruments and new rules to exchange information have been introduced by the OECD following the political mandate of the G20. Examples of these changes are for instance the adoption of the new global standard on automatic exchange of information including also the possibility to automatically exchange financial account information and country-by-country reporting.<sup>157</sup> In this context, it is submitted that the safeguards to protect the right of confidentiality, right to privacy and the procedural rights are needed more now than ever due to the adoption of the new global standard of automatic exchange of information.

The analysis in Sections 2 and 3 demonstrate that exchange of information is subject to international instruments and the domestic rules of the exchanging countries regarding the type of information that can be exchanged, the use of the exchanged information and the use of safeguards to protect the right of the taxpayer to confidentiality and privacy. The taxpayers’ procedural rights are left to the domestic law of the countries. In respect of procedural rights, the surveyed countries (except Uruguay) do not have these rights, although the authors submit that these rights should be granted to the taxpayer. Furthermore, due to the peer review by the Global Forum, Uruguay has reduced

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<sup>153</sup> L.E. Schoueri and M.C. Barbosa. *Transparency: From Tax Secrecy to the Simplicity and Reliability of the Tax System* in *British Tax Review* (United Kingdom, Thomson Reuters, 20013/5) pp. 677 and 678. See also in the relation between transparency and trust in the tax administration. Erich Kirchler, et al. Enforced versus voluntary tax compliance: The “slippery slope” framework. *Journal of Economic Psychology*. Volume 29, Issue 2, April 2008, pp. 210-215. See also from a perspective of tax morale: Torgler, B. (2011), “Tax Morale and Compliance. Review of Evidence and Case Studies for Europe”, Policy Research Working Paper 5922, The World Bank, Washington.

<sup>154</sup> This changing relationship between the taxpayer and the tax administration and the problems have been also addressed by M.T. Soler Roch in *Tax Administration versus Taxpayer – A New Deal?*, 4 *World Tax J.* (2012), *Journals IBFD*.

<sup>155</sup> This has already addressed in para. 14.1. of the 2014 OECD Commentary to art. 26(3) as one of the benefits of the notification procedure. The OECD Commentary states that “Some countries' laws include procedures for notifying the person who provided the information and/or the taxpayer that is subject to the enquiry prior to the supply of information. Such notification procedures may be an important aspect of the rights provided under domestic law. They can help prevent mistakes (e.g. in cases of mistaken identity) and facilitate exchange (by allowing taxpayers who are notified to co-operate voluntarily with the tax authorities in the requesting State).”

<sup>156</sup> Accordingly, “the lack of participation and representation will influence the legitimacy of these instruments vis-à-vis the taxpayer and that therefore, the participation of taxpayers’ associations, tax advisers, business representatives and civil society are needed since these instruments should also provide a solution to the taxpayers’ problems and their rights”. I.J. Mosquera Valderrama, *Legitimacy and the Making of International Tax Law: The Challenges of Multilateralism*, 7 *World Tax J.* 3 (2015), *Journals IBFD*.

<sup>157</sup> See Common Reporting Standard and Multilateral Competent Authority Agreement (CRS MCAA) and Multilateral Competent Authority Agreement on the Exchange of Country by Country Reports (CbC MCAA).

these rights, mainly in respect of the procedure to lift the bank secrecy and the application of the right to notification for taxpayers.

This article argues that the taxpayer needs to have procedural rights before, during and after the exchange of information. The main argument is that the “taxpayer should have procedural rights in order to guarantee that the taxpayer has an active role to prevent situations that may result in a breach of confidentiality or misuse of personal and business data exchanged”.<sup>158</sup> Another argument for granting the taxpayer rights in the exchange of information process is that such exchange may result in a new assessment, fines or criminal prosecution. Therefore, “and taking into account that the taxpayer’s interest will be affected by the exchange, the taxpayer should have a right of standing (i.e. locus standi) to review the accuracy of the information, including the right to inspect the files, to be heard and to appeal against such exchange of information. This taxpayer right of standing is available, for example, in Switzerland (but, in that case, limited to tax procedures)”.<sup>159</sup> Other scholars have also argued that in countries where there is no notification during the exchange of information or it has been repealed (e.g. the Netherlands), at minimum a right to inspect the files should be given to the taxpayer.<sup>160</sup>

Simonek has argued that there should be a balance between exchange of information and taxpayers’ procedural rights. For Simonek, “a denial of any procedural rights to the person concerned in the information-supplying state may seriously affect his legitimate rights and interests. Further, such a denial is not necessary in order to guarantee an effective exchange of information process. A judicial review of the exchange of information in the requested state could be combined with measures to avoid undue delays”.<sup>161</sup>

In the same direction, the 2015 IFA general reporters, Pistone and Baker, argued that the approach towards exchange of information (EoI) of some countries that there is no reason to give the taxpayer any role or participation “is flawed in principle, and the error is also seen in the decision of the Court of Justice of the European Union in the Sabou case. The fact that the request for information takes place during the investigative stage does not mean that the taxpayer has no rights at that time. The taxpayer has the general rights to confidentiality and privacy at all stages. More specifically, most provisions for EoI, based either on tax treaties or on specific intergovernmental agreements, exclude from the EoI any matter that would disclose any trade, business, industrial, commercial or professional secret or trade process or any information the disclosure of which would be contrary to

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<sup>158</sup> I.J. Mosquera Valderrama, *The Rights of Multinationals in the Global Transparency Framework: McCarthyism?*, 18 *Derivs. & Fin. Instrums.* 1 (2016), *Journals IBFD*.

<sup>159</sup> *Ibid.*

<sup>160</sup> On this argument, see I. Burgers, *Taxpayers’ rights in het gedrang?*, *Nederlands Tijdschrift voor Fiscaal Recht* 2015/2867

<sup>161</sup> M. Simonek, *Taxpayers’ rights in the international exchange of information procedure: where is the right balance?* Special issue IFA 2015, 83 *Archives de Droit Fiscal Suisse*, May-June 2015, p. 877.

public policy. How are these safeguards for the taxpayer to be enforced if the taxpayer is not made aware of the proposed exchange and given an opportunity to challenge on these grounds?”<sup>162</sup>

It is submitted that the notification requirement should aim at guaranteeing the taxpayer a fair procedure and not at preventing or unduly delaying the exchange of information process. This conclusion is also in line with the 2015 IFA general reporters’ recommendation regarding notification as best practice in exchange of information on request (EoIR) with some specific limitations.<sup>163</sup> In this context, the 2015 IFA general reporters have argued that the taxpayer should have the right to be informed and to participate in the exchange of information even if there is no tax dispute between the taxpayer and the tax authority.<sup>164</sup>

#### **4.2. Recommendations**

This article has argued that the differences among rules and the lack of protection for taxpayer information may hinder the effective protection of the taxpayer and the tax administration should guarantee the protection of the taxpayer’s rights as part of the rule of law. Therefore, in this article, the authors recommend that these rights should be guaranteed by countries as part of the rule of law and to enhance global fiscal transparency. The following paragraphs provide three recommendations addressing the right to confidentiality, the right to privacy and the taxpayers’ procedural rights. These recommendations may be extended to other developing countries on a similar economic and legal situation. However, further research will be needed to see whether the conclusions of this article are also applicable to (other) developing countries.

##### ***First recommendation***

The first recommendation addresses the protection of confidentiality. The taxpayer’s right to confidentiality differ among countries. In general, this right has been left to international instruments and domestic law, however, it is not clear what is being regulated under taxpayer information and how confidentiality is effectively safeguarded in the surveyed countries. The comparison helps to exchange best practices and to learn from each other. Of the surveyed countries, South Africa

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<sup>162</sup> Pasquale Pistone & Philip Baker. *The Practical Protection of Taxpayers’ Fundamental Rights. International Fiscal Association (IFA). Cahiers de droit fiscal international*. Volume 100B. International Bureau of Fiscal Documentation, Amsterdam, the Netherlands, 2015.

<sup>163</sup> Accordingly, the IFA general reporters stated that notification should take place but it should not constitute an obstacle to the exchange of information in case that the taxpayer “launch a series of legal moves to prevent information from being supplied: if these moves are drawn out, it may prevent the EoIR taking place for months or years, or even prevent it completely. However, to totally refuse to inform the taxpayer because of these concerns is excessive and disproportionate. It is perfectly possible to deal with this in two ways. First, by making provision for the taxpayer normally to be informed, but for that requirement to be dispensed with if the requesting states asks, on reasoned grounds, that the taxpayer should not be informed. Secondly, the judicial procedures by which a taxpayer may challenge a request for exchange do not necessarily have to be elaborate and long drawn out. In most cases they will concern a simple question: whether the request is or is not within the terms of the provisions for exchange, or whether the various guarantees for confidentiality apply. Very short time limits and limited appeal rights should ensure that the delays are minimal.” Ibid. p. 60.

<sup>164</sup> Ibid, p. 61.

provides the most detailed rules regarding the disclosure of confidential information, the types of information that can be disclosed and to whom.

In this regard, two best practices have been identified in South Africa that may be implemented by the other surveyed countries and by other developing countries. The first is the introduction of detailed rules concerning confidentiality of taxpayer information and procedural rules including a clear definition of taxpayer information to ensure that this information will be protected under the confidentiality provisions.<sup>165</sup> In South Africa, biometric information can only be disclosed to the Police Service or the National Prosecuting Authority for their performance of their duty. In some cases, the recipient of the information is required to take an oath or solemn declaration to comply with the requirements of Chapter 6 of the Tax Administration Act addressing the confidentiality of the information.<sup>166</sup>

A further practice that could also be adopted by other countries is the training that takes place in South Africa to familiarize tax officials with tax treaties including the exchange of information in an international environment. This training has ensured that in every local revenue office there is at least one tax official that has the expertise to gather the information necessary to comply with an information exchange request.

The survey demonstrates that all the surveyed countries have introduced safeguards to restrict the access to tax information and to ensure that the information exchanged is protected. However, the restrictions to the access to confidential information, the storage of the information (including requests of information within the tax administration) and, obtaining the information required from another tax unit are addressed differently by each of the surveyed countries.

To safeguard the confidentiality of information exchange, Brazil and South Africa have issued manuals or regulations. Brazil has followed the OECD Manual for Exchange of Information whereas South Africa has introduced detailed regulations for the automatic exchange of information on February 2016. Furthermore, from the surveyed countries only Uruguay has ratified the 1980 (updated in 2013) OECD Guidelines on the protection of Privacy and Transborder Flows of Personal Data.<sup>167</sup>

In this context, the authors recommend to Colombia and Uruguay to develop such manuals taking into account the OECD Manual for Exchange of Information. The authors also recommend for Brazil, Colombia and South Africa to ratify the OECD Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data 1981 and its Additional Protocol of 8 November 2001<sup>168</sup>

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<sup>165</sup> See Section 2.3.2. above.

<sup>166</sup> See Section 2.3.2. above.

<sup>167</sup> See Section 2.1. above.

<sup>168</sup> The 1980 Guidelines (with the 2013 update) contain the following principles: (i) collection limitation (ii) data quality principle; (iii) purpose specification principle; (iv) use limitation principle; (v) security safeguards

Where business and personal information of the taxpayer is leaked to the press or third parties, there may be financial and reputational consequences for the taxpayer. Clear sanctions or remedies are required in such instances.

In order to address the differences in resource capacity between developed and developing countries, developing countries could benefit from the assistance of developed countries regarding technological equipment, resources and administrative capacity to deal with the exchange of information.<sup>169</sup>

In terms of transparency, it is important for tax administrations to make publicly available the problems that have been encountered regarding the protection of confidentiality and how they have dealt with cases regarding the breach of confidentiality. Until now, there is no information regarding the sanctions and the use of remedies by taxpayers upon a breach of confidentiality.

### ***Second recommendation***

In general, the right to privacy has been left to international instruments and domestic law. However, the application of the right to privacy, bank secrecy and professional secrecy information to taxpayer information is not always clear and, in some cases, such as data protection, the laws have been not implemented. Both Brazil and South Africa have Data Protection Laws that are partially enforced (South Africa) or are still in a draft Bill form (Brazil). In Uruguay, there is a Data Protection Law but this Law is not applicable in case of automatic exchange of information. Therefore, it is recommended for these countries to make all efforts to adopt or enforce these Laws. It is also recommended to apply these data protection laws in case of automatic exchange of information in order to establish the responsibility of the tax administration (as data controller) regarding the protection of individuals with regard to the processing of personal data.

The laws on Data Protection of the surveyed countries appear to a large extent to be based on the principles of the 1995 EU Data Protection Directive.<sup>170</sup> This 1995 Directive has been recently (April 2016) replaced by a new Data Protection Directive and the General Data Protection Directive with the aim to update the data protection in accordance with EU developments in the field of data

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principle; (vi) openness principle; (vii) individual participation principle; and (viii) accountability principle. See F. Debelva and I. Mosquera, *supra* n. 19.

<sup>169</sup> Some pilot projects have already been initiated which partner developed and developing countries to help developing countries to implement automatic exchange of financial account information developed by the Common Reporting Standard. However, the number of countries participating in this project are limited, and up till the time of writing (August 2017) few pilot projects have been carried out. The pilot projects and partners are for instance Albania-Italy; Colombia-Spain; Ghana-the United Kingdom; Morocco -France; Philippines - Australia; Pakistan- the United Kingdom. Furthermore, as stated in the 2016 Annual Report Global Forum on Transparency, three AEOI Implementation projects are underway with Saint Kitts and Nevis and Seychelles and a new project has been launched with Uruguay partnering with Mexico. 2016 Annual Report Global Forum on Transparency at 26. See F. Debelva and I. Mosquera, *supra* n. 19.

<sup>170</sup> If one example may illustrate this is for instance the conditions for lawful processing of data and the transfer of personal data to third countries. Text of the 1995 Directive available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995L0046&from=en>

protection. Should this revised EU Directive reflect greater protection for taxpayers, from a legal perspective, law-makers will need to review the current EU developments and legislate changes to their Data Protection Laws where these changes contribute to the safeguarding of the right to privacy. For instance, in respect of the new EU Data Protection Directive the specific definitions of personal data, genetic data and biometric data (art. 3) and the protection of the processing of these data as special categories of personal (sensitive) data (art. 10) may represent an enhancement since the 1995 Directive.<sup>171</sup>

Finally, distinctions remain between the type of information protected under the right of confidentiality and the data protection laws dealing with the right to privacy. The countries refer in their data protection laws to sensitive data, special data and biometric data. However, it is not clear whether such data is regarded as taxpayer information and will be afforded the same protection under the right of confidentiality and the right of privacy.

The authors submit that the use of personal sensitive data, biometric data and/or genetic data may also prevent identity fraud. However, specific rules to protect this data and to make use of the data in the exchange of information would have to be drafted. For this purpose, it is recommended that tax rules be drafted concerning the inclusion of personal sensitive data, biometric data and genetic data as taxpayer information. The Tax Administration Act of South Africa, for example, classifies biometric information as taxpayer information, and therefore such information is subject to the rules of confidentiality under the Tax Administration Act (see section 2.3.2. above).<sup>172</sup>

### ***Third recommendation***

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<sup>171</sup> For this purpose, the definitions used in the revisited Data Protection Directive may be used. In art. 3 of the Directive, the following definitions are provided:

- (i) personal data' means any information relating to an identified or identifiable natural person ('data subject'); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person;
- (ii) genetic data' means personal data, relating to the inherited or acquired genetic characteristics of a natural person which give unique information about the physiology or the health of that natural person and which result, in particular, from an analysis of a biological sample from the natural person in question;
- (iii) biometric data' means personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data.

Art. 3 Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0680&from=EN>

<sup>172</sup> Section 67 of Chapter 6 on Confidentiality of the Information of the 2011 Tax Administration Act states that Chapter 6 applies to:

- “(a) SARS confidential information as referred to in section 68(1); and
- (b) taxpayer information, which means any information provided by a taxpayer or obtained by SARS in respect of the taxpayer, including biometric information.”



The taxpayers' procedural right to be notified, to appeal or to object are not available in Brazil, Colombia or South Africa. Some rights mainly the right to inspect the file and to be notified are available in Uruguay in respect of exchange of information on request. The authors submit that there should be some taxpayers' procedural rights before, during and after the exchange of information. These rights ought to be exercised while taking cognisance of the right to inspect the file and due process (Colombia), the fair and administrative procedure (South Africa), and the due process clause (in Brazil<sup>173</sup> and in Uruguay). Granting of such rights would also ensure the accuracy of the information provided by the requesting state.

In further support of such rights, it is submitted that such rights may limit the risk that the exchange of information is conducted for political purposes (e.g. in Colombia). Furthermore, such rights guarantee that the information prepared for exchange protects the confidentiality of the trade and business secrets of the taxpayer. Moreover, participation by the taxpayer with the tax administration of the developing country where there is an arbitration procedure with a developed country with visible larger resources and experience in arbitration may provide further advantages. In such cases, the participation of the taxpayer may guarantee greater financial equality between the parties i.e. developing country and developed country in arbitration.

It is also submitted that taxpayers' rights should be also granted by the requested state to guarantee fairness in the procedure. Once the information is exchanged, there is no certainty that the taxpayer will be heard or that he will have the right to produce and contest evidence in the requesting state. Therefore, the taxpayer's right to be notified should be granted but with certain limitations i.e. if it can be demonstrated that notifying the taxpayer would impede or prejudice the purpose of the request. In addition, the taxpayer should be also informed to allow the taxpayer the right to challenge the accuracy of the information before the exchange takes place. In South Africa, international agreements do not appear to add to procedural rights, but rather refer to the domestic law. Basic protection standards for the rights of taxpayers may be better guaranteed in an international agreement (as this has equal standing with domestic law) rather than allowing each contracting state to add such protection unilaterally, which has been demonstrated to vary. In the same direction, at least in the case of Colombia, human right protections set off in tax treaties would have a slight preference over domestic protections, except if those domestic protections were to be set in statutory laws or in the Constitution itself.

The OECD when introducing the multilateral instruments to address standard of transparency and more recently the standard on automatic exchange of information has left the protection of taxpayers' rights to domestic law. As shown in the description above, some countries (mainly Uruguay) have decided to also introduce some reference to these rights in their DTCs and TIEAs (see section 2.2. above) with respect to information exchange on request. However, the situation will change with the implementation of automatic exchange of information with databases set up containing information to be accessed by countries participating in the automatic exchange of

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<sup>173</sup> The due process is listed among the individual and collective rights in Article 5, LIV (substantive) and LV (procedural) of the Brazilian Constitution.

information. In 2014, the General Reporter for the European Association of Tax Law Professors already stated that there is “a tension between the legitimate rights of States to protect their tax base by collecting information of taxpayers as much as possible to guarantee taxation and the legitimate rights of taxpayers on privacy and to be protected against the almighty power of these States”.<sup>174</sup> How the OECD and individual countries will protect the right to confidentiality, the right to privacy and the procedural rights remains a question as does the measures required to balance the power between the tax administration and the taxpayer.

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<sup>174</sup> G. Marino. General Reporter. *New Exchange of Information versus Tax Solutions of Equivalent Effect*. EATLP Annual Congress Istanbul 29-31 May 2014. Amsterdam. IBFD Publications. 2015. p. 46.