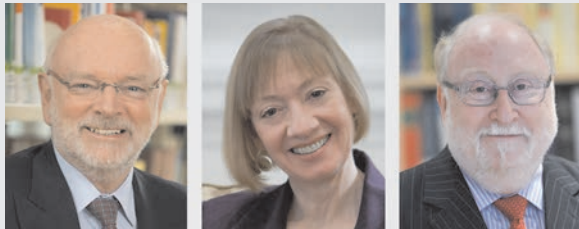


Conversations: Jeffrey Owens, Nina Olson, and Philip Baker

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THE VIEW FROM VIENNA

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Jeffrey Owens

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Philip Baker

Jeffrey Owens, director of the WU Global Tax Policy Center at the Institute for Austrian and International Tax Law (Vienna University of Economics and Business), has created a series of Fireside Chats with people in the tax world who influence the way we approach tax policy and administration. Owens is the former head of the Centre for Tax Policy and Administration at the OECD.

In this installment, Owens talks to U.S. National Taxpayer Advocate Nina Olson and Philip Baker QC, with Field Court Tax Chambers in Gray's Inn in London, about taxpayer rights in an age of transparency.

This interview has been edited for clarity. The full interview can be seen at <http://www.wu.ac.at/taxlaw/institute/videos/tax-policy-fire-side-chats/en/>.

Jeffrey Owens: Taxpayer rights are in many countries “bitter thoughts” for governments. In reality, do tax technicians think about human rights as relevant to tax issues? This is a broad-ranging topic that does not always get the attention it should, which is why I decided to focus on this at this Fireside Chat.

First, we will look at the question of the move toward a more open, transparent tax environment and explore how to ensure taxpayer confidentiality in this new environment. How do you ensure that the rights

of citizens are protected? And how do you make sure that governments accept the greater accountability that should accompany a move toward transparency?

Nina Olson: As with everything, this is a difficult balance to achieve. In the Taxpayer Bill of Rights that the United States adopted last year, there is the right to privacy, the right to confidentiality, and the right to be informed. The tax agency, however, has an enormous amount of data about the private lives of individuals and the commercial lives of business entities, and the world would like to have access to it. From the taxpayers’ perspective, they want to know that their information is protected and that it will be used for the purpose that it was given. Because taxpayers in the U.S. feel confident that the IRS will respect confidentiality, they feel comfortable giving that data to the Internal Revenue Service.

In the United States, there is a history — in 1976 the United States Congress changed our privacy laws. It used to be that privacy of tax information was confidential only if the law said so. It turned out, for example, that the Agricultural Department asked the IRS for every single piece of financial information for every farmer in the United States, and understandably, the farmers got a little angry, and that led to hearings and to a reversal of the law in 1976 so that tax information is confidential unless we say otherwise.

On the same level, you also had in the 1970s the accusation that President Nixon used tax information to audit his enemies, and although the commissioner at that time totally denied this, the suspicion still exists, and that’s a story that has power, so you just have to be very careful about releasing information.

Owens: This is why in a post-[base erosion and profit-shifting] environment where there is a lot more information flowing (country-by-country reports, master files, exchange of information) between countries, there is a heightened risk of a leak of information, and then we’re back to where we were in the 1980s.

Olson: That’s correct.

Philip Baker: It's not just BEPS that's relevant here. Quite apart from that, there has been a trend over the last 10 years or more toward greater transparency. You think about FATCA and then EU FATCA, the inter-governmental agreements coming toward a common reporting standard — we are talking about massive amounts of personal financial data and corporate data about financial holdings being exchanged between countries. In terms of taxpayers' rights and starting from the European perspective, we have two very important rights here. First of all, specifically the right to privacy and article 8 of the European Convention on Human Rights and that has been applied in tax cases for well over 30 years and constrains the gathering of information and its dissemination by the authorities. But we also have data processing rights, which are included in the European Charter. Tax administrations are used to gathering data, but they are not used to recognizing the importance of data protection. In late December last year, after something of a debate, the European Directive was amended to give specific reference to these data protection rights. There's a wonderfully named committee called the Article 29 Working Group under article 29 of the Data Protection Directive, which had been warning about the dangers of FATCA. Lots of people warned about the dangers of FATCA.

In practical terms, it means that financial institutions are obliged to observe confidentiality. The tax authorities that receive data have obligations of confidentiality and can only retain the data for specific purposes and for no longer than it is necessary to meet those purposes.

And in terms of sending to third countries, you have to be certain that the third country has adequate data protection levels. In order to do that, the OECD is carrying out a peer review of countries, and every country is being reviewed by a small group in order to decide whether they have the adequate data protection levels. I have to say I'm not very happy about that because this needs to be independently audited. I don't know why we should trust the OECD to do this work.

Owens: It is really hard in this area because you're not just looking at the legislation. You're looking at the culture: Do you have a culture of compliance? Do you have a culture of respecting confidentiality? And of course there's always the risk of there being one bad egg that leaks, and that's a hard one to crack. Would you agree?

Baker: Very much so, as I said to someone at the OECD, this internal review process will fail the first time there is a major leak, and it will lose credibility.

Owens: The U.S. has tried to address this issue by having an in-depth review of the countries that the U.S. will exchange information with, which looks at their past record and what they have done.

Olson: There's also a very interesting issue just internal to the U.S. with FATCA since we actually have two databases. One, if the information is being up-

loaded from third parties and we're putting information into this so it can be accessed by other countries — that database is operated under a contract, and then that data from the third countries comes into our internal databases. The question is what about confidentiality when it goes to that database that is maintained by a contractor of the U.S. Internal Revenue Service, and that's important because under some of our contract rules the prohibitions for reuse or use or re-disclosure in other areas pertain to those contractors. Now once that database is no longer maintained — it might be maintained by other countries down the road — that analysis may be different. Whoever's maintaining the data may have different rules, or if it's maintained by a consortium, that may have different rules. Those rules may be stronger than our rules actually if they're under a Human Rights Convention or something like that.

Baker: The European Convention dates back to the 1950s. Data protection is a much more recent issue, but in the European Union it is made concrete by provisions both in the Treaty on the Functioning of the European Union and in the Data Protection Directive, so there's quite a significant body of law dealing with the rights of the data subject to access the data, to correct the data, and the whole question of the transmission of the data to third states. I suspect that we're going to have quite a number of challenges when the system starts to operate where financial institutions in European Country A gather information, send it to the tax authority, the data subject is told this information is going to go to Country X, and the data subject says, "But everybody knows that Country X leaks like a sieve." There are countries where you can buy taxpayer data that will be of great interest to criminals in terms of kidnapping, in terms of extortion. This is potentially incredibly damaging, and I think tax authorities are coming in rather late to the best way to safeguard this increased flow of information.

Owens: To be fair to the tax administrators, they're very much aware of the need to protect confidentiality, and that's why the OECD has put a lot of emphasis on this.

Olson: Since 1976 there have been exceptions to the general rule that tax information cannot be shared with other government departments — for prosecution purposes by other parts of the government. There has to be a finding by a magistrate or some judicial official that it's necessary, that it can't be received from another source so there is a structure where you are really protecting the confidentiality principle and inserting a third party. Now, since 9/11, there have been exceptions for anti-terrorism that came in, and what you see under our statute is that it has all the exceptions to the general confidentiality principle so it starts looking like Swiss cheese after a bit.

The Link to Arbitration

Owens: How does this whole issue relate to the debate on arbitration?

Baker: I haven't seen article 13 particularly raised. Article 6, the right to a fair trial, comes in because quite simply the mutual agreement procedure just doesn't in any way secure a right to a fair trial. What sort of fair trial can it be when the two adjudicators [are] chosen by the two interested tax authorities and the taxpayer, who ends up potentially footing the bill, is outside that procedure? Nobody as far as I can see has brought a challenge to MAP under article 6 of the European Convention, and that's partly because of the *Ferrazzini* line of case law that says that ordinary tax proceedings do not fall within the right to a fair trial. But, of course, many MAP cases concern transfer pricing and many transfer pricing cases involve a significant penalty, where article 6 does apply. I'm strongly of the view that MAP by itself does not secure a right to a fair trial if it is the only procedure by which the taxpayer can actually resolve an inter-country issue. Arbitration may help, but again it has to be arbitration where the taxpayer has a right to participate and where there is some guarantee of a determination within a reasonable time by an independent and impartial tribunal, so the arbitrators have to be independent and impartial.

Owens: Is this an issue that crosses your desk, Nina?

Olson: Not yet. I mean, it's just very early on in this kind of initiative.

Owens: How do you improve MAP and arbitration? Who will raise issues in terms of what is the process that's put in place for arbitration — an issue to be discussed in the United Nations?

My own feeling is that we need to step back and have a new look at what is the institutional framework we want for dispute settlement. I don't think you can expect developing countries to buy into the process that's been set up by the OECD. I don't think we want to model arbitration on what happens in bilateral investment treaties. That's not been a great experience, but I do think we need to think carefully about how we address some of the concerns of developing countries in setting up proposals where you have a guarantee of the independence of the arbitrators, where you address the cost issues and whether there is a fair chance of getting a case heard without any biases.

Baker: Yes, there are a lot of considerations that need to be addressed, and I'm not holding my breath expecting a tremendous step forward in the arbitration report. Unfortunately, I think that the discussion draft was one of the least helpful discussion drafts in the whole BEPS process, but what we have got is an indication that at least 20 countries are interested in taking arbitration further through potentially the multilateral instrument, which will modify tax treaties by introducing arbitration into a large number of them. There's no reason that the arbitration format has to be any particular one that has been used up until now. This is an issue that the U.N. has taken on.

Owens: Baseball is an interesting approach because it comes back to what we were discussing earlier today with respect to transparency. When you look outside of the tax area, one of the biggest debates in the Trans-Atlantic Trade Agreement is the question of dispute resolution.

Baker: We have well-developed methods of dispute resolution in the trade area, which do allow the businesses concerned to participate. Our problem here is that essentially MAP developed at a relatively early stage in the 1920s, before many of these concepts of taxpayers' rights to participate in a fair trial were developed. We could learn a great deal from them. We know that trade disputes are determined in an open way with participation from the companies concerned.

Owens: This is what WU Vienna is trying to do in its project on what you can learn from the experience of bilateral investment treaties, free trade agreements, and the WTO process and how these practices could inform the debate in the tax arena.

Tax Exceptionalism

Olson: I think that this is something we were talking about a little earlier in some other conversations. Tax has always been treated as separate in the United States — tax exclusionism. It's different from all the other areas of law, and so it has not developed as have other areas of law. Tort law, for example, is a concept that is very natural to lawyers in other areas — they come to the tax world and it just stuns them what's missing. And even — and maybe — this is segueing into the principles of taxpayer rights as human rights — our Supreme Court ruled very early on that the traditional due process protections of having a hearing before you seize property doesn't apply in the tax world because — and this is a quote from the Supreme Court case — “Taxes are the lifeblood of government” and therefore government should be able to proceed to have that lifeblood immediately, and then we can figure out the correct answer later. So what they looked for is only that there is a hearing later on. No, never mind that they also just took the taxpayer's lifeblood, so there isn't any taxpayer around anymore to get that. You have a dead taxpayer and they don't have hearings. Some of what the taxpayer rights perspective might be if you ground it in the right way is to chip away a little bit at that principle, which is sort of the goal of my life. It's very important to challenge this exceptionalism of tax from the rest of the body of law.

Baker: I would like to pick up on this tax exceptionalism. In other areas where citizens interact with the state — for example, police, prisons, the judicial system — there's a whole body of principles and standards for the protection of citizens' rights that have been developed through the U.N. process. The whole standard-setting process has developed over the last 50 years largely through the U.N. human rights bodies, typically starting with a broad convention like the convention against torture and then saying, how do we ensure that people are not tortured in prison? How do we ensure

they are not tortured in police cells? That whole element of standard setting has not started at all in the tax area, and I am really quite shocked that it hasn't. There are U.N. principles for the participation of judges in various procedures. There are principles for even lawyers, but none for tax officials. I don't want to dump too much on the OECD, but I think that part of the problem is that the U.N. human rights bodies have said, "Tax, that's exceptional. The OECD deals with it." And the OECD, largely made up of tax administrators, hasn't been particularly concerned with this in the past.

Olson: You know what is interesting is that in trying to get the United States to adopt a Taxpayer Bill of Rights, I looked at the OECD's past studies and surveys of countries and their reports and I shamelessly plagiarized, but modified it according to certain things that I thought would resonate more in the United States.

When I first started working on it, I thought, let's do a survey of United States taxpayers. We surveyed a representative sample of United States taxpayers nationwide and we asked them, "Do you believe you have rights before the IRS?" Forty-seven percent of the taxpayers said they did not believe they had rights before the IRS, so almost half of the taxpayers did not believe they had rights as taxpayers. And then we asked them, "Do you know what those rights are?" Eleven percent of them said they knew what their rights were, so 89 percent had no idea. If you do not know what your rights are, you will never avail yourselves of them. I have spent the better part of my life trying to get into law, statute by statute, specific taxpayer protections, but if you don't have a general sense that you have a right to an appeal, a right to retain representation, you will never ask, "Don't I have a right to retain representation?" and then be told what your specific statutory rights are and your remedies if they're violated.

We finally got the IRS to agree to adopt this. The IRS agreed to adopt this provision partly because it is not a law; it doesn't create any new remedies under law because tax administrators are very scared of that. I can remember the day I issued a Taxpayer Assistance Order, which is an order requiring the IRS to do something, and I used the words, "this violates the right" to something or other, from the Taxpayer Bill of Rights. And the person from whom I ordered it ran to the commissioner of Internal Revenue and said, "She's saying it violates their Bill of Rights. The Bill of Rights isn't a law, so it can't be violated." And so the commissioner talked to me and said you can't use the word "violates." We were just about to do a training for my employees so we had a whole section of our training that says we're not allowed to use the word "violates." You can say it impairs your rights. It does not comport with your rights, too. We just looked in the thesaurus, but that also gave me ammunition to say to Congress that it needs to become a law.

Baker: That's interesting because the U.S. Taxpayer Bill of Rights is part of a very widespread worldwide trend to adopt charters of taxpayers' rights.

Owens: Way back in the 1980s, the OECD launched an initiative on taxpayers' rights and has returned to this theme on a number of occasions.

Baker: Many countries have issued taxpayer charters. In fact, one of the first countries to do this was the U.K., which had a charter of rights for the Inland Revenue and then has a new charter of the combined Revenue and Customs Department. But it has spread around the world. France has had a charter of taxpayer rights for a long time. Many countries, even many developing countries, have charters, and there's a split between countries as to whether the charter is legally binding or is just an aspirational document and whether you can rely upon it or not.

Who Sets the Standards?

Baker: I would like to come back to the question of standard setting. I didn't want to lose that completely, and there were a very small number of OECD reports that related in this area, nothing like the sort of developments that you see in the U.N. At the IFA Congress this year in Basel, I and professor Pasquale Pistone of the WU Institute for Austrian and International Tax in Vienna presented a report on the practical protection of taxpayers' fundamental rights. The background to that study was partly the absence of a process of standard setting at international bodies. We thought we would kick-start this process, and the Swiss branch who hosted the Congress were very keen on the topic relating to taxpayers' rights.

We looked at what countries do to protect taxpayers' rights, and we said to the branch reporters, "Don't tell us what is done wrong in your country, tell us what is done right. What do you do well in your country to protect taxpayers' rights?" A number of countries had what was obviously best practice in this area; for example, some proposed solutions on confidentiality, or on taxpayers' participation in MAP, and also there were some areas where a particular practice was so common among such a large number of countries that we could say it is a minimum standard. That's something that you can expect every country to adopt. Governments and taxpayers can take this report and look through it and say, "First of all, do we comply with all those minimum standards and if not, why not? Why can't we do what the majority of countries are doing? And secondly, if we do comply with those minimum standards, can we get up to the best practice? Why shouldn't we be following the best practice of other countries? How do we achieve that?"

What we have done is to set up an IFA monitoring group using the IFA branch reporters, some who work in government, to monitor the process. We would be delighted if our process were also taken up by the official side of the world, the OECD, and the U.N.

Olson: Let me bring this discussion back to the domestic way that our Taxpayer Bill of Rights was adopted, even though it wasn't a law, although maybe it will become a law. Because the United States is a common law country, I've been encouraging representatives, attorneys, in particular in litigation, to tie whatever issues they're raising in cases to one of the particular rights in that Bill of Rights, and all you need is a judge saying this IRS action does not comport with — although a judge could say violates if they want to — this right, and you suddenly have a case citing that you can then cite and cite and cite, and suddenly it starts having the force and effect of law. And I just gave out my guerilla strategy for the Taxpayer Bill of Rights, but I've actually been very transparent about that since Day 1, that it's a roadmap to effective tax administration. It's a set of governing principles, but it can also become a force of its own that will have a whole legal history and will force the tax agency to perhaps give it more substantive meaning than they're maybe comfortable with doing now.

Tax Administration and Taxpayers' Rights

Baker: Good tax administration and taxpayers' rights are compatible for at least two reasons. You can justify it on the grounds that it improves taxpayer administration. We are, as taxpayers, subject to supplying a huge amount of information, spending time filling in tax returns; if taxpayers disagree with the revenue, there's an independent tribunal. We aim for very high levels of voluntary compliance, and some of the best countries' voluntary compliance is well into the 90 percent and, in a sense, that's part of the covenant with the taxpayer, that their rights will be observed if they're voluntarily compliant.

On the other hand, you can come at it from a totally different view, which is simply to say compliant or noncompliant, taxpayers have rights. They are human beings or they are entities owned by, staffed by, human beings. There is a good in protecting human rights come what may, regardless of the advantages for tax administrations. I don't really mind which of those arguments you take.

Olson: Or both!

Baker: They are both mutually supportive in this direction, but if from the point of view of a tax administration, if one doesn't buy into the position that everyone has human rights, I hope that you can nevertheless buy in as a tax administration to the fact that anything that helps us to improve voluntary compliance is worthwhile pursuing.

Owens: And that's the key. Rights on the one side, obligations on the other side, getting the right balance. I always work on the basis that no modern tax system can work unless 90 percent of the taxpayers voluntarily comply 90 percent of the time. You cannot force those levels of compliance, particularly the way we're going and the way technology is challenging the traditional ways that tax administrations function. So there is a

common interest here, making sure that taxpayers have confidence in the system, that they know that they have rights, that their rights will be respected, that they can get a fair hearing, but also that noncompliance will be dealt with. Once they perceive the tax system as being fair, they're much more likely to comply.

Olson: You know when we were working on this, we did a whole series of focus groups around the country with different kinds of taxpayers and taxpayer representatives because I had originally proposed what the OECD had covered on taxpayer rights and taxpayer obligations: the obligation to be honest, you have the obligation to file, etc. We focus on the rights and the language, the descriptions that we had for them, and the obligations, and there were two things that really came out of these focus groups. One was on the materials: We listed the right to challenge the IRS's position and be heard. That was really important to me. First of all, not just you have the right to challenge the IRS's position, but the IRS has to listen to you. You have to be heard. You have the right to be heard.

Taxpayers and representatives in all those focus groups said when they got to that provision they didn't know they had that right, and that thudding sound was my head against the table every time I am confronted with people not knowing something so fundamental. And then our focus group — we said, let's talk about the obligations and, to a person, in all of these focus groups they found us telling them about their obligations insulting. So the IRS looked at that response and said, "We're not going to include obligations in this Taxpayer Bill of Rights," which I found surprising. I would have thought they wanted that, so that was very interesting to me.

Baker: In the United Kingdom, we have a charter at the moment, which does have both rights and obligations. From my point of view, I am not opposed to putting in obligations — basic statements of the obligations. We have to remember that we are here talking from the perspective of two very, very developed countries. There are large parts of the world where the informal economy is 60 percent, 80 percent, where the tax base is realistically the civil service because they can't avoid having tax withheld and the small number of multinationals. If there is a hope going forward, one has to draw many more people into the tax net. I heard a very interesting talk recently in Oxford. One participant was saying we should tax the poor because it's important that everybody is seen to participate in the government process. If you're going to go down that route, you've got to bring in the informal economy and reduce that and start applying taxes even if it's at 0.1 percent, and this is an instrument for people to understand they have obligations, not just to operate on cash and declare nothing.

Olson: Another thing about the rights versus obligations, one thing I was concerned about was that it would look like a quid pro quo, that if you have not met all your obligations you have waived your rights,

and so I was very comfortable with the obligations going away — no, not going away but just not being any specific equation — and I keep saying to people, you know, it is really easy to protect the rights of taxpayers who have just made a mistake, what you think of as good taxpayers. Where rights really become challenging and are actually incredibly important is where you have the greatest risk of government overreaching, when you have these difficult situations, when you have what might be classed as a bad taxpayer, but that is also where government will overreach and then you get into real problems there.

Owens: But that's the direction we're going — where tax administrations have more information, they engage in more risk management. One outcome of risk management is to classify taxpayers.

It's what I call the "Michelin Guide." You are a five-star taxpayer, so you are really good, or you are a one-star taxpayer because you are really bad. The other interesting point, of course, is that many countries are moving down the road of having codes of good conducts.

Olson: Right.

Owens: I'm curious as to what are the consequences of violating taxpayers' rights from the perspective of a tax collector. What is the remedy on my part if I made an error of violating taxpayers' rights?

Olson: I can only speak for the United States and because this bill of rights is not a legal document there isn't any remedy for violating anything here, but we have so many statutory remedies in the Internal Revenue Code, so let me just give a specific example. There is a right to privacy, and the language on the right to privacy says taxpayers have the right to expect that any IRS inquiry, examination, or enforcement action will comply with the law and be no more intrusive than necessary. Now, that language "be no more intrusive than necessary" actually comes out of a statutory remedy that our Congress created granting taxpayers a collection due process hearing for the first levy that the tax agency wants to make on a taxpayer's assets.

With respect to a tax, they have the right to go to an administrative appeals officer and have a hearing in which the government's legitimate interest in collecting the tax must be balanced against the taxpayer's legitimate interest; that the government's action be no more intrusive than necessary. And if you don't like the way the administrative appeals officer applies that balancing test, you can get to the Tax Court and it will look at the IRS decision-making. So, although the Taxpayer Bill of Rights itself has no enforcement mechanism mapped to this language, this right to privacy is a statutory right to a collection due process hearing that actually does have some teeth.

So what happens if the IRS gets it wrong and the court says this is an abuse of discretion? First of all, the standard for saying the IRS is wrong is a high standard — abuse of discretion. And the judges can actually, rather than finding it an abuse of discretion,

can remand it back to the IRS and say, "You didn't look at this; you didn't consider this enough. I want you to really look closely at this information." And the IRS gets another chance to get it right in the judge's point of view. I think that's what has been so important about the Taxpayer Bill of Rights, namely, the work we did to map it to statutory provisions and remedies.

Now, right to confidentiality: As an IRS employee, if I violate [section] 6103, I could be terminated from employment. That's in the law. It's not coming from the Taxpayer Bill of Rights. It's coming from the statutory provision in the Internal Revenue Code and the sanctions there, but it gives teeth to this right to confidentiality.

Baker: The position in Europe and quite a number of other parts of the world is that there are a lot more teeth behind the issue of taxpayers' rights because the rights may be contained in the charter or the bill of rights, which may or may not be legally binding, but they're also likely to be contained in national constitutions and in international treaties and obligations. Under national constitutions, the whole tax may be struck down as being discriminatory or disproportionate. The German Constitutional Court, for example, has a long history of striking down taxes. Sometimes the tax is even prevented from going into force. In France, the Constitutional Council can be asked to rule whether a proposed tax or a tax rate is excessive. If you look at the particular situation within the Council of Europe countries, the European Convention on Human Rights is enforced by a court in Strasbourg, and that court in Strasbourg can find a breach of human rights. They can order a government to pay just satisfaction, and the pressure can be put on governments politically to change their law. So there's a great deal more teeth.

We find, for example in my country, not a huge number of cases, but from time to time taxpayers will say that this investigation, this assessment, this tax charge infringes my rights, and if they're successful, the tax charge ends. The investigation ends.

Olson: Even in the United States, it is very difficult to get anything overturned in the tax world on constitutional grounds. You have the *Estate of Windsor* and that is where the first United States Supreme Court ruling on same-sex marriage came in that the wife on state-law basis of a decedent sought to inherit and get the estate tax exemption for spouses, and Congress had passed the Defense of Marriage Act, which said we're not recognizing these marriages. *Windsor* led to more recent nontax cases, which recognized same-sex marriages as the law of the land.

Owens: This is clearly a theme where we need more work both on the part of academics and government if we are to find the right balance between the rights of taxpayers and the right of tax administrations to ensure that all taxpayers are complying with the law. I look forward to coming back to both of you in five years' time so that we can continue this conversation. ♦