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International Association of Tax Judges Webinar: Recent Trends in Case Law on Exchange of Information

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This report summarizes the webinar held on 8 April 2022 by the judges of the International Association of Tax Judges on the topic of recent trends in case law on exchange of information.

1. Introduction

Because of the COVID-19 pandemic, the International Association of Tax Judges (IATJ) suspended its physical annual assembly in 2020 and 2021. Instead, the judges are holding a series of webinars. The fourth webinar on the topic of “Recent Trends in Case Law on Exchange of Information” took place on 8 April 2022.

Wim Wijnen, head of IATJ’s Permanent Program Committee, introduced the topic of the webinar. The rise of exchange of information (EOI) in tax matters is one of the most important developments in international tax in the last decade. Often taking place in the shadows of much more discussed topics – such as base erosion and profit shifting and the taxation of the digital economy – significant developments have taken place in the field of the EOI. Thanks to current technical possibilities, governments have powerful tools with which to exchange information easier and faster than ever before. On the other hand, it is questionable whether the protection of the rights of individual taxpayers has kept pace with these developments. In many countries, taxpayers are not notified (or have lost the right to be notified) of EOI requests. In a few countries, the number of court cases in this field has sharply increased. Switzerland is a key example of this trend, and is a country that morphed in less than a decade from a haven of financial secrecy into the epicentre in international EOI practice. Unsurprisingly, Switzerland has today the largest body of EOI case law. Accordingly, a discussion on recent trends in EOI case law cannot take place without assigning a prominent role to the Swiss judiciary.

Michael Beusch, *Bundesgericht/Tribunal fédéral* (Federal Supreme Court), Switzerland, served as the moderator of the webinar. The webinar consisted of presentations made by the following panellists: Thomas Andrieu, *Conseil d’Etat* (Supreme Administrative Court, CE), France; Tamara Ashford, Tax Court (TC), United States; Arjo van Eijnsden, *Hoge Raad* (Supreme Court, HR), the Netherlands; and Raphaël Gani, *Bundesverwaltungsgericht/Tribunal administratif fédéral* (Federal Administrative Court), Switzerland.

2. EOI on Request: Procedures in the Requesting State

2.1. France

Thomas Andrieu started by outlining that, under French domestic law, the French tax authorities face few constraints when it comes to issuing a request for information to another state with which France has an international agreement in place that provides for EOI on request. This can be carried out under a bilateral or multilateral agreement or by way of the EU Exchange of Information Directive (2011/16/EU) (hereinafter Directive (2011/16))^[1] where the request is addressed to a Member State of the European Union (a “Member State”). The start of an EOI procedure is discretionary and confidential. The initiation of an EOI procedure does not require the start of a formal audit. If an audit has been started, the sending of a request allows for the audit period to be extended. A pending EOI procedure also allows for the extension of the limitation period until the requested information is received and with a maximum extension of three years in addition to the standard term of three years. A French taxpayer is not notified of the fact that an EOI request has been sent. The taxpayer must be informed only when the

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1. Council Directive 2011/16/EU of 15 February 2011 on Administrative Cooperation in the Field of Taxation and Repealing Directive 77/799/EEC, OJ L 64 (2011), Primary Sources IBFD [hereinafter Directive (2011/16)].

tax authorities decide to extend the audit period or the limitation period. But otherwise, during the initial standard audit period, there is no requirement to inform the taxpayer of an EOI procedure, and it might be sufficient to inform the latter of it at the same time the resulting notice of tax adjustment is served.

France generally adheres to the policy of implementing in all of tax treaties that it concludes the latest version of article 26 of the OECD Model.^[2] For instance, the France-Switzerland Income and Capital Tax Treaty (1966)^[3] was amended by the France-Switzerland Protocol (2014)^[4] to incorporate a wide EOI provision. This provision sets no limits on the persons, the taxes or the nature of the information that may be targeted by an EOI request, which, in line with the tax treaty in general, can serve both the purpose of avoiding double taxation as well as preventing avoidance and evasion of taxes.

As to the question of whether taxpayers and other persons of interest (such as the holder of the information in the requested state) have the right to ask a French court to block outgoing information requests, Andrieu believed that information holders might have some standing in court to do so. On the contrary, French taxpayers, who are typically not informed of the EOI request, are able only to challenge the request at the end of the tax assessment procedure. Even if the taxpayer is informed of the request during the procedure – which is not mandatory under French domestic or tax treaty law – they will not be able to challenge the request at that stage. This position is in line with the general principle under French tax procedure law according to which any act by the French tax authorities can only be challenged by the taxpayer in the phase of the execution and recovery of taxes. Moreover, it is only if the information requested is effectively used by the tax authorities that it can be challenged in court.

A taxpayer may go to court before the recovery phase only if the sending of an information request has “significant non-tax effects”, such as privacy or trade secret violations. If it could be asserted that the EOI procedure has infringed on these rights, there might be a scope for a taxpayer to challenge an EOI request prior to the tax collection phase. But this is quite unlikely.

2.2. The United States

Tamara Ashford presented the US perspective and started by referring to the Internal Revenue Manual (the “Manual”)^[5] of the US Internal Revenue Service (IRS). The Manual contains instructions on all administrative and procedural matters, including the procedure of sending an outbound information request. For US taxpayers, the Manual provides significant insight as to how the IRS goes about EOI. However, the US TC has more than once held that the Manual is not law, and that the taxpayer cannot derive any substantive legal rights against the IRS if the guidelines are not followed.

The EOI provisions in the tax treaties that the United States has sometimes contain uniquely worded provisions. However, in general, the provisions include the following three components: (i) the general obligation that the requested information must be “foreseeably relevant”; (ii) procedures on the use and disclosure of exchanged information; and (iii) a prohibition of administrative procedures that are at variance with the law or practice of any of the countries involved. As such, the IRS is prevented from making information requests to get around restrictions in the laws or administrative practices of the United States.

Ashford concluded that, as with the situation in France, the IRS faces little constraints when it comes to making outbound requests for information. Before an outbound request can be made, the IRS is required, in any case, to exhaust all domestic means available, except those that would give rise to disproportionate difficulty.^[6] The Manual provides that information requests must be in writing and include certain information, for example, a detailed description of the requested information and why it is deemed to be foreseeably relevant, a detailed description of the taxes due and the taxable periods, and a reference to the effect that all of the relevant domestic means available have been exhausted.^[7]

In practice, before the US competent authority decides to issue an information request to a foreign country, the taxpayer or a foreign-based third party usually has been requested to provide themselves the information sought after in the information request. This action is the first means available to the tax authorities to obtain the information. If the information holders do not comply, more formal means to obtain the information are used before entering into the EOI procedure, such as the issuing of an “IRS administrative summons”.

2. [OECD Model Tax Convention on Income and on Capital](#) art. 26 (21 Nov. 2017), Treaties & Models IBFD.

3. [Convention between the French Republic and the Swiss Confederation for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital](#) (unofficial translation) (9 Sept. 1966), Treaties & Models IBFD.

4. [Protocol to the Convention between Switzerland and France for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital, Signed at Paris on 9 September 1966 \(and Its Final Protocol\), as Amended by a Protocol Signed at Paris on 3 December 1969, by a Protocol Signed at Paris on 22 July 1997 and by a Protocol Signed at Berne on 27 August 2009](#) (unofficial translation) (25 June 2014), Treaties & Models IBFD.

5. US: Internal Revenue Manual.

6. Id., at 4.60.1.2(2).

7. Id., at 4.60.1.2.1(4).

The IRS is under no obligation to notify a taxpayer that an outbound information request has been made. Ashford noted that in most cases this means that the taxpayer has no clue that an outbound request has been made in relation to their tax affairs. There are some administrative paths for a taxpayer to discover if a request has been made, but there is no formal recourse to appeal to the judiciary at this stage regarding an outbound request.

2.3. The Netherlands

Arjo van Eijdsden noted that the situation in the Netherlands was not markedly different from that in France (see section 2.1.) and the United States (see section 2.2.). As a requesting state, the Netherlands is held to apply the requirements for information requests set out in the bilateral and multilateral tax treaties to which the Netherlands is a party, and Directive (2011/16) where the request is addressed to a Member State. These requirements have been incorporated into Dutch domestic law.

In terms of legal protection, as in France and the United States, there is no obligation under Dutch law to inform the taxpayer of a pending outbound information request. Interestingly, in the Netherlands, there is no formal obligation on the Dutch tax authorities to exhaust the domestic procedures before sending a request. In practice, the tax authorities do so, and it might be argued that they are required to do so under the general principles of sound administration.

In most cases, a Dutch taxpayer who is the subject of an information request is not aware of the procedure. In the context of EU law, the Court of Justice of the European Union (ECJ) has held in *Sabou* (Case C-276/12)^[8] that, under EU law, there is no requirement to inform the taxpayer that information is being requested. The lack of a right to be informed does not violate the taxpayer's rights of defence and a fair trial.

Van Eijdsden concluded that, for Dutch taxpayers, this position implied that there is no upfront legal protection in EOI procedures. There might be situations in which the taxpayer is aware of a pending information request. In such cases, the taxpayer could appeal to the civil courts but not to the administrative or tax courts. Before the tax courts, legal protection is only granted on a *post hoc* basis as part of the taxpayer's right to challenge the tax assessment that is based on information obtained from a foreign state on the basis of an EOI request.

2.4. Switzerland

Raphaël Gani started by observing that, while Switzerland might be the epicentre of EOI when it comes to inbound requests, this is certainly not the case for outbound requests. For instance, in 2019, the Swiss competent authorities issued 37 outbound information requests, whereas in the same year it received 1,514.^[9] The discrepancy could be explained by the fact that, under Swiss domestic law, bank secrecy still exists. As such, the Swiss tax authorities have no access to banking information of Swiss residents in a domestic context. As in other countries, EOI procedures cannot be used to get around restrictions of domestic law, which in the case of Switzerland means that information requests by the Swiss tax authorities to obtain bank information are not admissible.^[10]

Gani noted that, in those cases, in which Switzerland is the requesting state, the Swiss taxpayer is not notified of the fact that an outbound request is being sent. If the Swiss taxpayer would somehow become aware of the request, there is no legal recourse available to challenge the request before the Swiss administrative courts. As such, there are very few Swiss court cases dealing with issues relating to outbound requests.

3. EOI on Request: Procedures in the Requested State

3.1. The Netherlands

Arjo van Eijdsden explained that, as with the Netherlands being the requesting state (see section 2.3.), in the case of the country being the requested state, the taxpayer who is the subject of the inbound information request is not informed of the fact that: (i) information has been requested; and (ii) information is to be exchanged.

Van Eijdsden noted that the law has been changed in the Netherlands in 2014. Before 2014, persons with regard to whom information was requested were informed that the information would be exchanged. This system of legal protection turned out to be quite effective. The persons affected could object to the intention to exchange information and at the same time

8. CZ: ECJ, 22 Oct. 2013, *Case C-276/12, Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu*, Case Law IBFD.

9. The relevant numbers of outbound EOI requests received by Switzerland are: 36 in 2021; 46 in 2020; 37 in 2019; 28 in 2018; 18 in 2017; 11 in 2016; 39 in 2015; 2 in 2014; and 6 in 2013. The relevant numbers of inbound EOI requests received by Switzerland are: 20,885 in 2021; 2,112 in 2020; 1,514 in 2019; 7,266 in 2018; 28,240 in 2017; 66,553 in 2016; 2,623 in 2015; 2,791 in 2014; and 1,386 in 2013, available at <https://www.estv.admin.ch/estv/fr/accueil/afc/statistiques-fiscales/chiffres-indicatifs-afc/chiffres-indicatifs-assistance-administrative-internationale.html> (accessed 11 October 2022).

10. Whereas, due to the automatic exchange of information (AEOI), the Swiss tax authorities have access to information regarding bank accounts held abroad.

request an interlocutory order by the court to suspend the EOI before a final decision by the court regarding the validity of the information exchange.

The abolition of the regime in 2014 was justified by, *inter alia*, the absence of notification and recourse procedures in other Member States. Van Eijdsden believed abolition was deplorable, given that it implied that, currently, there is no legal recourse for taxpayers to challenge EOI procedures.

Current Dutch law appears to be in line with EU law as interpreted by the ECJ in *Sabou*, in which was held that EU law does not require upfront notification of the taxpayer in the requesting state and/or in the requested state. One important exception is the case in which a requested state does not possess the information but has to issue an information order to an information holder over which it holds jurisdiction. Based on the ECJ's decisions in *Berlioz* (C-682/15)^[11] and *Etat Luxembourgeois* (C-245/19),^[12] the party ordered to provide information to the requested state should have the possibility to appeal against the information order. Van Eijdsden noted that it is an open question as to whether Dutch law as it stands is compatible with these decisions by the ECJ. Currently, there is no right to appeal to the tax courts. Information holders might bring an action to the civil courts, but, under the Dutch doctrine, it has been stated that this is insufficient to comply with the EU law requirements as set out by the ECJ.

Van Eijdsden also noted that, under the current global EOI regime, the automatic exchange of information (AEOI) plays an equally if not more important role than exchange of information on request (EOIR). The generally shared opinion in the Netherlands is that there is very little legal protection in relation to AEOI. This might be problematic, for example, where taxpayers fear that the receiving state would use the automatically exchanged information for purposes other than that which is permitted or in violation of privacy laws.

3.2. France

Thomas Andrieu noted there was no French case law where France acted as the requested state. There are two reasons for this. First, under French law, the person of interest has no right to be informed of the information requests received by the French tax authorities. Second, France receives far less information requests than it makes. For instance, in 2020, the French tax authorities received 720 inbound requests for information. However, in the same year, the French tax authorities made 2,875 outbound requests.

Andrieu believed that, if a taxpayer of a foreign state was informed about the fact that the tax authorities of that state were addressing a request for information to the French tax authorities, nothing could prevent this taxpayer asking a French court to block the information request, given that the only relevant venue to adjudicate the tax execution and recovery itself were the courts of the foreign country.

Under French domestic law, a domestic information holder, such as a French bank or a French notary, who is requested to give specific information regarding a French taxpayer, can challenge this request in court. There is no reason to assume this would be different where the order to provide information was based on an information request received by the French tax authorities from a foreign state. However, such action might result in contradictory court decisions between French courts and foreign courts that could be asked to decide on exactly the same issues, i.e. on the principle of foreseeable relevance.

In France, as in the Netherlands (*see* section 3.1.), the relevant decisions of the ECJ are a major influence. The ECJ's jurisprudence does not grant any upfront legal protection to taxpayers. However, after the request is made, there is legal protection in the requested Member State, given that taxpayers have the right to appeal to national courts in their respective Member States to ascertain whether the requested information is not manifestly lacking foreseeable relevance. While not offering much in terms of upfront protection, EU law does give the taxpayer important rights at the final stage, when challenging the resulting tax assessment.

Andrieu also noted that, strictly, the ECJ jurisprudence on EOI matters is only binding to the extent that the provisions of the EU "DAC" Directives are applied, i.e. in the case of information exchanges between Member States. He believed, however, that the influence of the ECJ on the EOI procedure would affect eventually exchanges with third countries, as – should the applicable bilateral convention permit – it is unlikely that courts would offer a lower level of protection for taxpayers depending on whether a Member State or a third country is involved in the EOI procedure.

Finally, Andrieu mentioned that there are questions to be raised as to whether international agreements on EOI violate human rights. He noted that the French CE has recently submitted for a request for a preliminary ruling to the ECJ on the question of

11. LU: ECJ, 16 May 2017, *Case C-682/15, Berlioz Investment Fund SA v. Directeur de l'administration des Contributions directes*, Case Law IBFD.

12. LU: ECJ, 6 Oct. 2020, *Case C-245/19, État du Grand-duché de Luxembourg (Droit de recours contre une demande d'information en matière fiscale) v. B*, Case Law IBFD.

whether EU Directive 2018/822/EU on administrative cooperation on reportable cross-border arrangements (the “DAC6”)^[13] violates articles 7 and 47 of the Charter of Fundamental Rights of the European Union (“EU Charter on Fundamental Rights”)^[14] to the extent that it does not provide for an exception to the reporting obligations in case legal privilege of attorneys can be asserted.^[15]

Similar questions might arise regarding the compatibility of the EOI regime with data protection laws. In 2019, the French CE gave a decision in which it held that the France-United States FATCA (Foreign Account Tax Compliance Act) Model 1A Agreement (2013)^[16] is compatible with the EU General Data Protection Regulation (GDPR).^{[17][18]} The France-United States FATCA Model 1A Agreement (2013) requires French financial institutions to disclose a very great deal of information on French residents, who have been identified as US citizens. Andrieu believed it was an open question whether this decision, which dates from 2019, is compatible with the ECJ’s jurisprudence on data protection that has been decided since, such as “*Schrems II*” (Case C-311/18).^[19] The same question of compatibility with the EU GDPR and the EU Charter on Fundamental Rights may also be posed in the future with regard to any other form of AEOI.

3.3. The United States

Tamara Ashford noted that, in the United States, the statutory basis for granting an inbound request for information received from a foreign country is found in the disclosure provisions of the US Internal Revenue Code (IRC).^[20] Disclosure is permitted only to the extent provided for in an international agreement.^[21] In line with the provisions of those international agreements, this implies that, for example, the IRS does not comply with requests for information that are not legally obtainable, that are not foreseeably relevant, or the exchange in respect of which would be contrary to public policy.

Complying with an inbound information request by the US tax authority does not require the existence or initiation of an IRS examination of the affected taxpayer. The fulfilling of a request does not constitute an IRS examination.^[22] If the inbound request seeks information that is already in possession of the IRS (such as information on US tax returns, etc.), the IRS reviews the request and complies with it without notification to the taxpayer. If the IRS does not have the requested information, it first tries to obtain the information from the information holder by using informal means and sends an “Information Document Request”, which is like a written questionnaire. The questionnaire states that the information is requested under an international EOI request from a certain foreign country. This, potentially, is the first occasion for the taxpayer to become aware of the pending EOI. The taxpayer could try to challenge the inbound information request at that point, but there is no formal recourse provided to the US TC or other US general jurisdiction civil courts. Where the Information Document Request is not complied with, more formal means are used, such as an “IRS summons”. An IRS summons is an administrative document commanding a person summoned to turn over records. If the person ignores the summons, the IRS goes to court to enforce it. The court that is competent to hear the IRS’ action is the US District Court (DC), where the judges on the bench are generalists without specialization in tax. The person affected by the IRS summons is entitled to file an action in the district civil courts to have the summons quashed. The summons is quashed if the IRS fails to demonstrate that the summons satisfies the four requirements in *Powell* (1964).^[23] In order to issue a valid IRS summons, the IRS must show that: (i) the investigation was conducted for legitimate purposes; (ii) the inquiry is relevant to those purposes; (iii) the information sought is not within the IRS’s possession; and (iv) the administrative conditions set out in the IRC have been met. Ashford noted that, under the four-pronged *Powell* test, the IRS really must demonstrate a realistic expectation rather than an idle hope that, in the course of enforcing the summons, something relevant to income taxes would be discovered. Once the IRS has shown this, and it does so by adding a sworn affidavit by the investigating agent that the *Powell* requirements have been met, the burden shifts to the taxpayer or the third-party information holder to demonstrate bad faith on the part of the IRS. In practice, the *Powell* test has turned out to be a very low bar for the IRS to overcome. Where the IRS summons is issued in the context of an inbound EOI request, the bar is even lower. Ashford pondered whether in the case where an IRS summons based on an inbound request is challenged in the DC, it would not make more sense for the DC that is applying the *Powell* standard to look at the purpose of the requesting state instead of the purpose of the IRS which is to comply with the inbound request. Ashford noted that the US Supreme Court

13. Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards Mandatory Automatic Exchange of Information in the Field of Taxation in relation to Reportable Cross-Border Arrangements, OJ L 139 (2018), Primary Sources IBFD [hereinafter the DAC6].

14. Charter of Fundamental Rights of the European Union, OJ C 326 (2012), Primary Sources IBFD [hereinafter EU Charter on Fundamental Rights].

15. FR: CE, 25 June 2021, Case No. 448486.

16. Agreement between the Government of the United States of America and the Government of the French Republic to Improve International Tax Compliance and to Implement FATCA (14 Nov. 2013), Treaties & Models IBFD.

17. Regulation (EU) 2016/679 (General Data Protection Regulation), OJ L 119 (2016), OJ L 127 (2018).

18. FR: CE, 19 July 2019, Case No. 424216, Assoc. des Américains accidentels: Rec. Lebon, p. 296, Case Law IBFD.

19. IE: ECJ, 16 July 2020, Case C-311/18, Data Protection Commissioner v. Facebook Ireland Ltd and Maximilian Schrems (*Schrems II*).

20. US: Internal Revenue Code.

21. Id., at sec. 6103(k)(4).

22. See Manual, *supra* n. 6, at 4.60.1.2.2(2).

23. The requirements are based on the decision of the US Supreme Court (SC) in US: SC, 23 Nov. 1964, *United States v. Powell*, 379 U.S. 48, 57-58 (1964).

(SC) confirmed in its decision in *Stuart v. United States* (1989)^[24] that the motive or good faith of the foreign jurisdiction is not relevant just so long as the IRS can show that it itself is making a good faith effort to comply with the inbound information request. There has been some litigation on this matter. For instance, in *Mazurek v. United States* (2001), a French taxpayer motioned to quash an IRS summons made under a French information request to exchange US bank records. The DC and the Court of Appeals (CA)^[25] both found in favour of the IRS. The DC and the CA held that evidence of bad faith on the part of the French tax authorities was irrelevant to the only good faith issue arising under *Powell*, i.e. the good faith of the IRS in honouring the French request.

Ashford concluded that there is an avenue for a taxpayer or for a third party to attempt to quash the IRS summons or to prevent the IRS from fulfilling the inbound information request. The likelihood of success on the merits with regard to that is very low, however.

3.4. Switzerland

Raphaël Gani explained that, in contrast to the Netherlands (see section 3.1.), France (see section 3.2.) and the United States (see section 3.3.), when Switzerland is the requested state, the Swiss tax authorities must inform the person concerned and all other persons who, on the basis of the file, are “evidently” entitled to appeal.^[26]

There has been some controversy about the scope of this “evidence”, i.e. who has to be considered as other persons with the right to be informed. It could be possible to think of persons referred to in banking documents or beneficial owners of bank accounts, etc. In the so-called *Neymar* (2020) case, the Swiss Federal Administrative Court had to decide whether contractual third country counterparts in sponsorship agreements signed by the taxpayer, in respect of which information had been requested, had the right to be informed. The Federal Administrative Court held that it was unlawful not to inform the contractual counterparties, as they might be considered to be persons with the right to appeal. The Swiss Federal Supreme Court^[27] overturned this decision, holding that only persons who on the basis of the file are “evidently” entitled to appeal had to be informed. This was not the case of the counterpart of the sponsoring agreement (i.e. the sponsor) in that case. Gani also noted that the application of the Federal Supreme Court’s evidence theory in practice is far from evident, though. More litigation is expected to arise out of this issue, which, hopefully, will allow the finetuning of the relevant criterion.

As to the question of how all of these persons – often third parties located in foreign countries – are effectively notified in practice, Gani noted that the obligation to notify often lays on the Swiss information holder, who is required to provide information under an inbound information request. Switzerland is not always permitted by foreign states to serve documents directly to citizens or entities in those foreign countries. If the Swiss information holder cannot contact the affected person (often its client), the ultimate resort is to publish an announcement in the Swiss Official Gazette in which the foreign person is invited to provide a Swiss address to which a notification can be served.^[28] Gani also mentioned that, apparently, foreign tax authorities are committed readers of the EOI notification section of the Swiss Official Gazette, as it permits the gathering of relevant information on local taxpayers if they are affected persons of an inbound information request in Switzerland.

With regard to the right to appeal, Gani observed that targeted persons benefit from important formal procedural rights, such as the right to review the file (which includes the underlying information request), the right to comment and contest the information to be exchanged and the right to appeal against the decision by the Swiss tax authorities to exchange the requested information. Persons with the right to appeal also have the right to block the effective EOI until a final court decision has been given.

As to the substantive rights, the appellant may essentially claim a violation of the EOI rules. However, in its jurisprudence, to date, the Swiss Federal Supreme Court has been very reserved in considering material violations of the EOI rules. If the formal conditions are met, the Federal Supreme Court usually upholds decisions to comply with inbound information requests. For instance, in many cases, foreign taxpayers have claimed to be considered wrongly as tax residents by the requesting state. The Swiss courts generally dismiss these claims, holding that such challenges are purely a matter of domestic tax law of the requesting state and not a matter for the Swiss authorities to judge in a pure EOI proceeding. A second example are claims by taxpayers that the limitation term for the tax investigation in the requesting state has lapsed. This situation, too, does not prevent Switzerland from exchanging the requested information. It is not Switzerland’s role as the requested state to police the rules of the tax procedure in the requesting state. A third example is the issue of stolen bank data. Many appellants have argued in the Swiss courts that Switzerland cannot comply with inbound information requests if these requests were originally

24. US: SC, 28 Feb. 1989, *United States v. Philip Stuart*, Docket No. 87-1064, 489 U.S. 353, Case Law IBFD.

25. US: CA, Fifth Circuit, 7 Nov. 2001, *Zbigniew Emilian Mazurek v. United States (Internal Revenue Service)*, 00-31430, Case Law IBFD.

26. See CH: Federal Law on International Administrative Assistance in Tax Matters (651.1), arts. 14 and 19 and CH: Federal Law on Administrative Procedure (SR 172.021), art. 48.

27. CH: Federal Supreme Court, 13 July 2020, *Case No. 2C_376/2019*, Case Law IBFD.

28. Art. 14 Federal Law on International Administrative Assistance in Tax Matters (651.1).

based on stolen data that has been obtained by the requesting state. Switzerland has always been very restrictive in refusing the transmission of requested information. The Federal Supreme Court has held that, in general, if a requesting state has previously given Switzerland guarantees that it does not issue information requests based on data stolen in Switzerland and subsequently issues requests in contradiction to these guarantees, Switzerland rightfully refuses to exchange the requested information, as the requesting state is not acting in good faith.^[29] If a requesting state has not given such guarantees (as in the case of India), Switzerland complies with inbound information requests, even if these are based on stolen data.^[30]

Gani concluded by recapping that appellants do have formal procedural rights, but, when it comes to material breaches of EOI rules, Swiss courts are very hesitant. Many taxpayers appeal to the Swiss courts to challenge inbound EOI requests, but few cases effectively result in preventing Switzerland from exchanging information.

4. EOI on Request: Follow-Up Procedures in the Requesting State

4.1. France

Thomas Andrieu observed that information obtained by the French tax authorities under an EOI procedure is dealt with as any other information obtained through third parties. This position implies that the tax authorities must inform the taxpayer of the content and origin of the obtained information, and it is required to communicate a copy of the documents to the taxpayers who so request. Should the taxpayer decide to litigate, this information is discussed in the adversary procedure before the court.

French courts check the legality of the EOI procedure, and ensure the taxpayer's rights under tax treaties are observed fully. French courts, however, refuse to consider the legality of any information that has not been used in levying French taxes.

In France, the assessment and adjustment of taxes can never be based on illegally obtained information. Nevertheless, the illegality must be committed by a French administrative or judicial authority and has to be declared so by a French administrative, civil, criminal or commercial court. There is a subtle nuance, though. If the French tax authorities dispose of information that has been illegally obtained, for example, as it was stolen, this information cannot be used. However, if the stolen data was obtained by the tax authorities in the framework of a criminal proceeding started in France on the behest of foreign criminal authorities, and the French criminal investigation authorities would legally transfer the information to the French tax authorities, the information – which is essentially the same stolen data – can be used for tax assessment purposes. Andrieu noted that this practice, which he believed looked a bit like “intelligence laundering”, has occurred in the “Falciani” affaire, which related to the use in France of data stolen from the HSBC Private Bank in Switzerland.

Finally, in France, there is no secrecy of judicial proceedings. Even if tax treaties might not qualify courts as lawful recipients of information exchanged pursuant to an information request, the French tax authorities have no option other than to disclose fully the information to the courts if it was used in the tax assessment. The courts subsequently give the information to the taxpayer, as a taxpayer cannot be taxed based on information that he or she cannot challenge in court.

4.2. The United States

Tamara Ashford noted that, in the United States, taxpayers have the option to make an administrative request the IRS – under a so-called “Freedom of Information Act request” – to be granted access to their examination file to establish whether it contains information that has been obtained under an EOI request. Under section 6103(e)(7) of the IRC, the IRS can withhold information if it is determined that the disclosure could impair administration of the US tax laws. In addition, taxpayers can make a similar request to be informed what information contained in their file (such as trade or business secrets) has been exchanged with a foreign state under an inbound EOI request. If the exchange of such information turns out to be illegal or if there has been an improper disclosure of the information in the requesting state, a taxpayer has the right to sue the IRS for civil damages. However, in *Aloe Vera v. United States* (2015),^[31] the DC held that the taxpayer is only entitled to statutory damages and not actual damages, which meant that the taxpayer was entitled to approximately USD 1,000 of damages instead of the USD 52 million requested in respect of the IRS's improper disclosure of information to the Japanese tax authority.

4.3. The Netherlands

Arjo van Eijdsden explained that, in the Netherlands, the tax authorities, in general, are not required to notify or provide the taxpayer with the information received pursuant to an outbound information request. So, generally speaking, the taxpayer is not aware of EOI procedures that concern them.

29. See, for example, in relation to France, CH: Federal Supreme Court, 17 Mar. 2017, [Case No. 2C_1000/2015](#), Case Law IBFD.

30. See, for example, in relation to India, CH: Federal Supreme Court, 17 July 2018, [Case No. 2C_648/2017](#), Case Law IBFD.

31. US: DC, 11 Feb. 2015, [Aloe Vera v. United States](#), CV-99-01794-PHX-JAT, Case Law IBFD.

The information received is used typically in the tax assessment of the taxpayer. The taxpayer can object and appeal the tax assessment. Both in the context of an administrative objection procedure or an appeal procedure before the judicial courts, the taxpayer has the right to all of the information on which the tax assessment is based. At that time, the taxpayer becomes aware of the EOI procedure and has an opportunity to challenge the EOI. In principle, before the Dutch courts there is a full review of the EOI procedure, including the requirements under Dutch law, and treaty law or EU law.

4.4. Switzerland

Raphaël Gani reiterated that the Swiss experience as a requesting state is limited. In theory, as in France (see section 4.1.) or the Netherlands (see section 4.3.), the tax assessment and any subsequent challenge by the taxpayer gives the taxpayer the right to information, and the right to be heard on issues that relate to inbound information requests.

5. Conclusions

Michael Beusch concluded the webinar by emphasizing that legal protection of taxpayers in EOIR procedures is rather underwhelming, but the subject of an ongoing debate, especially with the rise of data protection laws and trade secrecy protection questions. Conflicts between EOI and data protection are addressed most likely in civil courts, rather than in tax courts, though.

In closing, Wim Wijnen thanked the panellists for their valued contributions and the staff of the Tax Court of Canada (TCC) for their technical assistance in relation to the webinar.