

Subject 2

Practical Protection of Taxpayers Rights



+ Introduction

The Panel (1)

- General Reporters
 - Philip Baker (United Kingdom)
 - Pasquale Pistone (Italy)

- Chair
 - Michael Beusch (Switzerland)

The Panel (2)

- Panel Members
 - Beric Croome (South Africa)
 - Masato Ohno (Japan)
 - Luís Eduardo Schoueri (Brazil)
- Secretary
 - Susanne Raas (Switzerland)

Topic

- What is it about?
- Importance of the topic cannot be overestimated
- Everyone is affected
- A taxpayer is „chosen by the law“
- Taxes (alleged tax debts) are used to muzzle people
- Practical protection of uttermost importance

Setting

- Follow General Report
- Short introduction
- Statements from panelists
- Seminars

Outline (1)

- Identifying taxpayers, issuing tax returns and communicating with taxpayers
- The issue of tax assessments
- Confidentiality
- Normal audits
- More intensive audits
- Reviews and appeals
- Criminal and administrative sanctions

Outline (2)

- Enforcement of taxes
- Cross-border procedures
- Legislation
- Revenue practice and guidance
- Institutional framework for protecting taxpayers' rights



Introduction; General Report

- Identifying minimal standards and best practices for a timely and effective protection of fundamental taxpayers' rights
- Not about whether principles exist, but how they apply in practice
- Directives identified 12 key points
- National reports elaborated on country practice
- Selected minimal standards and best practices
- Short-form questionnaire => empirical evidence, elaborated in general report to rank jurisdictions as to the effectiveness in the protection of such rights

+ 1. Identifying taxpayers, issuing tax returns and communicating with taxpayers



General Report: 1. Identification and returns

Minimal standards

- 8 issues, including:
 - Number-coded tax returns
 - Access to filed returns in order to correct them (33 countries, see fnotes 18 and 19)
 - Free option for cooperative compliance

Best practices

- No liability for taxpayer in respect of tax withheld by third parties (Denmark)
- Public guidelines for taxpayers to access information and correct inaccuracies

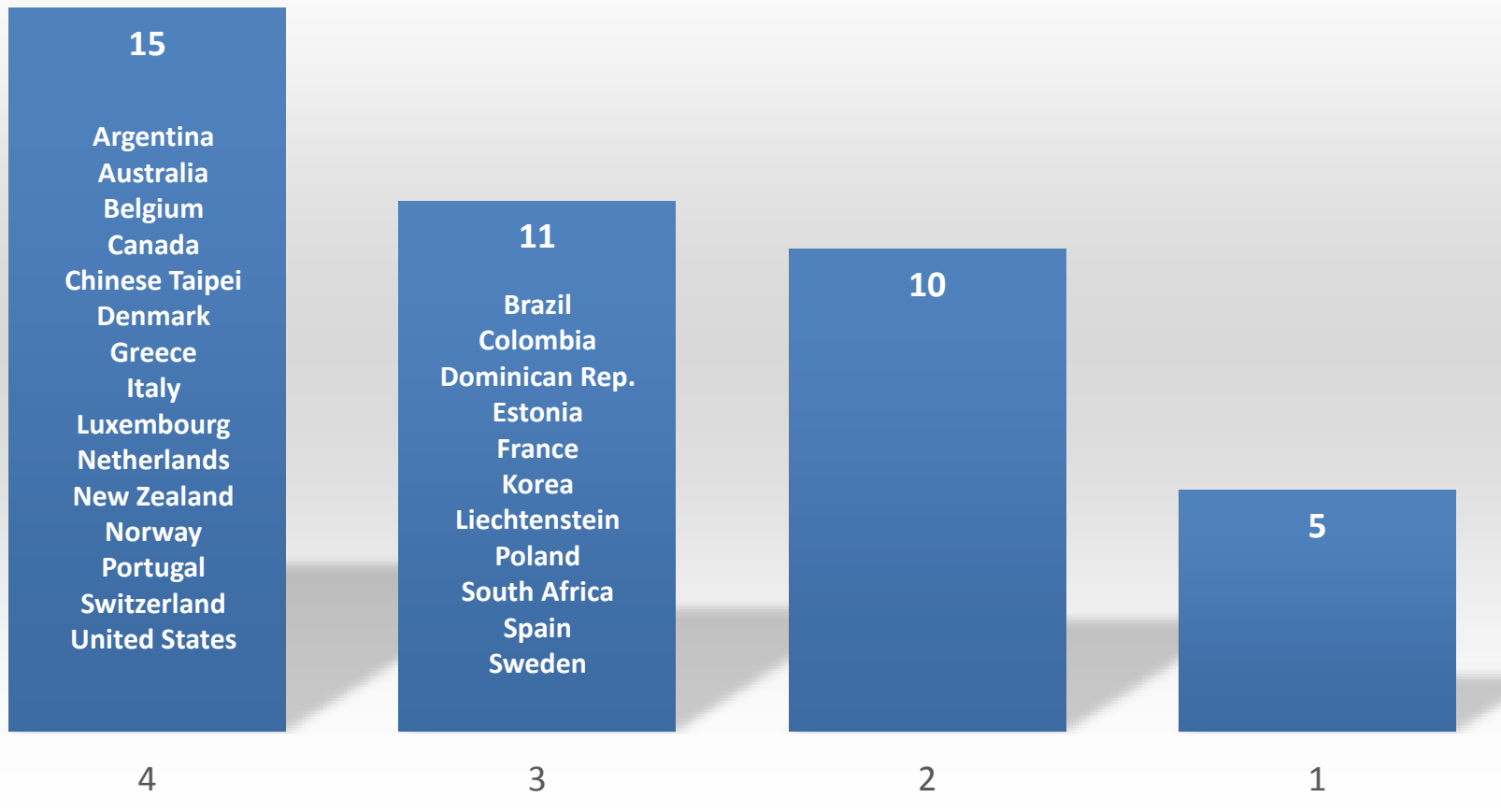
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LOWEST RANKING: 1/4

AVERAGE: 2,88/4



1. Identifying Taxpayers





Challenges and solutions/different people

- Identifying taxpayers, issuing returns
 - General issues
 - Use of information technology
 - Efficient and cost effective
 - Integrity and security of data
 - Risk of identity theft?
 - Taxpayer must visit the tax office



Challenges and solutions/different people

- Communication with taxpayers
 - 20 of 41 countries have arrangements to help taxpayers with special needs
 - Different languages – South Africa
 - 11 official languages and officials can assist taxpayers
 - Tax forms in all languages
 - Blind taxpayers – Korea provides braille information and other aids
 - Deaf taxpayers – New Zealand provides sign language videos



OECD: Taxpayer Education



Building Tax Culture, Compliance and Citizenship

A GLOBAL SOURCE BOOK ON TAXPAYER EDUCATION



+ 2. The issue of tax assessment



General Report: 2. Issuing of tax assessment

Best practices

- Constructive dialogue to ensure a fair assessment of taxes based on equality of arms
- E-filing of returns speeds up assessments, correction of recurrent errors and inconsistencies

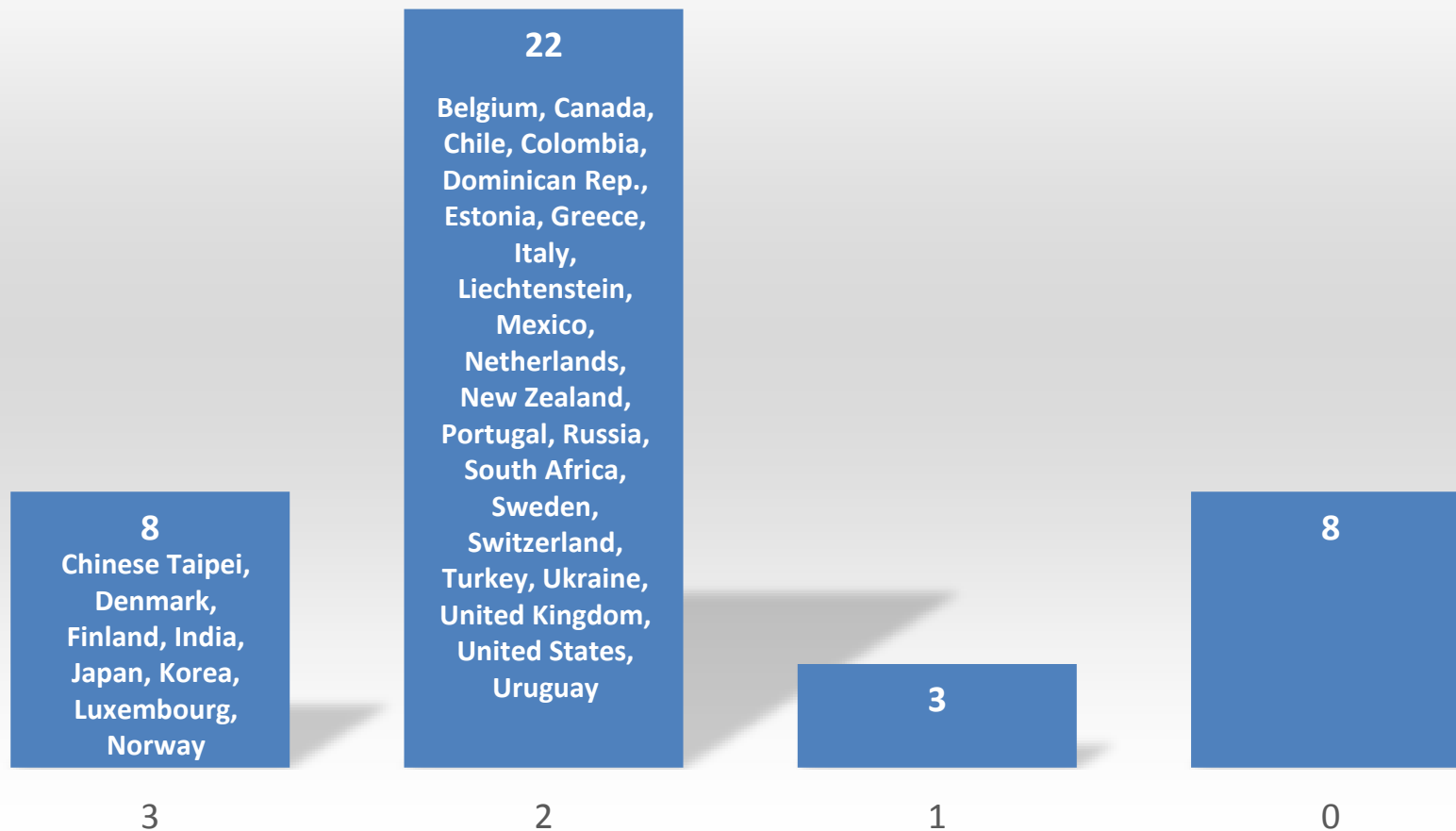
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LOWEST RANKING: 0/3

AVERAGE: 1,73/3



2. Assessment





Relation between taxpayers and authorities

- Forced relationship
 - Taxpayers: information
 - Authorities: power

- Aim: Assessment corresponds to actual situation



Relation taxpayer - authorities

- Good relationship: Exercising rights
 - Access to authorities
 - Help from authorities
 - Information from taxpayers
 - Information about taxpayers

- Switzerland
 - Explanation for differences in assessment
 - Investigation also in favour of taxpayer

+ 3. Confidentiality



General Report: 3. Confidentiality

Minimal standards

- Effective sanction to tax officials in case of violation
- Restricted access to data with encryption
- Limited exceptions
- Anonymisation of published data
- Naming and shaming only with ad hoc authorisation
- Legal privilege to all tax advisors

Best practices

- Encryption to highest level
- Effective fire-wall
- Data protection officers
- Judicial authorization required for all disclosure
- Anonymise all judgments

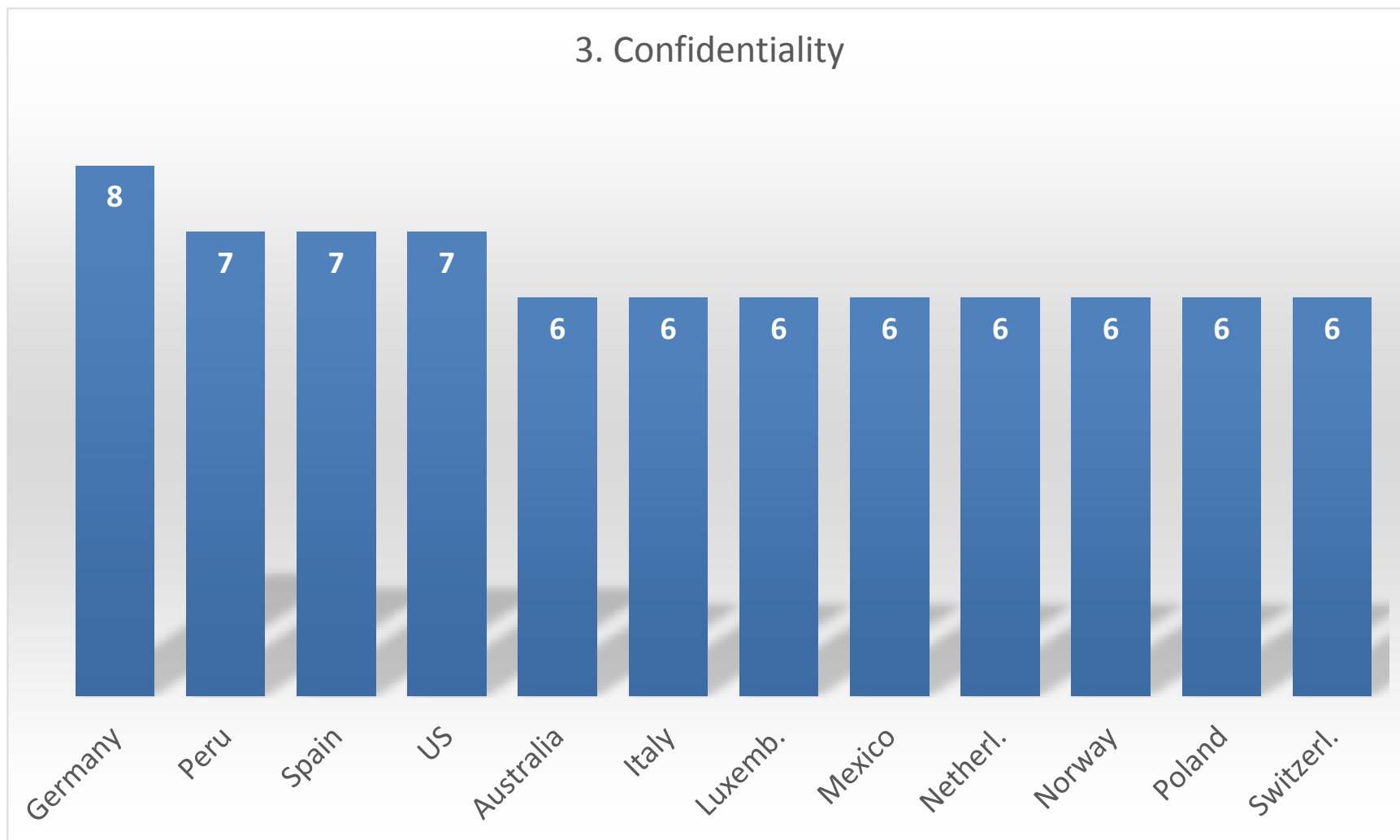
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AVERAGE: 4,17/8



3. Confidentiality



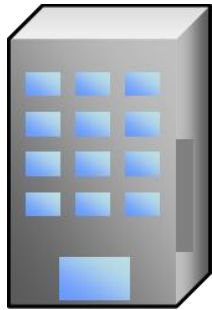


Legal professional privilege

- Legal adviser must protect client information and advice
- Recognised by all countries
- Privilege usually limited to lawyers only
- Some countries extend privilege to all tax advisers

Protection of data and encryption (Japan)

National Tax Agency



tax office



taxpayer



transfer

tax return

e-Tax System

NTA's DPS

transfer

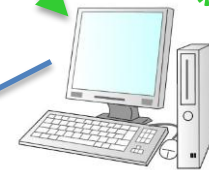
e-filing



taxpayer

* information is encrypted in DPS
and can be read only by NTA's WS.

taxman





Transparency and confidentiality

- Brazilian „Habeas Data“: opportunity to access the confidential information held about the taxpayer and to timely correct any errors in that information (similar provision present in 32 of 41 countries)
- Is a constitutional/legal provision sufficient to protect taxpayers?
 - Generic provisions are not effective: it is necessary to say how, when and by whom the right must be protected



Privacy versus publicity

- Privacy
 - Data protection, confidentiality
 - Rulings
- Publicity
 - Control by press/people
 - Knowledge of practice

Privacy versus publicity

- Procedure only between taxpayer and authority/court
- Publication of judgments in anonymized form
- Access to certain information for third parties

Naming and shaming

- Serious violation of tax confidentiality
- May non-compliant taxpayers be deprived of their basic rights?
- Proportionate reaction vs. Deterrent function
- Cases of fraud: disclosure in public interest
- No *carte blanche*



Naming and shaming

- Can be effective
- „Pillory“ does no longer exists in other areas of the law – why in tax law
- Other methods to collect taxes have to exists



+ Naming and shaming

- Japan does not have „naming and shaming” system to post names of delinquent taxpayers.
- Japan once had „millionaires posting” system, under which names of high income taxpayers (individuals and corporations) were posted at Tax Offices. It was repealed in 2006 to protect taxpayers’ privacy.
- „Naming and shaming” would not be supported in Japan because (a) it seems to be an infringement of privacy and (b) tax collectors have authority to seize taxpayers’ properties without judicial permission.



Naming and shaming

- In Brazil, access to case law is generally available. As a rule, there is no restriction to data involved in the assessment, which may be granted upon taxpayer's request.
- Tax officers may be held criminally liable for disclosure of secrets acquired on duty
- Naming and shaming is not a practice. Even though, administrative court sessions are public and the decisions are published in their entirety, including values under dispute. It is usual that the media reports the cases in detail, naming the companies and values involved.
- Ne bis in idem

+ Vote

- Are you in favour of naming and shaming before a court procedure has been completed?



+ 4. Normal audits



General Report: 4. Normal audits

Minimal standards

- The four pillars of fair tax auditing
 1. Proportionality
 2. *Ne bis in idem*
 3. *Audi et alteram partem*
 4. *Nemo tenetur se detegere*
- Obligation to inform taxpayers at start of audit and gathering of information from 3rd parties

Their implications

- **Proportionality:** only strictly needed and not available information; least burdensome impact on taxpayer
- ***Audi alteram partem:*** right to attend meetings (with advisors), to provide information and be heard
- ***Nemo tenetur:*** right to silence



Introduction; General Report

Best practices

- *Ne bis in idem*: one audit per taxable period
- Tax audits follow a pattern set out in published guidelines
- Global manual of good practice in tax audits
- Taxpayers may request the start of a tax audit
- Initial meeting to spell out aims, procedure, time and targets
- Reasonable timeframe for audits
- Final audit report drafted with participation of taxpayer

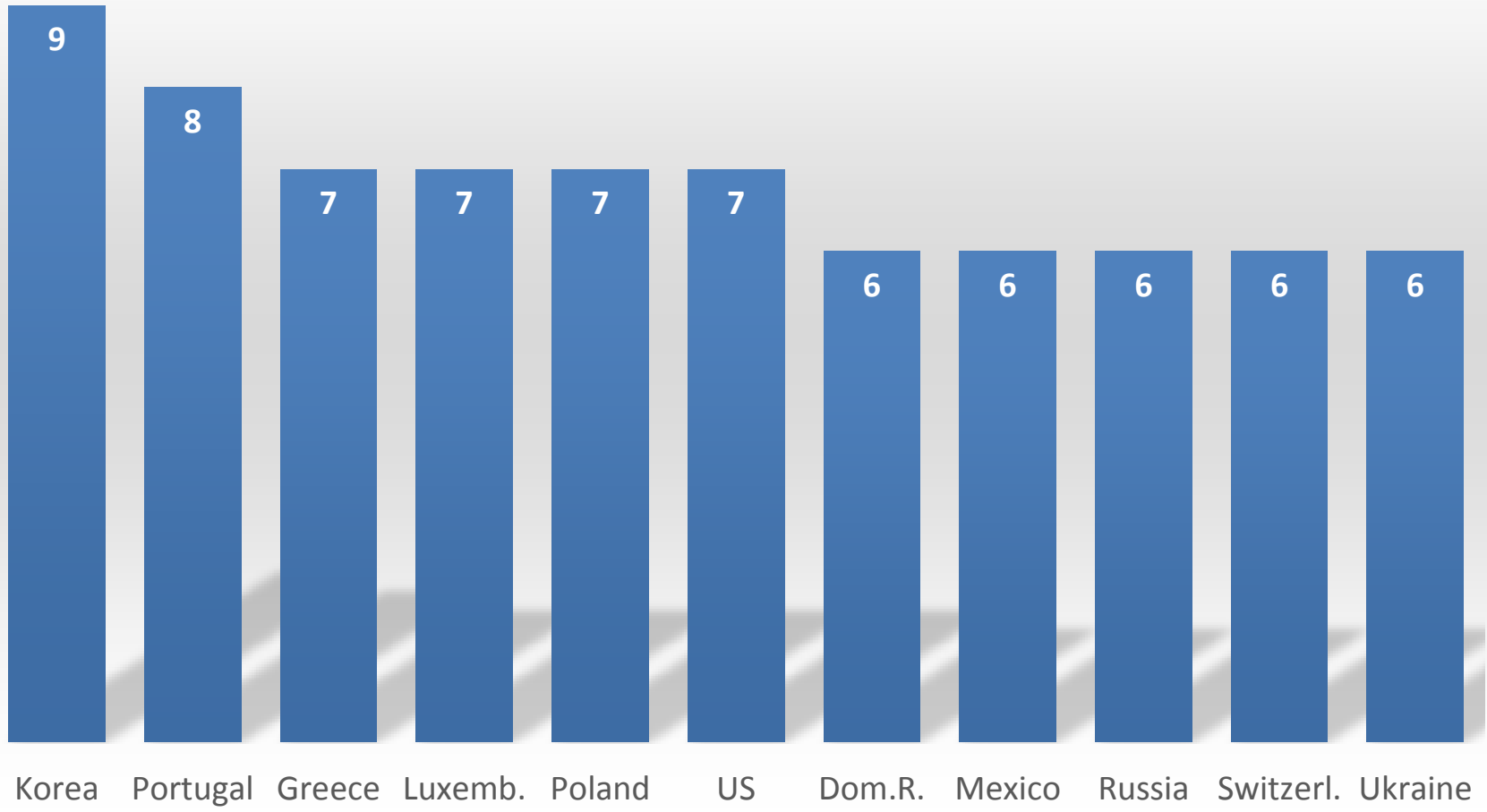
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LOWEST RANKING: 2/9

AVERAGE: 4,78/9



4. Normal Audits



+ Fact finding process

- Audit process in Japan
 - Prior to the audit, the date, the place of audit, etc. should be informed to the taxpayer (with few exceptions).
 - Usually taxpayer's delegate (a Certified Public Tax Accountant (CPTA) or a lawyer) attends the audit site. There are 74,500 CPTAs in Japan.
 - CPTAs can make full discussion with tax auditors at any stage of the audit, in respect of both facts and law interpretation.

+ Fact finding process

- Audit process in Japan (Cont'd)
 - The result of the audit should be explained to the taxpayer. After discussion, the taxpayer will have a choice of (a) receiving an adjustment notice, or (b) submitting an amending return.
 - In principle, the burden of proof is on the tax authority's side where they issued an adjustment notice. Written reasoning of the adjustment is also strictly required.
 - In principle, the statute of limitation is 5 years.

+ Several audits

- Best Practice
 - Taxpayers can only receive one audit in respect of the same taxable period
 - No step in the procedure shall be repeated;
 - Once the audit is completed, it may not start again, even if the tax authorities have committed mistakes

Several audits

- Brazil – no revision for legal mistakes
- Distinction on errors: legal x factual
 - Is it a valid distinction?

Audi et alteram partem

- From the commencement of audits
- Taxpayer - Authority
 - Taxpayer as the „other party“
 - Right to be heard
- Right and Opportunity
 - Taxpayer knows a lot about himself
 - Involvement is opportunity for authority
 - Easy amendment

+ 5. More intensive audits



General Report: 5. More intensive audits

Minimal standards

- Stronger protection of right to silence in presence of liability
- Authorization (ratification in case of urgency) for inspection
- Inspection at domicile only in exceptional cases
- Seizure of documents only if strictly indispensable
- Invasive audit techniques to be limited in order to avoid disproportionate effect



General Report: 5. More intensive audits

Best practices

- More intensive audits to be limited to the extent strictly necessary to ensure an effective reaction to non-compliance
- Inspection of premises subject to prior information and right to access Court, except in presence of evidence of danger that documents will be removed or destroyed
- Judicial authorization required for access to bank information and interceptions
- Seizure of backup data, while originals remain with taxpayer

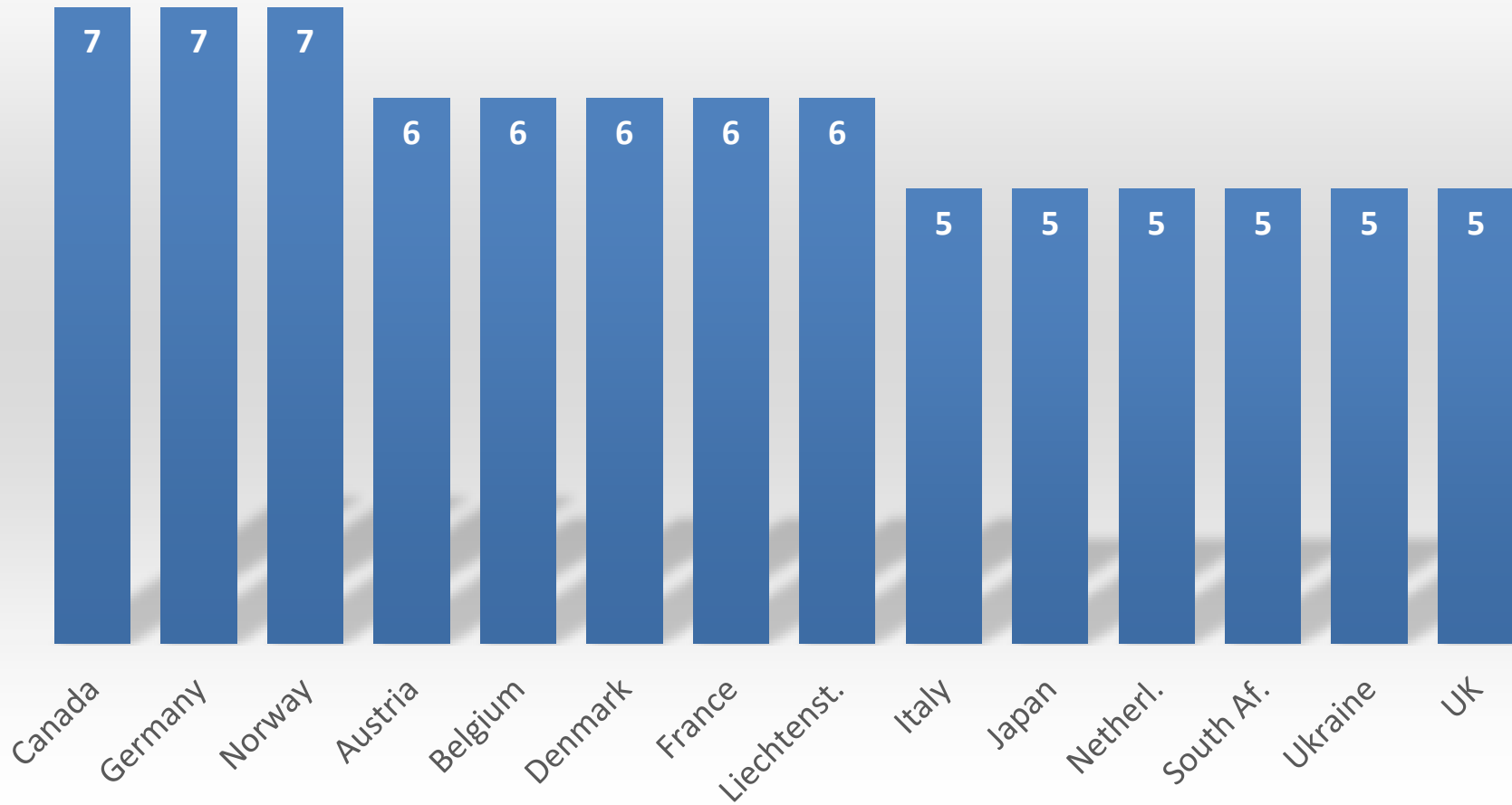
HIGHEST RANKING: 7/9

LOWEST RANKING: 0/9

AVERAGE: 3,78/9



5. Intensive Audits



+ Court authorisation

- „More intensive audit”: intercepting communication without judicial ex ante authorization? Unacceptable.
 - Only 14 of 41 reporters confirm that authorisation by a court is always needed
 - Judiciary branch is the only branch entitled to impartially evaluate the proportionality of such measures
- Notify action to the judiciary and ask for ex post ratification would not be an alternative
 - How would the subsequent proceeding be if the interception should not have been authorized?

Court authorisation

- Required in Brazil prior to Complementary Law No. 105/01 for accessing bank information
 - no specialized branch of judiciary for such authorisation (best practice?)
 - No immediate deadline for the procedure

+ Court authorisation

- As from the enactment of this legislation, tax authorities are entitled to limited access to bank information directly.
- Access is granted not only to Federal tax authorities, but also to States and Municipalities' agents: Huge risk of no protection at all
- Constitutionality: still pending before the Supreme Court



Legal professional privilege

- Search and seizure
 - South Africa requires independent lawyers on site
 - Lawyer to decide if material is privileged
 - Decision can be reviewed by court
 - Above process often agreed to by SARS during a field audit
 - Recent tax bill proposes regulating legal professional privilege during audit process



Nemo tenetur – right to silence

- 29 countries adhere to the principle
- Taxpayer required to submit information for assessment by revenue
- Separation of information for
 - Determining tax liability
 - Criminal liability



Nemo tenetur – right to silence

- Taxpayer entitled to remain silent
- Authorities should inform taxpayer of rights and obligations
- Statements made by taxpayer not available for prosecution
- Use of books and records for assessing tax liability?



Penalties and incentives

Public Discussion Draft

BEPS ACTION 12:

MANDATORY
DISCLOSURE RULES

11 May 2015



200. In order to enforce compliance with mandatory disclosure rules, countries should introduce financial penalties that apply if there is failure to comply with any of the obligations introduced. Countries are free to introduce penalty provisions (including non-monetary penalties) that are coherent with their general domestic law provisions.

If you are forced to make a choice, to „sell your soul” to mitigate penalties, can you then still exercise your rights freely?

+ Coffee break

9.45 - 10.15 am

+ 6. Review and appeals

Seminar K:

Practical protection of taxpayers in the tax litigation process

Chair: Justice Tony Pagone (Australia)

- „Judges Seminar“
- Protection of taxpayers' rights in
 - Legal settings
 - International settings
- Legal forums
- Assertion of jurisdiction and effective response

+ 7. Criminal and administrative sanctions



General Report: 7. Sanctions

Minimal standards

- Proportionality and ne bis in idem should apply to tax penalties
- Sanctions should not be increased simply to encourage taxpayers to make voluntary disclosures

Best practices

- Where administrative and criminal sanctions may both apply, only one procedure and sanction should apply
- Voluntary disclosure should reduce penalties

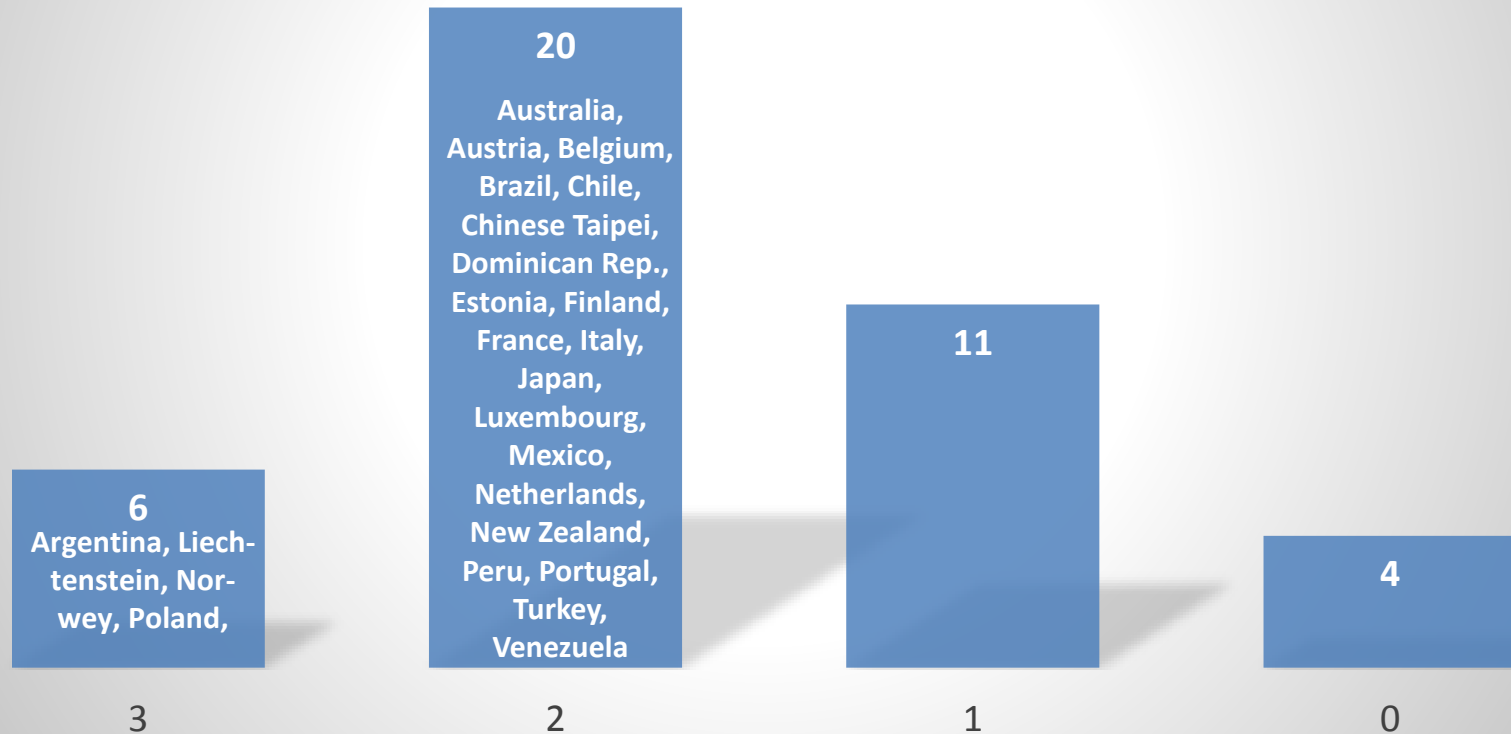
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LOWEST RANKING: 0/3

AVERAGE: 1,68/3



7. Sanctions





Overlapping of procedures

- There may be an overlap between the judicial and criminal procedures: it is common that the criminal procedure is initiated by the competent authorities prior to a final judgment of the tax case by the judicial authority
- In case overlap occurs, any invasive measure in the criminal procedure, or even the criminal procedure itself, may be suspended, due to the fact that a final decision on the tax case has not been handed down by judiciary



Overlapping of procedures

- As a minimum, overlap should not occur: taxpayer should only be criminally prosecuted after a final decision of judiciary on the respective tax case would be handed down. However, the statute of limitation should be counted as from the occurrence of the fact, and not from the final decision



Voluntary disclosure and amnesty

- Best practice?
 - Definition
 - Idea: usually not to protect taxpayers but to create income for the state
 - Equal treatment
- It can be a protection
 - No continuation of tax evasion or fraud
 - Community of heirs

+ 8. Enforcement of taxes



General Report: 8. Enforcement of taxes

Minimal standards

- Collection of taxes should never deprive taxpayers of their minimum necessary for living
- Taxpayers should have the right to request delayed payment of arrears.
- Temporary suspension of tax enforcement should follow natural disasters

Best practices

- Authorisation of judiciary required before seizing assets or bank accounts
- Bankruptcy to be avoided (partial remission of debt or plans for structured deferred payment)

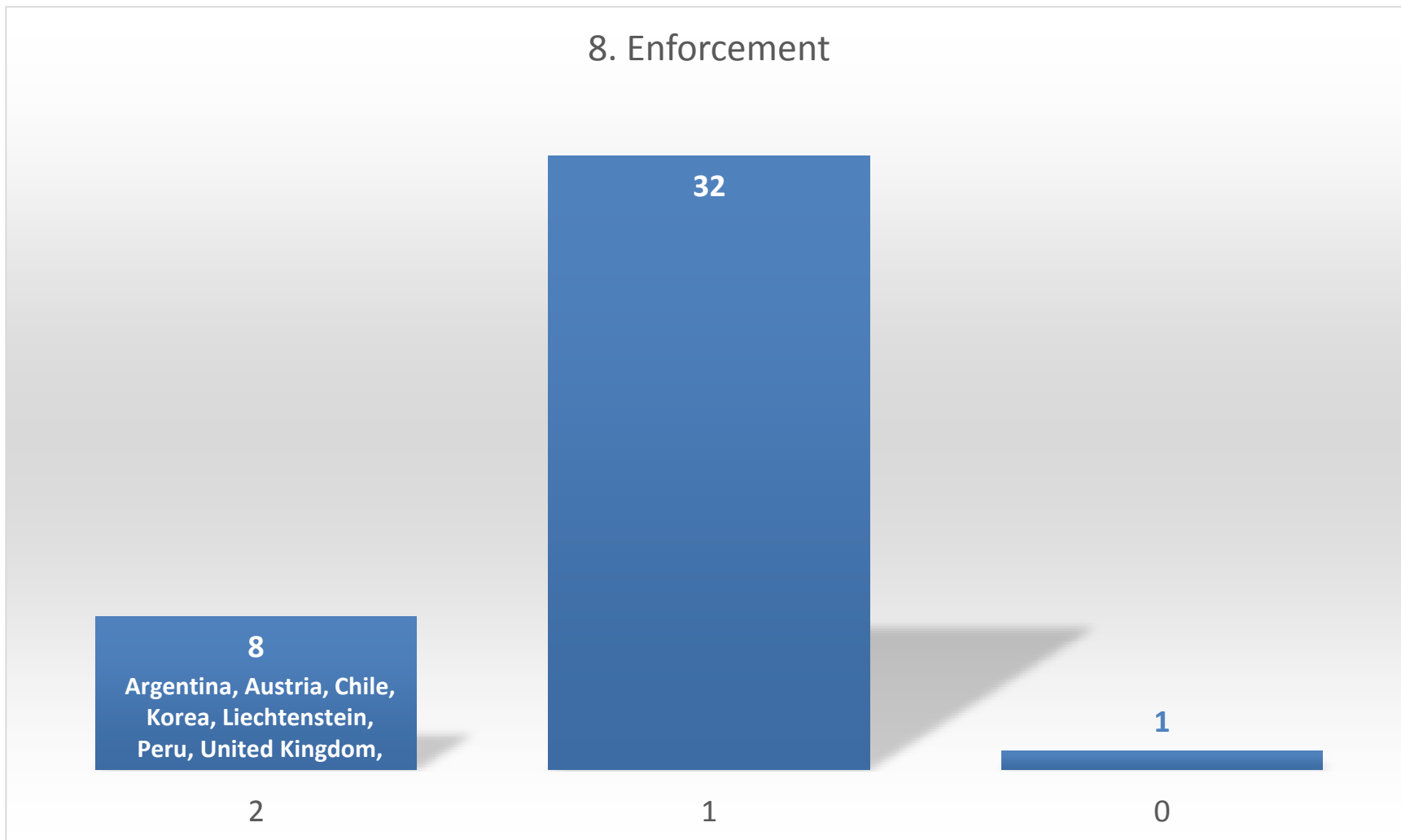
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LOWEST RANKING: 0/2

AVERAGE: 1,17/2



8. Enforcement



Delayed payment

- Tax delinquency in Japan
 - In FY 2014 (April 2014 – March 2015), JPY 591 billion (1.1% of tax that became due. Approx. USD 5 billion) was behind in payment.
 - Telephone Collection Centres of the NTA make phonecalls to delinquent taxpayers to request payment. Out of 751,000 taxpayers called in FY 2012, 521,000 taxpayers (69%) paid full amount, 94,000 taxpayers (13%) promised to pay, 59,000 taxpayers (8%) were kept in touch, and other 75,000 cases (10%) were sent back to Tax Offices for enforcement.

Delayed payment

- Extension of tax due date

Tax due date will be extended to maximum 6 years in case of: natural disaster, extraordinary accident, disease, injury, closing business, extraordinary damage in business, etc.

- Tax payment by installment

Taxpayers can request tax payment by installment if certain conditions are met.

- Prohibition of seizure

It is prohibited by law to seize taxpayers' necessities of life (clothing, furnitures, food, family altar, etc.).

+ 9. Cross-border procedures



Seminar D:

Practical protection of taxpayers in the exchange of information process

Chair: Jennifer Roeleveld (South Africa)

- Increasing importance
- Confidentiality
- Protection without information
- Resources

General report: 9. MAPs

Minimal standards

- Taxpayers should have a right to participate in mutual agreement procedure by being heard and being informed as to progress of the procedure

Best practices

- Taxpayers should have a right to request initiation of mutual agreement procedure

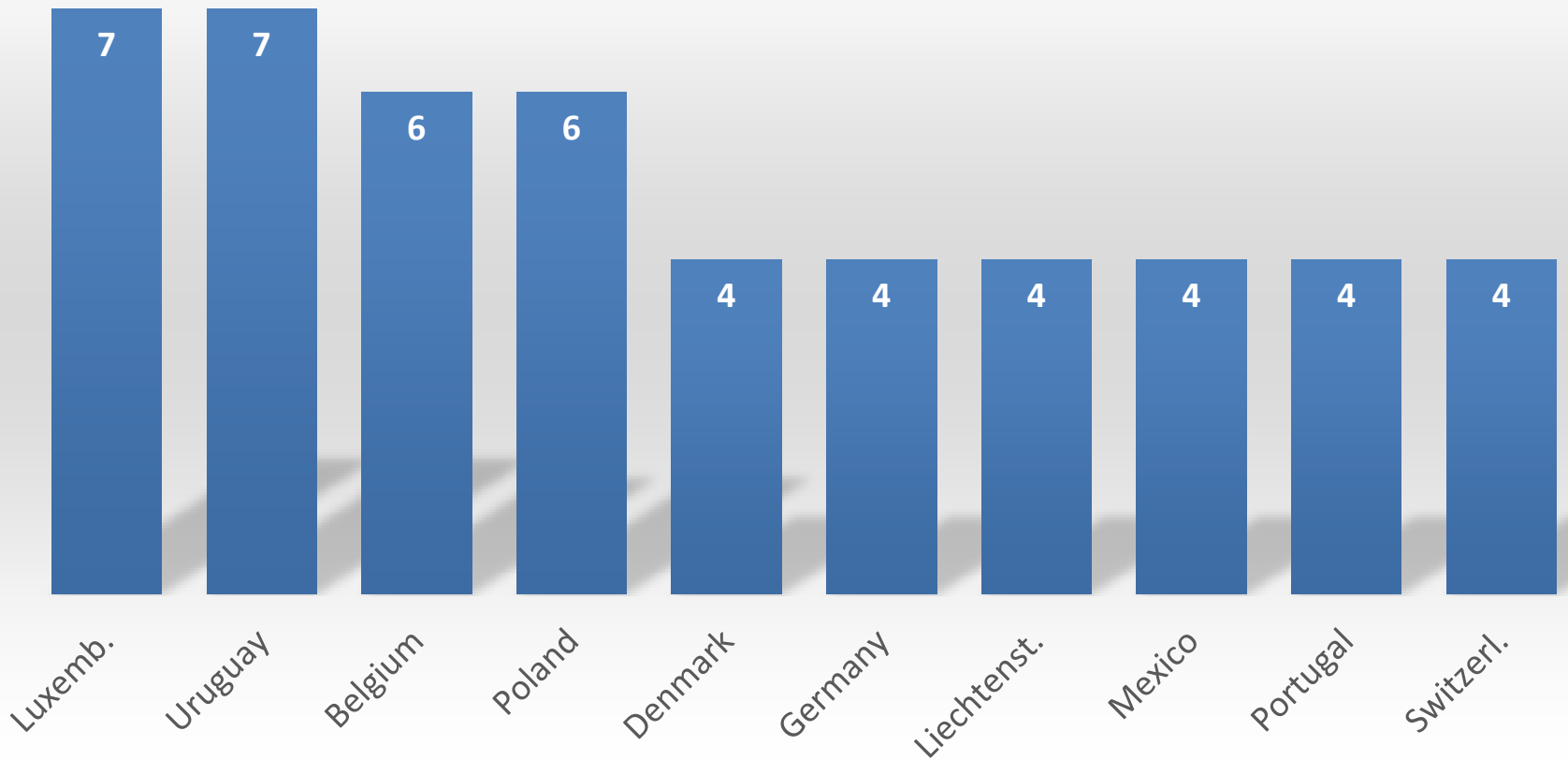
HIGHEST RANKING: 7/7

LOWEST RANKING: 0/7

AVERAGE: 2,27/7



9. Cross-border Procedures



+ 10. Legislation



General Report: 10. Legislation

Minimal standard

- Retrospective tax legislation should only be permitted in limited circumstances which are spelt out in detail

Best practices

- Retrospective tax legislation should ideally be banned completely
- Public consultation should precede the making of tax policy and tax law

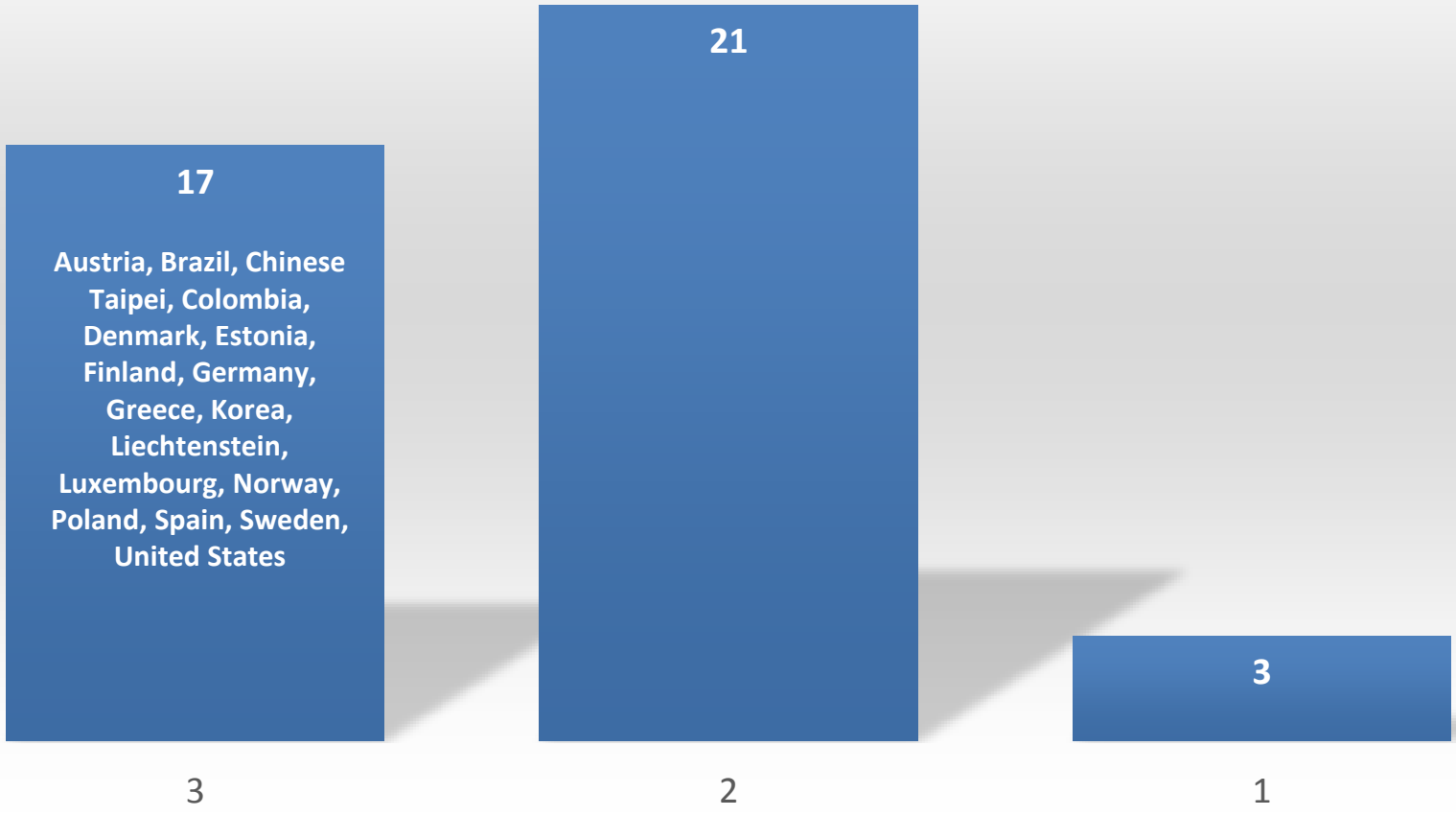
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LOWEST RANKING: 1/4

AVERAGE: 2,24/4



10. Legislation



Public consultations

- 25 of 41 countries consult publicly
- New Zealand generic tax policy process:
 - Identify need for tax reform
 - Possible solutions developed by Revenue
 - Announcement of reforms and discussion document released
 - Legislation drafted containing proposal
 - Guidelines on changes and post-implementation review

Public consultations

- Process may extend time required for amendments
- Legislation introduced via the process requires less remediation
- Deadlines in process
 - In South Africa can be short
 - Need to be reasonable to encourage adequate consultation
- Languages
- Referenda in certain countries

+ 11. Revenue practice and guidance



General Report: 11. Practice and guidance

Minimal standards

- Right to access all relevant legal material (legislation, administrative regulations, rulings, manuals and other)
- Binding rulings only published in an anonymised form
- Where a taxpayer relies upon published guidance of a revenue authority which subsequently proves to be inaccurate, changes should apply only prospectively

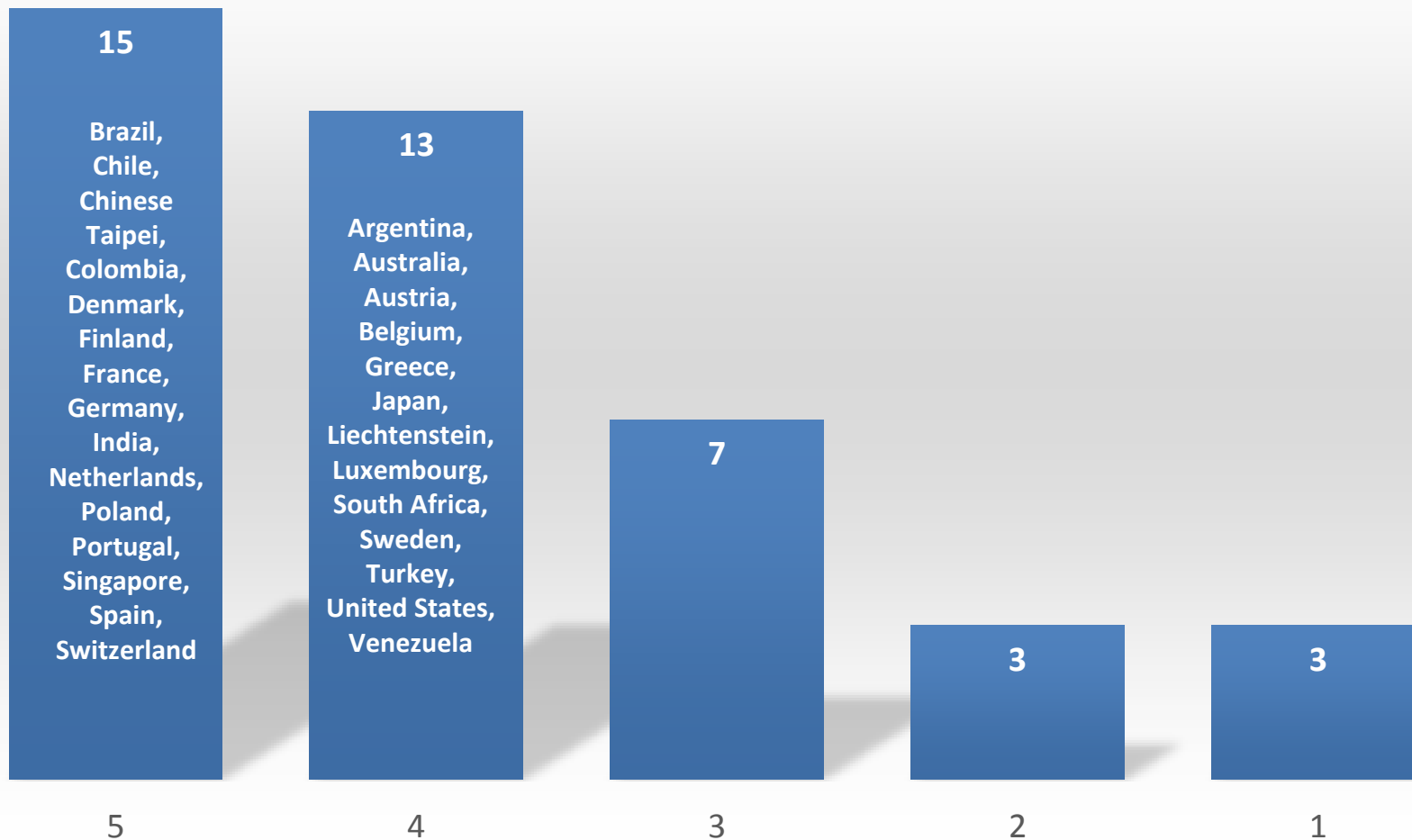
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LOWEST RANKING: 1/5

AVERAGE: 3,83/5



11. Revenue Practice and Guidance



Published guidance

- Publication of revenue practice and guidance in Japan
 - Statutes, Cabinet Orders, Ministerial Orders: published in Government Gazettes, posted on the Ministry of Justice website (e-gov. archives).
 - Commissioner's Directives for interpretation of tax laws: posted on the NTA's website, published by private publishers.
 - Commissioner's Directives for administrative guidance, etc: some are posted on the NTA's website, others can be obtained under the Access to Government Information Act.

+ Published guidance

- Advance Ruling in Japan
 - Every case will be posted on the NTA's website with anonymity 2 months after the ruling (or 1 year after the ruling if the taxpayer so requests for business advantage).
 - The ruling is (probably) legally binding according to the standards established by the Supreme Court's decision (30 June 1987) regarding estoppel (but no litigation so far).

+ 12. Institutional framework for protecting taxpayers' rights



General Report: 12. Institutional framework

Minimal standards

- Adoption of charter of taxpayers' rights

Best practices

- A separate statement of taxpayers' rights under audit should be provided to taxpayers who are audited
- Ombudsman as separate office within tax authority
- Protection at local and national level

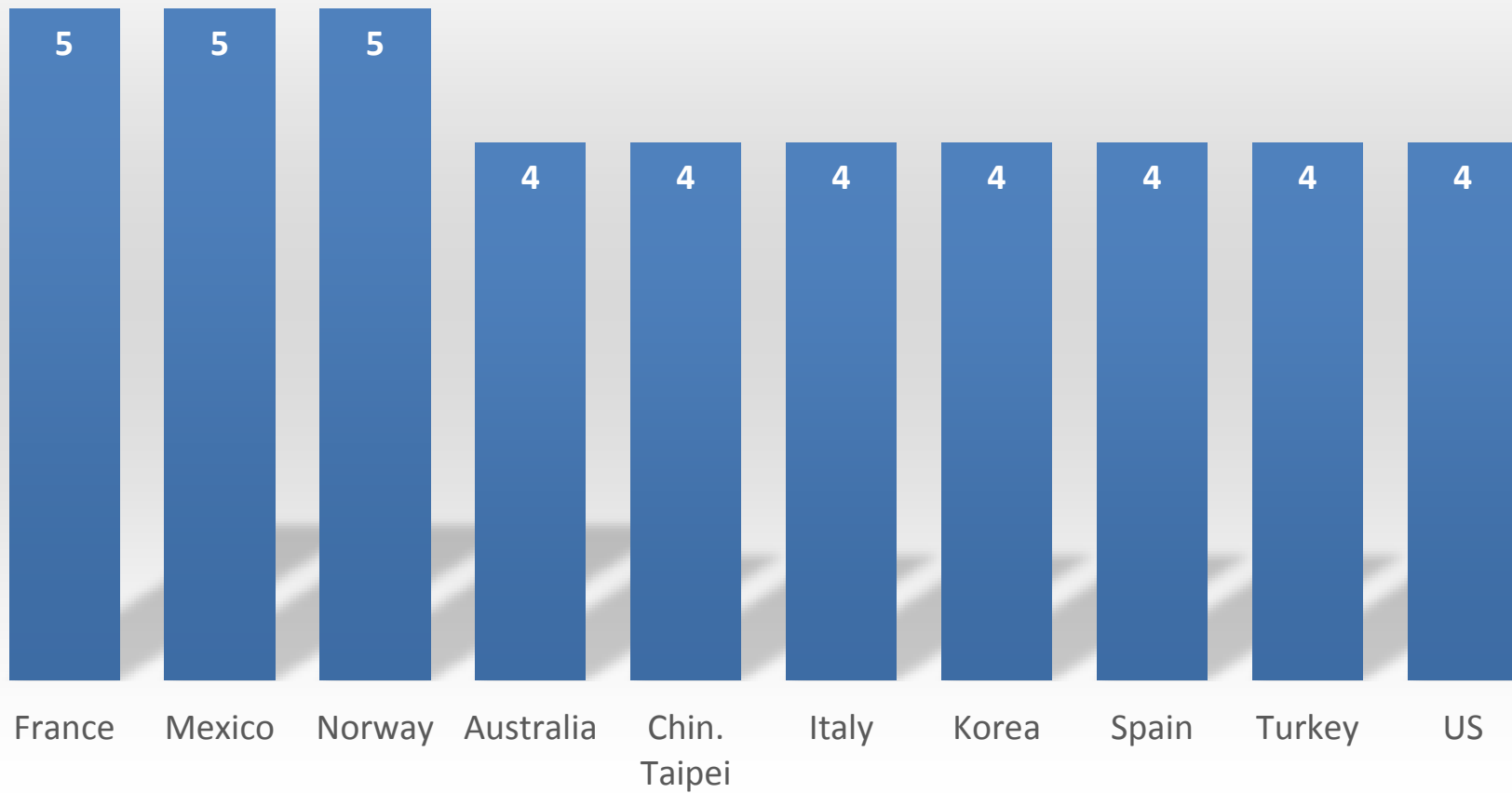
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LOWEST RANKING: 0/5

AVERAGE: 2,29/5



12. Institutional Framework



+ Taxpayers' charter

- Bill of Rights of the Taxpayer („*Código de Defesa do Contribuinte*”) – Project still not approved at Union Level
 - In general, present rights that could be derived from the Constitution
 - Institutional importance: pedagogical element for tax administrations
 - Similar Projects already enacted at State Level (SP, MG, PR, SC): no clear relevance, since taxpayers tend to call constitutional rights directly
- Applicable not only to taxpayers, but also to any person who enters into any sort of relationship with the public authority in its activity of levying taxes and inspecting tax collection, including non-residents



Taxpayers' charter, ombudsperson

- SARS Client Charter 1997
 - Statement of rights and obligations
- SARS Service Charter 2005
 - Levels of service taxpayers entitled to
 - Not updated and not on SARS website
 - Out of sight out of mind?
- Tax Ombud's office created by Tax Administration Act
 - Tax Ombud appointed 1 October 2013



Taxpayers' charter, ombudsperson

- Annual report submitted to Parliament
- Recommendations not binding on SARS
- SARS needs sound reasons to reject recommendation
- Identify systemic issues in tax system
- Tax Ombud can be contacted via email, telephone, fax or personal visit

Ombudsperson

- No taxpayers' charter in Switzerland
 - Protection through Constitution, laws and practice
- Ombudsperson
 - No specialised person
 - No binding decisions but annual report
 - More informal than courts



Taxpayers' charter, ombudsperson

- Taxpayers' charter
 - Japan does not have taxpayers' charter.
 - Taxpayers' rights are provided for in each tax law (as legal rights) and described in „The Mission of the NTA“.
- Taxpayer Support Officer
 - 74 Taxpayer Support Officers, expertized in tax laws and administration, stationed at all (12) Regional Taxation Bureaus and 52 major Tax Offices (out of 524 Tax Offices).
 - They try to solve taxpayers' complaints and give taxpayers advice on review and judicial appeals.



Final remarks

- Restrictive measures against taxpayers' fundamental rights should always be subject to judicial ex ante appreciation (including access to bank information)
- It is not proportional to let the tax authority decide whether the taxpayers' rights shall be restricted, since it has an immediate interest in such decision
- Ex post judicial appreciation is not viable, since the status quo ante cannot be achieved in case the fundamental right should not have been restricted
- Legislation has proven important to ensure fundamental rights granted by the Constitution and reduce the need for an appeal to the judiciary



Final remarks

- Tax Ombud is proving to be effective
- Updated Taxpayers' Charter needs to be published
- Remaining challenges in South Africa
 - Award of damages to aggrieved taxpayers
 - Power to suspend actions of SARS



Final remarks

- Relatively good protection in Switzerland and other European countries
- Always room for improvements
- Constant awareness for taxpayers' rights is necessary



Final remarks

- It is important to learn other countries' laws and practices in order to improve each country's system.
- Tensions always exist between protecting taxpayers' rights and realising fair taxation (fair assessment) under each country's given legal system. Reasonable and sound balances should be taken.



Conclusion

+ Concluding remarks

- *Ubi jus, ibi remedium*
- Stronger powers to tax authorities, stronger protection of taxpayers' rights
- Timely and effective *ex ante* remedies
- Compensation for damages *ex post* only a second best
- Global tax coordination => global framework for effective protection of taxpayers' rights
 - National procedures should be impartially monitored (technical peer-review) against minimal standards and best practices

The way ahead

- IFA branches should take the summary of minimal standards and best practices to tax authorities and consider to interrogate them when minimal standards are not met
- IFA Basel as starting point of an IFA monitoring group with branch reporters, who check developments in the effective protection of taxpayers' rights against the IFA 2015 standard of best practices



Conclusion

- Major challenges ahead: „Big Data“, „Globalized Revenue Authority“ (Exchange of Information), BEPS
- No antagonism between tax authorities being efficient and taxpayer's rights being respected
- The Protection of Taxpayers' Rights deserves to remain in the focus
- E-mail: academic@ibfd.org



Thank you