European Union

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Some Recent Decisions of the European Court of Human Rights on Tax Matters (and Related Decisions of the European Court of Justice)

The author examines decisions of the ECtHR from January 2015 to May 2016 relating to human rights and taxation including the application of the prohibition of double jeopardy; confidentiality, freedom of speech and taxpayer information; retrospective tax legislation; freedom from self-incrimination; confidentiality and privacy; exchange of information and procedural guarantees; discrimination in granting tax reliefs; justifiable discrimination for capital taxes; and the use of tax laws as a means of persecution; as well as recent human rights cases before the ECJ.

1. Double Jeopardy and Tax Offences (Again)

1.1. Introductory remarks

The principle against double jeopardy (often referred to as the *ne bis in idem* rule) and its application in tax cases was discussed in the last article in this series[1] in connection with the case of *Lucky Dev v. Sweden* (2014).[2] In that case, the ECtHR had decided that article 4 of the Seventh Protocol to the European Convention on Human Rights (hereinafter Convention or ECHR) does not prohibit parallel proceedings for a tax surcharge and a criminal penalty; however, it does prohibit consecutive proceedings where one set of proceedings continues after the other set has come to a final conclusion.

The issue of double jeopardy in tax matters has continued to raise problems and a case has been referred to the Grand Chamber that may provide more definitive guidance. The case referred to the Grand Chamber is *A and B v. Norway* (2016),[3] in respect of which an oral hearing was held on 13 January 2016.[4] By the time this article appears in print, it is possible that the Grand Chamber will have issued its decision in this case.

There is quite a lot to say by way of background to this reference.

First, article 4 of the Seventh Protocol of the ECHR provides as follows:

> ARTICLE 4 Right not to be tried or punished twice
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> 1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.
> 3. No derogation from this Article shall be made under Article 15 of the Convention.

At the time of writing this article,[5] 33 member countries of the Council of Europe had ratified this Protocol; Germany and the Netherlands have signed but not ratified and the United Kingdom has neither signed nor ratified.

The best way to explain the background to the Grand Chamber reference is probably to start by discussing the various groups of cases that have come to the ECtHR in the last few years that have raised the issue of double jeopardy in tax matters. These cases demonstrate some of the complex issues and fact patterns that the Court has considered.

1.2. The Finnish cases

The first group of four cases were all decided on 20 May 2014 and involved Finland.[6] In *Häkkä* (2014), the taxpayer was subject to additional taxes plus a tax surcharge (which was regarded as a criminal charge) and was also convicted of aggravated tax fraud and sentenced to prison. The taxpayer did not appeal against the tax surcharge but, had he done so, he could have applied for rectification and subsequently appealed; the surcharge case then would have gone on beyond the period of time when the criminal convic-

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1. *See* P. Baker, *Some Recent Decisions of the European Court of Human Rights on Tax Matters*, 55 Eur. Taxn. 2/3 (2015), Journals IBFD.
2. SE: ECtHR, 27 Nov. 2014, Application no. 7356/10, *Lucky Dev v. Sweden*.
3. NO: ECtHR (Grand Chamber), Application nos. 24130/11 and 29758/11, *A and B v. Norway*.
4. The webcast of the hearing can be viewed at: http://echr.coe.int/Pages/home.aspx?p=hearings&w=2413011_13012016&language=lang&c=&py=2016. The arguments in the case are particularly well explained in the very clear submissions of the advocate for the Norwegian government at the hearing.
5. 29 May 2016.
6. The cases are: FI: ECtHR, 20 May 2014, Application no. 758/11, *Häkkä v. Finland*; FI: ECtHR, 20 May 2014, Application no. 11828/11, *Nykänen v. Finland*; FI: ECtHR, 20 May 2014, Application no. 35232/11, *Pirttimäki v. Finland* and FI: ECtHR, 20 May 2014, Application no. 37394/11, *Glantz v. Finland*.

tion became final. The Court noted that these were parallel proceedings rather than consecutive proceedings and that the taxpayer could have avoided consecutive proceedings by seeking rectification and then appealing the tax surcharge. Accordingly, the Court found no violation of article 4. The logic of the reasoning is, quite frankly, difficult to follow; unless the Finnish authorities would have abandoned the surcharge after the criminal conviction, there would always have been consecutive proceedings.

In *Nykänen* (2014) the taxpayer was subject to additional tax and a tax surcharge, which (unlike Häkkä) he sought to have rectified and then appealed the refusal of this rectification. His appeal was rejected by the Supreme Administrative Court. Meanwhile, he was convicted of tax fraud and his appeal against that conviction was refused *after* the Supreme Administrative Court had refused his appeal against rectification of the tax surcharge. The Court concluded, therefore, that the second set of proceedings was not discontinued after the first set of proceedings (the tax surcharge, the rectification and the appeal) became final. Consequently, the taxpayer was convicted twice for the same matter and there was a breach of article 4. The facts in *Glantz* (2014) were similar to those in *Nykänen*.

Finally, in *Pirttimäki* (2014) the taxpayer was a shareholder of a company: additional taxes and tax surcharges were imposed on the company and additional taxes and tax surcharges were also imposed on the individual. He was further charged and convicted of an accounting offence and of aggravated tax fraud. The Court concluded that the three proceedings did not involve the same offence. The first tax surcharge applied to the company, the second tax surcharge to the individual and the criminal charges were on the individual in respect of declarations he had made for the company. They did not, therefore, arise from identical facts or facts that were substantially the same and, accordingly, there was no violation of article 4.

1.3. The Swedish cases

In October and November 2014, the ECtHR decided four cases involving Sweden.[7]

In *Shibendra Dev* (2014) (the husband of Lucky Dev), the taxpayer was found liable to increased income tax and VAT, together with tax surcharges and was also convicted of an aggravated bookkeeping offence and an aggravated tax offence. The Court noted that, as a result of a decision of the Swedish Supreme Court and of Swedish legislation, the taxpayer could obtain a review of the conviction and compensation; he had failed to do so and thus failed to exhaust domestic remedies. So far as the aggravated bookkeeping offence was concerned, this was sufficiently separate from the tax surcharges to conclude that he had not been punished twice for the same offence.

In *Henriksson* (2014), the taxpayer was convicted of a tax misdemeanour but also subject to a supplementary tax assessment involving tax surcharges. The taxpayer could have petitioned the Supreme Administrative Court to quash the tax surcharges and could have claimed compensation; he had failed to do so and had thus failed to exhaust domestic remedies.

In *Åberg* (2014), the taxpayer had used the new procedures as a result of which his criminal conviction had been set aside and he was claiming compensation. The Court, therefore, concluded that his application was inadmissible.

Finally, in *Lucky Dev* (2014) (which was the subject matter of the discussion in the previous article) the proceedings in respect of the tax surcharges continued after Mrs Dev had been convicted of an aggravated bookkeeping offence and an aggravated tax offence. Mrs Dev was assessed to additional income tax and VAT plus a tax surcharge and also convicted of an aggravated bookkeeping offence and an aggravated tax offence. The Court concluded that the aggravated bookkeeping offence did not arise from essentially the same facts. However, the tax surcharge proceedings continued after she was acquitted of the aggravated tax offence; consequently, there had been a violation of article 4.

1.4. More Finnish cases

On 6 January 2015, the Court decided two similar cases involving Finland.[8] In *Heinänen* (2015), the taxpayer owned all the shares in two companies. He was assessed to additional tax and tax surcharges and also charged with aggravated accounting offences and aggravated tax fraud. The Court concluded that the two sets of facts were different since the first set of proceedings involved the taxpayer in his personal capacity and the second set of proceedings involved the two companies; making a tax declaration in respect of personal taxation differs from making a tax declaration for a company. The second case involved a company and its owners and board members; the company was not a victim because it had not been convicted of tax fraud; with regard to the individuals, the facts in the proceedings were not the same since they were accused in their personal capacity of aggravated tax fraud and that differed from separate proceedings relating to the misuse of diesel oil.

1.5. More Swedish cases

This was followed on 13 January 2015 by six cases all involving Sweden. [9] As explained in section 1.3., following a decision of the Swedish Supreme Court on 11 June 2013, it was possible for someone who had received both a tax surcharge and a conviction to obtain a review of the conviction and compensation in damages. In *Abenza* (2015),

7. The cases are: SE: ECtHR, 21 Oct. 2014, Application no. 7362/10, *Shibendra Dev v. Sweden*; SE: ECtHR, 21 Oct. 2014, Application no. 7396/10, *Henriksson v. Sweden*; SE: ECtHR, 21 Oct. 2014, Application no. 57762/10, *Åberg v. Sweden* and *Lucky Dev* (2014).

8. The cases are: FI: ECtHR, 6 Jan. 2015, Application no. 947/13, *Heinänen v. Finland* and FI: ECtHR, 6 Jan. 2016, Application no. 15396/12, *VP – Kuljetus Oy v. Finland*.

9. The six cases are: SE: ECtHR, 13 Jan. 2015, Application No. 33029/10, *Delosangeles Abenza v. Sweden*; SE: ECtHR, 13 Jan. 2015, Application no. 59347/10, *Hellborg v. Sweden*; SE: ECtHR, 13 Jan. 2015, Application No. 64102/10, *Larsson v. Sweden*; SE: ECtHR, 13 Jan. 2015, Application no. 8167/11, *Ask v.* Sweden; SE: ECtHR, 13 Jan. 2015, Application no. 24705/11, *Abdulrazagh v. Sweden* and SE: ECtHR, 13 Jan. 2015, Application no. 51469/11, *Svensson v. Sweden*.

the taxpayer had not used these procedures and had, therefore, failed to exhaust domestic remedies. In *Hellborg* (2015), the taxpayer had asked the Prosecutor General to take action, but had not made use of these remedies and had consequently failed to exhaust domestic remedies. In *Ask* (2015), the taxpayer had requested for the proceedings to be reopened and the conviction was quashed, consequently the taxpayer was no longer a victim. In *Abdulrazagh* (2015), the taxpayer had failed to use the new remedies and had consequently failed to exhaust domestic remedies. In *Svensson* (2015), the taxpayer had requested the Supreme Court to reopen the criminal proceedings and had asked for compensation from the Chancellor of Justice; the proceedings were pending and consequently domestic remedies had not been exhausted.

Finally, in *Larsson* (2015) tax and a surcharge had been imposed on a company of which the applicant was part owner, and he was convicted of aggravated bookkeeping and of a tax offence. Since the surcharge had been imposed on the company, the taxpayer had not been subject to double jeopardy.

1.6. Yet more Finnish cases

A further group of cases concerning Finland was decided by the Court on 27 January 2015.[10] In *Robert Alasippola* (2015), the taxpayer was assessed to additional income tax and surcharges for the years 2000-2003. Those proceedings ended in 2006. In 2009 he was charged with aggravated dishonesty by a debtor, false accounting and aggravated tax fraud. The Supreme Court subsequently dismissed the charge of aggravated tax fraud. The ECtHR concluded that the offences of false accounting and aggravated dishonesty by a debtor did not arise from identical facts or facts that are substantially the same as the tax surcharges; as the taxpayer had been acquitted of aggravated tax fraud, there was no double jeopardy. His wife, *Hanna Riikka Alasippola* (2015) was also subject to assessment for additional taxes and tax surcharges in proceedings that ended in 2008. In 2009 she was charged with aiding and abetting aggravated dishonesty and with two counts of aggravated tax fraud. The charges of aggravated tax fraud were subsequently dismissed. The ECtHR again noted that the factual circumstances of the tax offences were not the same as the conviction for aiding and abetting aggravated dishonesty by a debtor. Consequently, the application was inadmissible.

Finally, in *Rinas* (2015) the taxpayer was subject to additional taxes and tax surcharges and was also convicted of aggravated tax fraud. The taxpayer appealed against the tax surcharges and those proceedings became final on 13 September 2012 when the Supreme Administrative Court refused the taxpayer leave to appeal. The criminal proceedings for aggravated tax fraud were concluded on 31 May 2012 when a final judgment was issued by the Supreme Court. The ECtHR reiterated that parallel proceedings were not a breach of article 4, but it was a breach for the tax surcharge proceedings to continue after the criminal conviction was concluded. There was, therefore, a breach of article 4 because the tax surcharge proceedings continued. This is an unusual case where the criminal proceedings ended before the tax surcharge proceedings.

On 10 February 2015, the ECtHR issued two further decisions concerning Finland.[11] In *Kiiveri* (2015), the taxpayer was assessed to additional income tax and tax surcharges; the taxpayer did not appeal those decisions. In 2009, the taxpayer was charged with an accounting offence and with aggravated tax fraud. Appeals against the criminal convictions continued until March 2013, after the time that the tax surcharges had become final. The ECtHR noted that the accounting offence did not arise from the same or similar facts as the tax offences and that the taxpayer was only subject to both surcharges and to a charge of aggravated tax fraud in respect of some of the tax years concerned – only in respect of those tax years was there the possibility of double jeopardy. For one of those years, the taxpayer had the possibility of seeking rectification and appeal of the tax surcharge and, having failed to do so, he had failed to exhaust domestic remedies. However, for the remaining years the criminal proceedings continued after the tax surcharge proceedings had become final and, consequently, the taxpayer was convicted twice for the same matter in two sets of proceedings. He was awarded EUR 3,000 in respect of non-pecuniary damage. The facts were similar in *Österlund* (2015) and a similar award of EUR 3,000 was made for the breach of article 4.

1.7. And a Greek case

To complete the historical overview of the case law, reference should be made to a case from another part of Europe: *Kapetanios & Others v. Greece* (2015).[12] Three individuals were charged with smuggling, but were acquitted at their trials. They were, however, all ordered to pay administrative fines arising from the same events, and the proceedings to challenge these fines ended in 2011 and 2012 with decisions of the Supreme Administrative Court. They complained that there had been a breach of article 4 of the Seventh Protocol when the administrative proceedings had continued after the acquittals in the criminal cases. The ECtHR agreed that the criminal charges and the administrative penalties arose from the same conduct and that the administrative charges were also criminal for convention purposes. Consequently, the three individuals had been tried twice for the same offence and there was a breach of article 4.

This long recital of the recent case law of the ECtHR on tax surcharges and criminal proceedings does more than simply record the jurisprudence. It shows some of the complexities created by the issues, which led to the referral of a case to the Grand Chamber. The complexities include

10. These are: FI: ECtHR, 27 Jan. 2015, Application no. 49509/12, *Robert Alasippola v. Finland*; FI: ECtHR, 27 Jan. 2015, Application no. 39771/12, *Hanna Riikka Alasippola v. Finland* and FI: ECtHR, 27 Jan. 2015, Application no. 17039/13, *Rinas v. Finland*.

11. The cases are: FI: ECtHR, 10 Feb. 2015, Application no. 53197/13, *Österlund v. Finland* and FI: ECtHR, 10 Feb. 2015, Application No. 53753/12, *Kiiveri v. Finland*.

12. GR: ECtHR, 30 Apr. 2015, Applications nos. 3453/12, 4294/12 and 9028/13, *Kapetanios & Others v. Greece*.

the question of whether certain criminal charges – such as those for false accounting – are substantially the same charges as those for which tax surcharges were imposed. The case law shows the various permutations where, for example, proceedings for tax surcharges are brought before criminal charges or where the order is reversed. The case law also shows that the results seem almost haphazard, with cases that are similar in many respects (some of them involving husbands and wives) resulting in different conclusions from the ECtHR as to whether there has been a breach of article 4.

2. Double Jeopardy in Tax Matters

2.1. Introductory remarks

Before examining the case that has now been referred to the Grand Chamber, it may be worth spending a little time thinking about what is objectionable about double jeopardy in the context of tax cases. Article 4 of the Seventh Protocol of the ECHR prohibits a person being "tried or punished again in criminal proceedings" for an offence for which he has already been finally acquitted or convicted. Thus, it covers both situations where an individual is punished twice and where the individual is tried twice (or is liable to be tried or punished twice). Clearly, the original concept was that an individual should not face two or more consecutive prosecutions for the same offence, nor should the individual be tried again once he has been acquitted or convicted for the same offence. However, article 4 goes beyond that and guarantees that the individual should not be tried again, or be liable to be tried or punished again, once he has been finally acquitted or convicted.

In the tax context, it is not unusual for multiple consequences to flow from a taxpayer's failure to comply with tax laws: the individual will be liable to pay the additional tax, plus interest, plus administrative penalties (generally assessed by the tax authorities, but subject to review or appeal). More than one tax might be at issue, such as income tax, social security taxes and VAT. More than one year may also be involved, though it may be the same tax arrangements that were non-compliant for one year after another. In addition, the individual may be charged with a variety of criminal offences, some of them relating directly to tax fraud and some of them to matters such as false accounting or other deliberate frauds.

Aside from the original mischief, where an individual might be tried again after having been acquitted or convicted, what is the real mischief in the tax context? Clearly, one element is the danger of a disproportionate penalty: if the taxpayer is liable to tax, interest, surcharges and also potentially to imprisonment and fines, then the total punishment may be disproportionate to the criminal activity. A solution to this may be for the later proceedings to take into account the outcome of the earlier ones; for example, in determining the penalty for a criminal conviction, account should be taken of the fact that the taxpayer has already been found liable to a surcharge.

A separate mischief is that the taxpayer may need to defend two or more separate sets of proceedings, with different evidential burdens, different appeal structures and different possible outcomes. Multiple parallel proceedings impose additional procedural burdens both on the tax authorities and on the taxpayer. In an ideal world, a taxpayer would face a single set of proceedings with a cumulative outcome reflecting the severity of the taxpayer's conduct.

2.2. *A & B v. Norway*

In this context, as explained, a joined case involving Norway has been referred to the Grand Chamber. The matter involves two individuals.

In the first case, the taxpayer was arrested in December 2007 for serious tax fraud. In November 2008, amended tax assessments were issued together with a 30% surcharge. The taxpayer did not appeal against those assessments and surcharges and they became final in December 2008. In March 2009 the individual was convicted of aggravated tax fraud and sentenced to one year's imprisonment; he appealed, raising the issue of double jeopardy. The Supreme Court in Norway ultimately concluded that there was sufficient connection in substance and time between the conduct giving rise to the tax surcharges and the criminal conviction so that there was no breach of article 4.

In the second case, the taxpayer was subject to an amended assessment with a 30% tax surcharge in December 2008 against which he did not appeal and they became final in that month. Meanwhile, in November 2008 he had been indicted for a criminal offence for which he was convicted in September 2009. He also appealed against this conviction raising the issue of double jeopardy, but his appeal was dismissed on the grounds that there was sufficient connection between the tax surcharges and the later criminal conviction.

The submissions made at the oral hearing indicate that three issues are being placed before the Grand Chamber. First, whether the concept of "criminal proceedings" in article 4 has the same meaning as a "criminal charge" under article 6 of the ECtHR or, alternatively, has the narrower meaning of "criminal offence" under article 7. A line of case law from *Bendenoun* (1994)[13] to the case of *Jussila* (2006)[14] has held that substantial administrative penalties in the form of tax surcharges imposed as a general penalty for failure to comply with tax laws constitute criminal charges for the purposes of article 6. In none of the cases cited did the local court or the national government argue that the tax surcharge did not constitute "criminal proceedings" for the purposes of article 4. However, the Norwegian government in the *A & B* case seeks to argue that tax surcharges should not be regarded as criminal proceedings for the purposes of article 4 and so should not engage the principle of double jeopardy.

Secondly, if the Grand Chamber concludes that tax surcharges do involve criminal proceedings, the question

13. FR: ECtHR, 24 Feb. 1994, Application no. 12547/86, *Bendenoun v. France.*
14. FI: ECtHR (Grand Chamber), 23 Nov. 2006, Application no. 73053/01, *Jussila v. Finland.*

raised is whether article 4 prohibits parallel proceedings for a tax surcharge and for criminal penalties. The case law so far indicates that parallel proceedings are permitted, but not consecutive proceedings: this being taken to mean that once one set of parallel proceedings has reached a final outcome, there is a breach of article 4 if the other set of proceedings continues. This would have potentially irrational outcomes where, for example, a taxpayer does not appeal against a tax surcharge that then becomes final, so that criminal proceedings against the taxpayer cannot then continue. This outcome would be avoided if parallel proceedings could each be allowed to continue to their final outcome.

The third issue, assuming that the Grand Chamber rejects the Norwegian government's submissions on the first two issues, raises the question whether the tax surcharge proceedings and the criminal proceedings are sufficiently closely connected that they can be considered a single set of proceedings leading to cumulative outcomes. Here, there is case law from the ECtHR[15] that supports the view that there may be consecutive proceedings resulting in cumulative penalties that nevertheless do not breach the rule against double jeopardy. An example is in the context of a driving offence where an individual may be subject to separate proceedings for a criminal penalty for drunken or unlawful driving and also to an administrative process for forfeiture of the individual's driving licence. These may be separate procedures, but they are sufficiently closely connected in substance and in time to consider them as a single procedure, not consecutive proceedings engaging the principle of double jeopardy. The Norwegian Supreme Court had decided these two cases on that basis; the question is whether it was correct to do so.

The outcome of the reference to the Grand Chamber is likely to be of significance for all those countries in the Council of Europe who have ratified the Seventh Protocol and who have both substantial administrative fines or surcharges and may also use the criminal law in tax matters. It will be an interesting case to consider when the Grand Chamber decision is published.

3. Confidentiality, Freedom of Speech and Taxpayer Information (Again)

Another case that has been referred to the Grand Chamber is *Satakunnan Markkinapörssi Oy & Satamedia Oy v. Finland* (2016).[16] The case concerns an issue that was also discussed briefly in the previous article in this series.[17] It concerns two companies that took publicly available data in Finland about individuals' taxable income and assets and published it in a magazine, and also provided an SMS service. The Finnish Data Protection Ombudsman advised the companies to stop publishing the data. The companies challenged this before the Finnish courts, ultimately alleging a breach of the freedom of expression in article 10 (as well as a separate allegation of delay in the hearing of the proceedings contrary to article 6).[18] The Fourth Section of the ECtHR held by a majority of six to one that there had been no breach of article 10 (though the court held unanimously that there had been a violation of article 6 through the delay in the proceedings).

The matter has now been referred to the Grand Chamber, no doubt because it raises interesting and important issues concerning the limits of the freedom of expression and, particularly, what might be regarded as journalism. However, it also touches upon important issues of confidentiality of information provided for tax purposes. The tradition in Finland and some other Nordic countries has long been that the overall tax liability of an individual is public information. However, does the compilation of that information into a magazine, and the supply of specific information on request by enquirers, interfere with the right of confidentiality and privacy enjoyed by all taxpayers? Once again, it will be an interesting hearing before the Grand Chamber (the hearing has been set for 14 September 2016 at 09:15) and an interesting decision of the Grand Chamber when it is handed down.

4. Retrospective Tax Legislation

In January 2015, the ECtHR handed down two decisions, both confirming that retrospective changes to tax law will not normally infringe article 1 of the First Protocol.

The first case, *Arnaud & Others v. France* (2015)[19] concerned a protocol to the France-Monaco Income Tax Treaty (1963),[20] negotiated in 2001 (signed in 2003), which subjected French citizens who had moved to Monaco to French wealth tax with effect from 2002. In Monaco, the law implementing this protocol was only enacted in 2005. A number of French citizens affected by the change allege that this was a breach of article 1 of the First Protocol to the ECHR taken by itself and/or combined with article 14. The ECtHR concluded that there had been no breach since the change to the law respected the fair balance between the general interest of the community and the requirement of safeguarding the fundamental rights of the individual.

The second case is that of *Robert Huitson v. United Kingdom* (2015).[21] The taxpayer had participated in a tax avoidance scheme that involved reliance upon the Isle of Man-United Kingdom Income Tax Treaty (1955).[22] An earlier version

15. *See*, in particular, CH: ECtHR, 30 May 2000, Application no. 31982/96, *RT v. Switzerland* and SE: ECtHR, 13 Dec. 2005, Application no. 73661/01, *Nilsson v. Sweden*.
16. FI: ECtHR (Fourth Section), 21 July 2015, Application no. 931/13, *Satakunnan Markkinapörssi Oy & Satamedia Oy v. Finland*. The case was referred to the Grand Chamber on 14 Dec. 2015 and a hearing date has been fixed for 14 Sept. 2016 at 09:15.
17. *See* Baker, *supra* n. 1, at 110.
18. The matter has also been the subject of a separate decision of the ECtHR in FI: ECtHR, 19 Nov. 2013, Application No. 16248/10, *Anttila v. Finland* and has also been the subject matter of litigation before the Court of Justice of the European Union in E2: ECJ (Grand Chamber), 16 Dec. 2008, Case C-73/07, *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, ECJ Case Law IBFD.
19. FR: ECtHR, 15 Jan. 2015, Application nos. 36978/11, 36963/11, 36967/11, 36969/11, 36970/11 and 36971/11, *Arnaud & Others v. France*.
20. *Protocol and Exchange of Notes to the Convention on Taxation between France and the Principality of Monaco of 18 May 1963* (26 May 2003), Treaties IBFD.
21. UK: ECtHR, 13 Jan. 2015, Application no. 50131/12, *Robert Huitson v. United Kingdom*.
22. *Arrangement between Her Majesty's Government and the Government of the Isle of Man for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (29 July 1955), Treaties IBFD.

of the scheme had been countered by legislation in 1987, which had also been enacted with retrospective effect.[23] The avoidance scheme that Mr Huitson entered into was a variation of the original scheme, with additional features designed to circumvent the effect of the 1987 legislation. In 2008[24] this new version of the tax avoidance scheme was countered by specified anti-avoidance legislation with effect going back to 1987. Thus, the amendment of the law built on the original anti-avoidance legislation in 1987 and ensured that the 1987 legislation was not circumvented by the new version of the old scheme.

Mr Huitson unsuccessfully challenged the change to the law through the UK courts and, having failed, took the matter on to the ECtHR. The decision of the ECtHR is very clear in confirming that retrospective tax legislation is not prohibited by article 1 of the First Protocol.[25] What is particularly interesting is what the ECtHR says about "marketed and wholly artificial tax avoidance schemes". On the public policy, the court said as follows:

> 30. The Court notes that in the present case the object of the legislative amendments in issue was to prevent the DTA tax relief provisions from being misused for a purpose different from their originally intended use, that is relieving taxpayers from double taxation. The Court considers that it is a legitimate and important aim of public policy in fiscal affairs that a DTA should do no more than relieve double taxation and should not be permitted to become an instrument by which persons residing in the United Kingdom avoid, or substantially reduce, the income tax that they would ordinarily pay on their income. Moreover, it is in the general interest of the community to prevent taxpayers resident in the United Kingdom from exploiting the DTA in a way which would enable them to substantially reduce their income tax and secure a competitive advantage over those who chose not to use such a scheme.

The ECtHR also confirmed that it was within the area of discretionary judgment for Parliament to legislate with retrospective effect to ensure a fair balance between the general body of taxpayers and the individuals who sought to benefit from the marketed tax avoidance scheme.

Where a government legislates retrospectively to counter a marketed tax avoidance scheme, it is very unlikely that the ECtHR will find that the government has stepped beyond the margin of appreciation in taxation matters and very unlikely that (except in extreme circumstances) there would a breach of article 1 of the First Protocol.

5. Freedom from Self-Incrimination (*Nemo Tenetur si Ipsum Accusare*)

The issue of whether a taxpayer may refuse to supply information that might prove the taxpayer's guilt in a subsequent penalty or criminal prosecution has arisen from time to time before the ECtHR.[26] In *Van Weerelt* (2015),[27] the Netherlands tax authorities obtained information from the German authorities under the Mutual Assistance Directive (77/799);[28] the information indicated that the taxpayer had an interest in a Liechtenstein foundation that had been liquidated in 2000. Various attempts by the Netherlands tax authorities to obtain further information from the taxpayer failed and the tax authorities sought from the Regional Court of 's-Hertogenbosch an order for him to disclose all information concerning assets held abroad. The Regional Court issued the order, with a penalty of EUR 2,500 per day if he failed to comply. He appealed that order to the Court of Appeal and, when the decision was upheld, appealed further to the Supreme Court (*Hoge Raad*). In the appeal he raised the question of self-incrimination. The Supreme Court confirmed the order to disclose information, but, in order to protect the taxpayer from potential self-incrimination, directed that the information should be used only for the purposes of levying taxes and not for the purpose of imposing any penalty or criminal liability. Despite this order, the taxpayer continued to refuse to provide the information, and an enforcement notice was served on him to enforce the EUR 2,500 per day penalty which, by that time, had amounted to EUR 140,000. The taxpayer took the matter on to the ECtHR.

The ECtHR confirmed that, though not expressly mentioned in article 6, the privilege against self-incrimination is a generally recognized international standard that lies at the heart of the notion of a fair criminal procedure. The right is primarily concerned with respecting the will of an accused person to remain silent and does not extend to the use of material obtained from the accused that has an existence independent of the will of the suspect (for example, existing documents, blood samples, etc.). The ECtHR also confirmed the importance of taxpayers providing information for the purposes of tax assessments:

> 56. However, the right does not act as a prohibition on the use of compulsory powers to require taxpayers to provide information about their financial affairs. Indeed, the obligation to make disclosure of income and capital for the purposes of the calculation and assessment of tax is a common feature of the tax systems of member states and it would be difficult to envisage them functioning effectively without it (*see Allen v. the United Kingdom* (dec.), no. 76574/01, 10 September 2002, and *King v. the United Kingdom* (dec.), no. 13881/02, 8 April 2003).

In this case, the taxpayer had failed to take into account the fact that the Supreme Court had ordered that the information should not be used for imposing any tax fines or criminal prosecution. In those circumstances, therefore, there was no danger that the information would be used for self-incrimination. Consequently, there was no potential breach of article 6.

The approach taken by the Netherlands Supreme Court is one that tax authorities may also decide to take where

23. UK: Finance (No. 2) Act 1987, sec. 62, which was enacted to reverse the effects of the decision in UK: HC, 22 Jan. 2001, *Padmore v. IRC* [1987] STC 36 (Chancery Division).
24. UK: Finance Act 2008, sec. 58.
25. *SeeHuitson* (2015), para. 28.
26. *See*, for example, CH: ECtHR, 3 May 2001, Application no. 31827/96, *JB v. Switzerland* and CH: ECtHR, 5 Apr. 2012, Application no. 11663/04, *Shambaz v. Switzerland*, which was discussed in an earlier article in this series: P. Baker, *Recent Tax Cases of the European Court of Human Rights*, 52 Eur. Taxn. 12 (2012), Journals IBFD.
27. NL: ECtHR, 16 June 2015, Application no. 784/14, *Van Weerelt v Netherlands.*
28. Mutual Assistance Directive (1977): Council Directive 77/799/EEC of 19 December 1977 Concerning Mutual Assistance by the Competent Authorities of the Member States in the Field of Direct Taxation and Taxation of Insurance Premiums, EU Law IBFD.

they seek information only available from the taxpayer and that has no existence independent of the will of the taxpayer. To respect the freedom from self-incrimination, they will need to guarantee that any information supplied will not be used for the purpose of imposing fines or criminal prosecution. Those advising a taxpayer would equally need to advise him not to supply information unless such as a guarantee was offered.

6. Confidentiality and Privacy, Exchange of Information and Procedural Guarantees

Not surprising given the increase in exchange of information and the use of investigative powers, there have been recent cases relating to the right of privacy in article 8 of the ECHR and the gathering and exchange of information. Several of the cases have turned on the absence of procedural guarantees for the persons whose confidential information was sought by the revenue authorities.

In *Othymia Investments BV v. The Netherlands* (2015),[29] the Spanish tax authorities were investigating the applicant company and sought assistance in gathering information from the Netherlands authorities under the Mutual Assistance Directive (77/799). The Netherlands tax authorities supplied information, including some they had gathered in the course of a prior investigation into the company. The information was first sent to the Spanish authorities, and subsequently the company was notified that the information had been supplied. The company lodged an objection to the supply of information, which, when it was rejected, they appealed to the Regional Court and then to the Council of State (*Raad van State*). When those objections were not upheld, they complained to the ECtHR alleging breaches of the right to privacy in article 8 and the right to an effective remedy for breaches of the Convention under article 13.

The ECtHR first decided that it was only necessary to consider the issue of a remedy under article 13 if the taxpayer had an arguable claim under article 8. With regard to the right to privacy, the ECtHR was prepared to accept that there had been an interference with the company's right to privacy, but that the interference was in accordance with the law, for the legitimate purpose of ensuring the collection of taxes, and necessary in a democratic society. In this context, the ECtHR considered the decision of the Court of Justice of the European Union on the Mutual Assistance Directive (77/799) in the *Sabou* (2013) case.[30] In that case, the ECJ had distinguished between the investigative stage of tax proceedings and the contentious stage: in the investigative stage, the ECJ had held that the taxpayer did not need to be informed of measures taken to gather information. The ECtHR did not follow that approach in the *Sabou* decision, relying instead upon its own case law that investigative methods may have to be used covertly in appropriate circumstances. Under that case law, it was not necessary as part of article 8 that prior notice of tax investigations or the exchange of tax-related information should always be given to the persons potentially implicated. On that basis, the company had no arguable claim under article 8. Consequently, there was no need to consider article 13.

The outcome of this case is not particularly surprising: there must be circumstances where information can be gathered and exchanged between countries for tax purposes without prior notification to the taxpayer (most notably where there is a reasonable perception that the taxpayer would destroy the information). However, it is interesting that the ECtHR does not follow the distinction made by the ECJ in *Sabou* to the effect that, during the investigative stages of a tax dispute, the right of persons concerned to be notified is not engaged. This implies that under the ECtHR (but not perhaps under EU law) persons affected must be notified and given a procedural remedy, unless the non-notification is justifiable and proportionate.

Two other recent cases have considered the procedural rights of persons in respect of whom information is sought by tax authorities.

The case of *MN & Others v. San Marino* (2015)[31] shows a breach of the Convention where persons affected by the gathering of information for tax purposes had no effective remedy. In that case, the Italian tax authorities were investigating various criminal matters concerning certain individuals (*not* including the individuals who brought this case before the ECtHR). Their investigations pointed to a company in San Marino and they approached the San Marino judicial authorities by a letter rogatory to gather certain information from banks and fiduciary companies in San Marino. The San Marino judicial authorities agreed to issue an order requiring investigations to be carried out and also ordered that the Italian citizens who had entered into fiduciary agreements with the San Marino company (of whom there were almost 1,500 individuals) should be notified of the decision. The applicants in this case were within that number. The applicants lodged a complaint to the San Marino judge, who held it inadmissible on the grounds that the applicants had no legal status to complain of the investigation; that decision was upheld by the higher court in San Marino. The applicants then complained to the ECtHR, raising articles 6, 8 and 13. The ECtHR concluded that it could consider the matter with regard to article 8 and the right to privacy.

The ECtHR first concluded that obtaining banking information interfered with the private life of the applicants. The interference was, however, in accordance with the law, it pursued a legitimate aim, but the question was whether it was necessary in a democratic society and, in particular, whether it was accompanied by sufficient procedural safeguards. On that point, the San Marino government failed: the applicants did not have an effective control, which is required as an element of the rule of law and which was also required to show that the interference was necessary in a democratic society. Accordingly, there had been a breach of article 8 because the absence of procedural

29. NL: ECtHR, 16 June 2015, Application no. 75292/10, *Othymia Investments BV v. The Netherlands*.
30. CZ: ECJ, 22 Oct. 2013, Case C-276/12, *Jiří Sabou v. Finanční ředitelství pro hlavní město Prahu*, ECJ Case Law IBFD.
31. SM: ECtHR, 7 July 2015, Application no. 28005/12, *MN & Others v. San Marino*.

safeguards led to the conclusion that the interference with the right to privacy could not be justified as necessary in a democratic society.

A similar conclusion with regard to procedural safeguards was reached by the ECtHR in the case of *Brito Ferrinho Bexiga Villa-Nova v. Portugal* (2015).[32] That case concerned a Portuguese lawyer who was under investigation in respect of her own tax affairs. She explained that her professional fees were paid into her personal bank account and, when the tax authorities asked for details of that account, objected on grounds of professional secrecy. Under Portuguese law there is a procedure under which an investigating judge may seek authorization from a higher court to lift professional secrecy: the investigating judge did that here, but following a procedure in which the lawyer was unable to participate. She complained of a breach of articles 6, 8 and 13, the ECtHR concluding that the matter could be examined under article 8. Once again, the ECtHR concluded that bank information was personal so that there was an interference with the right to privacy. That interference was in accordance with the law, had a legitimate purpose, but could not be regarded as necessary in a democratic society because the absence of procedural guarantees meant that there was no fair balance between the public interest and the interests of the individual concerned: the applicant had no possibility of intervening at any point in the procedure that authorized the lifting of professional secrecy.

Putting the three cases discussed above together, one can summarize the position under article 8 as follows. It is possible for a revenue authority to obtain information from a third party without notifying the taxpayer if it is justifiable to do so having regard to the margin of appreciation and the balance between the interests of the individual and of the community in general. Where the person about whom information is sought (from a bank, for example) is given notification, that person must have an adequate procedural guarantee to allow them to challenge the gathering of the information. That guarantee must also allow the individual adequate opportunity to present his legal position.

A final case on the cross-border exchange of information and the right to privacy – *GSB v. Switzerland* (2015)[33] – concerns the fallout from the revelation of large numbers of undisclosed bank accounts held by US citizens with UBS in Switzerland. Following the revelation, the US tax authorities sought information about the account holders and, in 2009, the Swiss Confederation entered into an agreement with the US government to supply this information. Though the applicant tried through various judicial proceedings in Switzerland to prevent the supply of information, details of his bank account were eventually given to the US authorities. He complained of a breach of article 8 taken by itself and together with the non-discrimination provision in article 14. The ECtHR dealt with the matter under article 8.

The ECtHR first confirmed that bank information is protected by the right to privacy in article 8 and that there was an interference with that right. The issue was whether that interference could be justified. The applicant claimed that it was not in accordance with the law because the agreement between Switzerland and the United States had not been subject to a referendum in Switzerland, was retroactive in its application and had not been properly approved by the Swiss parliament. The ECtHR concluded that the agreement had an adequate legal basis, even though there had been no referendum, and it had been sufficiently approved by parliament. On the retroactive operation, the Court noted that changes to procedural law, including the exchange of information, may apply to prior tax years so that the applicant had no expectation that it would not be retroactive. The interference was, therefore, in accordance with the law, but the second question was whether it had a legitimate purpose. Given the importance of the banking sector to Switzerland, it did serve a legitimate purpose for Switzerland to enter into the agreement with the United State to supply this information. Finally, having regard to the fact that the information concerned bank data, and not intimate personal information about the applicant, disclosure of the information was necessary in a democratic society and there had been a fair balance between the interests of the individual and the general interest of the community.

This decision is not particularly surprising, even if the applicant might have originally expected that his financial details would be protected by banking secrecy in Switzerland. Nevertheless, it reaffirms the point made in the two cases discussed previously that disclosure of banking data is prima facie a breach of article 8 and needs to be justified under article 8(2): that is, it must be in accordance with the law (including adequate procedural safeguards), it must serve a legitimate purpose and it must be necessary in a democratic society (requiring a fair balance between the interests of the individual and the general interests of the community, taking into account the margin of appreciation of all states in this context).

7. Discrimination in Granting Tax Reliefs: Negative and Positive Discrimination

The recent case of *Guberina v. Croatia* (2016)[34] raises some interesting issues about positive obligations imposed by the prohibition of discrimination. The applicant had lived in a third floor flat in a building without a lift. The applicant's child was born with severe physical and mental disabilities and, as the child grew, it became very difficult to take him out of the flat to see a doctor or for other social needs. Accordingly, the applicant sold his flat and bought a house that made access for a wheelchair much easier. Under Croatian law, there was an exemption from property transfer tax for a person who bought a house to solve his or her housing needs, provided that he did not already have another house or flat meeting the housing needs of

32. PT: ECtHR, 1 Dec. 2015, Application no. 69436/10, *Brito Ferrinho Bexiga Villa-Nova v. Portugal*. The author is very grateful to Rui Palma for drawing his attention to this case.
33. CH: ECtHR, 22 Dec. 2015, Application no. 28601/11, *GSB v. Switzerland*.
34. HR: ECtHR, 22 Mar. 2016, Application no. 2368/13, *Guberina v. Croatia*. The author is very grateful to Robert Attard for drawing his attention to this case.

his family members. The applicant sought the exemption in an amount of approximately EUR 11,250; the tax office refused on the grounds that he already had a flat. The taxpayer argued that it did not meet his family's housing needs because of the difficulty of access for his child. His appeal was rejected by the Croatian courts and he took the matter on to Strasbourg, alleging violation of article 1 of the First Protocol, together with article 14 (non-discrimination) and also article 1 of the Twelfth Protocol (the general non-discrimination provision).

The decision of the ECtHR cites widely from international standards relating to discrimination on grounds of disability. The Court concluded that, in the circumstances of the applicant's family, basic infrastructure requirements included the existence of a lift. The government argued that the tax exemption was only to protect financially disadvantaged persons, but the Court rejected that as justifying the discriminatory treatment of the taxpayer. It concluded, therefore, that there had been a violation of article 14 in conjunction with article 1 of the First Protocol (it was not necessary to examine separately article 1 of the Twelfth Protocol). The reasoning of the Court is not entirely easy to follow, but would appear to suggest that, in designing a tax exemption, the particular needs of disabled persons (and any other persons who might suffer discrimination) must be taken into account. If financial considerations were to be the only basis upon which the exemption was granted, that should have been specified precisely in the legislation.

There is one further aspect of the case that deserves mention. The applicant's claim was for just over EUR 11,000 in tax he had been obliged to pay, together with EUR 10,000 of non-pecuniary damage. The Court concluded that it was unable to assess the claim for the tax exemption since it did not have full financial information, but noted that the applicant might request a reopening of the proceedings in Croatia to claim the tax exemption. The Court awarded EUR 5,000 as non-pecuniary damage. The applicant also claimed approximately EUR 18,500 for costs and expenses; the Court awarded EUR 11,500 in costs. Thus, the taxpayer came away from Strasbourg without the tax exemption, some EUR 7,000 out of pocket with regard to expenses and with only EUR 5,000 for non-pecuniary damage. Put another way, the taxpayer was EUR 2,000 worse off as a result of going to Strasbourg. It may be correct that the ECtHR was not in a position to determine if the taxpayer met the financial conditions for the tax exemption and that possibly the costs incurred were excessive. However, it is difficult to advise anyone to take a case on to Strasbourg if they may win the case but nevertheless find themselves out of pocket as a result.

8. Justifiable Discrimination for Capital Taxes

The need for a state to justify potentially discriminatory tax measures is illustrated by the case of *Berkvens and Berkvens v. the Netherlands* (2014),[35] which concerned a Netherlands exemption for "enterprise succession". The applicants were a mother and son, both had inherited assets from the deceased father and the mother had also made an inter vivos gift to the son. Inheritance tax and gift tax were applicable, but the applicants complained that the tax exemption for enterprise succession did not apply to them. This partial or full exemption from the two taxes applied only to assets belonging to an enterprise that was owned by the deceased or the donor (as distinct from assets that did not belong to an enterprise). The rationale for the exemption was that the imposition of these taxes on assets held by enterprises might give rise to liquidity problems in paying the taxes.

The issue of the potentially discriminatory nature of the enterprise succession exemption had been fully considered by the Netherlands Supreme Court (*Hoge Raad*) in a series of cases and that Court had concluded that the exemption did not infringe either article 14 of the ECHR or article 26 of the International Covenant on Civil and Political Rights. Consequently, the Netherlands Tax Administration concluded that there was no merit to a claim that the enterprise succession exemption was discriminatory. The applicants challenged this before the ECtHR under article 14 (taken together with article 1 of the First Protocol) and article 1 of the Twelfth Protocol (the general anti-discrimination provision). The ECtHR noted that the national authorities are in a better position to determine whether there is an objective and reasonable justification for a difference in treatment and that states enjoy a wide margin of appreciation in implementing tax policies. As the Netherlands *Hoge Raad* had stated, transfers of family-owned businesses could give rise to liquidity problems if inheritance or gift tax were payable: the exemption for assets held through an enterprise, therefore, pursued a legitimate aim; it was also an effective measure to counter the problem of liquidity and was, consequently, not disproportionate. The ECtHR concluded that there had been no breach of the Convention.

Given the full examination of the issue by the *Hoge Raad*, it is not entirely surprising that the ECtHR did not substitute its own views. Nevertheless, the Court might have noted that the same problem of liquidity arises where capital taxes are imposed on the transmission of business assets or agricultural assets whether those assets are held by an enterprise or individually. The same policy considerations do not arise, however, if assets are held as investments. Perhaps the ECtHR might have considered further the Netherlands legislation to see whether there was a real and justifiable distinction between assets subject to the partial or complete exemption and other assets.

9. The Use of Tax Laws to Persecute a Human Rights Advocate

From time to time, the articles in this series have highlighted worrying cases where the tax system has been misused in breach of human rights. An example of that is *Jafarov v. Azerbaijan* (2016).[36] Jafarov was a well-known

35. NL: ECtHR, 27 May 2014, Application no. 18485/14, *Berkvens and Berkvens v. the Netherlands*.

36. AZ: ECtHR, 17 Mar. 2016, Application no. 69981/14, *Jafarov v. Azerbaijan*.

civil society activist and human rights defender in Azerbaijan. He was the victim of a series of actions taken against him by the government, many of them including allegations of tax evasion and related charges; he spent lengthy periods in prison under these charges. He brought to Strasbourg allegations of breaches of articles 5, 11 and 18 (which covers misuse of restrictions on human rights). The ECtHR found violations of articles 5 and 18 taken in conjunction with article 5 and found it unnecessary to examine article 11 separately.

The case is a salutary reminder that in some countries the tax system is, from time to time, used by the state to persecute its opponents and its critics. In those cases, the role of the Court in Strasbourg in protecting the rights of those persons is particularly critical.[37]

10. Addendum: Decisions of the Court of Justice of the European Union

Previously, the articles in this series have focused only on decisions of the European Court of Human Rights. However, with the entry into force of the Charter of Fundamental Rights of the European Union, important decisions relating to taxpayers' rights are appearing from the European Court of Justice. A selection of those cases is summarized here.

The issue of double jeopardy (the principle *ne bis in idem*) has been discussed extensively in the previous sections. The issue has also been discussed by the ECJ (Grand Chamber) in *Åklagaren v. Hans Åkerberg Fransson* (Case C-617/10).[38] Two further cases have recently been referred to the ECJ relating to the rule against double jeopardy found in article 50 of the Charter of Fundamental Rights. The first case, *Burzio* (Case C-497/14)[39] has been held inadmissible since it did not raise any issue of EU law. However, the case of *Orsi* (Pending Case C-217/15)[40] concerned criminal liability, as well as an administrative penalty of 30% in relation to non-payment of VAT; that matter appears to be proceeding.

The case of *WebMindLicenses Kft* (Case C-419/14)[41] raises a number of issues under the Charter of Fundamental Rights in relation to covert surveillance and interception of e-mails in connection with a VAT investigation. The decision discusses a range of issues concerned with the right to defence and interference with private life through the interception of communications without judicial authorization. The ECJ provides guidance and then states that it is for the national courts to review the legality of the use of the evidence.

C (Case C-122/15)[42] raised potentially interesting issues concerning justification of discriminatory tax provisions. Finland introduced an additional 6% supplementary tax on pension income, but this was challenged both on the grounds of article 21 of the Charter of Fundamental Rights and also Council Directive 2000/78/EC on discrimination on grounds of age.[43] In the final analysis, both the Advocate General and the Court concluded that neither the Charter nor the Directive was engaged by the national tax measure, which concerned only a domestic tax situation.

A case that examines a number of matters relating to exchange of information between Member States under the new Mutual Assistance Directive (2011/16)[44] has been referred to the ECJ (*Berlioz Investment Fund SA* (Pending Case C-682/15)).[45] At present, only the reference is available, but this clearly shows a number of matters raised in relation to the Charter, particularly article 47 (right to an effective remedy and to a fair trial – the equivalent (though differently drafted) to article 6 of the ECHR).

Though the Charter was not raised in the reference, the case of *Bara and Others* (Case C-201/14)[46] discusses the rights of data subjects where data is exchanged between authorities – including the tax authorities – of a Member State. The case turned on provisions of Directive 95/46/EC (the Data Processing Directive).[47] The ECJ concluded that the transfer of data from the National Tax Administration to the National Health Insurance Fund, without first notifying the data subject, was a breach of various provisions of the Directive. This clearly has significant ramifications for the systems currently being put in place for automatic exchange of financial information in tax matters between reporting institutions and tax authorities and between tax authorities of different states. It reaffirms that the data protection provisions under EU law will apply to any such data processing, including the right of the data subject to be informed of the collection and transmission of the data.

Looking forward, with cases coming to Luxembourg and raising issues on the Charter of Fundamental Rights, it seems likely that the Court of Justice of the European Union will become as significant (or more significant) a source of case law on taxpayers' rights as the ECtHR. Some interesting divergences, however, are already beginning to appear between the approaches of the two European Courts.

37. Similarly, the case of AZ: ECtHR, 2 June 2016, Application no. 59620/14, *Yunusova and Yunusov v. Azerbaijan* also concerns the treatment – including tax investigations – of a husband and wife who were well-known as civil society activists and human rights defenders.
38. SE: ECJ, 26 Feb. 2013, Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*, ECJ Case Law IBFD.
39. IT: ECJ, 15 Apr. 2015, Case C-497/14, *Burzio*.
40. IT: ECJ, Pending Case C-217/15, *Criminal proceedings against Massimo Orsi*, ECJ Case Law IBFD.
41. HU: ECJ, 17 Dec. 2015, Case C-419/14, *WebMindLicenses Kft. v. Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság*, ECJ Case Law IBFD.
42. FI: ECJ, 2 June 2016, Case C-122/15, *C*, ECJ Case Law IBFD.
43. Council Directive 2000/78/EC of 27 November 2000 Establishing a General Framework for Equal Treatment in Employment and Occupation, OJ L 303 (2000).
44. EU Mutual Assistance Directive (2011): 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), EU Law IBFD.
45. ECJ, Pending Case C-682/15, *Berlioz Investment Fund SA*.
46. RO: ECJ, 1 Oct. 2015, Case C-201/14, *Bara and Others*, ECJ Case Law IBFD.
47. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data, OJ L 281 (1995), EU Law IBFD.

