

Taxpayers Fundamental Rights and Due Process Clause

Québec, July 4th 2019



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Europe, as seen from Québec





Summary of the Presentation

- What are Fundamental Rights in Tax Law ?
 - A matter of *language*, a matter of ideas;
- How important are Taxpayers rights in the making of a (European) Fiscal system ?
 - A focus on the due process of law;
- What are the latest developments ?
 - A *Clear and Present danger doctrine* in taxation;
 - Evidence from the so called “Danish Cases”.
 - The tax dispute resolution mechanism (as from July 1st 2019).

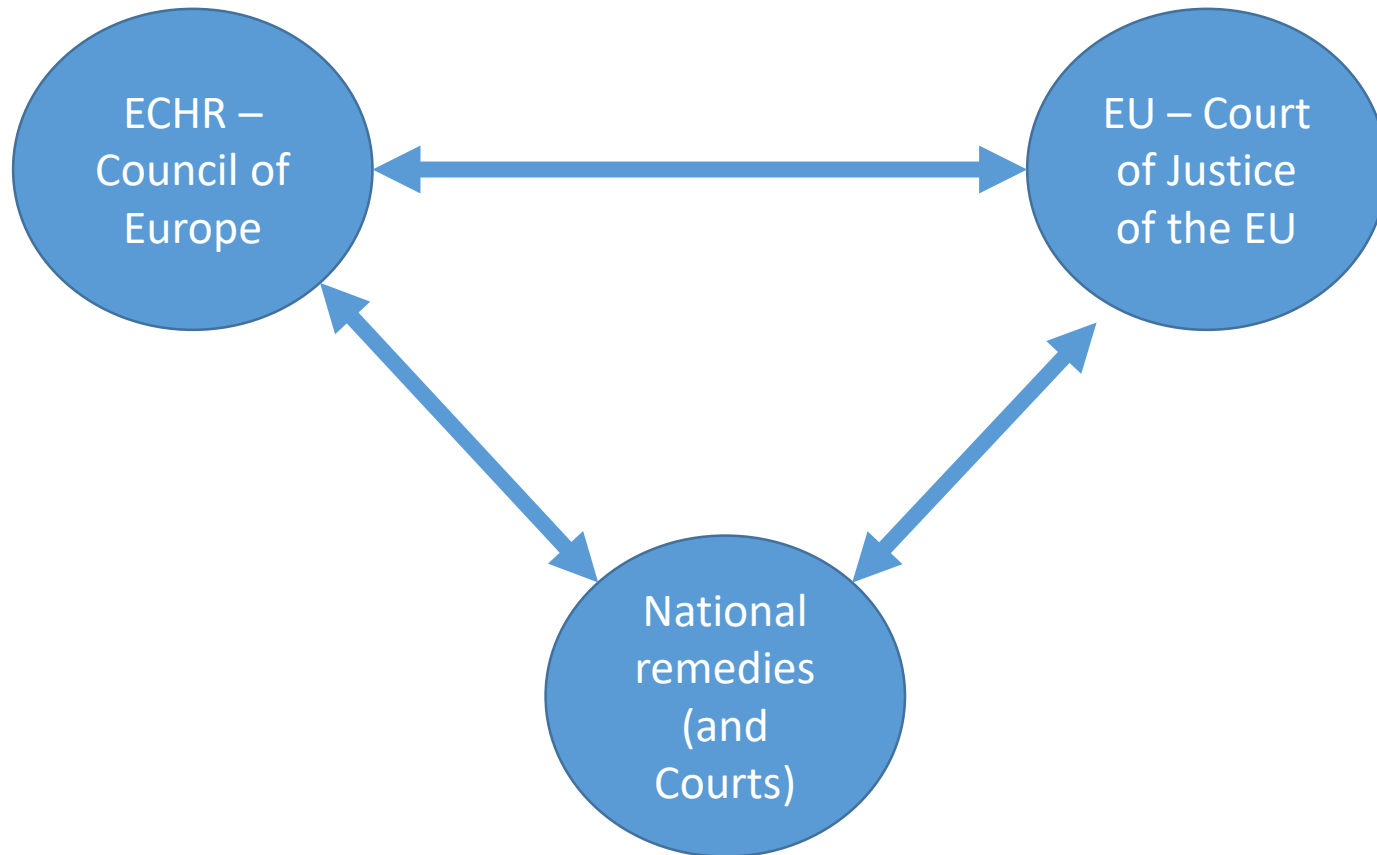


Understanding Fundamental Rights

- Multi-layer approach:
- International Covenant on Civil and Political Rights (1966);
- European Convention on Human Rights (1950);
- European Union Charter of Fundamental Rights (2000 / 2009);
- Domestic protection of Fundamental rights;
 - Depending on the legal framework of the case.



The Systems of Protection





Understanding Differences ...

- European Convention on Human Rights (ECHR):
 - Rights of the individual protected by the Court of Strasbourg and consistently with the scope of the Convention;
- EU Fundamental Charter:
 - Rights of the individual protected by the Court of Luxembourg within the scope of the Treaty and EU law;
 - Reference to ECHR included;
- Domestic Courts:
 - Depending on the domestic tradition (in the case of Italy, art. 111 of the Constitution).



... and appreciating Similarities

- Three **Judicial Bodies** protecting Fundamental Rights in Europe;
 - Two of them are supranational (CJEU and ECtHR);
- Efficient, reliable and actual system of protection available for citizens and non citizens of the EU;
 - On special conditions, in the case of non-European citizens.



The Relevance for Foreign Investors

- Judicial protection of investments and assets;
- Rule of law granted in each State of the Union as *condicio sine qua non* for being part of the European “community” (both Council and the EU);
- Impartiality as consequence of non-national structure of the two Courts:
 - **European Court on Human Rights;**
 - Judgement *de facto* binding on the States (effective and actual moral suasion of the Council);
 - **Court of Justice of the European Union;**
 - Judgement binding on the States.



Theory of Fundamental Rights in Taxation Law

- No specific reference to taxes in the European Convention on Human Rights;
- However taxation falls under the scope of the Conventions according to academic literature and a sound case law developed through years;
- Rights covered:
 1. Protection of property;
 2. Non discrimination principle;
 3. Right to privacy;
 4. Rule of law and due process (Article 6).



Protection of Property Rights

- Article 1, First Protocol to the ECHR:
 - No deprivation of property (*possessions*) without justification under the law and consistently with the Rule of Law;
 - Qualified exceptions for the application of taxes;
- Taxation can be considered a deprivation of property ?
 - Sovereignty of the State might meet limits in its implementation;
 - ...



Limits to the Power to Tax

- Security Rights (*in rem*) of the seller on a good sold to the purchaser and seized by the Tax office on the latter are protected by the Convention;
 - *Gasus Dossier vs The Netherlands* (23-02-1995), §59
- Lack of reimbursement of taxes overpaid is considered a violation of Human rights;
 - *Buffalo vs Italy* (03-07-2003);
 - This precedent is relevant for foreign investors active in Europe.



Right to Privacy

- Privacy is safeguarded by the ECHR, art. 8;
- Very recently the EU has released a new Regulation affecting data storage, disclosure and treatment: 2016/679, art. 23, § 1 let. (e) (*aka* **GDPR**);
- Key aspects for a disclosure consistent with the rule of law (in taxation too):
 1. Reasonableness, foreseeability, proportionality, respect for a democratic life;
 2. Principle of foreseeability relevance (in Directives and Treaties).



Case 1 - *Sabou*

- C-276/12 **European Court of Justice** (October 22nd 2013):
- No “Rights of the defence” of the taxpayer in the Exchange of information procedure consistent with EU law (if the limits are not in the domestic legislation):
 1. No adversarial procedure;
 2. No need for preliminary approval of the judiciary;
 3. No right of cross examination of witnesses;
 4. ...



Case 2 – *Berlioz Investment Funds SA*

- **C-685/15 European Court of Justice (May 16th 2017):**
 - Request of information may be challenged in front of a Court by the requested individual in the other State (failing to abide by an information order issued by the authority);
 - The request may be challenged on the ground of reasonable relevance by the requested individual (taxpayer);
 - Article 47 of the Charter of Fundamental Rights grants a (restrained) access to the request of information to the requested individual;
- *Apparently, Berlioz overrules Sabou.*



How this might impact on Taxpayers' Rights ?

- N° 73607/13 European Court of Human Rights (27-04-2017) (*Sommer vs Germany* case):
 - Article 8 (Respect of private ad family life) is a countervailing factor against the exchange of information;
 - *Tie break principle*: reasonableness, proportionality, ...
 - Legal point: Human rights *doctrine* is limited in taxation only where the Convention admits such a limit (example: Article 1, first protocol).



Continued ...

- N° 2C_1000 2017 Swiss Federal Court (17-03-2017) (*A and B* case):
 - Information may be denied if a violation of the Bona fides principle occurred (*Falciani* Case);
- The Swiss legal system:
 1. It admits (restrained) judicial review on the exchange of information requested;
 2. Taxpayer must be informed of the request;
 3. Individual rights and General principles of International Public law (Good faith in the implementation of Treaties) must be considered.



The Case of Due Process

- Due Process of Law is protected in every Charter: European (art. 6), EU, and Domestic;
- Key-aspects:
 - Impartiality of the Judge;
 - Reasonable length of the Trial;
 - Right to evidence (possibly, Cross-examination);
 - ...;
- Application to Tax Law as well after some uncertainties in the past (see *Ferrazini vs Italy* case, 12-07-2001).



Mainstream Literature

- European Academics always encouraged a more extensive application of Fundamental Rights to Taxation;
- *Jussila vs Finland* (23-11-2006) ECHR:
 - In principle, Tax process is covered by human rights and rule of law principles, including:
 1. Adversarial procedure;
 2. Right to evidence and possibly cross examination (with qualified limits);
- Progressive extension of Human Rights in the field of tax process.



The Case of Due *Procedura*

- Is this a Human Right ? The *Ravon* case (*Ravon vs France*, 21-02-2008) says that the very same principles (right of being heard) should be applicable also during the audit procedure by the Tax Office;
- Tax reassessment falling under the Rule of Law and the Fundamental rights protection;
- Evidence in the EU Fundamental Charter:
 - Art. 41: Right to good Administration.

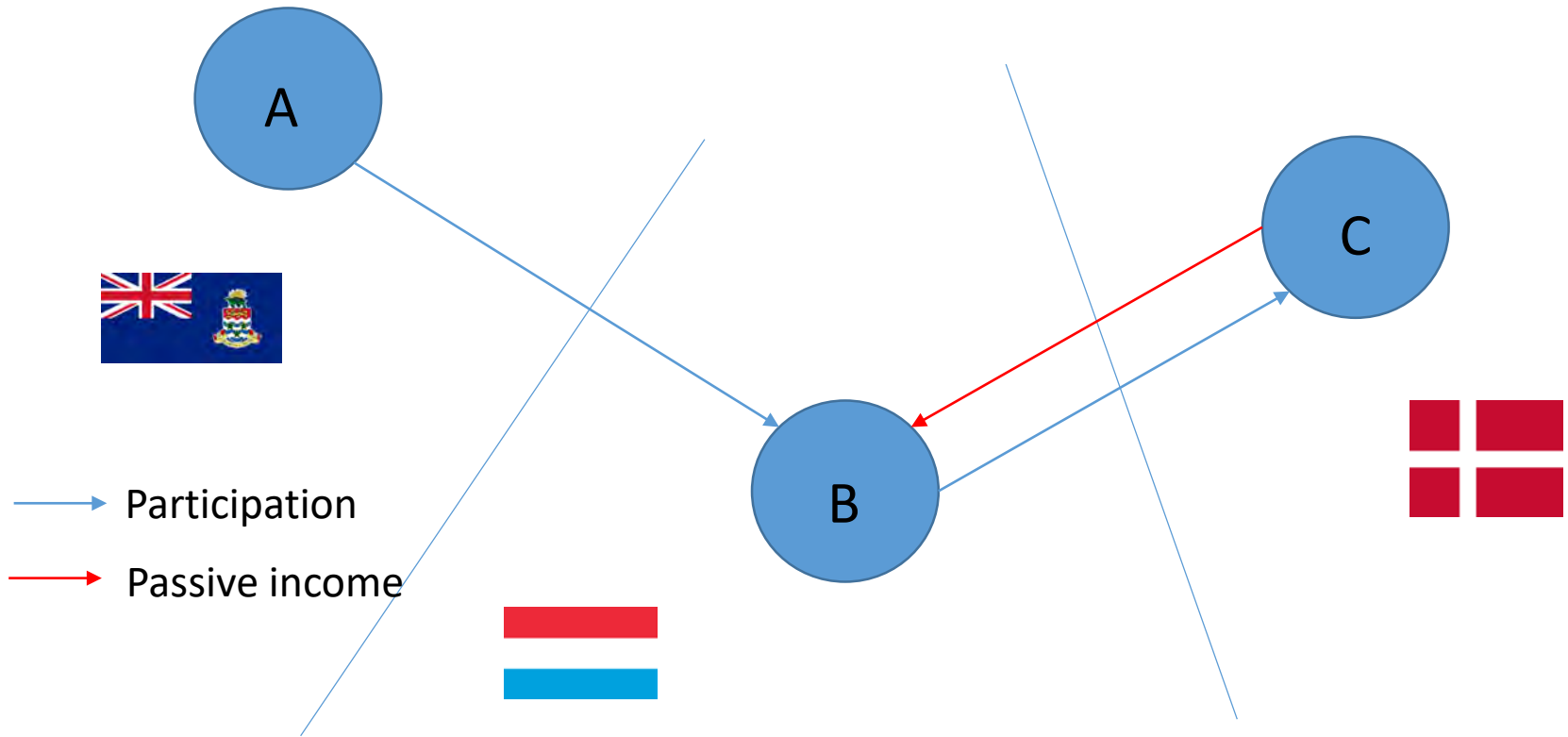


The Latest Developments

- Cases in reference: C-115/16, C-118/16, C-119/16, C-299/16 as decided by the CJEU on February 26th 2019 (the so called “Danish cases”);
- Possibility to grant the application of the “Royalties directive” in situations where the claimant company could be regarded as a (potential) *conduit*;
 - Issues under discussion:
 - The concept of beneficial owner;
 - The abuse of right doctrine and the conditions to prove it;
 - The Free movement of capital as fundamental right.



The case, in a Nutshell





Findings of the Court

- §§ 90 and 91 of the Sentence:
 - OECD Model and OECD Recommendations may be used to the purposes of understanding what “Beneficial owner” means to the purposes of the directive;
- §§ 101 and 102:
 - Abuse of law is a general principle applicable to the Treaty, to the directives, and to regulations.



Latest development, Statutory Law

- Council Directive (EU) 2017/1852 of 10 October 2017

Before	Now
Member States' obligation to resolve transfer pricing disputes not always enforced	Enforceable obligation on Member States to arrive at a resolution of all disputes within the scope of the directive
Often no recourse for taxpayers when mechanisms not applied properly	Recourse for taxpayers to national courts to unblock procedures
Unpredictable timeline for procedures	Clearly defined and enforceable timelines with a standard period of 6 months for the arbitration phase
Scope limited to issues related to transfer pricing and permanent establishments	Scope extended to all tax disputes between Member States that derive from tax treaties and other international agreements, that provide for the elimination of double taxation for businesses and citizens
No transparency requirements	Obligation to notify taxpayers and publish abstracts of the final decisions.



However ...

- Article 6: (...) The taxpayer may only make such a request (i.e., initiate the procedure) if:
 - No appeal can be made;
 - No appeal is pending;
 - The affected person **has formally renounced his right of appeal.**
- Article 13, § 2: Taxpayers may, at their request and **with the consent of the competent authorities** of the Member States concerned, **appear or be represented** (...).
 - Affected persons shall appear or be represented before it **upon request** by the Advisory Commission or Alternative Dispute Resolution Commission.

Concluding Remarks

- A matter of language, a matter of ideas:
 - What do we mean with “due process” in taxation ?
 - A Fresh start ?
Accountability,
Impartiality,
democratic control for
a “Win-Win” scenario.





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*Merci de votre
attention ...*

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