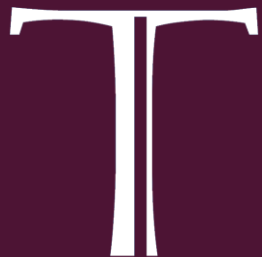

EXCHANGE OF TAX-RELATED INFORMATION AND THE PROTECTION OF TAXPAYER RIGHTS.



Tognetti Advocacia

SILVANIA TOGNETTI

TTN CONFERENCE SÃO PAULO

NOVEMBER 2017



Tognetti Advocacia

It is not just about transparency, but also about protection of basic rights of taxpayers, which are human rights.

AGENDA



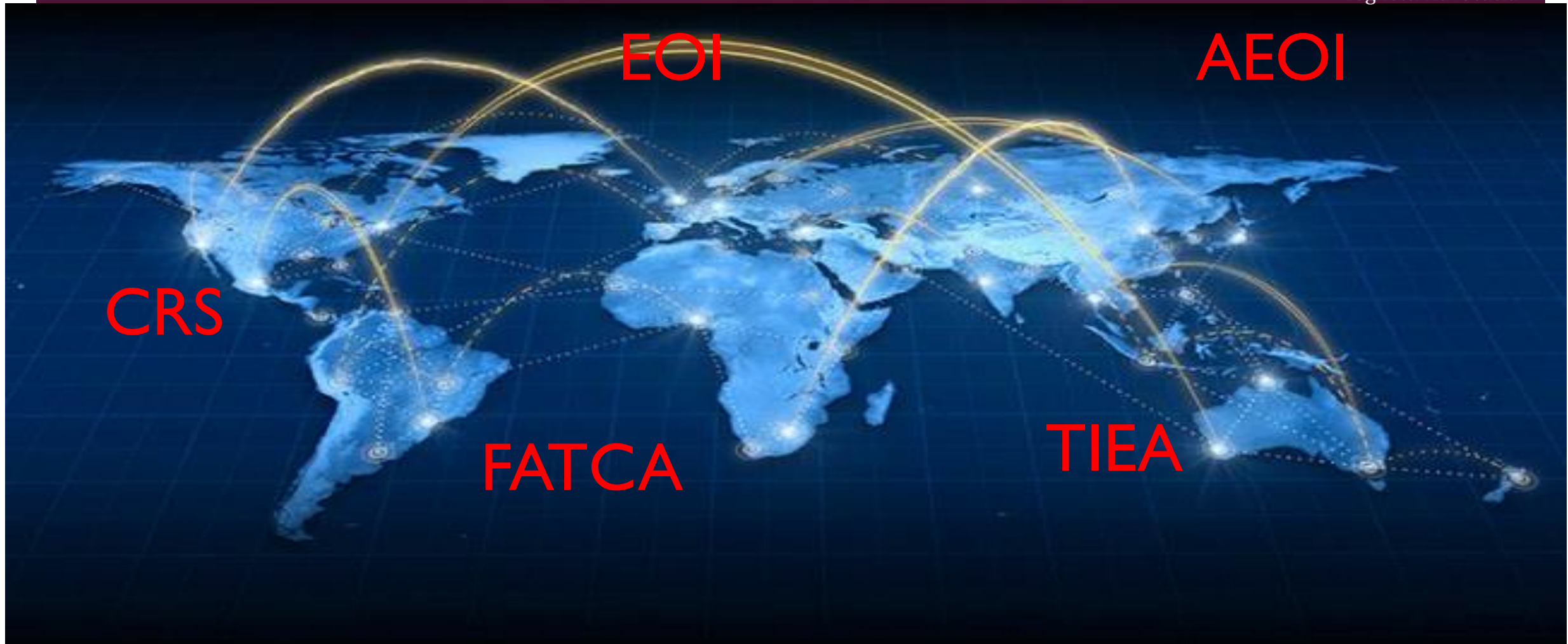
Tognetti Advocacia

- Transparent World
 - Old Idea
 - What is new?
- Automatic Exchange of Information
- Taxpayers' rights
- Brazilian perspective
- Conclusion

You cannot hide!!!



Tognetti Advocacia



TRANSPARENT WORLD



Tognetti Advocacia

PROBLEM

- Taxpayers are mobile, tax authorities are not
- Result: knowledge imbalance

TRANSPARENCE

- End of bank secrecy
- Increasing requests for information

FAIR PLAY

- Financial Centers
- Access for lower capacity countries

TRANSPARENT WORLD – OLD IDEA



Tognetti Advocacia

- Models prepared by the League of Nations in the 1920s provided for administrative cooperation between tax authorities.
- Since the late 1950s, the vast majority of tax treaties have provisions for exchange of information on request, for spontaneous exchanges, and for automatic exchanges of information.
- The Council of Europe/OECD Multilateral Convention on Mutual Administrative Assistance in Tax Matters, which was originally opened for signature on 24th January 1988 contained equivalent provisions for exchange on request, spontaneously and automatically

TRANSPARENT WORLD – OLD IDEA



Tognetti Advocacia

- Amendments to Art. 26 in subsequent versions of the OECD Model contributed to the strengthening of information exchange effectiveness in a bilateral context.
- In line with the global developments, since 2009 the focus has shifted on linking Art. 26 to Automatic Exchange Of Information (AEOI), rather than to the previously favored exchange upon request.
- What has changed?!?

TRANSPARENT WORLD – WHAT IS NEW?



- The multilateral action is a global initiative against offshore tax evasion.
- FACTA CHANGES THE GAME: FROM UNILATERAL ACTION TO MULTILATERAL SOLUTION
- The UBS banking scandal of 2008, where a banker employed with the Swiss bank helped wealthy US citizens to evade US taxes by covertly keeping the money in Swiss bank accounts, accelerated the adoption of FATCA and the legislation went into effect in July 2014.

TRANSPARENT WORLD – WHAT IS NEW?

- The Common Reporting Standard for automatic exchange of financial account information (CRS) shadows the structure of FATCA, with the aim of giving governments a proper instrument for retrieving information on the assets their tax residents hold with foreign financial institutions, thus putting an end to evasive tax practices.
- It was approved by the OECD Council on 15th July 2013 and endorsed by the G20 in September 2013.
- On October 29, 2014, 51 countries gave up banking secrecy by signing a Multilateral Competent Authority Agreement to give effect to automatic exchange of financial information as per OECD Common Report Standards - CRS.

AUTOMATIC EXCHANGE OF INFORMATION

- The OECD's Global Standard consists of two main components:
 - 1) the Model Competent Authority Agreement (Model CAA), which is essentially a template for a legal instrument enabling AEOI between participating countries; and
 - 2) the Common Reporting Standard (CRS), which lays down reporting and due diligence requirements in respect of specific categories of financial accounts (similar to FATCA).
- Financial Institutions (e.g. banks) in Participating Countries identify all Clients (incl. the controlling persons of certain entity clients) that are residents of another participating jurisdiction, the **REPORTABLE PERSON**
- Financial institutions will report the relevant information annually to its domestic tax authorities, which will forward the data to the tax authority of the jurisdiction in which the reportable person is resident for tax purposes.

AUTOMATIC EXCHANGE OF INFORMATION



Tognetti Advocacia

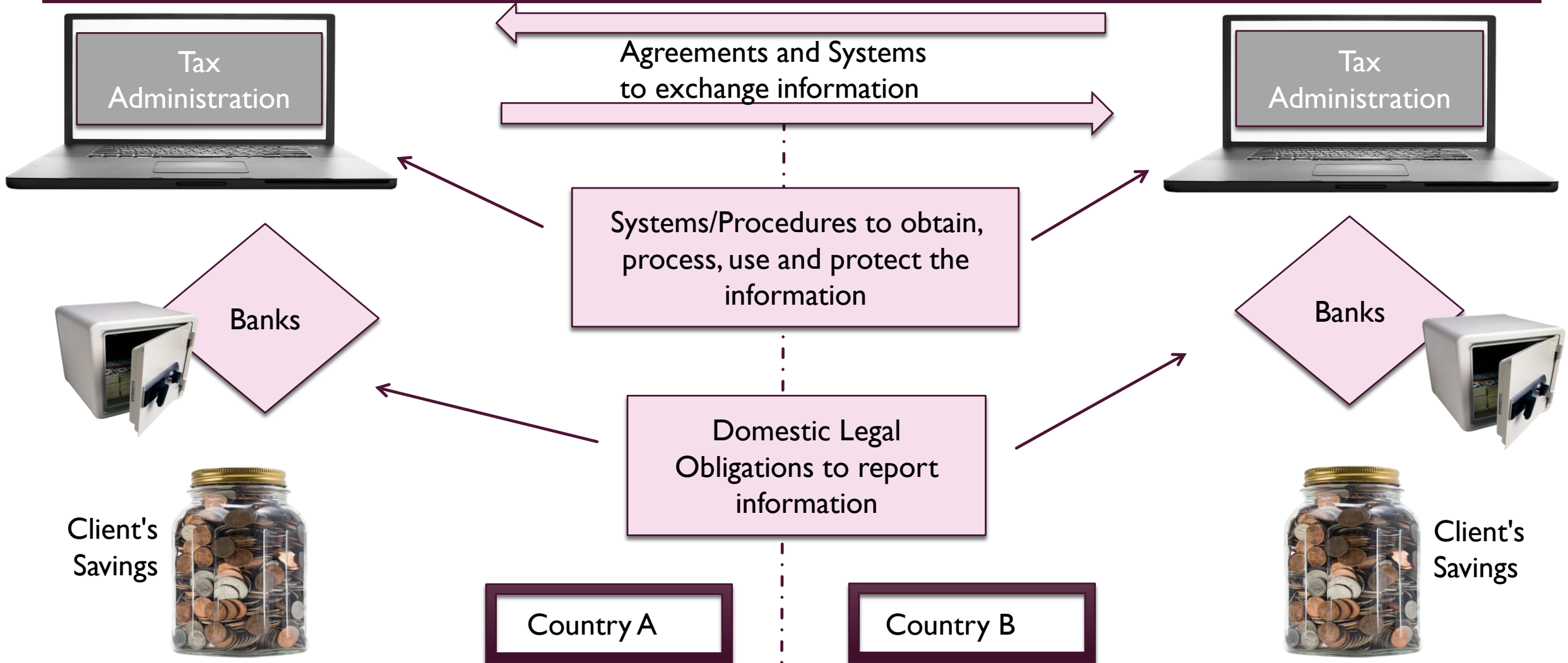
- The following information is to be reported by the financial institutions and will be exchanged with the tax authorities in the client's country of tax residence:
 - Identification information (e.g. name of the natural person or entity, address, country of residence for tax purposes, taxpayer identification number and date of birth);
 - Account information (e.g. name of the financial institution and account number); and
 - Financial information (e.g. account balance, dividends, income, other income, and gross proceeds)



Tognetti Advocacia

“GOD KNOWS EVERYTHING,
BUT THE TAX AUTHORITIES KNOW
EVERYTHING BETTER”

AUTOMATIC EXCHANGE OF INFORMATION



THE STANDARD



Tognetti Advocacia

DOMESTIC LAW

INTERNATIONAL
AGREEMENTS

ADMINISTRATIVE AND IT
CAPACITY

DATA SAFEGUARDS

TAXPAYERS' RIGHTS: MANY DOUBTS



Tognetti Advocacia

- How will provisions for data protection work in practice alongside the automatic exchange of information?
- Will a taxpayer be entitled to have access to any information provided by way of AEOI in order to correct any inaccuracies?
- Will there be time limits for which the recipient state may retain the data supplied?
- For how long may the data be retained before it must be destroyed?
- How will be defined the purposes for which information is gathered and exchanged?

TAXPAYERS' RIGHTS: MANY DOUBTS



Tognetti Advocacia

- Will there be controls on the use that may be made of data?
- How will unlawful use be challenged?
- How will countries with inadequate data protection be identified, and what will the reaction be when exchange of information with those countries is refused?
- What will happen when (almost inevitably) there are leaks of data which have been exchanged under these systems? Will the whole system be subject to destructive challenge?

TAXPAYERS' RIGHT OF BEING INFORMED

- Taxpayer rights include the right to a fair process in the exchange of information proceedings, basic privacy protection and procedural rights.
- The more global the exchange of information, the greater risk of breaches of confidentiality, privacy and secrecy provisions or even abuse in the use of data obtained
- Effective defense requires sufficient information to exercise such right.
- In automatic exchange of information, it might be impractical to inform each taxpayer of the exchange.
- Taxpayers are informed by financial institutions that the information provided to them may be subject to the automatic exchange. Is it sufficient?

TAXPAYERS' RIGHT: DATA PROTECTION

- The point to emphasize here is that data protection is not simply about the confidentiality of the data being gathered and exchanged.
- That the information will be kept confidential, and that there will be no unauthorized disclosure of information is only part of data protection.
- Safeguards is critical for large quantities of personal data for:
 - the processing of those data,
 - transmission to other countries
 - retention limitations.
- Confidentiality: the promise or duty to protect informational privacy
- Foreign tax authorities that have inadequate provisions for guaranteeing the confidentiality of data, and which are prone to leaks, are clearly providing inadequate data protection and cannot possibly receive data whilst these inadequate safeguards exist.

TAXPAYERS' RIGHTS: HUMAN RIGHTS



Tognetti Advocacia

- In one of the earlier cases of the European Commission on Human Rights, X (Hardy-Spirlet) v Belgium (decision of 7th December 1982), the Commission held that any gathering of information from a taxpayer by a revenue authority was prima facie a breach of the right to privacy, and could only be justified if it was in accordance with the law, necessary in a democratic society, and was not disproportionate.
- In the Sabou case (Case C-276/12, 22nd Oct 2013) the Court of Justice of the European Union discussed the possible participation of the taxpayer in the formulation of questions and the examination of witnesses.
- The Court of Justice took the view that the **gathering of information** was essentially an administrative procedure and **did not necessarily require protection of fair trial rights**.

BRAZILIAN LAW - CONFIDENTIALITY



Tognetti Advocacia

- Information obtained due to tax authorities functional activity about the financial or economic situation of the taxpayer or third parties and about the nature and status of their business or activities are confidential (Brazilian Tax Code, Art. 198)
- Complementary Law 105/ 2001 entitled the tax administration to have direct access to bank information without the need of a prior court order and such interpretation was confirmed by the Federal Supreme Court in 2016.
- In bilateral exchange of information the taxpayer has the right to be informed about the request.
- For automatic exchange of information, it should be provided a mechanism to inform the taxpayer and a procedure to allow a taxpayer to challenge the information accuracy before or after it is exchanged.

BRAZILIAN LAW – FAIR TRIAL RIGHTS



Tognetti Advocacia

- However, taxpayers has neither access to nor ability to obtain the same information as the revenue authorities.
- The duty to maintain tax secrecy has been claimed by the Ministry of Finance when rejecting a taxpayer's request (under Law 12,527) to access the tax inspection register with all documents held by Tax Administration.
- How is defense possible if taxpayer hasn't access to the data exchanged?
- Principle of Equality for fair trial in question?

CONCLUSION



Tognetti Advocacia

- The role of exchange of information is to prevent double taxation, which is in the interest of taxpayers, as well as to combat tax evasion and tax avoidance, which is in the interest of the states.
- No one can seriously doubt that countries may enter into arrangements for automatic exchange of information for tax purposes, but nothing authorizes tax administrations to ignore the rights of taxpayers in implementing those arrangements.
- However, transparency, cooperation, and accountability among financial institutions and tax administrations raises substantial concerns regarding the protection of taxpayers' rights for confidentiality of personal data and for challenging the collection of the information.
- There is a tension between the legitimate rights of States to protect their tax base by collecting information of taxpayers as much as possible to guarantee taxation and the legitimate rights of taxpayers on privacy and to be protected against the power of these States.

CONCLUSION



Tognetti Advocacia

- The new international tax scenario expands the investigative powers of tax authorities without a clear corresponding consideration of the basic rights of taxpayers.
- There is no indication of the extent to which compliant taxpayers were compelled to demonstrate their compliance or the cost they may have incurred in doing so.
- This should not, however, mean that the protection of individual rights should become of secondary importance. Nor does it mean that individuals should bear the consequences and costs of unresolved rough edges in the emerging system.
- How the OECD and individual countries will protect the right to confidentiality, the right to privacy and the procedural rights remains a question as does the measures required to balance the power between the tax administration and the taxpayer.

SILVANIA TOGNETTI

silvania.tognetti@tognetti.com.br

55 11 99450 0444

Thank you!
Obrigada!



T
Tognetti Advocacia

Silvania Tognetti
silvania.tognetti@tognetti.com.br

+55 11 3045-3131
+55 11 99450-0444



Tognetti Advocacia

Rua do Rocio, 288, 4o andar
Vila Olimpia – São Paulo - sp