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Exchange of information in corporate tax matters - limitations

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"From insight to impact"

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Overview

Legal basis

Limitations

1. Foreseeable relevance
2. Principle of subsidiarity
3. Abusive behaviour
4. Insufficient data protection
5. Information is not obtainable under domestic law
6. Private sphere
7. Further limitations

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Legal basis

Art. 26 OECD MC Exchange of information

Para. 1: Forseeable relevance

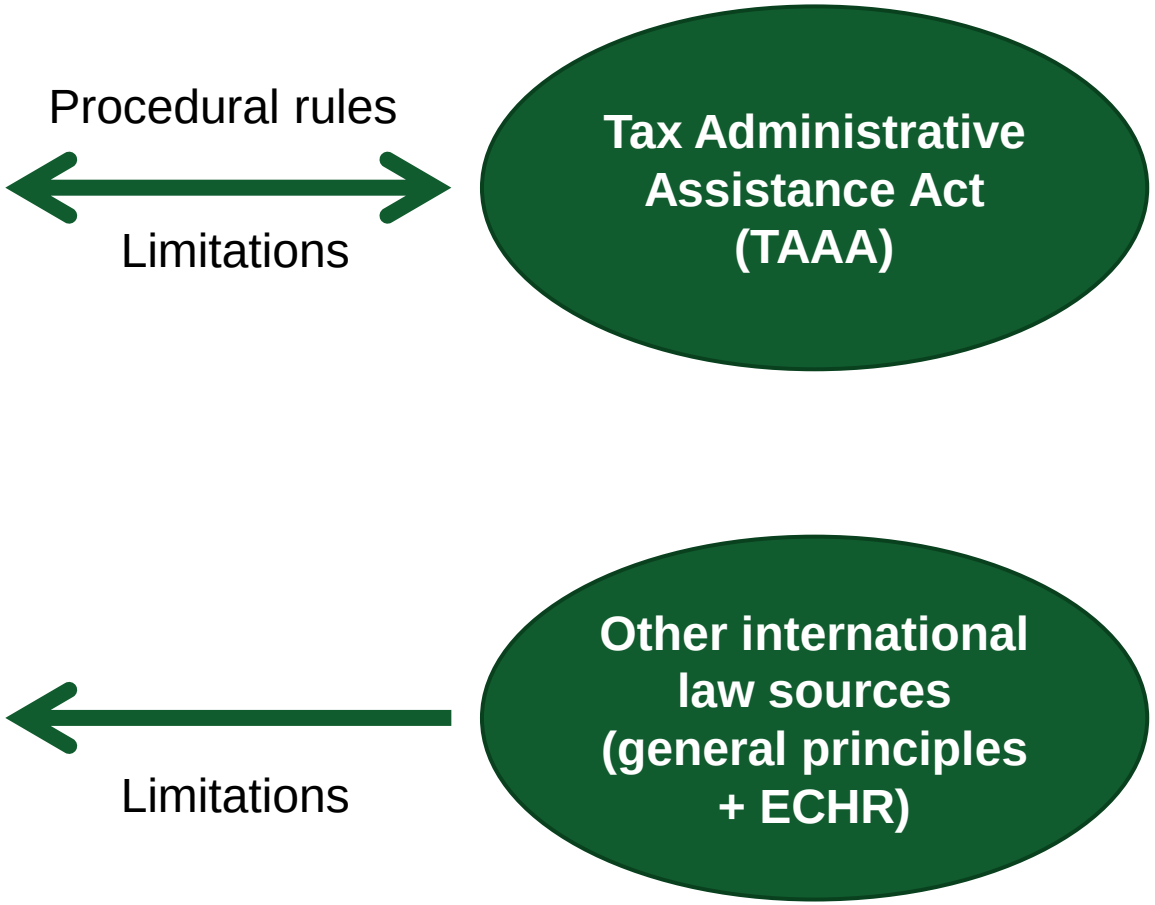
Para. 2: Confidentiality

Para. 3: Various limitations

- Lit. a: No illegal administrative measures
- Lit. b: Obtainable under domestic law
- Lit. c: Business secrecy, ordre public

Para. 4: Not needed for tax purposes in requested state

Para. 5: Banking secrecy shall not prohibit the exchange of information

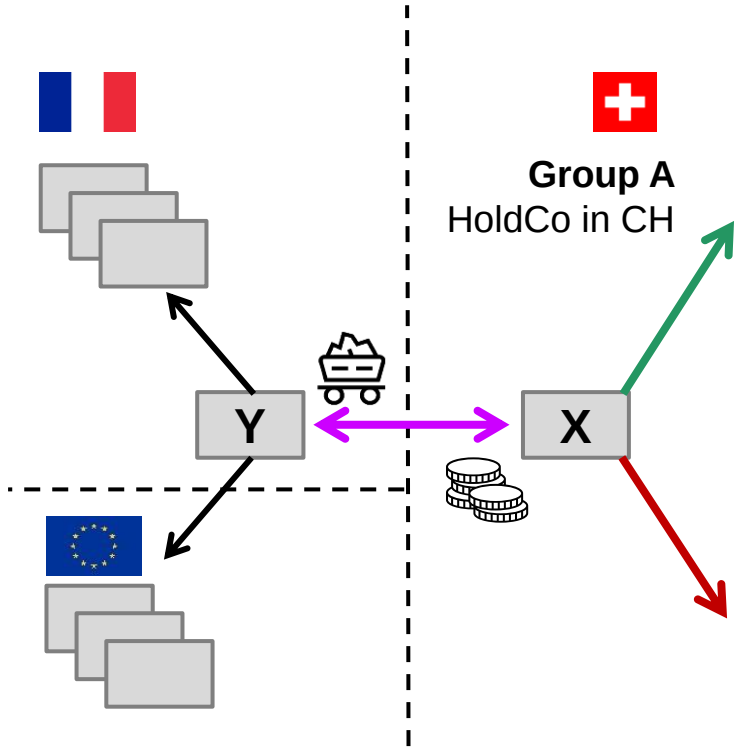


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Limitation 1: Foreseeable relevance – a case to start

FAC A-3810/2020 of 16 March 2021 (appealed to the FSC)

French corporate taxes from 2015 – 2017; transfer pricing audit: transaction between X and Y



Requested information (foreseeable relevance affirmed):

- Annual financial statements (balance sheet, profit and loss statement, cash flow statement, notes) (consid. 3.4.1)
- Information on participations (consid. 3.4.2)
- Contact details of subsidiaries (consid. 3.4.2)
- Amount of taxes paid (consid. 3.4.3); statutory and effective tax rate (consid. 3.4.4)
- Number of employees, information on directors and the date of incorporation (consid. 3.4.6)
- Enclosures to the tax return, but no official auxiliary sheets (consid. 3.4.7)

Requested information (foreseeable relevance denied):

- Tax returns (consid. 3.4.7)

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Limitation 2: Principle of subsidiarity

Broad understanding

More effective mean of investigation

Swiss FAC
exhaustion of the means usually available
unless this involves disproportionate difficulties
(see e.g. FAC A-4414/2014 consid. 3.1.1 [DTC-NL, 2015])

Narrow understanding

Exhaustion of all means of investigation

Model TIEA (2002)
«all means available […], except those that would give rise to disproportionate difficulties»
(art. 5[5][g] Model TIEA)

«interpreted liberally» (para. 57 TIEA Comm.)

«easier for the requested Party to obtain the information […] than for the applicant Party»
(para. 63 TIEA Comm.)

Swiss FSC
«épuisé ses sources habituelles»
(e.g. FSC 144 II 206 consid. 3.3.3 [DTC-FR, 2018])

Art. 26(1) OECD MC (2017)
«exhaustion of the regular sources […] available under the internal taxation procedure»
(art. 26 para. 9[a] OECD Comm.)

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Limitation 3: Abusive behaviour

!

Infringement of the double tax treaty → No obligation to exchange information

- No access to the mutual agreement procedure or the arbitration procedure - no exchange of information
- Discriminatory taxation (see art. 24 OECD MC)
- Application of domestic anti-avoidance rules (CFC legislation?)

?

Initiating a MAP?

However, initiating a MAP procedure before or after an exchange of information request is - in my opinion - per se not considered to be abusive behavior (different purpose of the EOI and the MAP).
→ See also FAC A-1781/2019 of 4 November 2020 consid. 3.4.

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Limitation 4: Insufficient data protection

1. Poor data protection in general is not sufficient.

2. Inadequate data protection <u>in tax matters</u> needs to be proven.

3. See e.g. India but of course applies to all states:
FSC 2C_619/2018 of 21 December 2018 consid. 2.1.



Switzerland stops information exchange with Bulgaria

By Cristian Angeloni, 8 Oct 19

Following data leak of Bulgarian and foreign taxpayers' financial account details

Source: International Advisor (8.10.2019)

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Limitation 5: Information is not obtainable under domestic law

Art. 26 (3) (b) OECD MC

"3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

[…]

b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State; […]"

→ What is obtainable under the tax laws of Switzerland?

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Limitation 5: Information is not obtainable under domestic law

Role of the counter party in Switzerland?
(Transfer Pricing)

Tax payer (= person concerned)

→ comprehensive reporting obligations
art. 124 - 126 FDTA

Intermediary / Third party

→ limited reporting obligations
art. 127 FDTA

e.g. employer, lender, business party, bank

Federal Supreme Court: Reporting obligations follow art. 124 - 126 FDTA if the information could be of relevance for the assessment of the person resident in Switzerland (piercing the corporate veil / transfer pricing cases; see e.g. FSC 2C_690/2015 consid. 4.1 - 4.6, FSC 2C_615/2018 consid. 4.3).

→ Comprehensive reporting obligation for related parties in transfer pricing EOI.

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Limitation 5: Information is not obtainable under domestic law

Problem: In a domestic context, there are no clear rules on what the tax authorities can obtain. Tax payers have comprehensive reporting obligations (not enforceable).

However: In a domestic context, there is a risk of an (i) estimation-based assessment or (ii) denial of deduction of business expenses.

The latter does not exist at an international level:

→ **So, what is obtainable according to domestic law?**

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Limitation 5: Information is not obtainable under domestic law



It is all about proportionality.

Measures shall be:

- Suitable
- Necessary (not all information is “necessary”)
- Reasonable relation between the purpose and the effect of a measure

Examples: M&A structuring paper, presentation about “tax risks”, correspondence between the head tax and the CFO

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Limitation 6: Private sphere – art. 8 ECHR

ARTICLE 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

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Limitation 6: Private sphere – art. 8 ECHR

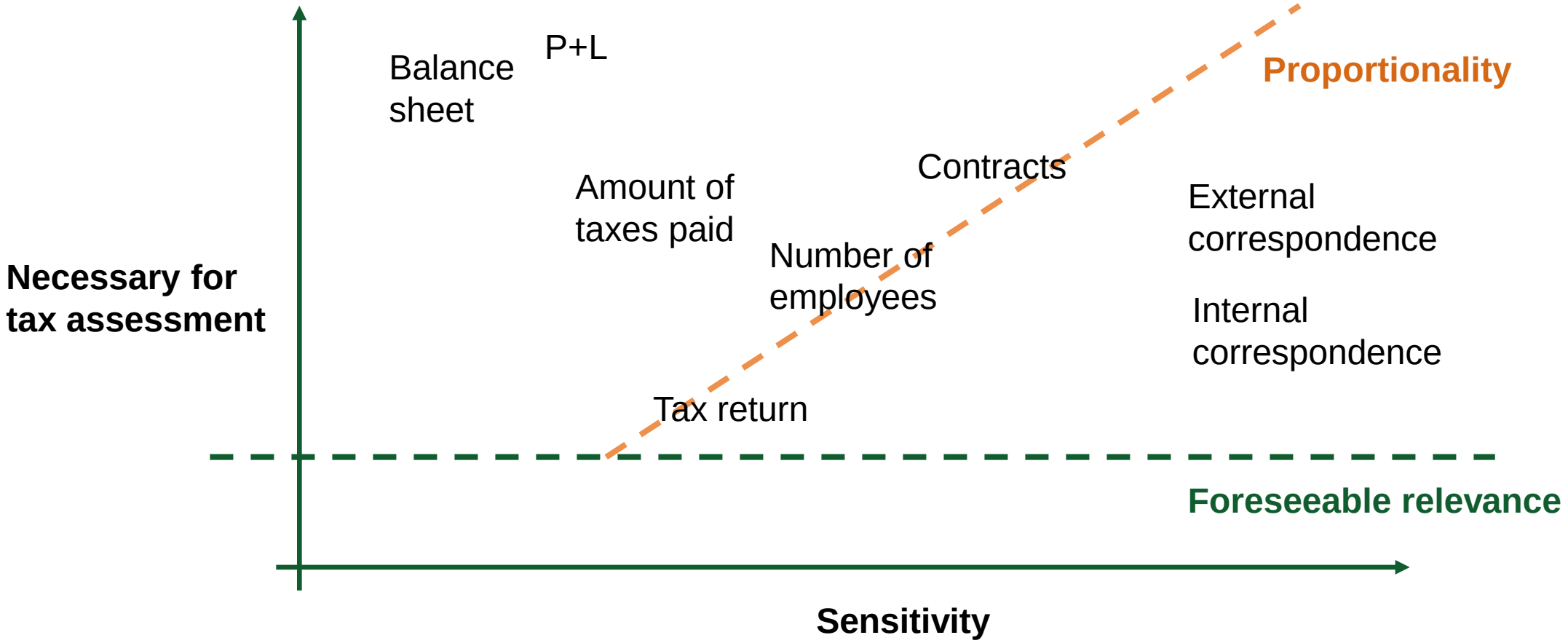
Example: French tax authorities request the structuring paper of the tax advisors who were involved in the M&A process for the acquisition of a new company.

- No abusive behavior
- Information is foreseeable relevant
- Principle of subsidiarity seems fulfilled
- Information seems to be obtainable – although it is not part of the information which is normally filed with the authorities.

→ Business correspondence is covered by art. 8 ECHR.

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Limitation 6: Private sphere - conclusive matrix



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Further limitations

- Ordre public
- Business secrecy

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