

# A Study on the Protection of Taxpayer Rights in an Era of Enhanced Exchange of Information: How Can the Chinese Approach Be Improved?

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*This study explores taxpayer protection under the exchange of information (EOI) in China. From a comparative study between Chinese law and European law in general (combining EU law and the ECHR as interpreted by the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR)), possible improvements for the Chinese approach are suggested. The protection of taxpayers' rights is divided into three different layers: confidential treatment of personal data, involvement of the taxpayer in the EOI-processes, and the right to remedy of taxpayers that have been treated incorrectly. Within these layers the study recommends to provide additional measures to attempt to effectively address data leakages or unjustified use of them, improved passive and active access for taxpayers into the EOI-process, and ex ante and ex post remedies in the event of violations.*

**Keywords:** Cross-border exchange of tax-related information, taxpayer rights, data protection, privacy and information confidentiality, taxpayer participation under the EOI, effective remedy, Chinese law, European fundamental legal principles.

## I INTRODUCTION

With the globalization of economies, many taxpayers generate cross-border income through multinational structures or cross-border transactions. Domestic tax administrations lack a global overview which encourages tax evasion and avoidance.<sup>1</sup> This erodes domestic tax bases, leads to inequality between (domestic and internationally active) taxpayers, and further undermines taxpayers' compliance.<sup>2</sup> To combat this, tax authorities have gradually introduced the exchange of tax-related information.<sup>3</sup> During the last two decades, this has evolved from exchange of information on request<sup>4</sup> to an automatic exchange.<sup>5</sup> For many years, the Organization for

Economic Co-operation and Development (OECD) has taken an active role in facilitating this exchange by creating a legal framework to provide guidance and practical support.<sup>6</sup> Stimulated from US initiatives,<sup>7</sup> the automatic exchange of information (AEOI) has faced unstoppable momentum whereas the OECD also interacted with the European Union (EU) and the G20 to promote the exchange of tax-related information between jurisdictions. Hence, the *Common Reporting Standard* (CRS) has enticed numerous jurisdictions to implement an upgraded framework known as the AEOI.<sup>8</sup>

However, this enhanced system can potentially result in a greater risk of infringements,<sup>9</sup> procedural errors,<sup>10</sup> and

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<sup>1</sup> Arthur J. Cockfield, *Big Data and Tax Haven Secrecy*, 18 Fla. Tax Rev. 483, 494 (2016).

<sup>2</sup> European Commission, *European Semester Thematic Factsheet: Curbing Aggressive Tax Planning 2* (2017).

<sup>3</sup> OECD, *Tackling Aggressive Tax Planning Through Improved Transparency and Disclosure 12* (2011).

<sup>4</sup> At the London 2009 Summit, G20 leaders called on countries to adopt and implement the international standard of exchanging information on request. See G20, Declaration on Strengthening the Financial System – London Summit, [https://www.imf.org/external/np/sec/pr/2009/pdf/g20\\_040209.pdf](https://www.imf.org/external/np/sec/pr/2009/pdf/g20_040209.pdf) (accessed 21 Jan. 2020).

<sup>5</sup> At the Saint Petersburg 2013 Summit, G20 leaders called on all other jurisdictions to implement the automatic exchange of information as the new global standard. See G20 Leaders' Declaration, [http://www.g20.utoronto.ca/2013/Saint\\_Petersburg\\_Declaration\\_ENG.pdf](http://www.g20.utoronto.ca/2013/Saint_Petersburg_Declaration_ENG.pdf) (accessed 21 Jan. 2020).

<sup>6</sup> For instance, the OECD published the '*Standard for Automatic Exchange of Financial Account Information in Tax Matters – Implementation Handbook (Second Edition)*' (2018) to provide practical guidance for government officials and financial institutions for implementing the AEOI, <http://www.oecd.org/tax/exchange-of-tax-information/implementation-handbook-standard-for-automatic-exchange-of-financial-information-in-tax-matters.pdf> (accessed 21 Jan. 2020).

<sup>7</sup> The Foreign Account Tax Compliance Act, issued by the US Congress in 2010, requires foreign financial institutions and certain other non-financial foreign entities to report the foreign assets held by their US account holders or be subject to withholding tax on their domestic payments, <https://www.irs.gov/businesses/corporations/foreign-account-tax-compliance-act-fatca> (accessed 21 Jan. 2020).

<sup>8</sup> See CRS by jurisdiction at, <https://www.oecd.org/tax/automatic-exchange/crs-implementation-and-assistance/crs-by-jurisdiction/> (accessed 25 Sep. 2021).

<sup>9</sup> Xavier Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency 209* (Edward Elgar 2015).

<sup>10</sup> Arthur J. Cockfield, *Protecting Taxpayer Privacy Rights Under Enhanced Cross-Border Tax Information Exchange: Towards a Multilateral Taxpayer Bill of Rights*, 42 U. Brit. Colum. L. Rev. 420, 441 (2010).

data protection violations.<sup>11</sup> Extending the EOI also creates concerns as the mechanism is deemed to offer taxpayers insufficient protection.<sup>12</sup> Currently, there has yet to be a global consensus on how and in what circumstances taxpayer rights should be protected under the AEOI. Without a uniform international approach, this is largely dependent upon the domestic legislation of the participating states. As the EOI continues to be implemented worldwide, additional research on this protection is needed. This contributes to the improvement of taxpayers' position and might lead to a commonly recognized legal standard for taxpayer protection among the participating states.

The People's Republic of China (PRC) also participated in this process by implementing the AEOI in 2018. As a representative of developing countries active in international taxation, it is keen to update its legal tax system in accordance with international trends with regard to the EOI, although the concerns that have been raised also target the Chinese legal framework: While the EOI has proliferated in China in recent years, the protection of taxpayers is deemed to be inadequate. As Yue Peng claimed, the propelling EOI has proposed many challenges to the Chinese tax administration and required the country to strengthen the protection of personal data in the framework's implementation.<sup>13</sup> This view is echoed by Duoqi Xu and Jie Lian who argued that the current Chinese law does not provide adequate protection for the taxpayer's right to information under the EOI procedure.<sup>14</sup> Additionally, Tianyong Liu advocated for enhanced protection of taxpayers' participation rights in the EOI process in China.<sup>15</sup> It is claimed to be necessary in order to grant certain participation rights and the rights to appeal for remedies to taxpayers under the EOI in China.<sup>16</sup> Thus, exploring ways to bolster the protection of taxpayer rights in the country becomes imperative. Concerning tax law, the *Law on the Administration of Tax Collection of the PRC (LATC)*<sup>17</sup> constitutes the fundamental law in the field of taxation. China is not a case law

jurisdiction; its judges are supposed to decide cases based on written legal instruments as they only interpret and apply the law rather than make it. The only exception is the concept of 'guiding cases' that are officially published by the Supreme People's Court. They must be referred to by the courts at all levels when adjudicating similar cases.<sup>18</sup> Nevertheless, even the guiding cases are not a formal source of law. Hence, '*they should not be cited as legal bases in the holding section of adjudication documents, but they can serve as important reasons that influence judges during adjudication and be quoted in the reasoning part of the adjudication documents*'.<sup>19</sup> Therefore, the primary legal sources in China with regard to taxpayer protection should be written legal instruments related to taxation.

Chinese case law plays a limited role in providing legal guidance for taxpayer protection particularly in the context of the EOI. Chinese taxpayers rather negotiate with the administration or apply for a tax review during which they can settle with the tax authority at any stage. Hence, a significant number of tax disputes, including cases involving taxpayer rights under the EOI procedures, are resolved before a tax proceeding is brought before a court. However, neither these negotiations nor tax reviews are publicly accessible in China. In addition, due to the rather discouraging trend to report about EOI activities<sup>20</sup> and for the purpose of protecting state secrets, privacy, and trade secrets,<sup>21</sup> some judgments regarding taxpayer rights under the EOI system might also not be published and are only disclosed to the concerned parties. These judgments are hence difficult to obtain. Whereas some aspects of judicial cases might be related to this topic, they are not particularly representative. In addition, since they are not a formal source of law in China, they do not bind judges in later cases. Hence, this study focuses on Chinese legislation instead of searching for relevant Chinese case law.

As the existing legal framework seems to be inadequate, this article investigates China's attention for taxpayer protection and explores several feasible solutions for

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<sup>11</sup> Marcel Schaper, *Data Protection Rights and Tax Information Exchange in the European Union: An Uneasy Combination*, 23 Maastricht J. Eur. & Comp. L. 514, 515 (2016).

<sup>12</sup> Niels Diepvens & Filip Debelva, *The Evolution of the Exchange of Information in Direct Tax Matters: The Taxpayer's Rights Under Pressure*, 4 EC Tax Rev. 210, 218 (2015).

<sup>13</sup> Yue Peng, *Personal Data Protection in the Automatic Exchange of Information*, 1 Law Sci. 156, 168.

<sup>14</sup> Duoqi Xu & Jie Lian, *Protection of Taxpayers' Right to Information in the International Exchange of Information*, 5 Tax'n Research 82, 83–84 (2018).

<sup>15</sup> Tianyong Liu, *Taxpayer Rights' Protection in Tax Information Exchange System*, 1 Int' Tax'n in China 39, 42 (2013).

<sup>16</sup> Tianjian Ouyang, *Tax Information Exchange and China's Countermeasures*, 1 Foundation for L. & Int'l Affairs Rev. 40, 51 (2020).

<sup>17</sup> Promulgated in 1992, came into force on 1 Jan. 1993, first amended in 1995, revised in 2001, and came into force on 1 May 2001, amended later in 2013 and 2015; the 2015 amendment came into force on 24 Apr. 2015 (PRC LATC).

<sup>18</sup> Article 7 of the Provisions of the Supreme People's Court Concerning Work on Case Guidance, Fa Fa [2010] No. 51, came into force on 26 Nov. 2010.

<sup>19</sup> Feng Guo, *On the Issue of the Application of the Supreme Court's Guiding Cases*, SLS CGCP Traditional Commentary No. 23 (2018), <https://cgc.law.stanford.edu/commentaries/clc-1-201806-23-guo-feng/> (accessed 31 Aug. 2019).

<sup>20</sup> For example, Art. 31 PRC Rules for the International Exchange of Tax Information provides that 'the general work relating to the EOI and the cases investigated by the tax authority taking advantage of the tax-related information exchanged are generally not publicized and reported on various news media such as radio, television, websites and publications'.

<sup>21</sup> Article 65 PRC Administrative Procedure Law provides that cases involving state secrets, privacy and trade secrets can be the exception to the public disclosure of the judgment.

improving the domestic legal framework against the background of the EOI. This will be accomplished with a comparison with the general European legal framework in particular as given effect under EU law and the European Convention on Human Rights (ECHR), further interpreted in the jurisprudence of both the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).<sup>22</sup> The EU attempted to transfer tax-related information between different tax administrations already in 1977 and issued a directive to promote the exchange of financial information between EU Member States.<sup>23</sup> This legal framework was substantially updated during the last decade. Currently, in the specific context of the EOI within the EU, the *Directive 2011/16/EU on Administrative Cooperation in the Field of Taxation* (DAC) and its several amendments as implemented in domestic tax legislation constitutes the main legal instrument for EU Member States. Additionally, the ECHR as interpreted by the ECtHR as well as the European Charter of Fundamental Rights (CFR) and subsequent EU regulations interpreted by the CJEU yield comprehensive legal guidance on the protection of personal data and other fundamental rights. The ECHR and the CFR seldom specifically mention the 'rights of the taxpayer',<sup>24</sup> but their legal protection derives from these provisions involving human rights protection as applied in a particular tax context. Human rights protect individuals, especially against the excessive exercise of public power whereas taxation is interference with individuals' ownership. Hence 'taxation and human rights are linked through the protection of the taxpayers' rights'.<sup>25</sup>

In conclusion, EU Member States are currently confronted with a well-established two-sided mechanism to guide processes of information exchange and helpful data on dealing with taxpayer protection under the EOI, which is a first reason to choose this legal framework for comparison. Additionally, both the EU Member States and China participate in the CRS which binds them to automatic information exchange under this framework. Both must address the dual issue of implementing the AEOI

while still maintaining taxpayer protection. EU Member States already gained considerable insights on the matter from the long history of the EOI in the EU. A comparison with the (double) European framework thus potentially yields valuable insights for formulating guidelines to improve the protection of taxpayer rights in China.

This comparative study comprises five main chapters. The first chapter develops a minimum standard of taxpayer protection with three different layers. Subsequently, each layer will be analysed from a comparative approach preceded by a description of its recognition under both the existing Chinese and European legal regimes. A conclusive chapter summarizes the proposed improvements of taxpayer protection in China.

## 2 A THREE-LAYERED MINIMUM STANDARD OF TAXPAYER PROTECTION UNDER EOI

Although EOI regimes provide some measures to prevent their abuse,<sup>26</sup> the protection of taxpayers heavily relies on the domestic law of the states participating in the exchange. The OECD recognizes that 'given the diversity of environments faced by revenue authorities around the world, the specific details of the rights and obligations vary somewhat by country'. Nonetheless, 'there are ... a number of common threads that can be identified'.<sup>27</sup> Hence, some basic rights are widely recognized in OECD countries such as the right to confidentiality and secrecy, the right to privacy, the right to be heard, and the right to appeal.<sup>28</sup> Notwithstanding this divergence, this common ground should make it possible to establish an ideal minimum standard for the protection of taxpayer rights to be included in domestic legislation.

A minimum standard not only protects taxpayers but is also beneficial for the EOI procedure itself. Corresponding to this standard can avoid a potential decline of information exchange requests. Hence, it would be helpful to avoid the potential failure of the EOI.<sup>29</sup> Additionally, it also supports the effectiveness of the EOI agreements. In the cross-border context, 'due to the various national sovereignties', taxpayers' protection faces more challenges 'but if States strive to achieve

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<sup>22</sup> Within the EU, different legal regimes interfere with each other. EU Member States are required to ensure the implementation and enforcement of Union law and are reigned by a loyalty principle of sincere cooperation even when applying domestic legislation. In particular, besides the EU treaties and secondary EU law, this article focuses on the Charter of Fundamental Rights as applicable for European institutions and EU Member States in their application of EU law. In addition, all EU Member States have signed the European Convention on Human Rights and are hence also subject to these rules as interpreted by the ECtHR. Therefore, this double layer will be considered as the legal framework that is appropriate for comparison rather than particular legislation of one single EU Member State.

<sup>23</sup> Council Directive 77/799/EEC of 19 Dec. 1977 concerning Mutual Assistance by the Competent Authorities of the Member States in the Field of Direct Taxation, as currently replaced by Directive 2011/16/EU.

<sup>24</sup> Article 1 of the Protocol to the ECHR (1952) stipulates that the protection of property must not impair the right of a State to secure the payment of taxes, see, [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf) (accessed 18 Aug. 2021), at 31.

<sup>25</sup> Mirugia Richardson, *The EU and ECHR Rights of the Defence Principles in Matters of Taxation, Punitive Tax Surcharges and Prosecution of Tax Offences*, 6 EC Tax Rev. 323, 334 (2017).

<sup>26</sup> For example, measures ensuring information confidentiality and reasons to reject an exchange.

<sup>27</sup> OECD, *Taxpayer's Rights and Obligations - Practice Note 3* (2003), [http://www.oecd.org/tax/administration/Taxpayers'\\_Rights\\_and\\_Obligations-Practice\\_Note.pdf](http://www.oecd.org/tax/administration/Taxpayers'_Rights_and_Obligations-Practice_Note.pdf) (accessed 21 Sep. 2020).

<sup>28</sup> *Ibi.* Referring to OECD Committee on Fiscal Affairs, *Taxpayers' Rights and Obligations: A Survey of the Legal Situation in OECD Countries* (1990).

<sup>29</sup> Xavier Oberson, *General Report*, in *Exchange of Information and Cross-border Cooperation Between Tax Authorities* 57 (IFA ed., IFA Cahiers Vol. 98b 2013).

greater coordination of their fiscal activities', it would encourage developments for a more robust protection for taxpayers.<sup>30</sup> Hence, safeguarding taxpayer's adequate protection is also beneficial to the effectiveness of the EOI *per se*.

An effective EOI instrument covers the efficient exchange of information, reduces costs associated with cross-border information transfers, and also guarantees taxpayer rights when the information is transferred.<sup>31</sup> Therefore, a minimum standard may serve as the fundamental requirement for the protection of taxpayer rights while maintaining the efficiency of the EOI instrument. Nevertheless, *'the objectives of uniformity cannot ignore the different levels of efficiency and culture of the administration apparatus in the world that can lead to problems with developing countries'*.<sup>32</sup> Therefore, the standard should remain feasible for all participating states to implement it in their domestic legal system. Taxpayer protection in the EOI process echoes the general need for a substantive and procedural justice of a tax administration. Its fundamental elements can be drawn from the long-accepted principles of the rule of law, the common ideas on the protection of fundamental rights, and the experience from administrative practices in general.<sup>33</sup> As such, taxpayers are entitled to the respect of their rights such as privacy and confidential treatment of their data. They should be entitled to procedural rights in order to be able to determine whether their information has been appropriately obtained and used by the tax administration. Finally, in the event of infractions, remedial measures should be foreseen for redressing arising failures. A minimum standard for the protection of taxpayer rights under the EOI should at least include these elements. Hence, the general framework of the minimum standard to be guaranteed under domestic legislation may be established throughout a three-tier approach.

## 2.1 Treatment of Personal Information by Tax Administrations

A smooth operation of the EOI mechanism supposes taxpayers' enthusiasm and cooperation and avoids their

resistance. They generally will not oppose the exchange if they can be assured that secrecy will be maintained when their information is exchanged and the information will be used only for the intended processes. This requires its confidential treatment such as the acquisition of information in conformity with legal procedures (i.e., through legitimate and proper EOI)<sup>34</sup> and the implicit protection against unlawful disclosure or use of the exchanged information. Confidentiality with regard to the tax-related information is essential for strengthening taxpayer protection under the (A)EOI<sup>35</sup> and has been recognized as *'a basic minimum standard that all countries must comply with'*.<sup>36</sup>

Hence, taxpayers should have *'general rights to confidentiality and privacy at all stages'* under the EOI mechanism.<sup>37</sup> The confidential tax-related information to be exchanged between participating states may cover various elements, including taxpayers' privacy and personal financial data. In the context of evolving AEOI, *'it is essential to establish a playing field between the public interest pursued with the exchange of information and the guarantees of confidentiality, adequate use and protection of taxpayer data'*.<sup>38</sup>

## 2.2 Taxpayers' Involvement in Exchanging Procedures

Ensuring due process and procedural justice requires fairness and high quality in the decision-making process of administrations.<sup>39</sup> In a tax context, procedural fairness implies ensuring the neutrality and unbiasedness of tax proceedings, providing taxpayers with the opportunity to vocalize their concerns, and treating taxpayers fairly and respectfully.<sup>40</sup> Their involvement in public affairs that is guaranteed by the active exercise of participation rights positively influences tax morale.<sup>41</sup> Hence, ensuring taxpayers' participation and providing them with a platform to express their opinion with regard to tax decisions significantly influences procedural justice. Their right to be informed about information exchange procedures and

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<sup>30</sup> Menita Giusy De Flora, *Protection of the Taxpayer in the Information Exchange Procedure*, 45 Intertax 447, 455 (2017).

<sup>31</sup> Cockfield, *supra* n. 10, at 420, 454.

<sup>32</sup> *Ibid.*, at 420, 459.

<sup>33</sup> For example, Art. 2 of the Treaty on European Union provides that 'The Union is founded on the values of respect for ... the rule of law and respect for human rights ...'. Art. 5(1) and 33(3) of the Constitution of People's Republic of China (PRC) states that 'The PRC implements the rule of law ...' and 'The State respects and protects human rights'. Several fundamental rights of citizens are widely protected in the CFR, the ECHR and the PRC Constitution (Chapter Two).

<sup>34</sup> The domestic tax authority should also collect the information to be exchanged in conformity with legal procedures before transferring the information to another tax authority, which falls within the scope of domestic legislation concerning general tax procedures but not specific rules involving EOI. Hence, it will not be a particular focus in this study.

<sup>35</sup> Xiaoqing Huang, *Ensuring Taxpayer Rights in the Era of Automatic Exchange of Information: EU Data Protection Rules and Cases*, 46 Intertax 225, 239 (2018).

<sup>36</sup> Philip Baker & Pasquale Pistone, *General Report*, in *The Practical Protection of Taxpayers* 28 (IFA ed., IFA Cahiers Vol. 100b 2015).

<sup>37</sup> *Ibid.*, at 61.

<sup>38</sup> Saturnina Moreno González, *The Automatic Exchange of Tax Information and the Protection of Personal Data in the European Union: Reflections on the Latest Jurisprudential and Normative Advances*, 25 EC Tax Rev. 146, 161 (2016).

<sup>39</sup> Kristina Murphy, *The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders*, 28 L. & Hum. Behavior 187, 189 (2004).

<sup>40</sup> Nina Peršak, *Procedural Justice Elements of Judicial Legitimacy and Their Contemporary Challenges*, 6 Oñati Socio-legal Series 749, 752 (2016).

<sup>41</sup> Bruno S. Frey, *Deterrence and Tax Morale in the European Union*, 11 Eur. Rev. 385, 395 (2003).

their right to be heard can be of assistance for protecting their rights of defence which is a fundamental aspect for maintaining a due process and procedural justice. This prevents potential encroachments.

Hence, this second layer attempts to safeguard an informed taxpayer's involvement in tax administration processes and to protect their participation rights to ensure procedural fairness of the EOI process. A taxpayers' right to information can be divided into an active (right to access information) and passive aspect (right to be informed/notified). The right to be heard further complements this as a third 'highly effective taxpayer right'.<sup>42</sup> Hence, a second layer of the minimum standard considers the protection of taxpayers' rights to access information, be notified, and be heard.<sup>43</sup> Under an ideal minimum standard, these three fundamental procedural rights are especially considered to be essential for taxpayers' meaningful participation in the EOI procedure. Although their precise scope may vary from country to country, they are recognized in China, the EU, and in other jurisdictions worldwide.<sup>44</sup>

- 1) The active right to access information. Under the EOI mechanism, taxpayers should have the right to question the procedure and the information being exchanged. This guarantees their ability to obtain the necessary knowledge to follow up with the tax collection and administration. It allows taxpayers to know how and why tax decisions that affect them are made, eventually adapting it to specific criteria outlined by the tax administrations. They can better monitor tax administrations' behaviours and avoid potential mismanagement or corruption which leads to a much more comprehensive supervision of the latter's integrity. Hence, guaranteeing an active right to access information can help to avoid malpractices of tax administrations. Ensuring the right to obtain this information also encourages taxpayers' participation in the decision-making process. It is a prerequisite for taxpayers to be included in the EOI procedure and the precondition for exercising any other taxpayer-related rights. In the particular context of personal data protection, the data subjects' right of access is also deemed to be a necessary prerequisite for them to exercise other participation rights (e.g. the right to rectify and to erase).<sup>45</sup>

- 2) The passive right to be informed. In addition to an active right to access information, tax administrations should also notify taxpayers of the information that involves their individual significant interests that cannot be expected to be voluntarily learned from taxpayers' own knowledge. Without the notification, such information, e.g., tax penalties, will not easily be aware of by the taxpayer since it is initially formed through a unilateral decision of the tax administration.

Under the EOI mechanism, such as the EOI on request, tax administrations may thus inform taxpayers of an upcoming exchange of information. Ensuring the right to be informed has particular significance for taxpayers in this case since those who are involved will not be aware that their information will be transferred between the tax authorities unless the latter has notified them. Hence, '*the international exchange of information legislation should at least warrant the right of the person involved to be informed of the fact that these data are supplied to another State. Such a right serves not only the purpose of legal certainty, but also that of transparency and verifiability of governmental actions*'.<sup>46</sup> Taxpayers should also be notified of the detailed information regarding the exchange, e.g. when it will be implemented and who will receive the information.

Under the EOI on request, although tax authorities should notify the taxpayers who are involved, it may be quite challenging for the requested state to do so for a taxpayer located in the requesting state. Hence, both states should at least notify the concerned taxpayers in their territory. If the tax authorities require information from a third party, they should also inform the latter of the relevant information. The prior notice informs taxpayers who are intending to exercise their right to challenge tax administrations' decisions or uphold exchanging processes. '*Legal protection may only be effective if taxpayers are informed of the request before the information is transmitted to another State; otherwise, they would have no possibility of appealing*'.<sup>47</sup> On the other hand, however, notifying taxpayers prior to an exchange may adversely affect the effectiveness of the EOI. This has been invoked to justify limiting taxpayers' passive right to be informed under EOI on request.

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<sup>42</sup> Nicola Sartori, *The Italian Statute of Taxpayers' Rights: State of the Art. 20 Years After Its Enactment*, 48 Intertax 1045, 1050 (2020).

<sup>43</sup> Jose Calderón, *Taxpayer Protection Within the Exchange of Information Procedure Between State Tax Administrations*, 28 Intertax 462, 466 (2000). Referring to OECD Committee on Fiscal Affairs, *Tax Information Exchange Between OECD Member Countries: A Survey of Current Practices* (1994), para. 66.

<sup>44</sup> For example, see Taxpayer Bill of Rights of the US at, <https://www.irs.gov/taxpayer-bill-of-rights> (accessed 24 May 2021). And 2021 National Tax Agency Report of Japan at, [https://www.nta.go.jp/english/Report\\_pdf/2021.htm](https://www.nta.go.jp/english/Report_pdf/2021.htm) (accessed 16 Oct. 2021).

<sup>45</sup> Case C-553/07 *Rijkeboer* [2009] ECR I-03889, paras 51–52.

<sup>46</sup> Tonny Schenk-Geers, *International Exchange of Information and the Protection of Taxpayers* 235 (Kluwer Law International 2009).

<sup>47</sup> De Flora, *supra* n. 30, at 447, 448.

However, whereas a complete refusal to inform is also improper, two possible approaches have been mentioned in legal doctrine to deal with this conflict.<sup>48</sup> As a first solution, notifying taxpayers could be considered the standard practice whereas exceptions can be established in cases when tax authorities object to notifying the relevant taxpayer on reasoned grounds, e.g. the taxpayer who is involved might be engaging in severe tax evasion activities. Secondly, a short intermediary procedure might be thought of by which a taxpayer can challenge a request for the exchange of information. This means that, although the taxpayers will be notified of the EOI request, they may only challenge it with a rapid summary procedure within a brief period of time, which ensures the minimum hindrance of the procedure. In order to ensure that the delays are minimal, it is also suggested that *'the maximum time limit to inform the interested party ... is the moment of communication of the information to another State. In this way, the ongoing investigation activities will not be hindered, nor will the exchange of information to another Member State'*.<sup>49</sup>

Under the AEOI, taxpayers may be informed by domestic financial institutions that their information may be used for exchanging purposes. Hence, taxpayers will first be aware that their relevant information will be transferred automatically to another tax authority. In addition, bulk financial data will be transferred among tax authorities under the AEOI. Hence, it would be extremely challenging for tax authorities to notify the involved taxpayers every time the relevant information is received or sent. However, a greater frequency of exchanging information means a higher possibility of making errors which also requires taxpayers' participation to monitor these. In this case, such taxpayer participation can be ensured by the protection of taxpayers' right to access information. They should be entitled to enquire from the tax authority about what information the latter has obtained from or what information it has sent to other tax authorities. They can thus verify whether their information held by the tax administration is correct which will also contribute to the effectiveness of the EOI. Hence, taxpayers' right to know may be protected through slightly different approaches under the EOI on request and the AEOI.

- 3) The right to be heard. In accordance with the *audi alteram partem* principle, a taxpayer should have *'the right to be heard and present his views in respect of the tax*

*notice before any measure potentially affecting him is adopted'*.<sup>50</sup> With this defensive right, taxpayers can submit their observations and information concerning their personal circumstances to the tax administration that can subsequently and adequately consider all of the relevant information and correct potential errors. A hearing procedure improves the interaction between tax administrations and taxpayers, making both of them aware of one another's views and claims in order to reach an informed mutual agreement. Taxpayers can consult and negotiate with tax administrations and challenge any tax decision involving them. A hearing is thus a form of effective review of the lawfulness and the enforceability of intended tax decisions. Under the cross-border tax cooperation between administrations, the pursuit of balanced interests between taxpayers and tax administrations could be achieved *'with a provision and guarantee of the implementation of a general right to be heard'*.<sup>51</sup> However, an effective right to be heard is also dependent upon recognition of the other inter-related rights such as the taxpayers' right to access information held by tax administrations as well as to be informed of decisions and practices concerning them.

Mentioning only the right to information and being heard does not mean that other procedural rights become unimportant for taxpayers. These basic rights rather validate the exercise of additional rights such as the possibility to challenge administrative decisions or to object to an exchange of information. For example, being heard affords the opportunity to challenge administrative positions or practices. A hearing procedure can provide the necessary platform for taxpayers to exercise their right to object to and challenge the tax administration's behaviour. Hence, these rights can be considered 'secondary rights' or 'transitional rights'. They can be guaranteed, to a certain extent, within the exercise of the three fundamental procedural rights mentioned above. More in particular, in the context of the EOI on request, there might be a possibility for taxpayers to object to the request of exchange. However, under the AEOI, bulk information is exchanged regularly between tax administrations. Individual taxpayers are thus less likely to object to this. In this case, the significance of safeguarding taxpayers' right to be heard appears to be more prominent. At the very least, this ensures that taxpayers can have their views heard by the tax

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<sup>48</sup> Baker & Pistone, *supra* n. 36, at 61.

<sup>49</sup> Fernando Fernández Marín, *The Right of Defence and the Exchange of Tax Information Ruled by EU Law*, II Eur. Tax Stud. 25, 52 (2018).

<sup>50</sup> Baker & Pistone, *supra* n. 36, at 51.

<sup>51</sup> De Flora, *supra* n. 30, at 447, 450.

administration. Therefore, the taxpayers' three fundamental procedural rights mentioned above are considered to be the essential elements for achieving minimum protection for taxpayers under the EOI mechanism.

### 2.3 Right to Remedy

The third layer to be considered covers what should be provided when rights or interests of taxpayers have been unduly infringed and/or they suffer damages: A taxpayer should be entitled to appropriate remedies. This also enforces the rights under the previous two layers. For example, the right to access information could '*be enforced by giving all parties whose interests are at stake standing to assert their rights in the courts*'.<sup>52</sup> In particular, in a cross-border context, taxpayers may be more vulnerable. The transborder character of tax administrations' behaviours might be an extra obstacle for taxpayer protection. It could be more difficult for taxpayers to demonstrate 'evidence of unlawfulness, damage, and a causal connection' if the infringements occurred in another state. This makes it more challenging for the taxpayer to obtain compensation for losses suffered from an unlawful action by another state.<sup>53</sup> Hence, a specific ground for sufficient remedies in the EOI mechanism should be established for the taxpayers who are involved.<sup>54</sup>

### 2.4 Conclusion

Based on the previous paragraphs, each domestic legal system should provide minimum protection for taxpayers being confronted with an EOI of their data between tax administrations. First, the confidentiality of the relevant information should be maintained throughout the entire taxing process. Second, three procedural rights should be granted to taxpayers to ensure their participation in this process, i.e., the right to access information, be informed, and be heard. Finally, adequate remedies should be established for taxpayers to safeguard their interests in the event of violations. Based on this three-tiered system, the following chapters will analyse this integration of rights in domestic Chinese legislation and search for improvements

based upon a comparison with the recognition of this standard under European legal principles as applied and interpreted by the European courts (ECtHR and CJEU).

## 3 PROTECTION OF INFORMATION CONFIDENTIALITY UNDER THE EOI PROCEDURE

### 3.1 The Existing Chinese Legislation

#### 3.1.1 Confidentiality in General Tax Law

As mentioned, the LATC constitutes the fundamental law in the field of taxation. According to Article 8 LATC, taxpayers and withholding agents have the right to request that the tax administration keeps their information confidential. This forms the primary legal source to protect its confidentiality in tax law. According to Article 5 of the *Rules for the Implementation of the Law on the Administration of Tax Collection of the PRC* (RILATC), the 'confidential information' referred to in Article 8 LATC includes the privacy and trade secrets of taxpayers and withholding agents.<sup>55</sup> The former's violations of tax law do not fall within the scope of 'confidential information'.<sup>56</sup> Instead of defining taxpayers' privacy, the tax administration<sup>57</sup> gave specific examples of the 'privacy of natural persons' protected by tax law. These envisage the taxpayer's personal information acquired by tax administrations in their work such as deposit accounts, deposits, personal property, income state, and marital status.<sup>58</sup> Hence keeping tax-related information confidential is ensured by protecting taxpayers' privacy, relevant personal information, and trade secrets. In addition, Article 13 LATC stipulates the tax administration's confidentiality obligation under certain circumstances. Public servants receiving or investigating reports from taxpayers concerning any violations of the tax laws and administrative regulations must be kept confidential for the taxpayer. Moreover, in tax investigations, tax officers have the duty to maintain this for the taxpayer who is under inspection.<sup>59</sup> They are prohibited from using the information concerning taxpayers' deposits and saving accounts that is acquired in the tax investigation for purposes other than taxation.<sup>60</sup>

### Notes

<sup>52</sup> Thomas I. Emerson, *Legal Foundations of the Right to Know*, 1976 Wash. U. L. Q. 1, 17 (1976).

<sup>53</sup> Schenk-Geers, *supra* n. 46, at 294.

<sup>54</sup> *Ibid.*, at 290.

<sup>55</sup> Article 5 RILATC, Order No. 362 of the State Council, promulgated in 2002, came into force on 15 Nov. 2002, amended in 2012, 2013 and 2016; the 2016 amendment came into force on 6 Feb. 2016.

<sup>56</sup> Article 5 RILATC.

<sup>57</sup> State Administration of Taxation of the PRC (SAT).

<sup>58</sup> Interpretation of the Announcement on the Rights and Obligations of Taxpayers, <http://hd.chinatax.gov.cn/gdnps/content.jsp?id=2992898> (accessed 3 Sep. 2019).

<sup>59</sup> Article 59 LATC.

<sup>60</sup> Article 54 LATC.

Breaching this duty of confidential treatment is sanctioned in Article 87 LATC. When the tax administration fails to maintain confidentiality for taxpayers, the officers who are directly responsible and the person who is directly in charge (e.g., the leader of the officers who are involved) will be subject to disciplinary action by the units (the tax administration) to which they belong or other concerned units. The article applies to tax officers who engage in any of the following types of behaviour:<sup>61</sup>

- 1) *Disclosing taxpayers' confidential information in the process of acquiring, recording, organising, and preserving the information;*
- 2) *Disclosing taxpayers' confidential information in the process of daily data management, data statistics, statement management, tax source analysis, and tax assessment;*
- 3) *Illegally approving the inquiry or conducting technical operations to enable the tax officers who are not supposed to access the confidential information to access it;*
- 4) *Providing confidential tax-related information to others in violation of the prescribed procedure.*

However, Article 87 LATC only sanctions tax officers who breach their confidentiality obligation. There is generally no responsibility for the tax administration under these circumstances within the LATC. The tax law does not provide a liability to compensate the taxpayer suffering losses caused by information leaks. It only provides remedial measures for taxpayers in general;<sup>62</sup> no rules specifically target the taxpayer suffering from improper disclosure of information.<sup>63</sup>

This is different in the new *Civil Code of the PRC*. Article 1039 particularly emphasizes that state entities and their staff must keep both the privacy and the personal information data confidential when it is acquired in the course of their work.<sup>64</sup> Their confidentiality obligation is also inferred from this article and bears the attribute of a civil obligation. Hence, in case of a breach, although this stipulation is not coupled with a special breach provision, victims have the right to request the actor (i.e., the tax officers) to bear civil liability (not administrative liability) in this instance.<sup>65</sup> Nevertheless, the actor mainly refers to tax officers in this case. The taxpayer

cannot bring a civil proceeding against the tax authority since the case will thus involve the administrative liability of the tax authority. Hence, to seek compensation arising from the breach of administrative liability, taxpayers may only apply the state compensation system to seek reparation. However, according to the *State Compensation Law* in China,<sup>66</sup> only infringements of specific personal rights and property rights of individuals listed in this law may trigger state compensation. Infringements of confidential tax-related information do not fall within this application scope.

Hence, although taxpayers may claim compensation from tax officers through civil proceedings for their losses in the event of data leakage, a significant amount of ambiguity remains as to whether they can claim compensation from the tax administration since this involves its administrative liability. Ensuring taxpayers' right to compensation in this case can help safeguard their right to know and provide a remedial measure to protect themselves under the EOI. Hence, such remedial rights follow from the protection of information confidentiality. The first and the third layers of the minimum standard of taxpayer protection are thus correlated in this regard.<sup>67</sup>

### 3.1.2 Confidentiality Under the EOI

In China, a legal code of practice with regard to the EOI is enacted in the *Rules for the International Exchange of Tax Information* (RIETI).<sup>68</sup> According to this code, for the purpose of exchanging information, tax-related information is generally protected as 'confidential state secrets' without a distinction as to whether it relates to privacy, personal data, or trade secrets.<sup>69</sup>

The State Administration of Taxation (SAT) supervises the nationwide tax collection and administration in China and can refuse to transfer information if it may disclose any trade secrets.<sup>70</sup> Tax officers involved in an exchange are obligated to keep the information confidential and undergo confidentiality training for their posts.<sup>71</sup> Information exchanged under the EOI procedure will be

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<sup>61</sup> Article 23 of the Interim Measures for the Management of Taxpayers' Confidential Tax-related Information.

<sup>62</sup> According to Art. 8(4) LATC, taxpayers are entitled to the right to apply for administrative review, initiate judicial appeals, and request state compensation in certain instances.

<sup>63</sup> IBFD, *Observatory on the Protection of Taxpayers' Rights – Report of China* 19 (2018).

<sup>64</sup> Article 1039 PRC Civil Code, promulgated in 2020, came into force on 1 Jan. 2021, which has repealed and replaced the GPCL and the General Rules of the Civil Law of the PRC.

<sup>65</sup> Lixin Yang, *Analysis on the Articles and Relevant Cases of the Civil Code of the People's Republic of China* 1689 (China Renmin University Press 2020).

<sup>66</sup> Articles 3–5 and 17–19 of the State Compensation Law of the PRC, promulgated in 1994, came into force on 1 Jan. 1995, amended in 2010 and 2012, the 2012 amendment came into force on 1 Jan. 2013.

<sup>67</sup> Protection of taxpayers' right to compensation in the event of data leakage will be further discussed in the third layer concerning the protection of taxpayers' right to compensation under the EOI.

<sup>68</sup> Notice of the State Administration of Taxation on Issuing the Rules for the International Exchange of Tax Information, Guo Shui Fa [2006] No. 70, issued and came into force on 18 May 2006.

<sup>69</sup> Article 17 RIETI.

<sup>70</sup> Article 9 RIETI.

<sup>71</sup> Article 24 RIETI.



stored in special computers by specifically designated people. Security measures, such as access control and data encryption, must be in place.<sup>72</sup> Additionally, inbound information obtained in the EOI process is prohibited from being transferred or disclosed to other persons or departments that are irrelevant to taxation except if otherwise stipulated in the tax treaty between the exchanging states.<sup>73</sup> If other public entities such as those involved in national audits or financial crime prevention require this information from the tax administration, they should first obtain the approval of the SAT. However, it remains unclear how the SAT will examine and judge the request from them. If this examination were merely a formality procedure, material supervision concerning the necessity and relevance of the sharing would be lacking.

If the exchanged information is disclosed or lost in the EOI process, on the one hand, a notice of criticism will be circulated to the involved tax administration.<sup>74</sup> Before 2021, such a notice was not a severe punishment but rather a condemning public announcement in China. However, the *Administrative Penalty Law of the PRC* (2021) has confirmed it as an administrative penalty,<sup>75</sup> raising its deterrence. The tax officers responsible for the mismanagement, on the other hand, are subject to disciplinary actions based on Article 87 LATC, as previously mentioned.

Tax administrations process and exchange substantial quantities of data during the EOI process. If there is an illegal disclosure, the leaked data may have severe consequences for taxpayers. Tax administrations are thus required to implement a breach report system.<sup>76</sup> However, no detailed rules concerning the report system are introduced in the RIETI. Nevertheless, according to the recently enacted *Law on the Protection of Personal Information of the PRC* (LPPI), data processors must notify the data subjects involved when a leak, distortion, or loss of personal data might have occurred. This will be the case unless the processor has adopted measures that can effectively avoid the negative effect of the disclosure.<sup>77</sup> Hence, as a data processor, in the event of data leakage, the tax administration is not only obligated to report this to the relevant department but must also notify the concerned taxpayers unless the damage caused by it can be avoided. Once taxpayers have been informed that their information

has been improperly disclosed, they can continue monitoring whether it has been handled properly and prepare to interact with the tax administration to protect themselves. Hence, notifying taxpayers in a case such as this is beneficial for the protection of information confidentiality and taxpayers' participation in the EOI procedure that concerns both the first and the second layers of the minimum standard of taxpayer protection.<sup>78</sup>

### 3.1.3 Conclusion

In general, the protection of confidential tax-related information includes protecting taxpayers' privacy, personal data, and trade secrets. Tax officers' confidentiality obligation under the EOI procedure is established in particular in separate tax rules. If this confidentiality is breached, the tax officers who are involved may be subject to disciplinary actions whereas the concerned tax administration may be confronted with a notice of criticism. The LPPI has also introduced a notification procedure in case of illegal information disclosure.

For the EOI procedural rules and secrecy requirements such as limited access and data encryption are particularly foreseen. Supervision power is granted to the SAT, however, what that actually entails remains unclear. Detailed rules regarding material supervision concerning the sharing of inbound information should be published.

Taxpayers who have suffered losses from data leakage may claim compensation against the tax officer through civil proceedings based on the *civil code*. Nevertheless, it is unclear whether they can seek compensation against the tax administration on the basis of administrative liability.

## 3.2 European Legislation and Principles

### 3.2.1 Confidentiality in General

As mentioned, the European CFR and the European Convention on Human Rights (ECHR) constitute the fundamental legal basis for protecting citizens' fundamental rights in EU Member States. This is further complemented with the *General Data Protection Regulation* (GDPR)<sup>79</sup> providing detailed rules for data privacy.

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<sup>72</sup> Article 25 RIETI.

<sup>73</sup> Article 29 RIETI.

<sup>74</sup> Article 41 RIETI.

<sup>75</sup> Article 9 of the Administrative Penalty Law of the PRC, promulgated in 1996, came into force on 1 Oct. 1996, amended in 2009 and 2017, revised in 2020 and came into force on 15 Jul. 2021 (PRC Administrative Penalty Law).

<sup>76</sup> Article 25 of the Interim Measures for the Management of Taxpayers' Confidential Tax-related Information.

<sup>77</sup> Article 57 LPPI, www.npc.gov.cn (20 Aug. 2021) <http://www.npc.gov.cn/npc/c30834/202108/a8c4e3672c74491a80b53a172bb753fe.shtml> (accessed 1 Sep. 2021).

<sup>78</sup> This issue will also be a focus in the second layer concerning the protection of taxpayers' procedural rights under the EOI.

<sup>79</sup> Regulation 2016/679 of the European Parliament and of the Council of 27 Apr. 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) [2016] OJ L119/1.

These rules and principles should also be respected in the application of tax legislation. Furthermore, given the pivotal role of the CJEU and the ECtHR in interpreting and applying the legal framework for the protection of human rights, their case law is evidently also of paramount importance for this topic.

Article 8 ECHR protects the right to respect for private and family life as well as home and correspondence which makes it the most fundamental source for the protection of the fundamental right to privacy in Europe. Aggregating, storing, and exchanging tax-related information between (tax) administrations may interfere with the taxpayer's right to privacy as protected by Article 8(1) ECHR. The ECtHR has made it clear that '*the information retrieved from banking documents undoubtedly amounts to personal data concerning an individual, irrespective of it being sensitive information or not*'.<sup>80</sup> According to Article 8(2) ECHR, such interference can only be justified if it is in accordance with the law; necessary in a democratic society; and for the protection of the legitimate aims including the interests of national security, public safety, the economic well-being of the country, the prevention of disorders or crime, the protection of health and morals, and the rights and freedoms of others. Any legal interference with someone's privacy hence requires further verification of the necessity and proportionality of this interference. Such a test requires the existence of the 'pressing social need' and 'relevant and sufficient reasons' and being proportionate to the legitimate aim being pursued.<sup>81</sup> For example, in *F. section v. Germany*, an exchange of financial information from the German tax authorities to the Dutch tax authorities for tax purposes was considered as interfering with a taxpayer's right to privacy. However, it was in accordance with German legislation and to prevent crimes. The European Commission of Human Rights ruled that the information transfer between these tax authorities had 'relevant and sufficient reasons' and no disproportionality was ascertained. The disputed exchange of information was thus considered to be justified under Article 8(2) ECHR.<sup>82</sup> Under the AEOI, taxpayers' financial information from their banking documents constitutes an essential component of the information to be automatically

exchanged. In this regard, when exchanging information with other Member States, tax administrations must strictly examine their behaviour in correlation with Article 8(2) ECHR in order to avoid any illegal interference with taxpayers' privacy. In particular, the automatic character of the exchange might become problematic in light of this proportionality test.<sup>83</sup>

Under the EU framework in particular, reference should be made to the CFR and the GDPR. Articles 7 (respect for private and family life) and 8 (protection of personal data) of the CFR correspond to the interests guaranteed by Article 8 ECHR.<sup>84</sup> The CFR, however, only applies to EU Member States when they are implementing Union law,<sup>85</sup> including when EU law imposes a specific obligation on them.<sup>86</sup> This is the case when EU Member States implement exchanging rules based on the DAC.<sup>87</sup> For example, Article 18 DAC stipulates the requested authority's obligation 'to use its measures aimed at gathering information to obtain the requested information' under the EOI procedure. Hence, when regulating the collection and exchange of tax-related information under the EOI, EU Member States are implementing EU Law, and the CFR applies. In order to assess whether an interference with the taxpayers' confidential tax-related information constitutes an infringement of their rights, Article 52(1) CFR is comparable to Article 8(2) ECHR. Interference with the rights of Articles 7 and 8 CFR through the exchange of tax-related information must be provided by law and must respect the essence of the rights. It should further be determined whether the limitation to be made is necessary and genuinely meets the objectives of general interests recognized by the Union or the need to protect the rights and freedoms of others. Therefore, legality, necessity, and proportionality of the interference will also be examined in this case.

Additionally, the GDPR provides detailed rules for data privacy. It protects personal data by stipulating the principles and requirements for legitimate data processing (Articles 5–11) and protecting several data subjects' participation and remedy rights (Articles 12–23 and 82). This regulation replaced the former *Directive 95/46/EC Data Protection Directive (DPD)*<sup>88</sup> regarding data protection and

## Notes

<sup>80</sup> *M.N. AND OTHERS v. SAN MARINO* App no 28005/12 (ECtHR, 7 Oct. 2015), para. 51.

<sup>81</sup> *DUDGEON v. THE UNITED KINGDOM* (1981) Series A no 45, paras 51–54.

<sup>82</sup> *F. S. v. GERMANY* App no 30128/96 (Commission Decision, 27 Nov. 1996).

<sup>83</sup> The study of the principle of proportionality exceeds the objective of this article and hence will not be dealt with in detail. Nevertheless, the implementation of the AEOI has posed some challenges for the tax administration with regard to the observance of this principle. Under the AEOI, although the exchange is usually based on Union law or domestic law and for the purpose of taxation, it is still challenging for the tax authorities to evaluate whether the high speed and routine automatic exchange is proportionate. For the importance of this principle under the AEOI, see also Huang, *supra* n. 35, at 225, 230–235.

<sup>84</sup> Explanations Relating to the Charter of Fundamental Rights [2007], OJ C303/02, 20–21.

<sup>85</sup> Article 51(1) CFR.

<sup>86</sup> Case C-206/13 *Siragusa* [2014] OJ C129/6, para. 26. See also case C-198/13 *Julian Hernández and others* [2014] OJ C315/13, para. 35.

<sup>87</sup> Case C-682/15 *Berlioz* [2017] OJ C239/8, para. 35.

<sup>88</sup> Directive 95/46/EC of the European Parliament and of the Council of 24 Oct. 1995 on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data [1995] OJ L281/31 (no longer in force).

harmonized data privacy within the EU which also contributes to the protection of taxpayers' personal data under the EOI procedures. Data relating to declared income was already considered 'personal data' under Article 2(a) DPD. Both its transfer by the requested administrative body and its subsequent use by the receiving body constitute 'personal data processing'.<sup>89</sup> The transmission of personal data from an EU Member State to a third country also constitutes 'personal data processing' according to Article 2(b) DPD.<sup>90</sup> With regard to the EOI, reporting financial institutions and competent authorities of each EU Member State are 'controllers' as defined in Article 4(7) GDPR. It has been explicitly extended to intermediaries and reporting platform operators with the latest amendment of the DAC.<sup>91</sup> This has also been confirmed in preliminary recital 27 DAC stating that each EOI under the DAC framework is subject to the DPD (GDPR). Hence, the principles and requirements concerning legitimate data processing and the protection of data subjects' rights under the GDPR also apply to the EOI procedures. Article 25(4) DAC clarifies that these 'controllers' are required to inform data subjects of the data they collect and provide them the necessary information in a sufficient amount of time in order to enable them to exercise their data protection rights. Data security measures under this system are encouraged.<sup>92</sup> The European Data Protection Supervisor also stresses the importance of operating the EOI system through an approach that respects data protection rights.<sup>93</sup>

### 3.2.2 Confidentiality Under the EOI

Taxpayers' financial data is also protected to a certain degree within the EOI framework as regulated under the DAC. An exchanging state can refuse to exchange information 'where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy'.<sup>94</sup> Trade secrets are thus excluded from being exchanged under the EOI in the EU. The receiving state should protect the information exchanged in a similar manner as it protects similar information under its domestic legislation. This information shall, in any case, 'be covered by the obligation of official secrecy'.<sup>95</sup> The information exchanged can only be used for the tax purposes stipulated in the DAC.

However, Article 16 DAC provides that this also embraces the assessment and enforcement of other taxes and duties as well as compulsory social security contributions.

Article 21 (2) DAC also requires Member States to notify a taxpayer in the event of 'a breach of the security with regard to his data when that breach is likely to adversely affect the protection of his personal data or privacy'.<sup>96</sup> In addition, in the case of a data breach, the Member State(s) where the breach occurred must 'investigate, contain and remedy the data breach' and even 'request the suspension of the common communication network access' when necessary. They also must 'report the data breach and any subsequent remedial action to the Commission without delay'.<sup>97</sup> The commission will subsequently inform all of the Member States of the data breach.

### 3.2.3 Conclusion

In brief, Article 8 ECHR, Articles 7 and 8 CFR, and the GDPR are all applicable to the exchange of tax – related information within the EU. Any exchange of data under the EOI procedures should be implemented in accordance with these rules. EU Member States are thus subjected to a multi-layered system to protect personal information, including confidential tax-related information. The ECHR and the CFR provide general principles whereas secondary EU legislation such as the GDPR and the DAC establish specific rules to protect confidential tax-related information. These sources are being interpreted in case law of the CJEU and the ECtHR, providing practical guidance. The legal sources at the EU level have contributed to a more uniform protection of tax-related information in the different EU Member States.

## 3.3 Potential Improvements for the Chinese Approach

There is some resemblance between Chinese law and European legislation in the protection of information confidentiality under the EOI procedures. Both ensure the protection of taxpayers' privacy, personal data, and trade secrets and also introduce a number of data security

### Notes

<sup>89</sup> Case C-201/14 *Bara and others* [2015] OJ C381/5, para. 29.

<sup>90</sup> Case C-362/14 *Schrems* [2015] OJ C389/5, para. 45.

<sup>91</sup> Council Directive (EU) 2021/514 of 22 Mar. 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation [2021] OJ L104/1 (DAC 7). See in particular the adapted Art. 25(4) DAC. These amendments should be implemented by 31 Dec. 2022 and apply as of 1 Jan. 2023.

<sup>92</sup> Recital 33 DAC 7, e.g., requesting the suspension of the exchange of information with the Member State(s) where the data breach occurred.

<sup>93</sup> European Data Protection Supervisor, Opinion 6/2020 on a proposal for an amendment of Council Directive 2011/16/EU relating to administrative cooperation in the field of taxation, para. 7.

<sup>94</sup> Article 17(4) DAC.

<sup>95</sup> Article 16(1) DAC.

<sup>96</sup> Article 21(2) DAC.

<sup>97</sup> Article 25(6) DAC.

measures. They also offset the duty to exchange information if this might disclose any trade secrets. Three differing aspects, however, can be noticed that might improve Chinese practice.

First, under the European principles, interferences with privacy can be tolerated, but this must be examined with a triple test: the interference should be in accordance with implemented legislation, justified by the protection of a legitimate aim, and necessary in a democratic society to attain this goal. No such test has been introduced in Chinese law where courts judge according to their own criteria. In assessing whether interferences with privacy can be justified, such a triple test enables the examination process to be implemented incrementally and in a more consistent and coherent manner by different courts. It may hence inspire the Chinese legislator/court to consider the relevant factors more systematically when guaranteeing privacy protection in China.

Second, apart from tax legislation, several legal instruments concerning privacy protection and data privacy for EU Member States are broadly applicable and hence also apply to the EOI as implemented under the DAC framework. The sharing and use of exchanged information is also bound by general privacy rules under the ECHR and the CFR. Hence, tax administrations can also use general principles to supervise the sharing and use of in – and outbound information. In comparison, similar principles are less present in Chinese tax law. In China, since the LPPI has taken state entities into its scope of application,<sup>98</sup> tax administrations are also bound by these rules when processing taxpayers' personal data, including under the EOI process. Despite this, however, it remains unclear how the SAT can supervise the sharing and use of inbound information under EOI procedures since detailed rules in this regard are not published. Hence, Chinese law can either develop general principles or introduce further rules to address this issue.

Third, in the event of data breaches or leaks, the tax administration under both regimes must report the leak and notify the concerned taxpayer. Chinese law stipulates punishments for the tax administrations and their staff for noncompliance with information confidentiality. In addition, the GDPR provides taxpayers with the opportunity to seek compensation for improper data processing and data breaches. In China, however, there is no particular compensation mechanism for public data infringements, although the taxpayer may attempt to seek compensation through a civil procedure based on the *civil code*.

## 4 PROTECTION OF PROCEDURAL RIGHTS UNDER THE EOI PROCEDURE: RIGHT TO ACCESS INFORMATION, BE INFORMED, AND BE HEARD

### 4.1 The Existing Chinese Legislation

#### 4.1.1 Taxpayer Protection in General

In China, the *Regulation on the Disclosure of Government Information* (RDGI)<sup>99</sup> ensures citizens' right to access government (public) information. Following the RDGI, the SAT (State Administration of Taxation) issued the *Working Rules of the SAT on the Public Disclosure of Government Information (for Trial Implementation)* (WRPDGI) to implement the disclosure of tax-related government information.<sup>100</sup> Based on these two legal instruments, taxpayers can access the government information that relates to tax issues.

Article 8(1) LATC states that taxpayers and withholding agents have the right to know the information regarding tax laws, administrative regulations, and tax payment procedures from the tax administration. As the SAT declared in the *Announcement on the Rights and Obligations of Taxpayers* (Announcement No.1),<sup>101</sup> taxpayers have the right to ask tax administrations for information involving:

- 1) *current tax laws, administrative regulations, and tax policies;*
- 2) *the time limit, method, and procedures for handling tax matters and the relevant documents to be submitted;*
- 3) *the legal basis, factual basis, and calculation method for tax payable and tax decisions;*
- 4) *legal remedies and the prerequisites for these remedies when disputes arise between taxpayers and tax administrations regarding the payment of tax, tax penalties, and compulsory enforcement measures.*

In addition, according to the *Measures for the Administration of Tax-related Information Inquiries*,<sup>102</sup> taxpayers can inquire about the information exclusively held by tax administrations that is available for investigation. They can also request the tax-related information that is conducive to taxpayers' performance of tax payment obligations including their tax payment status, credit evaluation results of tax payment, and the follow-up progress of their tax-related matters. Taxpayers can submit an

## Notes

<sup>98</sup> Articles 33–37 LPPI.

<sup>99</sup> 《中华人民共和国政府信息公开条例》, Order of the State Council No. 492, came into effect on 1 May 2008, revised in 2019 and came into force on 15 May 2019.

<sup>100</sup> 国家税务总局机关政府信息公开工作规程(试行), issued and came into force on 30 Dec. 2019, <http://www.chinatax.gov.cn/chinatax/n810214/n810641/n810687/c5142145/content.html> (accessed 1 Dec. 2020). It repealed the former Working Rules of the SAT on the Disclosure of Government Information upon Application (国家税务总局依申请公开政府信息工作规程), which was issued on 8 Apr. 2008 and came into force on 1 May 2008, <http://www.chinatax.gov.cn/n810214/n810641/n810687/c1210355/content.html> (accessed 1 Dec. 2020).

<sup>101</sup> 《关于纳税人权利与义务的公告》, Announcement [2009] No. 1 of the SAT, issued on 6 Oct. 2009, amended on 15 Jun. 2018.

<sup>102</sup> Articles 2, 7, and 8 of the Measures for the Administration of Tax-related Information Inquiries.

application to the tax administration for information that cannot be routinely obtained.

In China, the tax legislation does not particularly distinguish the right to access information from the right to be informed. It covers both rights under the protection of the right to know. Hence, the LATC does not mention 'the right to be informed' in its articles but ensures it by emphasizing tax administrations' obligation to inform taxpayers in some instances. The SAT declared in *Announcement No. 1* that, before deciding to impose tax penalties, tax administrations should inform taxpayers about the factual and legal basis and the reasons for the penalty decision as well as the rights that taxpayers have in such case (e.g., the right to contend, to defence, and to be heard). According to the *Working Rules for the Tax Inspection*, when tax administrations take any temporary tax preservation measure, they are obligated to send the Decision of Tax Preservation Measures to the taxpayers and notify them of the facts, causes, and legal basis of the decision as well as their right to seek remedy.<sup>103</sup>

In addition, the recently enacted LPPI must again be mentioned. Articles 44–45 LPPI provide that the data subject has the right to know the information and examine his information from processors. Although the LPPI does not define the content of the data subject's right to know, it can reasonably be considered from its wording that the information they can consult includes their personal data stored by the processor. Article 17 LPPI requires a data processor to inform the data subject of the following information *before* processing the latter's personal data:

- 1) *The name and contact method of the data processor;*
- 2) *The purpose and method of the processing, the category and retention period of the data;*
- 3) *Methods and procedures for the data subject to exercise the rights provided in this law;*
- 4) *Other items that must be informed according to laws or administrative regulations.*

These rules also bind the tax administration since the LPPI also applies to data processing implemented by public authorities. Hence, apart from the information that is accessible in accordance with the *Measures for the Administration of Tax-related Information Inquiries*, they also have the right to access their personal data stored by the tax administration. Nevertheless, exceptions exist:

- 1) *where laws or administrative regulations provide that secrecy must be preserved;*
- 2) *where notification is not necessary;*
- 3) *where a notification will impede public authorities' fulfilment of their statutory duties and responsibilities.*<sup>104</sup>

In addition, as mentioned in 3.1, Article 57 LPPI also protects the data subjects' right to be informed by obligating the data processor to inform data subjects who are involved in case of illegal disclosure of personal data. The information consists of the category of the data, the cause and possible influence of the leakage, the remedial measures data subjects may take, and the contact information of the processors unless they adopt measures that are able to effectively avoid the harm caused by the leak. This hence also binds the tax administration.

In accordance with the *Administrative Penalty Law (2021) of the PRC*, the concerned party has the right to request a hearing before administrative entities adopt any administrative penalty involving the suspension of production or business, the rescission of a business permit or licence, the imposition of a comparatively large fine, the confiscation of illegal earnings, a downgrade of qualification level, and the order to close the business, or ban access to the business.<sup>105</sup> The SAT issued the *Measures for the Implementation of the Hearing Procedure for Tax Administrative Penalty (For Trial Implementation) (MIHPTAP)* to implement these rules for tax hearings because this also binds tax administrations. According to the MIHPTAP, taxpayers have the right to be heard if a tax administration envisages imposing a fine over CNY 2,000 on a citizen or over CNY 10,000 on a legal person or other organization.<sup>106</sup>

#### 4.1.2 Taxpayer Protection Under EOI

Particularly with regard to the EOI, as explained, the RIETI is a legal code of practice concerning the EOI in China. However, the RIETI does not provide any active information right for the taxpayer; he has no access to the relevant information.<sup>107</sup> Additionally, a hearing right in the exchange procedure is also not foreseen. Article 27(1) RIETI only establishes a passive information right and states that tax administrations *may* notify relevant taxpayers, withholding agents, and other parties of the purpose of collecting the information, the source, and the content of the collected information. Unless approved by

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<sup>103</sup> Article 35 of the Working Rules for the Tax Inspection, Guo Shui Fa [2009] No. 157, issued on 24 Dec. 2009 came into force on 1 Jan. 2010, amended in 2018; the newest amendment came into force on 15 Jun. 2018.

<sup>104</sup> Articles 18 and 35 of the Working Rules for the Tax Inspection.

<sup>105</sup> Article 63 PRC Administrative Penalty Law (2021). Chinese tax administrations are not empowered to suspend the production or business of taxpayers or revoke the business permit or licence of taxpayers. As the fine is most frequently used by the tax administration this is only mentioned in the MIHPTAP.

<sup>106</sup> Article 3 MIHPTAP, Guo Shui Fa [1996] No. 190, promulgated in 1996, came into force on 1 Oct. 1996 (PRC).

<sup>107</sup> Xu & Lian, *supra* n. 14, at 82, 84.

the SAT in advance, according to Article 27(2) RIETI, exceptions of notification exist when:

- 1) *taxpayers, withholding agents, or other parties are suspected of committing severe tax violations and a notification might impair the tax investigation; and*
- 2) *one of the information exchanging administrations explicitly requests not to inform about the source and content of the information.*

The right of a taxpayer to be informed should be balanced with the tax administration's need to implement effective tax audits. Hence, in certain circumstances, the obligation to inform the taxpayer can be disregarded.<sup>108</sup>

The RIETI rules are however ambiguous in several respects. First of all, the obligation to inform is not distinctly stated. From the wording '*may notify*', it can already be deduced that it is not a compulsory obligation of the tax administration to notify but a decision that depends on its discretion. Since the notification is not a routine procedure, tax authorities may not inform the relevant parties in their work simply because they consider the notification procedure troublesome. Additionally, doubts can also arise with regard to the literal exceptions. The RIETI has no criterion to determine the seriousness of tax violations. When can the tax administration decide that a wrong application of tax legislation is a 'severe tax violation'? This also leaves ambiguity concerning the notification of taxpayers or other concerned parties. It remains unclear whether no party can be informed if any of the concerned parties is involved in tax violations or whether this only excludes the parties involved in the violation. In addition, for the second exclusion, the article only refers to 'the source and content of the information' but does not include 'the purpose of collecting the information'. These rules hence need further clarification.

Nevertheless, the general rules concerning the taxpayers' right to access government information also apply under the EOI procedures. However, the transposition of these rules is not literally mentioned in this legislation. Detailed guidance on its application is lacking which may hinder the taxpayer from applying his rights in practice. Moreover, the general notification obligation of the tax administration refers to issuing tax penalties and preservation measures, but does not include the EOI procedures. This obligation will hence rarely practically apply in the EOI process. First of all, the AEOI makes the notification of the taxpayer unnecessary as information will automatically be continually exchanged. Under the EOI on request, the notification also does not apply when

this may impede the tax administration's fulfilment of the duty to collect taxes. In addition, a taxpayers' right to be heard is protected when fines are imposed exceeding a particular amount of money. Once more, this does not refer to information exchanged under the EOI.

### 4.1.3 Conclusion

In brief, Chinese tax law ensures a taxpayers' right to access public tax-related information and certain personal information. It obligates tax authorities to notify the taxpayer before issuing tax penalties or tax preservation measures. They must also inform the concerned taxpayers in the case of data leakage. The taxpayers' right to be heard essentially focuses on cases for which a certain fine is issued. Further protection of taxpayers' procedural rights is not particularly developed in a balanced manner under the EOI procedures. Only the right to access information and to be informed are, to a certain extent, recognized and legally protected. However, the vague wording of Article 27 RIETI and the lack of clear rules regarding the right to access personal files under the EOI may lead to inadequate enforceability of these rights. Despite its flaws, the general LPPI may provide some further legal support for the taxpayer's right to access personal files or to be informed but, in general, clear legal guidance is rather lacking, particularly with regard to the EOI. The tax law does not particularly guarantee the taxpayer the right to be heard in the EOI process.

## 4.2 The European Context

### 4.2.1 A Legal Framework Based on General Principles

Legislating the tax procedure in the EU is left to discretion of the individual EU Member States.<sup>109</sup> The domestic legal system determines '*whether procedural protections are available and to what extent*'.<sup>110</sup> Despite this, the application of national procedural rules is determined by what is known as the principles of equivalence and effectiveness in the implementation of EU law. Under these principles, domestic rules protecting EU rights must not be less favourable than those governing similar domestic situations or render their exercise to be impossible or excessively difficult in practice.<sup>111</sup> Even the DAC and its further amendments as the primary framework for the exchange of tax-related information in the context of

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<sup>108</sup> Philip Baker & Pasquale Pistone, *BEPS Action 16: The Taxpayers' Right to an Effective Legal Remedy Under European Law in Cross-Border Situations*, 25 EC Tax Rev. 335, 344 (2016).

<sup>109</sup> Keith Fogg & Sime Jozipovic, *How Can Tax Collection Be Structured to Observe and Preserve Taxpayer Rights: A Discussion of Practices and Possibilities*, 69 Tax Law. 513, 546 (2016).

<sup>110</sup> Jasna Voje, *The Limits to the Participation of the Taxpayer in Tax Dispute Resolution Procedure Under the Dispute Resolution Directive*, 48 Intertax 157, 160 (2020).

<sup>111</sup> Herwig C. H. Hofmann, *General Principles of EU Law and EU Administrative Law*, in *European Union Law 215* (Catherine Barnard & Steve Peers eds 2020). See also the case-law of the CJEU, e.g., Case C-298/16 *Ispas* [2018] OJ C5/10, para. 29; and Case C-349/07 *Sopropé* [2008] ECR I-10369, para. 38.

EOI procedures do not confer any rights to taxpayers.<sup>112</sup> This directive is addressed to the Member States stipulating responsibilities of their tax administrations under EOI procedures.<sup>113</sup>

Nevertheless, both the ECHR and EU legislation do provide some legal texts guaranteeing the taxpayers' right to access information, be notified, and be heard. In addition, the expression of more general principles can be referred to. As such, Article 8 CFR guarantees everyone access to data that has been collected concerning him, and Article 11 recognizes the right to receive and impart information and ideas without interference by the public authority and regardless of frontiers. Article 41 mentions the right to good administration including the right of every person to be heard before any individual measure that would adversely affect that individual is taken, the right of every person to have access to his file while respecting the legitimate interests of confidentiality as well as professional and business secrecy, and the obligation of the administration to provide reasons for its decisions. Furthermore, Article 42 CFR grants any citizen of the Union and any natural or legal person residing or having its registered office in a Member State a right of access to documents of the institutions, bodies, offices, and agencies of the Union, whatever their medium. Finally, Article 47 CFR expresses the right to a fair trial, including the entitlement to a fair and public hearing within a reasonable timeframe by an independent and impartial tribunal previously established by law to make its own arguments being heard. One additional right to be noted is the right of defence. Guaranteed by Article 48 CFR and the CJEU case law, the general principle of the right of defence also ensures 1) taxpayers' right to access files,<sup>114</sup> including all of the evidence supporting the tax administration's position, and 'documents that may be helpful in the exercise of the rights of the defence'<sup>115</sup>; and 2) taxpayers' right to be heard<sup>116</sup> to ensure the addressees of decisions that significantly affect their interests to be placed 'in a position in which they can effectively make known their views'.<sup>117</sup> Moreover, the right of defence

not only guarantees this protection in court proceedings but also in administrative procedures.<sup>118</sup> However, these CFR principles guaranteeing taxpayers' procedural rights apply in particular to institutions and bodies of the EU. They only apply to the individual EU Member States when they are implementing Union law<sup>119</sup> which includes exchanging tax-related information under the DAC.<sup>120</sup>

Apart from the CFR, Article 6(3) of the *Treaty on European Union* (TEU) recognizes the fundamental rights being guaranteed by the ECHR as general principles of Union law. The CJEU also acknowledges its inspiration from the ECHR.<sup>121</sup> and adheres to its interpretation for similar rights as those recognized by the ECtHR.<sup>122</sup> In particular, Article 6 ECHR installs a fundamental right to a fair trial in the determination of an individual's civil rights and obligations whereas Article 10 ECHR repeats the right to hold opinions as well as receiving and imparting information and ideas without interference by a public authority and regardless of the frontier. Article 13 ECHR finally grants everyone whose rights and freedoms are violated as set forth in this convention an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

#### 4.2.2 Limiting Taxpayer Rights Under the EOI

The scope of the general legal principles has been particularly shaped in the jurisprudence of both the CJEU and the ECtHR. Although this article does not intend to study these judgments in depth, the following paragraphs briefly illustrate some landmark decisions concerning the exchange of tax-related information.

A first question arose as to whether a taxpayer must be informed when a tax administration is investigating his situation and intends to request information from another (tax) administration. In the *Sabou* case,<sup>123</sup> the CJEU was asked whether the right to be informed, the right to participate in formulating a request for information and examine witnesses, and the right to challenge the information could be deduced

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<sup>112</sup> Case C-184/05 *Twob International* [2007] ECR I-07897, para. 31.

<sup>113</sup> Case C-276/12 *Sabou* [2013] OJ C376/16, Opinion of AG Kokott, para. 30.

<sup>114</sup> Case C-383/13 *PPU - G. and R.* [2013] OJ C325/8, para. 32.

<sup>115</sup> Case C-189/18 *Glencore* [2019] OJ C221/6, paras 53–58.

<sup>116</sup> Case C-276/12 *Sabou* [2013] OJ C376/16, para. 28.

<sup>117</sup> Case C-419/14 *WebMindLicenses* [2016] OJ C68/16, para. 84.

<sup>118</sup> Hofmann, *supra* n. 111, at 237.

<sup>119</sup> Article 51(1) CFR.

<sup>120</sup> Case C-682/15 *Berlioz* [2017] OJ C239/8, para. 42.

<sup>121</sup> Case C-260/89 *ERT AE v DEP et al* [1991] ECR I-02925, para. 41.

<sup>122</sup> For example, Joined cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I-11063, paras 51–52; Case C-334/12 *RX-II Réexamen Arango Jaramillo and Others v. EIB* [2013] ECR I-, para. 43.

<sup>123</sup> Case C-276/12 *Sabou* [2013] OJ C376/16. A professional football player who is a resident in the Czech Republic has incurred expenses in several EU Member States. The Czech tax administration requests the tax authorities of these states to verify the truthfulness of the applicant's expenses. The applicant claimed that the information has been acquired illegally since he was not informed of the request, has not been invited to take part in the exchanging procedure, and hence also not in the examination of witnesses in the other EU Member States.

from EU law. In addition, the referring court also wondered whether domestic law providing such rights would violate it. The CJEU considered that Directive 77/799/EEC did not confer any taxpayer rights or establish any obligation on the competent authorities to consult the taxpayer.<sup>124</sup> Concerning the right of defence,<sup>125</sup> the CJEU distinguished between an ‘investigation stage’ and a ‘contentious stage’. The mere collecting and exchanging of information between tax administrations takes part in the investigation stage. This is not a decision that adversely affects the interests of the taxpayer. Hence, according to the CJEU, the right of defence neither requires the taxpayer to participate in the investigation stage nor to be heard when the request is made.<sup>126</sup> This not only applies for the requesting administration but also for the requested administration when obtaining the information under its domestic procedures to subsequently exchange it.

The CJEU further confirmed that EU Member States could extend the taxpayer’s rights to be heard in (and hence also to be informed about) the process of information collection and/or exchanging in their domestic legislation.<sup>127</sup> However, this does not regularly occur. According to a survey of the International Bureau of Fiscal Documentation (IBFD), notification to taxpayers before the EOI does not appear to be mainstream among EU Member States.<sup>128</sup> Most surveyed jurisdictions do not recognize a taxpayers’ right to be heard in this process.<sup>129</sup> Although considering that the distinction in *Sabou* ‘cannot be decisive’,<sup>130</sup> the ECtHR confirmed in its *Othymia* case that neither Article 8 nor Article 13 ECHR grant a taxpayer the right to be informed *before* the exchange of information.<sup>131</sup> Hence, the prenotification of lawful tax investigations or exchanges of tax-related information is not required to be given to all taxpayers who are potentially involved.

The outcome of both judgments seems to be a rather disappointing result for taxpayers whose information is

being exchanged. The CJEU distinction between an investigation and a contentious stage, however, has attracted criticism. Some legal scholars consider the court’s arguments somewhat unconvincing and confusing. First, the CJEU did not actually explain why exchanging information cannot already substantially affect the concerned taxpayers’ interests in this stage.<sup>132</sup> Asking the requested state may lead to an investigation in the latter state that may feasibly cause reputational damage to the taxpayers concerned and further unfavourably affect their business in the requested state.<sup>133</sup> Hence, the taxpayer may have a relevant and significant interest in confirming/disputing the correctness of the information upon which the request for information is based. Additionally, some scholars simply consider that the CJEU’s approach is ‘*a rather archaic approach that predates the recognition of taxpayers’ rights*’.<sup>134</sup> Moreover, the EOI is claimed to be ‘*much more than a simple “fact gathering” process and that the taxpayer should be in a position to defend his or her interests already at this stage*’ since it reflects both the substantive and procedural aspects of an independent administrative nature.<sup>135</sup> Notwithstanding the limited outcome, these judgments do contribute to establishing the procedural framework for the EOI to which the EU Member States must adhere. Despite the fact that European Union law does not provide much protection for taxpayers, it confirms that the judicial protection of the right to be informed must be sought in national law or in data privacy rules, as will be further illustrated. The exercise of the taxpayer’s rights to be informed or heard ‘is deferred or formally postponed’ until the completion of the investigation stage but remains valid under the formulation of a final tax assessment.<sup>136</sup>

In addition to actively informing the passive right of access to information that is available under the EOI has also been challenged. An important judgment in this regard is the *Berlioz* case.<sup>137</sup> The CJEU was asked to what extent a (third) party should have access to relevant

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<sup>124</sup> Case C-276/12 *Sabou* [2013] OJ C376/16, para. 40. The request was based on Directive 77/799/EEC, the predecessor of the DAC, as applicable during the facts of the case.

<sup>125</sup> The disputed decision was issued before the Charter of Fundamental Rights (CFR) had come into force. Hence, the CFR did not apply in this case.

<sup>126</sup> Case C-276/12 *Sabou* [2013] OJ C376/16, paras 42–46.

<sup>127</sup> *Ibid.*, para. 45.

<sup>128</sup> IBFD Observatory on the Protection of Taxpayers’ Rights, *The IBFD Yearbook on Taxpayers’ Rights 2019* 135 (IBFD 2020).

<sup>129</sup> *Ibid.*, at 137.

<sup>130</sup> *Othymia Investments BV v. The Netherlands* App no 75292/10 (ECtHR, 6 Nov. 2012), para. 44. *Othymia Investments B.V.* is a company incorporated under Dutch law that received notification from the Dutch tax administration that they had been requested by the Spanish tax authorities to provide information on its relations and transactions with a Spanish company. The Dutch tax administration had already sent the requested information before informing the applicant. The applicant lodged an objection against this practice and claimed that its rights protected under Arts 8 and 13 ECHR had been infringed.

<sup>131</sup> *Othymia Investments*, *supra* n. 130, paras 44 and 46.

<sup>132</sup> CFE ECJ Task Force, *Opinion Statement ECJ-TF 2/2014 of the CFE on the Decision of the European Court of Justice in Sabou (Case C-276/12), Concerning Taxpayer Rights in Respect of Exchange of Information upon Request* 6 (2014).

<sup>133</sup> Giuseppe Melis, *AEOL and Protection of Taxpayers’ Procedural Rights*, in *New Exchange of Information Versus Tax Solutions of Equivalent Effect* 169 (Giuseppe Marino ed., IBFD 2016).

<sup>134</sup> Baker & Pistone, *supra* n. 36, at 61.

<sup>135</sup> Xavier Oberson, *Towards Automatic Exchange of Information*, 87 *Revue suisse de droit des affaires et du marché financier* 91, 105 (2015).

<sup>136</sup> J. M. Calderón Carrero & A. Quintas Seara, *The Taxpayer’s Right of Defence in Cross-Border Exchange-of-Information Procedures*, 68 *Bull. for Int’l Tax’n* 498, 501 (2017).

<sup>137</sup> Case C-682/15 *Berlioz* [2017] OJ C 239/8. *Berlioz* is a Luxembourg company with a French subsidiary. The French tax administration requested information from the Luxembourg tax administration that questioned *Berlioz*. It was imposed a penalty under Luxembourg domestic law because it partly refused to deliver the requested information. It challenged this penalty and claimed that it needed access to the request from the Luxembourg tax administration in order to be able to dispute the correctness of the request.



information when being requested to inform under an EOI procedure. The CJEU first confirmed that the CFR was applicable.<sup>138</sup> The case concerned the implementation of the DAC whereas the applicant was sanctioned based on a national provision that implemented this EU law within the meaning of Article 51(1) CFR. Hence, Article 47 CFR concerning the right to an effective remedy applied. The court subsequently distinguished this case from its earlier Sabou judgment. The Berlioz case concerned an information holder as the addressee of a request for information and not the taxpayer whose tax situation was being investigated throughout the EOI. The penalty for not delivering the requested information is a measure that adversely affects the interest of this applicant. Hence, this party is entitled to challenge the legality of that decision.<sup>139</sup>

In order to be able to effectively challenge such a decision, the information holder who is being requested to deliver information and the court reviewing the legality of the penalty decision should have *some* access to the request for information. The access should enable the party to properly present its case to a court.<sup>140</sup> In previous case law, the CJEU already affirmed that, in determining whether the right of access to certain files (as guaranteed by the rights of defence) has been infringed, a court must consider the specific circumstances of the case, 'including the nature of the act at issue, the context of its adoption and the legal rules governing the matter in question'.<sup>141</sup> Based on these considerations, the CJEU concluded in *Berlioz* that it did not see the necessity for Berlioz to access the entire request for information in order to receive a fair hearing. Not every aspect of the request would be foreseeably relevant for Berlioz as an information holder. However, *some* information should be given to this concerned party. According to the CJEU, in this case, accessing the minimum information referred to in Article 20(2) DAC would be sufficient.<sup>142</sup> Hence, Berlioz should be able to verify the identity of the taxpayer involved and the tax purpose for which the information is requested. The CJEU further confirmed that the court of the requested EU Member State might consider this minimum information

inadequate and thus demand additional information from the requested authority. In such case, the court should also provide this information to the party that was requested to deliver the information 'while taking due account of the possible confidentiality of some of that information'.<sup>143</sup> According to the CJEU, this would grant an information holder under the EOI access to minimum information to ensure his personal right to an effective remedy.

Nevertheless, the taxpayer under investigation (whose interests may be significantly affected by the exchange of information) should also have broader access to the information regarding the exchange. Therefore, some researchers defend that ensuring effective protection, as derived from the right of defence, requires the interested taxpayers under the EOI mechanism to have full access to all of the information related to it. This also includes the information regarding 'the sources, procedures, and safeguards' used by the requested state to collect the information for the purpose of the exchange.<sup>144</sup> According to some scholars, the effective protection of taxpayer rights under the EOI procedures should grant taxpayers the right to be informed about what the tax administration obtained through the EOI.<sup>145</sup> The Article 29 Data Protection Working Party recommended that taxpayers should be informed *before* the EOI occurs so that interested parties can gain time to defend themselves if necessary.<sup>146</sup> Whether this only applies under a contentious stage or should already apply under an investigation stage, however, remains disputed.

In *État luxembourgeois*, a third question with regard to the access to a judicial procedure was at stake. The CJEU restated its findings from the previous cases and made further clarifications concerning the procedural protection for taxpayers under the EOI.<sup>147</sup> It distinguished three categories of parties potentially involved under the EOI on request, i.e., the information holder, the concerned taxpayer, and third parties.

The first party, the information holder, receives a decision ordering the requested information. He is subject to a penalty in the event of noncompliance that adversely affects his interests. Hence, he should benefit from effective judicial

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<sup>138</sup> The Charter had already come into force before the decision was issued.

<sup>139</sup> Case C-682/15 *Berlioz* [2017] OJ C 239/8, paras 57–59.

<sup>140</sup> *Ibid.*, paras 92–95.

<sup>141</sup> Case C-383/13 *PPU - G. and R.* [2013] OJ C325/8, paras 32 and 34.

<sup>142</sup> Case C-682/15 *Berlioz* [2017] OJ C239/8, para. 100. According to Art. 20 DAC, the request for information must be sent using a standard form that includes at least 'the identity of the person under examination or investigation', and 'the tax purpose for which the information is sought'.

<sup>143</sup> Case C-682/15 *Berlioz* [2017] OJ C239/8, para. 100.

<sup>144</sup> Carrero & Seara, *supra* n. 136, at 498, 507.

<sup>145</sup> Baker & Pistone, *supra* n. 108, at 335, 344.

<sup>146</sup> Article 29 Data Protection Working Party, *Guidelines for Member States on the Criteria to Ensure Compliance with Data Protection Requirements in the Context of the Automatic Exchange of Personal Data for Tax Purposes* 9 (2015).

<sup>147</sup> Joined cases C-245/19 and C-246/19 *État luxembourgeois* (GC, 6 Oct. 2020). In C-245/19, the Spanish tax administration interrogated the Luxembourg tax administration about a taxpayer, F. C., a natural person residing in Spain. The Luxembourg tax administration sent Company B, a resident in Luxembourg, an information order requiring it to provide certain information. In C-246/19, the Spanish tax authorities sent a second request regarding F. C. to the competent Luxembourg administrative authority one year later. This authority sent an information order to resident Bank A requesting information concerning any financial assets held by F. C. in Company B, Company D, or any other company controlled by F. C. Both information orders could not be judicially challenged as they were provided for by Luxembourg national legislation regarding the EOI on request proceedings. The CJEU was thus asked whether this domestic legislation that did not provide for any challenging possibility for the taxpayer nor for third parties was compatible with EU law.

protection that would not be available if he was unable to access a court to challenge the decision.<sup>148</sup> This right should be protected against any decision of a public authority that may be arbitrary or disproportionate. In this regard, the CJEU further confirmed in another case that an information holder who challenges the penalty decision and also, indirectly, the information order, should be allowed to comply with the latter after the time limit prescribed by national law without suffering a penalty decision.<sup>149</sup>

The second party is the concerned taxpayer. His position differs from the information holder since the latter would be deprived of any effective judicial protection if he were unable to lodge any action against the disputed decision. For the taxpayer, the distinction between the investigation stage and the contentious stage, as established in the *Sabou* case, was followed. Hence, the concerned taxpayer could enjoy a 'deferred protection' taking into account a fair balance between the protection of the right to privacy and the effectiveness of the tax enquiry.<sup>150</sup> The involved taxpayer can hence indirectly challenge the decision by reacting against a subsequent correction or adjustment decision.<sup>151</sup>

Finally, a third party can be interested when it maintains or is likely to maintain economic relations with the concerned taxpayer. However, different from the information holder, it is not under a legal obligation to provide the requested information neither at risk of receiving a penalty in a case of noncompliance with this obligation. Hence, the right to an effective judicial remedy does not require this third party to have the possibility of bringing a direct action against the decision concerning the request for information.<sup>152</sup>

However, various opinions exist. As Advocate General Kokott concluded in her opinion in *État luxembourgeois*, the deferred protection for the concerned taxpayer and the third party cannot ensure adequate protection under the EOI on request for their right to personal data. They are also entitled to challenge the legality of the information order in accordance with Article 47 CFR.<sup>153</sup>

In brief, based on this jurisprudence, the request and exchange of information between EU Member States are

deemed to be a part of collecting information and thus fall within the scope of the tax investigation procedure. Hence, concerned taxpayers cannot claim a right to be notified and heard or challenge the information order under a legal procedure. However, they may exercise these rights in the EOI process if a legal basis exists in their domestic law. Additionally, the holder of information has the right to access the minimum information concerning the EOI and to challenge the information request. However, there remains some lack of guidance in EU law concerning to what extent the directly involved taxpayer can access the relevant information in the process of the EOI. In addition, a mere third party cannot directly challenge information requests since they do not have a direct adverse effect on them.

As EU law allows the entitlement of taxpayers' participation rights under domestic law, the treatment of taxpayers in the framework of the EOI may be dissimilar among the EU Member States due to differences in the national legislation. Therefore, it was already claimed to be imperative '*to accelerate the development of participation rights at a European level in order to achieve a complete system of rules*'.<sup>154</sup> Considering the EOI procedure merely as a manner of collecting information instead of a proper administrative procedure may lead to the ignorance of the taxpayers' rights and interests in this process.

### 4.2.3 Influence from the GDPR

Whereas the taxpayers' rights under the EOI procedure derived from general legal principles under EU law or the ECHR seem rather limited, another influence can be deduced from the GDPR. As recognized in Article 25(2) DAC, both the reporting financial institutions and the competent authorities of each EU Member State are considered to be 'data controllers'. Hence, they principally have an obligation to inform the data subject about the collected information and provide access and the right to rectify.<sup>155</sup>

Nonetheless, Article 23(1)(e) GDPR allows further restrictions to this transparency to be determined in a legal text when '*such a restriction respects the essence of the fundamental rights and freedoms and is a necessary and*

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<sup>148</sup> Joined cases C-245/19 and C-246/19 *État luxembourgeois* (GC, 6 Oct. 2020), paras 56–68.

<sup>149</sup> Case C-437/19 *État luxembourgeois v. L* (ECJ, 25 Nov. 2021), para. 99. In this case, the French tax authority requested information from the Luxembourg tax authority about L (a Luxembourg company) since L was the indirect parent company of F (a French immovable property company). Under French law, natural persons directly or indirectly owning immovable property situated in France must declare it. The French tax authority hence searched for the identity of the shareholders and beneficial owners of L. Following the French request, the Luxembourg tax authority sent an information order to L to provide this information which was an order that L could not legally challenge. L was subsequently punished for failure to comply with this request. In a preliminary request, the CJEU was asked whether L as the information holder facing a penalty should be entitled a period of grace in order to comply with the information order after it had been considered legal.

<sup>150</sup> Stefano Zagà, *The Protection of Individual Taxpayer Rights Regarding Exchange of Information on Request in the European Union*, 62 Eur. Tax'n 1, 6 (2022).

<sup>151</sup> Joined cases C-245/19 and C-246/19 *État luxembourgeois* (GC, 6 Oct. 2020), paras 80–93.

<sup>152</sup> *Ibid.*, paras 94–104.

<sup>153</sup> Joined cases C-245/19 and C-246/19 *État luxembourgeois* (GC, 6 Oct. 2020), Opinion of AG Kokott, para. 147.

<sup>154</sup> De Flora, *supra* n. 30, at 447, 459.

<sup>155</sup> Articles 13–15 GDPR.

*proportionate measure in a democratic society to safeguard ... an important economic or financial interest of the Union or of a Member State, including monetary, budgetary and taxation matters*. Article 25(1) DAC requires the EU Member States to provide for this exception to the degree needed to protect these interests. Hence, EU Member States may still decide not to notify and restrict the right to be notified for persons concerned with the EOI in order to maintain the effectiveness of their tax collection.<sup>156</sup>

However, in particular for the AEOI, reporting financial institutions are required to inform the account holders that their relevant information will be collected and transferred to other competent authorities. They also have to provide these account holders the information to which they are entitled under their domestic law in order to exercise their data protection rights. Article 25(3) DAC explicitly requires EU Member States to implement this in their domestic legislation. Researchers thus claimed that the reporting financial institutions' notification obligation is '*a fascinating example of the respect for data protection rights over administrative convenience*'. These stipulations, however, created the strange phenomenon that a significant number of taxpayers is to be notified (known and hence predictable) under the AEOI whereas specific taxpayers are not notified (and hence less predictable) in the case of a non-automated EOI on request.<sup>157</sup>

In addition, Article 34 GDPR also ensures the communication of a personal data breach to the data subject. Such an obligation may not be required if certain conditions are satisfied, e.g., when the controller has implemented appropriate protection measures that apply to the personal data affected by the leakage. This can also be avoided when the controller has taken subsequent measures that can ensure the adverse influence of the leakage for the involved data subjects is no longer likely to materialize.

#### 4.2.4 Conclusion

In brief, the legal protection of taxpayers' procedural rights under the EOI procedures seems unsatisfactory to some extent also in the EU.

First of all, as a matter of legal procedure, the taxpayers' right to be informed and heard largely depends on individual EU Member States' domestic legislation. Taxpayers can exercise their rights if this is provided in domestic law; however, this is rarely substantially provided for EOI procedures in particular.

When examining at a supra/international level, fundamental legal principles are being interpreted in a rather restricting manner by both the ECtHR and the CJEU.

Requesting and exchanging information between states is considered to be an element of aggregating information and thus falls within the scope of the tax investigation procedure. In some major cases, the courts did not recognize a fundamental right for taxpayers to be heard or notified or to challenge the information request during this procedure.

This might have changed to some extent when the CJEU was asked about the legal position of a holder of information being requested to deliver the requested information. At least for this information holder, some access and the right to challenge the legality of the information order have been recognized. However, there is still excessive uncertainty to what extent the taxpayer who is directly involved can access the relevant information and challenge the tax administration under the EOI procedures. Other third parties' right to challenge the information order has also not been recognized at the Union level.

#### 4.3 Potential Improvements for the Chinese Approach

Chinese tax law does not specifically grant the taxpayer a right to be heard or to access information under the EOI. It only affords a possibility for the tax administration who *may* inform the taxpayer (Article 27 RIETI). Hence, a taxpayers' right to know under the EOI procedure is not explicitly guaranteed in the form of a right of access but as the tax administration's 'obligation' to notify the taxpayer. Under the RIETI, information involving the purpose of collecting the information that is aggregated under the EOI, its source, and its content is difficult-to-obtain information for taxpayers and other parties and thus requires active notification from the tax administration. Nevertheless, the taxpayer can access the relevant information by applying general tax law and be notified under certain circumstances according to the data protection law. However, exceptions may apply to the EOI procedures. Considering the increase of circulating data because of the AEOI compared to an EOI on request, this will come with a higher risk of errors or miscommunications. Taxpayers' interaction can be of assistance for preventing this and even facilitate the information exchange *per se* (e.g., by allowing taxpayers to cooperate voluntarily or clarify certain aspects). The present text of Article 27 RIETI is ambiguous and affords too much discretionary powers for the tax administration. When examining European experiences, a possible improvement could be to rather consider this topic from the position of taxpayer entitlement. Which rights should be granted, and what

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<sup>156</sup> Viktoria Wöhrer, *Data Protection and Taxpayers' Rights: Challenges Created by Automatic Exchange of Information* 391 (IBFD 2018).

<sup>157</sup> Baker & Pistone, *supra* n. 36, at 64–65.

are valid reasons to limit his access to information or right to be heard? Hence, enhanced cooperation can be realized through enforcement of the rights of this private party no longer depending on willingness from the tax administration to take any initiative.

However, the European outcome also appears to be rather limited when investigated more closely, as it is criticized in legal doctrine. Although stakeholders claim that the taxpayer should have complete access to the information that is exchanged, the CJEU provides very little guidance in this regard. *'There is little discussion so far on access to information by the taxpayer'* under the EOI in legal doctrine.<sup>158</sup> On the contrary, considering the EOI as an investigation procedure that is detached from an actual taxing procedure, several legally recognized rights derived from the right of defence do not yet apply. Only the respect of an information holder's interests can make it necessary to access the EOI procedure and challenge the information order. Additionally, although the GDPR guarantees data subjects the right to be informed and the right of access, Member States can still limit the protection of these rights under the EOI procedure in the interest of taxation matters. However, such a limit should be foreseen in a clear legal text and can no longer depend on the administrative discretion.

Hence, when looking at European experiences, a change of perspective from the possibilities of a tax administration towards the rights of a concerned taxpayer could be taken into consideration and particular attention should be paid for the rights of third parties, e.g., a holder of information. This focus on entitlement also raises the necessity of clear legal limitations to inform instead of administrative discretion. Ultimately, however, both regimes should probably pay more attention to the recognition of these taxpayer rights.

## 5 EFFECTIVE REMEDIES IN CASE OF VIOLATIONS UNDER EOI

### 5.1 Remedial Measures in China

Under Chinese law, taxpayers can seek remedies by applying for an administrative review, initiating a judicial proceeding, or claiming compensation through the state

compensation procedure. When specific 'tax disputes' arise,<sup>159</sup> taxpayers must pay or remit the disputed amount (tax and penalties) or provide the necessary guaranty before they can apply for an administrative review.<sup>160</sup> In addition, this tax review has to be completed before bringing the case before the court.<sup>161</sup>

In addition, taxpayers can apply for administrative reviews or lodge judicial proceedings when they disagree with the tax administration's penalty decisions, compulsory enforcement measures, or tax preservation measures. In such cases, it is optional for the taxpayer to decide 1) whether to pay the disputed amount or provide guaranties before applying for the tax review, and 2) whether to apply for the administrative review before initiating the judicial proceeding.<sup>162</sup> Only when taxpayers are not satisfied with an additional fine being levied by the administration for the late payment of a penalty do they have to pay both before they can apply for an administrative review.<sup>163</sup>

Moreover, according to Article 4 State Compensation Law, taxpayers are entitled to compensation when any public authority or their staff infringes upon the taxpayer's property rights in the process of performing duties.<sup>164</sup> Since domestic tax administrations are doing so when implementing the EOI, they are bound by administrative law and tax law. Hence, this remedy mechanism also applies to them.

Notwithstanding these different possibilities, the mere application of these general principles in the context of the EOI can be very ambiguous. An example is that the admissibility of a legal dispute procedure involving the EOI in itself before the court remains uncertain. This is because the law does not formally confirm tax administrations' malfeasance under the EOI procedures as disputable in front of a court. Tax administrations' specific behaviour in performing their duties must be theoretically examined by the court if the administration has indeed infringed upon taxpayers' rights and interests. Nevertheless, the court cannot find a direct legal basis for itself in the current written law. As already indicated, Chinese judges can only rule in accordance with statutory rules stipulated in valid written legal instruments. Hence, the court could question whether a case regarding an infringement of an EOI

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<sup>158</sup> Christiana HJI Panayi, *Current Trends on Automatic Exchange of Information*, Singapore Management University School of Accountancy Research Paper No. 2016-S-43, 33 (2016), <https://papers.ssrn.com/abstract=2748659> (accessed 20 Mar. 2022).

<sup>159</sup> I.e., 'disputes arising from taxpayers, tax withholding agents or tax payment guarantors over such specific administrative acts by tax authorities as determining the subject of tax payment, the target of tax collection, the scope of tax collection, the reduction and exemption of taxes, the tax refund, the applicable tax rate, the base of tax assessment, the means of tax-levying, the stages, time-limit, and place of tax payment'. (Cf. Art. 100 Rules for the Implementation of the Law on the Administration of Tax Collection of the PRC).

<sup>160</sup> Article 88(1) LATC.

<sup>161</sup> This is known as 'Shuang Qian Zhi' (double pre-systems) in Chinese.

<sup>162</sup> Article 88(2) LATC.

<sup>163</sup> Article 34(2) of the Rules for Tax Administrative Review (《税务行政复议规则》), promulgated on 10 Feb. 2010 came into force on 1 Apr. 2010 and was amended in 2015 and 2018; the newest amendment came into force on 15 Jun. 2018.

<sup>164</sup> This includes: 1) Illegally imposing administrative penalties upon taxpayers such as the imposition of fines, the revocation of certificates and licenses, the suspension order of production and business, and the confiscation of properties; 2) Illegally implementing compulsory administrative measures such as sealing up, distraining or freezing taxpayers' properties; 3) Illegally expropriating or requisitioning the properties of taxpayers; and 4) Other illegal acts causing damage to taxpayers' properties.

procedure is admissible. Although no relevant judgment concerning this issue seems yet having been publicly disclosed, a court could find a reasonable and legal basis for admitting the case under the current case filing register system. Due to the far reaching reform of the case admitting system in China, courts must accept all first-instance cases if they meet all of the formal requirements.<sup>165</sup> Hence, local courts must accept the cases relating to EOI violations as long as they do so. However, despite this, how a court will subsequently deal with admitted cases regarding EOI violations remains extremely unclear. The exercise of tax administrations' power to transfer tax information from/to other jurisdictions might create inequitable situations between taxpayers and tax administrations while posing a genuine and immediate risk to the taxpayers' interests and rights. Concerned taxpayers thus require robust remedy mechanisms to safeguard their interests.

Under the EOI, information confidentiality can be violated by the tax administration in generally two ways: the illegal obtaining and the improper disclosure of information (e.g., in the event of stolen information or leaking data to an irrelevant party). If the tax administration has illegally obtained evidence/information, this shall not be used to establish the facts of the case.<sup>166</sup> If the tax administration decides based on facts proven by illegally obtained evidence, such facts cannot be withheld by the court in judicial proceedings. This may ultimately lead to the (partial) revocation of the decision due to the lack of factual basis. On the other hand, if the tax administration improperly discloses information to an irrelevant party, such as the press, it may lead to financial consequences for the taxpayers who are involved.<sup>167</sup>

In China, however, the current legal system provides no detailed rules concerning remedies for taxpayers against such public data infringements under the EOI procedures in particular. There is no specific stipulation for taxpayers in this regard in the *Administration Procedure Law* nor in the *Administrative Review Law*. The *State Compensation Law* also does not explicitly mention compensation concerning taxpayers' losses caused by public data infringements in the EOI. The current state compensation system only compensates direct losses of the claimant whereas further losses generated from an illegal data leakage under the EOI may be indirect. Proving that the losses suffered by taxpayers were caused by an illegal information leak is

hence a troublesome issue. The LPPI also does not particularly mention the data subject's right to compensation in the case of data infringements by public authorities. The rules only provide for particular sanctions for the administration itself. An example is in the case of data infringements under the EOI; concerning tax law, a breach of the tax administration's confidentiality obligation may effectuate disciplinary actions, as already mentioned.<sup>168</sup> In the context of the EOI, a notice of criticism may be issued when the information exchanged is illegally disclosed or lost.<sup>169</sup> However, such notice (and subsequent disciplinary actions imposed upon tax officers) neither aims at confirming any right for the concerned taxpayers nor implies what rights taxpayers have to safeguard their interests in this case.

It would ultimately be even all the more challenging for a taxpayer to seek a remedy when a data leak is caused by the other tax administration with whom information is exchanged. There is only minimal legal guidance for determining whether the domestic tax administration can/will be held responsible for the mistakes of such other authority in the exchanging process.

Hence, from a practical perspective, the legal basis for applying remedial mechanisms for public data violations under the EOI is relatively weak in China. Taxpayers under it should have access to remedies 'to ensure that the confidentiality and the use of personal data are respected'.<sup>170</sup> The current domestic tax remedy system thus requires further refinement and improvement.

## 5.2 Remedial Measures in the EU

### 5.2.1 Remedial Measures in General

For EU Member States, remedies are encompassed within the procedural aspects and are hence governed by domestic legislation. However, a pivotal rule is played by the ECHR providing the fundamental right to an effective remedy (Article 13) throughout a fair trial (Article 6). Multiple cases concerning the violation of these rights have been brought before the ECtHR after previous exhaustion of domestic procedures. Hence, domestic courts have the primary obligation to guarantee an effective remedy for citizens under the ECHR. The ECtHR ensures that participating states perform their obligations 'by addressing complaints from individuals about

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<sup>165</sup> Notice of the Supreme People's Court on Issuing the Opinions on Promoting the Reform of the Registration System for Case Docket by the People's Courts, Fa [2015] No. 6, issued on 15 Apr. 2015, came into force on 1 May 2015.

<sup>166</sup> Article 43(3) Administrative Procedure Law.

<sup>167</sup> Filip Debelva & Irma Mosquera, *Privacy and Confidentiality in Exchange of Information Procedures: Some Uncertainties, Many Issues, But Few Solutions*, 45 Intertax 362, 374–376 (2017).

<sup>168</sup> Article 87 LATC and Art. 995 and 1039 of Civil Code. See also §3.1.

<sup>169</sup> Article 41 RIETI.

<sup>170</sup> Debelva & Mosquera, *supra* n. 167, at 362, 377.

violations of the ECHR'.<sup>171</sup> Article 46 ECHR guarantees a binding force and execution of the ECtHR's judgments whereby participating states involved in a proceeding must abide by the final judgments of the ECtHR. In addition, the ECtHR's case law also foresees compensation in its judgments. Empowered by Article 41 ECHR, the ECtHR may order states to indemnify the victim. ECHR infringements stemming from a decision of a national court adjudicating at last instance may also give rise to such compensation.

Whereas procedural law is not harmonized in the EU, the right to an effective judicial remedy is rather seen as 'an accessory right' and 'an enforcement tool' for exercising the rights derived from EU law.<sup>172</sup> Nonetheless, the CJEU also recognized the right to effective judicial protection as a general principle of EU law that derives from the constitutional traditions that are common to the EU Member States.<sup>173</sup> Article 47 CFR also repeats this right to an effective remedy and a fair trial in particular with regard to matters concerning EU Law. As already mentioned, the CJEU confirmed that a penalty based on a national provision implementing the DAC is within the scope of this Article 47 CFR. Hence, the taxpayer can also rely on the right to an effective remedy protected by Article 47 CFR to safeguard his interests for other measures adversely affecting a taxpayer in the EOI procedures.<sup>174</sup> The domestic courts of EU Member States play a pivotal part in executing the judicial review of a tax decision whereas the CJEU functions as the maintainer of a uniform EU legal order through preliminary rulings. The dialogue between the CJEU and the national courts is thus essential for the construction of a coherent system of rights and remedies within the EU.<sup>175</sup>

In addition, domestic legislation should arm the harmed taxpayers as data subjects with the right to seek appropriate remedies if any interests protected by data privacy rules were violated in the process of the EOI:

*Legislation not providing for any possibility for an individual to pursue legal remedies in order to have access to personal data relating to him or to obtain the rectification or erasure of such*

*data, does not respect the essence of the fundamental right to effective judicial protection, as enshrined in Article 47 of the Charter.*<sup>176</sup>

Inappropriate exchanges of tax-related information constitute such improper data processing for which a taxpayers' right to an effective remedy and compensation is protected by the GDPR. Hence, taxpayers can file a complaint to a data protection supervisory authority, bring a judicial proceeding before the national courts, and seek compensation from relevant controllers or processors.<sup>177</sup>

The CJEU ensures the correct implementation of EU law. The court recognized the importance of enabling individuals to obtain recovery '*when their rights are infringed by a breach of Community law for which a Member State can be held responsible*' to ensure the effectiveness of community law and the protection of individual's rights.<sup>178</sup> A state can be obligated to compensate for the individuals' losses and damages caused by infringements of Union law.<sup>179</sup> Although the CFR has not introduced a provision to require Member States to provide compensation for the violation of EU rights, individuals may also claim compensation for damages caused by an infringement of EU rights before a national court.<sup>180</sup> If Union law is breached by a national authority of a Member State, that state as a single entity will be held liable irrespective of its legislative, judicial, or executive nature.<sup>181</sup> Apart from this EU Member State itself, a public law body may also be held liable to compensate the aggrieved party.<sup>182</sup> Hence, taxpayers can claim compensation if their rights as guaranteed under EU law have been violated by an EU Member State.

## 5.2.2 Particularities in a Cross-border Context

In the particular context of a cross-border EOI procedure, taxpayers might experience more vulnerabilities compared to a mere domestic environment. Therefore, it can become more difficult to safeguard themselves. Hence, allowing taxpayers to seek remedies for violations of their rights under the EOI mechanisms is challenging. Nonetheless,

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<sup>171</sup> European Union Agency for Fundamental Rights and Council of Europe, *Handbook on European Law Relating to Access to Justice* 18 (Publications Office of the European Union 2016).

<sup>172</sup> Voje, *supra* n. 110, at 157, 165.

<sup>173</sup> For example, Case C-432/05 *Unibet* [2007] ECR I-02271, para. 37 with further references.

<sup>174</sup> Case C-682/15 *Berlioz* [2017] OJ C239/8, para. 52.

<sup>175</sup> Aronstein I.V., *Remedies for Infringements of EU Law in Legal Relationships Between Private Parties* (Wolters Kluwer 2019), 444–445.

<sup>176</sup> Case C-362/14 *Schrems* [2015] OJ C 389/5, para. 95.

<sup>177</sup> Article 82 GDPR.

<sup>178</sup> Joined cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-05357, para. 33.

<sup>179</sup> *Ibid.*, para. 35.

<sup>180</sup> Case 26/62 *Van Gend en Loos v Administratie der Belastingen* [1963] ECR 00003, 13.

<sup>181</sup> Case C-46/93 *Brasserie du Pêcheur* [1996] ECR I-01029, para. 34.

<sup>182</sup> Case C-424/97 *Haim* [2000] ECR I-05123, para. 32.

this largely remains under the domestic sovereignty of individual EU Member States. As explained, according to the CJEU, the DAC primarily addresses the relationship between different tax administrations of the EU Member States and does not impose any obligation for them to provide specific rights for taxpayers under the EOI procedure. Some judgments of the CJEU and the ECtHR might nonetheless offer an illustration of how this international context may be addressed. Although this will not be analysed in detail, two cases merit being briefly mentioned.

In *WebMindLicenses*,<sup>183</sup> the CJEU provided guidance with regard to illegally obtained evidence. According to it, a national court should verify in accordance with the applicant's right of defence whether 'the taxable person has the opportunity, in the context of the administrative procedure, of gaining access to that evidence and of being heard concerning it'.<sup>184</sup> If such a possibility was not guaranteed, the collected evidence must be disregarded. Any decision that is exclusively based on such evidence should be annulled. The same should apply if a national court is not able to check whether such evidence was obtained in accordance with EU law or the court cannot satisfy itself that the evidence was obtained in accordance with EU law on the basis of a review that has been carried out by a criminal court.<sup>185</sup>

These findings were further elaborated by the CJEU in *Glencore*.<sup>186</sup> It concluded that evidence might be collected and used regardless of whether the evidence is gathered in proceedings that are against or involve the taxable person, whether such proceedings are criminal or administrative, and whether they are closed or still pending as long as the collection and use of such evidence is in accordance with EU law. The domestic court must be able to examine the legality of the collection of the evidence. If not, such evidence 'must be disregarded and the contested decision which is founded on that evidence must be annulled if, as a result, that decision has no basis'.<sup>187</sup>

### 5.3 Potential Improvements for the Chinese Approach

The EOI procedures concern the cross-border transfer of a substantial amount of tax-related information that involves numerous taxpayers' interests. Entitling them to remedies is essential for supporting their rights and

safeguarding their interests in this process. The EOI is considered part of an information collection and investigation process of the tax administration in both China and the EU. Hence, involved taxpayers can only challenge the tax administration by administrative/judicial proceedings when the latter has made decisions based on the information obtained under the EOI.

Both regimes do not provide a particular remedy for a taxpayer against unlawful exchanges *before* the exchange process has actually occurred. However, alternative forms of *ex ante* control are also important for taxpayers, and might prove to be more effective than subsequent remedies in certain situations. For instance, introducing a complaint system or a summary hearing procedure before the actual exchange may be a suitable and viable approach for preventing potential data infringements or other disputes and thus ensure the confidentiality of the tax-related information under the EOI mechanism, especially under the EOI on request. Such a complaint system can afford an opportunity for taxpayers to access the information that is transferred between tax administrations and rectify incorrect information in time even under the AEOI. This also contributes to the effectiveness of the subsequent exchange of information.

However, apart from this similar lack of *ex ante* protection for taxpayers in the EOI process, divergences in the remedy mechanism also exist when comparing the EU framework with Chinese practice. Direct protection for taxpayers particularly focusing on the EOI procedure is simply lacking in China. The RIETI helps to alleviate this flaw to a certain extent, but the primary rules concerning remedies are rooted in statutes of general tax law, such as the LATC. Hence, taxpayers are not challenging the improper EOI but only the decisions based on the exchanged information. In this regard, the EU experience provides valuable inspiration for China. Chinese taxpayers should also be able to challenge the tax administration if their rights are violated in the EOI process.

Moreover, no rules govern administrative compensation for information leakages in the EOI process in China. In the EU, although the DAC does not confer compensation rights on taxpayers, they can rely on domestic legislation or Article 82 GDPR to obtain compensation. Since it may be difficult and unfair for

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<sup>183</sup> Case C-419/14 *WebMindLicenses* [2016] OJ C68/16. *WebMindLicenses* is a commercial company registered in Hungary that had a VAT dispute with the Hungarian tax authority. The latter imposed a penalty decision based on evidence obtained from a parallel criminal procedure without the applicant's knowledge. Several issues were raised questioning whether the means used to obtain the information were legitimate and whether the tax authority could use this information. In particular, the CJEU was also asked if the taxpayer should have the opportunity in accordance with his right of defence to access this evidence and be heard concerning it.

<sup>184</sup> Case C-419/14 *WebMindLicenses* [2016] OJ C68/16, para. 91.

<sup>185</sup> *Ibid.*

<sup>186</sup> Case C-189/18 *Glencore* [2019] OJ C221/6. *Glencore* is a Hungarian company. The Hungarian tax authorities made two decisions regarding *Glencore* and considered it had unlawfully deducted VAT since it knew or should have known that its transactions with its suppliers were linked to VAT fraud. However, the tax administration made these decisions based on evidence gathered in related administrative procedures to which this company was not a party and pending criminal procedures that did not involve *Glencore*. This company was also not entitled to access all of the relevant files in these proceedings. Disputes between the taxpayer and the tax authority thus arose.

<sup>187</sup> Case C-189/18 *Glencore* [2019] OJ C221/6, para. 68.

taxpayers to do so using domestic legislation in the different EU Member States, Article 82 GDPR provides an impressive legal basis and opportunity for taxpayers at an EU level. Hence, the EU approach introduces a potential solution to the question of how the taxpayer can be compensated for losses caused by improper use of the EOI. This might inspire the resolving of the limited practical utility of the administrative compensation that is currently applicable in China.

In brief, the primary issue concerning remedies for misuse of the EOI in China is the lack of detailed rules. Taxpayers have no appropriate legal instruments to protect themselves. This is all the more problematic and unbeneficial for taxpayer protection under the AEOI. Not only *ex post* judicial remedies and compensation should gain legal ground but also *ex ante* control of the EOI should be developed for taxpayers whose interests might be affected by tax administration's misbehaviour under the EOI procedures in China.

## 6 SUMMING UP: RECOMMENDATIONS FOR TAXPAYER PROTECTION IN CHINA UNDER EOI

This article intended to provide a practical response on how to improve taxpayers' rights under the exchange of information in Chinese tax law regulations. Although China already adhered to the AEOI in 2018, its legal tax regime has been criticized for not paying sufficient attention to taxpayers' rights under this procedure. Based on a comparison with the general European experiences of EU Member States, this article discussed the development of a three-layered minimum standard of taxpayer rights that should be respected. Subsequently, the recognition and respect of these rights in current Chinese legislation has been compared with its recognition in EU Member States as developed under the umbrellas of EU legislation and the European Convention on Human rights (ECHR) as well as interpretations of both the CJEU and the ECtHR.

Based on this research, the following conclusions to improve taxpayer protection in China under EOI procedures can generally be drawn.

A first layer concerns the protection of the privacy of the taxpayer and the confidential treatment of exchanged information. Both preventive measures to avoid data maladministration and corrective measures to attempt to effectively address cases of improper data leakages must be added. This enhances data encryption techniques, software upgrades, and targeted formation of tax officials involved in EOI procedures. In the event of data leakages, taxpayers should be more rapidly notified, and further measures to mitigate potential impacts should be taken. This must be completed with a compensation clause and a right to remedy for the taxpayer in addition to the existing mere disciplinary actions against the tax official or tax

administration who has committed the errors. This also requires further clarification of justifications or exceptions allowing the use or communication of private information. The SAT should publish detailed rules for the sharing and use of inbound information between public authorities. This facilitates control of eventual disclosure and use of exchanged information. In this regard, the SAT should further implement material supervision concerning the necessity and relevance of sharing information in order to avoid arbitrary disclosure to irrelevant parties. The law should finally further clarify how exchanged information will be dealt with after being used for tax purposes, such as being stored for a longer period of time or destroyed.

A second layer envisages the role of taxpayers in the EOI procedures. They need to be able to access them and obtain information about what is exchanged to whom and under which guarantees. This has been described as an active right to access information that is further complemented with a passive right to be informed and a right to be heard. The current Article 27 RIETI that merely allows the tax administration to notify a taxpayer is insufficient in this regard. Instead of offering possibilities to the tax administration, the perspective of the legislation should begin from a taxpayer's right that can eventually be limited based on further justifications. The recognition of these rights should not be an obstacle to the effective implementation of the EOI but can rather improve the exchange procedure and save time and possible administrative costs.

A third layer is focused particularly on remedies. A hearing (under the second layer) could already be an *ex ante* alternative for a legal remedy. These procedures do not need to be elaborate and prolonged to enable taxpayers to have the right to remedy while maintaining the effectiveness of the EOI. They can be rapidly completed by only dealing with simple issues ensuring that the administrative costs and delays are minimal. They may suspend the delivery of information for a brief period of time until the disputes have been resolved. Additionally, Chinese tax law should also provide narrowly tailored *ex post* remedies for taxpayers under the EOI procedure to enable taxpayers to actively protect themselves instead of facing the situation passively. They can preserve their legal interests when suffering any improper exchange or disclosure of information. To achieve this, tax reviews and tax proceedings in China should be expanded to include disputes under the EOI procedure. The *State Compensation Law* or the LATC should also introduce the right to compensation in the event of public data infringements resulting from it.

Not every recommendation is fully present in each EU Member State. These states have their own domestic legislation through which fundamental principles of both EU legislation and the ECHR are integrated in different ways. Despite several imperfections in certain aspects, this so-called 'EU-approach' can still yield



indications for inspiration and possible solutions in China. Of particular interest seem to be 1) the EU experience for justifying the interference with privacy, supervising the sharing and use of information, and safeguarding the data subject's compensation rights in the case of data leakages; 2) the protection of an information holder's right to access

information and challenge the information order; and 3) the direct legal protection and remedial measures, including the possibility to seek compensation, for taxpayers whose rights are infringed in the process of the EOI. Hence, the goal of this comparative approach seems to be achieved.