

## A European 'Taxpayers' Code

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*The European Commission published 'Guidelines for a Model for A European Taxpayer's Code'. The Guidelines seek to clarify taxpayers' fundamental rights and obligations in the EU while proposing best practices for their enhancement. The European initiative follows several international ones to the same end. Their comparison reveals the Guidelines' rather restricted scope. Although they constitute a step forward, they fall short of their potential, demanding further steps to ensure due protection of taxpayers' rights.*

## I INTRODUCTION

In November 2016, the European Commission published '*Guidelines for a Model for A European Taxpayer's Code*'.<sup>1</sup> Such initiative aims at consolidating a set of common principles underlying relations between taxpayers and tax administrations of Member States. It seeks to clarify the fundamental rights and obligations of taxpayers in the EU. It forms part of a series of actions, already taken or underway, to enhance tax compliance. The Guidelines are not binding on Member States. Nevertheless, Member States are invited to duly consider the principles reflected therein with a view to creating/updating national Taxpayers' Codes or equivalent instruments, following proper adjustments to take into account their specific legal system and culture.

Thorough knowledge of his rights and obligations is of fundamental importance for each and every taxpayer, whether an individual, or a corporation that may be small or large, whether taxpayer only *in theory*, i.e. not effectively taxed, or also in practice. First and foremost, precondition to the exercise of one's rights is being aware of them. In other words, taxpayers have to be the first ones to promote the exercise of such rights by laying claim thereto and qualifying themselves for their application, if and when appropriate. Secondly, there is a loud and strong request, worldwide, for States to take action to

introduce and enforce fairer taxation. It is high time that Governments focus on individual taxpayers, generally overly weighted down by onerous tax burdens. Equally desirable is for taxpayers to ensure compliance with due tax obligations.<sup>2</sup> Indeed, apart from rights, the Guidelines provide for corresponding taxpayers' obligations. A fairer tax system cannot be built without taxpayers fully acquainted and duly compliant therewith. Thirdly, the European Commission's Guidelines are one of the few supranational steps recently adopted towards the consolidation of taxpayers' rights.<sup>3</sup> Impressive as such scarcity might be amidst the global fuss for fair and effective tax systems, such steps signal opportunities not to be missed. An additional reason is the claim that the new international taxation framework, requiring increased transparency and disclosure, causes taxpayers' rights to become an '*endangered species*'.<sup>4</sup> Should such risk be real, the Guidelines could be a lifeline.

In view of the above, this article will provide an overview of the European Commission's Guidelines and the background leading to their adoption. It will also look at similar initiatives around the globe, i.e. by the OECD and tax professionals' associations, and their differences from the European proposal. Finally, it will comment on strengths and weaknesses of the European Model,

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<sup>1</sup> European Commission, Directorate-General Taxation and Customs Union, *Guidelines for a Model for a Taxpayers' Code* (2016), [https://ec.europa.eu/taxation\\_customs/business/tax-cooperation-control/guidelines-model-european-taxpayers-code\\_en](https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/guidelines-model-european-taxpayers-code_en).

<sup>2</sup> For the purposes of this article 'tax obligation' is meant to refer to the amount of tax that a specific taxpayer has to pay for a specific time period, within a defined deadline, in accordance with the wording of the applicable tax law. The term is not deemed to include any obligation that might arise by reference to the spirit of tax legislation.

<sup>3</sup> L. Cerioni, *The Possible Introduction of a European Taxpayer Code: Objective and Potential Alternatives*, (9) Eur. Tax'n (Sept. 2014).

<sup>4</sup> P. Baker & P. Pistone, *Blueprints for Enhancing the Protection of Taxpayers' Rights in Cross-Border Tax Procedures*, E/C.18/2016/CRP.11 submitted to the Committee of Experts on International Cooperation in Tax Matters, 2016.

concluding that the Guidelines reflect a step forward for the protection of European taxpayers, albeit quite hesitant.

## 2 BACKGROUND

The discussion on taxpayers' fundamental rights<sup>5</sup> and their guarantees within the legal system is by no means new. OECD raised the issue already in 1990, when the Committee of Fiscal Affairs published a report entitled '*Taxpayers' Rights and Obligations – A survey of the legal situation in OECD countries*'.<sup>6</sup> This survey confirmed that taxpayers' rights and obligations differ from country to country, the varying aspects mainly being attributable to the varying cultural environments. However, the survey also led to the identification of certain principles that emerge above and beyond national borders. OECD's initiative was a follow-up to long-term discussions persisting for decades in some countries, where special instruments (e.g. Charters) provided for taxpayers' rights or where such rights were explicitly referred as integral parts of more general pieces of legislation, e.g. Income Tax Codes. The UK claims to be the first country introducing a '*Taxpayer's Charter*' aiming at the optimization of public administration service to citizens.<sup>7</sup> The French deny the UK claim, however, underlining that French taxpayers' rights during audits were established in a *Charte* since 1975.<sup>8</sup> The German Fiscal Code should also be paid tribute: although not in a separate document, it provided for taxpayers' rights and duties, already almost a century ago (since 1919). In 2003, OECD reverted on the issue with the production of a Taxpayer Charter Model with a view to promoting cooperation in the field of taxation.<sup>9</sup> The international debate extends to considerations as to the most appropriate

instrument to provide for taxpayers' rights: Charter or Bill of Rights or a Declaration or other.<sup>10</sup>

In the EU, the issuance of the Guidelines is the first significant step towards consolidation of taxpayers' position in a consistent way throughout Member States. It is rather surprising that such guidance was so belated, taking into account the fundamental role human and civil rights always played in the EU. Nevertheless, a possible answer may be found in the specificities of the European integration process and the delicate balance between Member States' sovereignty and European Institutions' authority, especially in the tax area. In any case, European taxpayers were always guaranteed at least a minimum protection of their rights, under EU law. In addition, as stated above, several Member States had taken steps towards more consolidated approaches within local legislations. As a result, consolidated provision at EU level, although important, could not be a priority.

A first formal reference to the drawing up of a European Taxpayer's Code may be found as recently as in the 2012 '*Action Plan to Strengthen The Fight Against Tax Fraud and Tax Evasion*'.<sup>11,12</sup> Such Code was envisaged to have, primarily, a twofold goal: (1) to promote transparency in relations between taxpayers and tax authorities, by clarifying the former's rights and the latter's expectations, (2) to allow the optimization of tax administration services by setting a point of reference for their performance. The ultimate purpose was to facilitate cooperation between the two ends and maximize tax compliance.<sup>13</sup> In addition, the urgent need to strengthen the potential of the Single Market highlighted the importance of a pan-European standard of taxpayers' rights and responsibilities.

Four years later, in 2016, the Guidelines for a European Taxpayers' Code Model were actually issued, amidst

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<sup>5</sup> Taxpayers' rights are derived from fundamental civil rights. Cf. Opinion Statement FC 11/2014 and PAC 2/2014: *The European Tax Advisers' Priorities in EU Policy: Goals for the Next 5 Years Ahead* (May 2014). See also Taxpayers Australia, *The Taxpayers' Guide 2013–2014* (John Wiley & Sons Sept. 2013); D. Bentley, *Taxpayers' Rights: Theory-Origin-Implementation*, 36(3) Intertax (2008).

<sup>6</sup> OECD Committee of Fiscal Affairs Forum on Tax Administration, *Taxpayers' Rights and Obligations, Practice Note*, Center for Tax Policy and Administration, Tax Guidance Series (2003), [https://www.oecd.org/ctp/administration/Taxpayers'\\_Rights\\_and\\_Obligations-Practice\\_Note.pdf](https://www.oecd.org/ctp/administration/Taxpayers'_Rights_and_Obligations-Practice_Note.pdf).

<sup>7</sup> I. Young, *The Current Arrangements to Set Out and Monitor Taxpayers' Rights and Obligations*, in Reflections from Within (June 2016), <https://www.taxation.co.uk/Articles/2016/05/31/334845/reflections-within>.

<sup>8</sup> A. Karim, *Droits Fondamentaux Du Contribuables et procédures fiscales, étude comparative* (Harmattan 2008).

<sup>9</sup> OECD Committee of Fiscal Affairs Forum on Tax Administration, *supra* n. 6.

<sup>10</sup> The difference between a Bill of Rights (commonly referred to as TABOR) and a Charter (TACH) usually refers to their form: TABOR is in principle part of legislation while TACH is a statement issued by the revenue authorities. An indicative example of a TABOR may be found in the US, issued by the Internal Revenue Service, while an example of a TACH may be found in Australia; Canada on the other hand has opted for a *Declaration of Taxpayers' Rights*. In any case, the instrument to be selected and the effect granted thereto, binding or not, is at the discretion of each tax jurisdiction. Cf. J. Li, *Taxpayers' Rights in Canada*, in *Taxpayers' Rights: An International Perspective* (D. Bentley ed., 1998); P. Baker, *How We Have Fallen Behind on Our Tax Rights*, Tel. (Sept. 2005), <http://www.telegraph.co.uk/finance/personalfinance/2922315/How-we-have-fallen-behind-on-our-tax-rights.html>.

<sup>11</sup> European Commission, *Communication from the Commission to the European Parliament and the Council Including an Action Plan to Strengthen the Fight Against Tax Fraud and Tax Evasion* (COM 2012/722), (Dec. 2016) [http://ec.europa.eu/taxation\\_customs/sites/taxation/files/resources/documents/taxation/tax\\_fraud\\_evasion/com\\_2012\\_722\\_en.pdf](http://ec.europa.eu/taxation_customs/sites/taxation/files/resources/documents/taxation/tax_fraud_evasion/com_2012_722_en.pdf).

<sup>12</sup> The compilation of the Code was envisaged as one of a series of actions to be implemented in combination. Other measures proposed in the Action Plan with a view to strengthening tax compliance in Member States were (1) voluntary disclosure programs, (2) promotion of joint audits, (3) establishment of single instrument for administrative cooperation etc.

<sup>13</sup> For literature on the impact of mutual trust relations between taxpayers and tax authorities to tax compliance, cf. J. Alm, *Measuring, Explaining and Controlling Tax Evasion: Lessons from Theory, Experiment, and Field Studies*, 19(1) Int'l Tax & Pub. Fin. (2012); J. Andreoni, B. Ennard & J. Feinstein, *Tax Compliance*, 36(2) J. Econ. Lit. (1988); B. Frey & B. Torgler, *Tax Morale and Conditional Cooperation*, 35(1) J. Comp. Econ. (2007); E. Kirchler, *The Economic Psychology of Tax Behavior* (Cambridge University Press 2007); Colin C. Williams, *Confronting the Shadow Economy: Evaluating Tax Compliance and Behavior Policies* (Edward Elgar Publishing 2014).

radical changes under implementation in the area of international taxation. It is a timing granting the Guidelines an even symbolic meaning. Within the worldwide struggle to (re)establish fairness in taxation, it is crucial to acknowledge and reinstate that taxpayers are the '*real proof of the pudding*', the beginning and the end of the tax system. Taxation is meant to serve taxpayers, as humans and as citizens; and taxpayers are the ones to sustain the system.

### 3 A EUROPEAN TAXPAYER'S CODE

The Guidelines are divided into two main parts. The first and most important includes general principles that have been observed to underpin – or should underpin – the whole network of relations between taxpayers and tax administrations. It also includes some more specific principles, focusing on three areas, i.e. cooperation ('*working together*'), administrative procedures and dispute resolution. All such principles are further broken down into taxpayers' rights, on the one hand, and obligations, on the other. The practices referred to in this first part seem to currently constitute common standards throughout the EU. The second part stands beyond the scope of the Taxpayers' Code *stricto sensu*; it outlines tax-related practices that have been implemented in some Member States. This part is more '*forward-looking*', aiming at informing Member States on tested solutions that could be exploited to address own problems that might be similar.

#### 3.1 General principles

To begin with, there are nine general principles listed and analysed in the first part of the Guidelines. These are: (1) lawfulness and legal certainty, (2) non-discrimination and taxpayers' equality, (3) presumption of honesty, (4) courtesy and consideration, (5) respect of law, (6) impartiality and independence, (7) fiscal secrecy and data protection, (8) privacy and (9) representation. Such principles are, in essence aspects of fundamental civil rights, as they arise in relations between tax administrations, representing the state, and taxpayers, i.e. every citizen. The European Code confirms their specific application in the tax area and indicates common standards within Member States.

Lawfulness and legal certainty stand out as the most important as well as the broadest of the nine principles. They are two distinct concepts, highly interacting with one another and therefore set together in one general principle.

The Guidelines translate lawfulness into the right and obligation of taxpayers to pay no more and no less than the amount of tax provided in the applicable law under the conditions therein. Taxpayers should be able to fully capture their tax obligation from the wording of the law.<sup>14</sup> Noncompliance may only imply the sanctions provided by the law. In essence, lawfulness incorporates in the tax context the rule of law, i.e. the principle that no one is above the law, neither the State, nor the citizen.<sup>15</sup> Tax payment constitutes one of the most controversial obligations imposed by States upon citizens. It has even been pointed at as a kind of *modern slavery*.<sup>16</sup> If democracy demands that each and every obligation of the citizen to the State is to be regulated by the law, the controversial nature of tax obligations causes such requirement to be even more vital in their case. There will always be taxpayers for whom the potential benefits from tax non-compliance are such to be worth running the risk; in their case the potential gain from infringement exceeds the cost of the sanction risked taking into account the probability of punishment.<sup>17</sup> Lack of proper outlining and justification of tax obligations exacted by the law may well encourage non-compliant attitudes.

On the other hand, legal certainty demands from tax administrations to adopt reasonable, consistent and transparent decisions within the letter of the tax law. In other words, taxpayers should be able to foresee the position and actions of the tax administration. Only thus would they be able to regulate their position respectively. Legal certainty is no less important than lawfulness in taxation, albeit distinctive therefrom. Tax administrations have the authority to apply the law. Where there is a margin of discretion, their responsibilities are comparable to those of the legislator. Should their actions not adhere to the highest standards of clarity, consistency and predictability, these can severely undermine the quality of the legal system. Such principle could not possibly be missing from the European Code, especially, given the extensive

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<sup>14</sup> This is an important recognition in view of the ever increasing demands at worldwide level for compliance with the spirit of tax laws. In fact the Guidelines include no such reference in taxpayers' obligations, despite the explicit reference thereof in the OECD Guidelines for Multinational Enterprises. Cf. OECD, *Guidelines for Multinational Enterprises* (2011), <http://www.oecd.org/corporate/mne/>.

<sup>15</sup> According to F. Vanistendael, this principle means that '*no tax can be levied except under authority of a law*'. Such principle is deemed as a basic pillar of western democracies. It is worth mentioning in this respect that the UK largely owes its parliamentary government system to the effort to limit the power of the monarch to raise tax revenue while the American Revolution began with the well-known '*No taxation without representation*.' F. Vanistendael, *Legal Framework for Taxation*, 1 Tax L. Design & Drafting, IMF (1996).

<sup>16</sup> Taxation has been compared to slavery several times in literature. Specifically, in 1900, Leo Tolstoy, argued that '*the slavery of our time is very clearly and very definitely produced not any elementary iron law, but by human enactments, concerning land, taxes and property*'. Cf.: L. Tolstoy, *The Slavery of Our Time* (The Free Age Press 1900). Similar argument has been produced by R. Nozick. According to the latter, '*taxation from earnings from labor is on par with forced labor*' since '*as the individual has no choice but to pay the tax or face punitive treatment, the state is effectively asserting a property right in the individual*'. Cf. R. Nozick, *Anarchy, State and Utopia* (The Perseus Books Group 1977).

<sup>17</sup> *Rule Porousness and the Design of Legal Directives*, 121(8) Harv. L. Rev. (2008).

argument on uncertainty in taxation<sup>18</sup> and the debates on the contrast between letter and spirit of the law.<sup>19</sup>

Respect of law is another general principle contained in the European Code. At first sight it seems to be overlapping with the above analysed lawfulness principle. The content assigned thereto could be derived from the former. Nevertheless, in this case the focus is on tax evasion. Respect of law is explained as taxpayers' right to a tax system that does not permit fraud, evasion, avoidance, i.e. to a tax law that is enforceable, exists in substance and not only in form. This right implies the corresponding obligation of tax administrations to take action to ensure that such system is – and continues remaining – in place. On the other side of the coin, it is the duty of taxpayers to ensure that their actions are tax-compliant, not only in form but also in substance. Hence, respect of law is a principle that must be considered within the context of tax evasion; it is the fully fledged acclaim to substance over form throughout the tax world, in all of its aspects.

Fiscal secrecy and data protection as well as privacy are also general principles in the relations between taxpayers and tax authorities. Taking into account the rapidly multiplying taxpayers' disclosure obligations,<sup>20</sup> their consolidation as such is even more critical today. Country-by-country reporting is already a mandatory requirement for large multinational enterprises in the EU,<sup>21</sup> while public country-by-country reporting<sup>22</sup> is under consideration. Enhanced exchange of information and administrative cooperation among national tax authorities, within the EU and beyond,<sup>23</sup> regardless of their merits, cannot but pose a threat to the aforementioned taxpayers' rights. Such threat needs to be controlled through strict guarantees. According to the Guidelines, tax administrations have the duty to *actively protect* taxpayers' personal data in their possession, i.e. merely abstaining from violation is not sufficient. The protection may only be limited as provided by law. In this regard, the EU is well known for the high standards of personal data

protection guaranteed in all Member States under Directive 95/46/EC. Such Directive has now been replaced by Regulation (EU) 2016/679, leading to harmonization of such data protection throughout the EU. These standards must be equally respected in case of taxpayers' data.

The presumption of honesty and the right to representation in tax matters are also included in the general principles. The presumption of honesty implies that taxpayer shall be considered compliant unless and until there is clear reason<sup>24</sup> to substantiate the opposite. During any and all tax procedures, tax officers must treat taxpayers, assuming the latter's full compliance with their tax obligations, provided, though, that taxpayers' position does allow such assumption. For example, a taxpayer who did not pay his tax due on time, may not abuse such right by invoking the presumption of honesty. In any case, taxpayer should also be guaranteed the right to be represented. In light of the complexity of tax legislation and the procedural requirements generally involved in interfacing with tax authorities, representation is a vital factor for fairness.<sup>25</sup>

### 3.2 Specific principles

Apart from the general principles deemed to underpin all aspects of tax authorities – taxpayers relations, the Guidelines also address more specific aspects. In essence, they clarify the proper application of the general principles in three particular areas identified within the context of the above relations, specifying in detail respective rights and obligations.

The first area of focus is cooperation between the two ends, i.e. taxpayers and tax administration. Such cooperation is seen as crucial in modern tax systems. In 2008, the Forum on Tax Administration (FTA) put on the table the concept of an enhanced relationship between large taxpayers and tax authorities.<sup>26</sup> Five years later, the OECD

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<sup>18</sup> The European Commission itself has also been accused lately for contributing to *legal uncertainty* in taxation. An indicative example is its decisions in the area of fiscal state aid and their implications for legal certainty with respect to transfer pricing rules. Cf. L. Gormsen, *EU State Aid Law and Transfer Pricing: A Critical Introduction to a New Saga*, 7(6) J. Eur. Competition L. & Prac. (2016); US Department of the Treasury, *The European Commission's Recent State Aid Investigations of Transfer Pricing Rulings* (Whitepaper Aug. 2016); C. Long & B. Erwin, *EU State Aid – The Saga Continues*, 3(6) Insights (2016).

<sup>19</sup> H. Flipczyck, *'Spirit of the Law' for Non-Believers: Tax Avoidance and Legal Philosophy* (Sept. 2014), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2517906](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2517906).

<sup>20</sup> To expand further on the right to privacy, cf. Chris Evans, Judith Freedman & Richard E. Krever, *The Delicate Balance: Tax, Discretion and the Rule of Law* (IBFD 2011); Georg Kofler, Miguel Poiares Maduro & Pasquale Pistone, *Human Rights and Taxation in Europe and the World* (IBFD 2011).

<sup>21</sup> European Commission, *Country-by-Country Reporting*, [https://ec.europa.eu/taxation\\_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation/country-country-reporting\\_en](https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation/country-country-reporting_en). In addition, provided under Action 13 of the OECD's Base Erosion and Profit Shifting Project, country-by-country reporting is an obligation in many countries outside the EU. OECD, *Action 13, 2015 Final Report* (2015), <http://www.oecd.org/tax/transfer-pricing/documenta-tion-and-country-by-country-reporting-action-13-2015-final-report-9789264241480-en.htm>.

<sup>22</sup> European Commission, *Introducing Public Country-by-Country Reporting for Multinational Enterprises*, Press Release (Apr. 2016), [http://europa.eu/rapid/press-release\\_MEMO-16-1351\\_en.htm](http://europa.eu/rapid/press-release_MEMO-16-1351_en.htm).

<sup>23</sup> European Commission, *Enhanced Administrative Cooperation in the Field of (Direct) Taxation*, [http://ec.europa.eu/taxation\\_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation\\_en](http://ec.europa.eu/taxation_customs/business/tax-cooperation-control/administrative-cooperation/enhanced-administrative-cooperation-field-direct-taxation_en).

<sup>24</sup> It is noteworthy that 'clear reason' is a rather broad limit to the presumption of honesty. Requirement of evidence would be more appropriate. Such requirement has been endorsed by the Model Taxpayer Charter, analysed below, under s. 4.2.

<sup>25</sup> An effective right to representation though would further encompass the communications between the taxpayer and the representative with privilege. Such privilege has been suggested in other international Model Charters, as will be shown below (under s. 4.2).

<sup>26</sup> Forum on Tax Administration, *Study into the Role of Tax Intermediaries* (2008), <http://www.oecd.org/tax/administration/39882938.pdf>.

affirmed the implementation of the concept, already in twenty-four countries; based on their experiences, the OECD constructed a model of cooperative relationship in order to share the know-how and assist more countries in their efforts to improve compliance. The prevalent idea is once again that relations built on mutual assistance, transparency and trust between tax authorities and taxpayers are particularly value adding to the tax compliance<sup>27</sup> case. They should hence be encouraged. The Guidelines share this view, identifying the elements necessary to build desirable cooperative relations: (1) availability of up to date, accurate as well as clear information and guidance, including interpretations, for taxpayers, (2) customer-type, service-oriented approach of tax authorities to taxpayers, (3) establishment of key service standards, i.e. indicators allowing measurement of the administration's performance and (4) enhancement of legal certainty through issuance of advance rulings, where available and applicable. Satisfaction of these standards is necessary to boost productive and efficient cooperation with taxpayers. It will also support lawfulness and legal certainty within the tax system in general, contributing to tax compliance.

The second area analysed in the Guidelines is procedures, i.e. tax declarations, tax assessments, audits, tax collection, voluntary disclosures and sanctions. The core standards to instill into tax procedures are (1) transparency on both sides, i.e. taxpayers and tax administrations and (2) a taxpayer-friendly approach. In all cases, it is worth underlining that taxpayers should abide by procedural rules and fulfil the respective procedural obligations; they should be prepared and willing to provide information on a detailed basis, while exploiting opportunities for voluntary disclosure. Tax administration on the other hand should take all reasonable action to facilitate compliance by taxpayers, duly respecting their rights to be informed and defend their case.<sup>28</sup> Thus, taxpayers must be provided with all necessary information on tax procedures. Tax administrations must properly reason any and all decisions to amend taxpayers' submissions, update them

on a continuous basis on administrative actions and on their relevant rights and obligations. Taxpayers should also be given a reasonable opportunity to be heard. Finally, tax administrations are urged to provide their services with a view to minimizing compliance burdens for taxpayers, by focusing their audits on the riskiest ones and following proper tax risk management.

Tax dispute resolution constitutes the last aspect of the relation between taxpayers and tax administrations specifically analysed in the Guidelines. It is no surprise, in light of the weight recently attached to the establishment of efficient dispute resolution mechanisms in the Single Market<sup>29</sup> and taking into account the legislative action of the European Court of Justice (ECJ) in recent caselaw.<sup>30</sup> The Guidelines also draw inspiration from the requirements for an effective right to fair trial as guaranteed under the European Convention on Human Rights<sup>31</sup> and the EU Charter of Fundamental Rights. In particular, there are provisions for (1) internal appeal procedures, (2) Court or Tribunal review and (3) right to complaint. The most important principle is that taxpayers must have the right to challenge the decisions of tax administrations before independent authorities. Such right should be warranted in both, form and substance. Hence tax administrations must act so as to ensure an effective right to appeal, keeping taxpayers informed on their rights and facilitating the smooth conduct of judicial procedures. The right to appeal is a basic form of tax administration's accountability for their actions to taxpayers, and hence an elementary concept to instill confidence in the system.

### 3.3 Best Practices to be Considered

Having outlined the current state-of-play in the EU through the general and specific principles, the Guidelines expound to share know-how among Member States on less widely implemented practices. Thus taxpayers can benefit from country-specific input regarding their rights in the respective jurisdictions.

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<sup>27</sup> On the implications between protection of taxpayers' rights and tax compliance, cf. *Taxation: Critical Perspectives on the World Economy* (S. James ed., Taylor & Francis 2002).

<sup>28</sup> The confirmation of taxpayers' rights to be informed and in a position to properly defend their case is particularly relevant today in the EU. Recent case law of the Court of Justice (C-276/12) as well as pending cases before it (C-682/15) have inspired discussions on the appropriate protection of the right to defence during procedures for the exchange of information between tax administrations.

<sup>29</sup> Taxpayers' right to be involved in international tax dispute resolution is significantly enhanced in the double taxation dispute resolution mechanisms endorsed in the Directive agreed on 23 May 2017 in relation to their respective right under the Arbitration Convention. Cf. European Commission, *Corporate Tax Reform Package* (Oct. 2016), [https://ec.europa.eu/taxation\\_customs/business/company-tax/corporate-tax-reform-package\\_en\\_en](https://ec.europa.eu/taxation_customs/business/company-tax/corporate-tax-reform-package_en_en) and European Council, Council of the EU, *Double Taxation: Council Agrees Its Position on Dispute Resolution Procedures* (May 2017), <http://www.consilium.europa.eu/en/press/press-releases/2017/05/23-double-taxation/>.

<sup>30</sup> One of the most significant decisions of the ECJ in this field was in the *Sabou* case (C-276/12). In that case the ECJ considered that the taxpayers' right to defence did not need to be protected in the stage of investigation/gathering of information in the context of administrative cooperation. The reason was that such stage is purely administrative while followed by a second – contentious stage during which the taxpayer shall have the chance to be informed and properly and effectively defend his position. More recently the Court decided on a relevant, albeit not identical case – *Berlioz* (C-682/15). It had to consider the rights to effective legal remedy of a person requested to provide information in the context of administrative cooperation (Berlioz) and on which pecuniary penalty was imposed for refusal to do so. The Court held that pursuant to Art. 47 of the EU Charter on Fundamental Rights, Berlioz was entitled to appeal against the act imposing the penalty; for such right to be effective, the appeal court should be given access to the request for administrative cooperation. The right to effective legal remedy though did not imply the requested person/appellant's right to full access to such request.

<sup>31</sup> Art. 6 of the ECHR; it is noted however that tax proceedings are excluded from the objective scope of the ECHR, as per the respective guidelines to Art. 6. Cf. European Convention on Human Rights ([http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)) and Guide to Art. 6 ([http://www.echr.coe.int/Documents/Guide\\_Art\\_6\\_ENG.pdf](http://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf)).

Simultaneously, Member States are invited to consider the relevant practices as potential solutions to own problems.<sup>32</sup> Overall, the practices included in this part converge as far as a highly service-oriented approach is concerned.

The first proposal refers to electronic administration and online services, i.e. to the exploitation of technology to the best interests of taxation. Technology is the means for tax administrations to exchange information among themselves, with other public authorities as well as with the private sector.<sup>33</sup> More information will allow better decisions, optimal targeting of tax audits to the riskiest taxpayers and hence allow the minimization of costs.<sup>34</sup> Online services are also strongly encouraged. Filing of tax declarations, payment of taxes, acquisition of tax certifications and access to information on current status of personal tax obligations should be as easy and as fast as possible, i.e. they should be available online. Such option would further contribute to reduction of compliance costs and, most importantly, to minimization of the time required to comply with one's obligations. No less significant is the consideration that online systems can guarantee the accuracy of the information transmitted. Digitalization being perceived as endangering fair and efficient taxation, since it facilitates aggressive tax schemes and evasion, the Guidelines evidence that digital tools can provide an effective remedy to such risk.

Another best practice suggested is the identification and adoption of innovative approaches to incentivize voluntary compliance. As set forth above (under 3.2), OECD has been supporting and promoting the value of cooperative compliance since 2008. Several Member States have already adopted regimes to reward taxpayers' cooperation and transparency,<sup>35</sup> while some of them are already steps ahead in this direction. Austria constitutes a special example, offering an educational tax compliance program for high school students. Seminars and quick supply of information through social network pages are also exploited to the same effect. Thus, it is recognized and upheld that tax laws are not addressed to any privileged group of people, qualified to understand them. Every taxpayer is, or should be, entitled to understand what is required from him without the need of an intermediary to decode covert meanings in tax laws. It is,

unfortunately, disquieting that such a fundamental principle is not to be included in the general principles already established but is set as a goal for the future.

Increased transparency is a further issue raised in the Guidelines. The proposal takes a balanced approach, referring equally to taxpayers and tax administrations. On the taxpayers' side, a kind of public *naming and shaming* of noncompliant taxpayers is put forward as a disincentive to abstaining from due fulfilment of tax obligations. In consistency with the general principles set forth in the first part of the Guidelines, it is stressed that any such initiative should respect rights to privacy and data protection. On the tax administrations' side, the proposal focuses on the importance of their accountability to taxpayers. In this respect, tax administration assumes the role of an administrative body, sustained by taxpayers – shareholders of a tax system built to serve them, through the State. In such scenario, it is a natural consequence that administration must account to taxpayers on its activities, explaining the way their funds are used. The right to appeal constitutes a means to enforce accountability of tax administrations to specific taxpayers (plaintiffs). However, this section envisages a much broader concept of accountability, including publications of performance standards and reporting in relation thereto.

#### 4 OTHER INITIATIVES AT INTERNATIONAL LEVEL

The Guidelines for a European Taxpayers' Code Model follow a series of similar initiatives at international level, i.e. addressed to several countries with different tax and legal systems.<sup>36</sup> Indicative examples are (1) the '*Taxpayers' Rights and Obligations*' prepared by the OECD and (2) the 'Model Taxpayer Charter' developed by three international tax professionals' associations based in different parts of the world, i.e. Confédération Fiscale Européenne (CFE), Asia-Oceania Tax Consultants' Association (AOTCA) and Society of Trust and Estate Practitioners (STEP). In all above cases, the tax jurisdiction adopting the proposed model is expected to adjust it to take into account the specific features of its system.

#### Notes

<sup>32</sup> This is one of the beneficial aspects of tax-related competition among Member States. Trying to attract investors within a Single Market that imposes similar rules to everyone and allows freedom of movement and establishment, Member States may identify inspired approaches to optimize their tax environment, boosting healthy tax competition within the EU.

<sup>33</sup> The same concept of maximization of the information available to tax administrations underpins the OECD's Multilateral Convention on Mutual Administrative Assistance on Tax Matters – in 2010 opened to signature by all countries – as well as the relevant Competent Authority Agreements for the Exchange of Financial Information and Country-by-country Reports. In the context of the ongoing fierce fight against tax fraud and tax evasion, such instruments are considered a significant weapon to multiply and verify the information on which tax administrations are called to make decisions.

<sup>34</sup> At the other end of the spectrum though, implementation of such practices reinforces the importance of guarantees to taxpayers' rights to privacy and confidentiality, threatened by the availability of their information to many more users than before.

<sup>35</sup> Examples in this respect are found in Italy, the Netherlands and France.

<sup>36</sup> From a national perspective, the Italian Association of Accountants and Auditors (Associazione Italiana Dottori Commercialisti ed Esperti Contabili, AIDC) proposed to the EU a systematic Statute of European Taxpayers' Rights (Statuto per i diritti del Contribuente) which has been regularly updated since then, [http://www.aidc.pro/nazionale/press/notizie/78/proposta\\_aidc\\_per\\_un\\_nuovo\\_statuto\\_del\\_contribuente](http://www.aidc.pro/nazionale/press/notizie/78/proposta_aidc_per_un_nuovo_statuto_del_contribuente).

#### 4.1 OECD's Taxpayers Rights and Obligations

The OECD Committee of Fiscal Affairs Forum on Tax Administration compiled already in 2003 an example of a Charter of Taxpayers' Rights and Obligations.<sup>37</sup> Inspired by common provisions in the OECD member countries regulating the relations between taxpayers and tax administrations, the exemplary Charter included six basic taxpayers' rights and six corresponding obligations.<sup>38</sup> Brief analysis of the implications of each of these rights and obligations is included in the Charter. The value of the Charter lies, in particular, with the fact that it was the first step of supranational dimensions towards consolidation of taxpayers' rights and obligations. It signalled, primarily, the need for taxpayers to have a clear view of their position within the tax system. It underlined that taxpayers' rights are in essence derived from the fundamental rights of citizens in democratic societies and hence cannot be denied. Furthermore, it highlighted the similarities between different countries and legal cultures, indicating what taxpayers engaged in cross-border transactions may expect from foreign jurisdictions. Finally, it came at a time where the listing of taxpayers' rights and obligations was less widespread in practice than today; it therefore substantially contributed to the argument on the merits of the introduction of specific instruments listing taxpayers' rights and obligations.

#### 4.2 A Model Taxpayer Charter

The Model Taxpayer Charter was published in 2013, following a survey on taxpayers' rights and responsibilities in thirty-seven countries. It was designed to respond to deficiencies in the protection of taxpayers' rights identified at supranational level by the aforementioned survey. More specifically, it was revealed that (1) the scope of taxpayers' rights was not always comprehensive, (2) non-

binding taxpayers' charters were substantially ignored, while charters in the form of policy statements were equally not useful to taxpayers, (3) recognition of taxpayers' rights was often hesitant and generic, (4) there was a severe lack of accountability on the part of tax administrations and (5) there was a complete lack of established standards for the legislative process, including their drafting. Similarly to the Model for a European Taxpayers' Code and the OECD's example, the Model Taxpayer Charter is structured as a balanced document, including rights and obligations.<sup>39</sup>

In view of the deficiencies it was envisaged to remedy, the Model Taxpayer Charter covers the rights included in the European Model while stepping further into areas that have not been touched in the latter. Thus, it includes specific drafting standards for tax legislation<sup>40</sup> as well as provisions on the legislative process.<sup>41</sup> It clarifies that tax legislation cannot be retrospective, acknowledging taxpayers' right to freely decide on the organization of their tax (and other) affairs, fully informed (or having a reasonable opportunity to be so informed) on their obligations.<sup>42</sup> Although such principle could be derived from the demand for legal certainty, explicit provision eliminates any margin for arguable tax legislation, conferring directly a specific right to taxpayers. In addition, there is distinctive provision regarding tax advisors, who are, usually, an indispensable actor in all scenarios involving tax administrations and taxpayers, as representatives of the latter.<sup>43</sup> It provides separately for tax evasion<sup>44</sup> and tax avoidance, clarifying two concepts often confused in the minds of taxpayers, and establishes standards as to the measures taken to curb them. It also addresses the issue of double taxation,<sup>45</sup> which is still a taboo in the EU context.<sup>46</sup>

Apart from regulating areas of the relation between taxpayers and tax administrations not dealt with under the European Model, the Model Taxpayer Charter is also more *dynamic* in the common areas. The different

#### Notes

<sup>37</sup> OECD Committee of Fiscal Affairs Forum on Tax Administration, *supra* n. 6.

<sup>38</sup> In particular, taxpayers are entitled to (1) be informed, assisted and heard, (2) appeal, (3) pay no more than the correct amount of tax, (4) certainty, (5) privacy, (6) confidentiality and secrecy. On the other hand, they must (1) be honest, (2) cooperate, (3) provide accurate and timely information and documents, (4) keep records (5) respect deadlines for payment of taxes and (6) expect and accept penalties levied for noncompliance with their obligations.

<sup>39</sup> For further information on the Model Taxpayer Charter cf. P. Valente, *Elusione Fiscale Internazionale* 3437 et seq., 3455 et seq. (Wolters Kluwer 2014).

<sup>40</sup> The drafting standards are detailed in Art. 17 of the Model Taxpayer Charter. This article refers not only to the language in which tax laws are drafted but also to the structure of the legislation, the proper reference of the interpretative materials etc.

<sup>41</sup> The proper legislative process is outlined in Art. 22 of the Model Taxpayer Charter, stressing the importance of (1) consulting with all stakeholders, or at least, providing an opportunity thereto and (2) timely enactment of legislation.

<sup>42</sup> The provisions on retroactivity of legislation are included in Art. 18 of the Model Taxpayer Charter, which allows retrospective effect only to relieving tax laws while highlighting the importance of transitional rules.

<sup>43</sup> The provisions on tax advisors are included in Art. 25 of the Model Taxpayer Charter, ensuring taxpayers' right to representation.

<sup>44</sup> Tax evasion and dishonesty are dealt with under Art. 29 of the Model Taxpayer Charter while tax avoidance under Art. 28 thereof.

<sup>45</sup> Model Taxpayer Charter, Art. 19.

<sup>46</sup> EU Member States are free to exercise their tax jurisdiction provided that they comply with EU law. Uncoordinated exercise of such jurisdiction has repeatedly led to clashes, i.e. cases where cross-border transactions are subject to taxation in more than one Member States. Even if the ECJ admits the severe implications of such phenomena, it has refused to take definitive action for their elimination until today. Cf. C-67/08; European Parliament, Directorate Generale for Internal Policies Policy Department A, Economic and Scientific Policy, *The Impact of the Rulings of the European Court of Justice in the Area of Direct Taxation* (2010).

position taken by the two Models may be explained by the Member States' sovereignty concerns<sup>47</sup> that had to be taken into account in the compilation of the European version. To the contrary, the Model Taxpayer Charter was not limited by similar EU policy constraints but was produced as an independent proposal to all States and had committed to cover best practices in as many areas as possible. As a result, it is much more detailed as regards the audit process<sup>48</sup> and voluntary disclosure programs.<sup>49</sup> Having established the right to appeal tax administration decisions, the Model Taxpayer Charter strengthens such right acknowledging privilege to communications between the taxpayer and the tax professionals representing him.<sup>50</sup> Furthermore, it adopts a dynamic attitude as regards transparency from and accountability of the tax administrations' side, further strengthening the potential for legal certainty. In this respect, it does not suffice for tax administrations to determine 'reasonable standards of service'; they should also conduct regular self-evaluation and report publicly on their performance in relation to the represented standards.<sup>51</sup> In the same direction, the availability of a procedure to obtain tax rulings is deemed necessary,<sup>52</sup> which is not the case in the European Model.

Last but not least, an important difference between the Model Taxpayer Charter and the European Model is related to the attitude towards legally binding effect. The former supports the adoption of charters or equivalent instruments granted binding effect, arguing that lack of such effect is adversely correlated with the visibility and use of such instruments in the jurisdiction. The latter does not seem to take a clear view on the issue of the effect of any instrument adopted by Member States for the protection of taxpayers' rights. In this respect, it should be taken into account that such instruments do not establish new rights; they merely consolidate existing rights and obligations, providing an easily accessible and comprehensive point of reference for taxpayers and tax administrations. In any case even non-binding instruments may have positive implications, since they define the proper attitude of tax officers towards taxpayers and they offer a set of standards to measure the performance of tax administrations. In lack of binding effect, the effectiveness of the instrument shall depend on its practical implementation and respective monitoring.<sup>53</sup>

## 5 EVALUATION OF THE MODEL FOR A EUROPEAN TAXPAYERS' CHARTER

The European Taxpayers' Code was conceived as a measure to boost tax compliance in EU Member States. In particular, it aims at improving (1) transparency in the area of taxation and (2) the quality of the relevant services offered to taxpayers, and hence (3) enhancing mutual trust between taxpayers and tax administrations (4) smoothening their cooperation. An EU-wide initiative was envisaged to contribute to the elimination of impediments in the function of the Single Market, imposed by differences in the protection of taxpayers' rights within Member States. The outcome of the compilation procedure, namely the Guidelines presented herein, should consequently be evaluated against the above purposes set forth by the European Commission.

As regards the removal of obstacles to the Single Market, account should be given to the fact that the general principles included in the Guidelines are all principles already adhered to in most, if not all, Member States. In addition, the Guidelines have no binding effect on Member States, i.e. Member States are not required to legislate on such basis. Hence, the Guidelines, at least at the current stage, do not ensure further coordination of Member States' legislations. Instead, they clarify the current state-of-play at EU level, providing EU taxpayers with a more comprehensive view of what they may expect when dealing with Member States' tax administrations. Nevertheless, taxpayers are not released from having to search the national legislations of Member States where they exercise their activities in order to ensure compliance with all provisions thereunder. Taxpayers' concerns and respective compliance costs are not decreased.

Furthermore, regarding the other purposes connected with the issuance of the Model for a European Taxpayers' Charter, its lack of any binding effect prescribes its implications. The Guidelines by themselves produce no effective change in the European legal order. Effective steps may only be taken by the Member States not disposing of relevant national legislation, if they opt to align themselves with the general principles listed in the Guidelines. Other measures might be taken by drawing inspiration from the best practices described in the second part of the Guidelines. In any case, the Guidelines seem to primarily

### Notes

<sup>47</sup> Cf. s. 2.2.2. of the Guidelines for a Model European Taxpayers' Code. European Commission, Directorate-General Taxation and Customs Union, *supra* n. 1.

<sup>48</sup> Model Taxpayer Charter, Art. 8.

<sup>49</sup> Model Taxpayer Charter, Art. 21.

<sup>50</sup> Model Taxpayer Charter, Art. 9 para. 6; it is noted that the European Model provides for the establishment of service standards for tax administration; it concentrates however on the area of cooperation between taxpayers and tax administrations.

<sup>51</sup> Model Taxpayer Charter, Art. 11.

<sup>52</sup> Model Taxpayer Charter, Art. 12.

<sup>53</sup> S. James, C. Murphy & M. Reinhart, *The Taxpayers' Charter, a Case Study in Tax Administration*, 7(2) J. Austl. Tax'n (2004).

constitute a report on best practices, whether widely adopted (first part) or not (second part).

In any case, the issuance of the Guidelines should be welcomed as a step forward for the EU and the international tax world. It conveys an important message at a time when it is most needed. Firstly, it turns the attention to taxpayers' rights and the urgent need to act to maintain and enhance their protection in the context of the radical transformations underway in the international tax world.<sup>54</sup> Taxpayers need not only be constantly overwhelmed with new obligations; they are always entitled to respect of their fundamental rights, in the tax context or otherwise. Secondly and subsequently, such action in favour of taxpayers' rights has the potential in itself to increase taxpayers' confidence in the tax system, or at least in the European tax system. Thirdly, the Guidelines take a clearly supportive view towards the adoption of Taxpayers' Charters in Member States.<sup>55</sup> In light of the general trend towards enhanced cooperation between taxpayers and tax administrations, it may well be expected that Member States that have not yet adopted a Charter or any equivalent instrument, shall be motivated to do so. Such action may hence be realistically expected to improve tax compliance within the EU.

Apart from the Guidelines, furthering the protection of taxpayers' rights is the goal of other EU initiatives as well. The Corporate Tax Reform Package presented in October 2016 offers an illustrating example, in the proposal for a directive to enhance double tax dispute resolution in the EU.<sup>56</sup> The new directive builds on the dispute resolution mechanisms provided under the Arbitration Convention while it encompasses enhanced involvement of taxpayers in the relevant proceedings. More specifically, taxpayers shall have an effective right to defend their case in the context of arbitration, through

submission of all relevant information as well as through representation before the competent authority.<sup>57</sup> Furthermore, taxpayers shall be able to refer to national courts in case national authorities omit to act for the settlement of their case.<sup>58</sup> In the same line, it is discussed whether taxpayers should enjoy the right to be involved in relevant exchange of information proceedings between Member States' authorities for tax purposes, on the basis also of relevant ECJ case law.<sup>59</sup>

## 6 CONCLUSION

This article was an attempt to provide an overview of the principles included in the Guidelines for a Model for a European Taxpayers' Code. It also looked at other comparable initiatives taken at international level, in comparison with the European proposal. Finally, it evaluated the Guidelines as to their being '*fit for purpose*', taking into consideration the goals set forth by the European Commission when it first envisaged the production of a European Taxpayers' Code. The issuance of the Code is undoubtedly a positive step forward, properly underlining the importance of taxpayers' rights for a fair tax system that is worthy of their confidence. Nevertheless, it seems to be overly concentrating on principles already existing in most Member States, i.e. on points where convergence is already established. Thus, it misses the opportunity to ensure further the protection of taxpayers' rights in the EU. In the same respect, its lack of any binding effect along with the disclaimers of the European Commission in the first page of the document are susceptible to somehow dampen its consideration by Member States. What might be indicative is that its issuance sparked rather minimal discussions.

### Notes

<sup>54</sup> On the protection of taxpayers' rights, cf. P. Baker, *The Protection of Taxpayers' Rights: An International Codification*, Eur. Pol'y F. (2001); P. Baker, *The Practical Protection of Taxpayers' Fundamental Rights* (Sdu Uitgevers 2015).

<sup>55</sup> To expand further on the advantages of introduction of Taxpayers' Charters, Bill of Rights, Declarations and equivalent instruments within a tax jurisdiction, cf. D. Bentley, *The Significance of Declarations of Taxpayers' Rights and Global Standards for the Delivery of Tax Services by the Revenue Authorities*, in the International Symposium on Japan's Tax Reforms (June 2002) [http://works.bepress.com/duncan\\_bentley/7/](http://works.bepress.com/duncan_bentley/7/); D. Bentley, *A Model of Taxpayers' Rights as a Guide of Best Practice to Tax Administration*, PhD, ePublications@bond, Faculty of Law (2006).

<sup>56</sup> European Commission, *Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union*, COM (2016) 686 [https://ec.europa.eu/taxation\\_customs/business/company-tax/resolution-double-taxation-disputes\\_en\\_en](https://ec.europa.eu/taxation_customs/business/company-tax/resolution-double-taxation-disputes_en_en); The adoption of the new Directive took place on 23 May 2017 and should be transposed into national legislation of Member States by 30 June 2019.

<sup>57</sup> Art. 12 of the *Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union*, COM (2016) 686.

<sup>58</sup> Art. 7 of the *Proposal for a Council Directive on Double Taxation Dispute Resolution Mechanisms in the European Union*, COM (2016) 686.

<sup>59</sup> *Sabou*, C-276/12; *Berlioz*, C-686/15.