

## KEY FINANCIAL SECRECY INDICATORS

### Key Financial Secrecy Indicator 14: Tax Court Secrecy

#### What is measured?

This indicator assesses the openness of a jurisdiction's judicial system in tax matters by analysing two relevant aspects.

1. **Regarding the openness of court proceedings/lawsuits/trials:** it assesses for a) criminal and b) civil/administrative tax matters<sup>1</sup>, whether the public always has the right to attend the full proceedings and cannot be ordered to leave the court room even if a party invokes tax secrecy, bank secrecy, professional secrecy or comparable confidentiality rules. **Acceptable justifications** for exceptions for the principle of public access may include (subject to contextual analysis): against morale, involvement of a minor, public order, national security, administration of justice, business or trade secrets or exceptional circumstances. **Unacceptable exceptions** include: discretion by the judge, the taxpayer requesting privacy or the involvement of, for example, a trustee.
2. **Regarding the public online availability of verdicts/judgements/sentences:** it assesses for a) criminal and b) civil/administrative tax matters, whether all written judgments are published online for free or at a cost of no more than EUR/GBP/USD 10. Only personal details which are not relevant for assessing the tax matter in question, such as personal addresses and account numbers, could be redacted. Tax Secrecy, bank secrecy, professional secrecy or comparable confidentiality rules are not acceptable as the basis for exceptions from public disclosure.

If court proceedings are openly accessible, this indicator's secrecy score is reduced by 25% for each criminal and civil tax matters. By the same token, the secrecy score will be reduced by 25% if all judgments in criminal tax are published online for free; and likewise by another 25% for judgements in civil tax matters. However, the score is reduced only by 12.5% (instead of 25%) if judgments are available online only against a cost of no more than EUR/GBP/USD 10.

Thus, for instance, a jurisdiction with public and comprehensively accessible criminal and civil tax proceedings, will have a secrecy score of 0% if the judgements/verdicts resulting from those proceedings are published online for free. The jurisdiction would have a 25% secrecy score if the judgements resulting from both criminal and civil tax proceedings are available online against a cost of up to 10 EUR/GBP/USD each.

The information for this indicator has been drawn from the following sources: a) results of the TJN-Survey 2017; b) Thomson Reuters Practical Law [Tax Litigation Global Guide](#)<sup>2</sup> or similar online sources; c) in certain cases we searched for and analysed the local legislation of jurisdictions to find out whether there are any limitations to public access embedded in the laws; and d) in cases where the above sources indicated that written judgments of both criminal and civil tax court cases are published online, the corresponding local court website or other government agencies' websites were consulted to ensure that both criminal and civil tax judgments are effectively available and that technical problems do not prevent access to information.


If we were unable to find supporting evidence (either any (i) academic article or source, such as Thomson Reuters Practical Law [Tax Litigation Global Guide](#), or (ii) a Law plus Section/Article/Paragraph), we concluded the answer to be "unknown", and described the situation in a note (e.g. while the Ministry of Finance said X, we could not verify this).

For practical purposes, we consider court judgments to be publicly available online when it is not necessary to establish complex payment or user-registration arrangements for accessing the data (e.g. registration of bank account, requirement of a local identification number, or sending a request by post).<sup>3</sup>

Accordingly, we have split this indicator into two components. The overall secrecy score for this indicator is calculated by simply addition of the secrecy scores of each of these components. The secrecy scoring matrix is shown in Table 1 (below), with full details of the assessment logic given in Table 3 (at the end of the document).

**Table 1: Secrecy Scoring Matrix KFSI 14**

Regulation	Secrecy Score Assessment	
[Secrecy Score: 100% = full secrecy; 0% = full transparency]		
<b>Component 1: Public access to tax court proceedings (50%)</b>		
<p><u>No or restricted access to <b>both</b> criminal and civil tax proceedings:</u></p> <p>For both criminal and civil tax proceedings, the public cannot access the courtroom or it may be ordered to leave by invoking tax secrecy, bank secrecy, professional secrecy or comparable confidentiality rules.</p>	50%	
<p><u>No or restricted access to <b>either</b> criminal <b>or</b> civil tax proceedings:</u></p> <p>While criminal (or civil) tax proceedings are generally public; civil (or criminal) tax proceedings are not public, or the audience may be ordered to leave by invoking tax secrecy, bank secrecy, professional secrecy or comparable confidentiality rules.</p>	25%	
<p><u>Public access to both criminal and civil tax proceedings:</u></p> <p>Criminal and civil tax proceedings are public, and the audience may not be ordered to leave by invoking tax secrecy, professional secrecy, or comparable confidentiality rules.</p>	0	
<b>Component 2: Online publication of tax judgements/verdicts (50%)</b>		
<u>Criminal tax judgements/verdicts</u>	Not available online	25%
	Available up to 10 EUR/GBP/USD	12,5%
	Available online for free	0%
<u>Civil tax judgements/verdicts</u>	Not available online	25%
	Available up to 10 EUR/GBP/USD	12,5%
	Available online for free	0%

All underlying data can be accessed freely in the [FSI database](#) . To see the sources we are using for particular jurisdictions please consult the assessment logic in Table 3 at the end of this document and search for the corresponding info IDs (**IDs 407 to 410**) in the database report of the respective jurisdiction.

## Why is this important?

The public's right to open courts is well established in most countries, regardless of whether the legal system is rooted in common law or civil law (Bocock 2014: 6).<sup>4</sup> Open court proceedings and public availability of verdicts are often considered to be important pillars of a modern democratic state, directly derived from a jurisdiction's constitution and/or the principle of the rule of law, on which the legitimacy of the entire judicial process hinges.

The "Rule of Law Department" of the Organization for Security and Co-operation in Europe (OSCE) makes a direct connection between the Universal Declaration of Human Rights and public access to court judgements:

"The obligation of states to 'make public' the decisions of their courts is found within the provisions on 'the right to a fair trial'. This right stems from Article 10 of the Universal Declaration of Human Rights (1948) and has been elaborated and set down in binding form in the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms (ECHR)." [\(p.5\)](#)<sup>5</sup>

Governments and private actors alike abide by court decisions at least in part because the openness of the process allows the public to monitor if it meets requirements of procedural justice. These requirements include the transparency of the process, thereby building confidence in the non-arbitrary application of the law. The transparency of the process safeguards the independence and impartiality of courts.

Closely linked to the fundamental human rights of the freedom of expression and freedom of the press,<sup>6</sup> open courts not only allow the scrutiny of judicial decisions, but also are a prerequisite for the accountability of governments (in the form of the public prosecutor and/or tax administration).<sup>7</sup> Furthermore, open courts are essential in ensuring compliance with both the letter of the law and its spirit.<sup>8</sup> Thus, open courts are an important element in protecting the integrity of the entire judicial system and of the administration.

If any exceptions are allowed for certain types of civil and/or criminal tax matters, governments and private sector actors may misuse these exceptions for sweetheart deals, questionable out of court settlements or political vendettas. Generally speaking, the possibility of allowing exceptions to public access to proceedings may invite pressures by powerful lobbyists and/or defendants on judges not to grant access to court proceedings or verdicts in order to avoid public scrutiny.

While specific exceptions to this open court principle are widely seen to be legitimate with respect to "the protection of children or victims of sexual crimes" (Bocock 2014: 7), the holding of closed sessions of a court ('in camera') should be restricted to such specific situations.

Nonetheless, in practice in some countries tax proceedings are typically conducted behind closed doors and/or tax judgements are not published. The justification given for non-disclosure or exclusion of the public sometimes refers to privacy arguments or official 'tax secrecy' legislation which sometimes has the power to override the open court principle.

This practice creates fundamental conflicts with the rule of law. While all tax proceedings should be public, to address data protection concerns, specific personal data of taxpayers (dates of birth, addresses, names of children, bank account numbers, etc.) could be redacted from verdicts, and their reporting could be restricted. These details are not required for judicial decision making and hence removing them does not conflict with the open court principle.<sup>9</sup> This approach balances the taxpayer's right to privacy over their personal affairs and to informational self-determination, and the public's right to transparent judicial proceedings.

Preventing public access to tax court judgments may result in important court decisions that have an impact on the public's revenue, being made without the public's knowledge. This denies the public the information required to exercise the right to protest or criticise decisions, to determine the need for a policy change, or to engage the court through an "amicus curiae" process. In some jurisdictions, all "important" or "relevant" court verdicts are said to be chosen by judges or others to be made public. However, this selection process of relevant cases for the public inevitably is subjective and thus rife with risk that cases considered to be relevant by some parts of the public remain out of reach of legitimate scrutiny.

Furthermore, court adjudications usually provide an essential part of the application of the laws by setting precedent and therefore provide clarity among citizens about the right way to interpret the law. Furthermore, they are often an important driver of policy changes and legislative action by exposing gaps and loopholes in, or unintended consequences of, laws and regulations. Not disclosing judgements therefore cuts off an important feedback loop for policy- and lawmakers, and may lead over time to flawed legislation as well as to a low deterrence effect and impaired law enforcement by prosecutorial authorities and tax administration's failure to collect taxes as intended by parliament. Without public access to all tax verdicts, meaningful empirical research about the outcomes of tax trials, especially with respect to large taxpayers, is near impossible. Consequently, sweetheart deals at court and undue political interference in the administration can neither be detected nor ruled out.

The secrecy emanating from a lack of open tax proceedings and verdicts shields both domestic and non-resident actors who are engaging in domestic economic activity and seek to aggressively minimise their tax payments from public scrutiny. For example, any non-resident individual or multinational company fearing spontaneous tax information exchange with home jurisdiction authorities may feel reassured to invest in jurisdictions with strict tax secrecy provisions that allow them to intervene to postpone or even frustrate that exchange at court in silence.

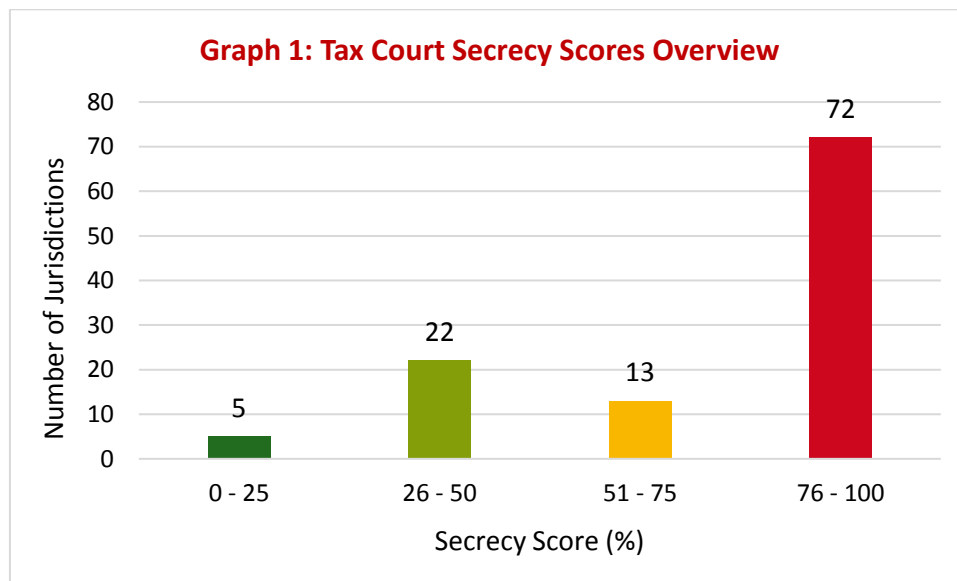
Similarly, in the context of tax wars (or "tax competition") non-resident individuals and/or companies may be given special tax deals by local administrations in the race to the bottom which may not withstand legal and/or public scrutiny. While limited access to information about special tax deals brokered between taxpayers and the tax administration is a problem separate from the issue of tax court secrecy (and is dealt with [in KFSI 9<sup>10</sup>](#)), the latter can act as an important backstop for the former in case for some reason a non-resident is taken to court.

Therefore, without public scrutiny, the risk of (undetected) biases by tax administrations and courts in favour of non-resident investors increases.

The reason why we place emphasis on open, unpaid data access lies in the enhanced utility in open data environments when data is available free of cost. If relevant data can only be accessed by paying a fee, it can be prohibitively expensive to import this data into an open data environment or to access sufficient cases for research/media purposes, even when the cost per record is low. This creates substantial hurdles for making comparisons between jurisdictions and new creative data usages.<sup>11</sup>

All underlying data can be accessed freely in the [FSI database](#)  (IDs 407 to 410).

## Results Overview



# KFSI 14: TAX COURT SECRECY

**Table 2: Tax Court Secrecy Scores**

Country Name	Score	ISO	Country Name	Score	ISO
Andorra	1	AD	Lebanon	0,75	LB
Anguilla	1	AI	Liberia	1	LR
Antigua & Barbuda	1	AG	Liechtenstein	1	LI
Aruba	1	AW	Lithuania	0	LT
Australia	0,5	AU	Luxembourg	0,5	LU
Austria	1	AT	Macao	0,5	MO
Bahamas	1	BS	Macedonia	0,5	MK
Bahrain	0,75	BH	Malaysia (Labuan)	1	MY
Barbados	1	BB	Maldives	1	MV
Belgium	0,5	BE	Malta	0,5	MT
Belize	1	BZ	Marshall Islands	1	MH
Bermuda	1	BM	Mauritius	1	MU
Bolivia	1	BO	Mexico	1	MX
Botswana	1	BW	Monaco	1	MC
Brazil	0	BR	Montenegro	0,5	ME
British Virgin Islands	1	VG	Montserrat	1	MS
Brunei	1	BN	Nauru	1	NR
Bulgaria	1	BG	Netherlands	0,75	NL
Canada	0,5	CA	New Zealand	0,75	NZ
Cayman Islands	1	KY	Norway	1	NO
Chile	1	CL	Panama	0,75	PA
China	1	CN	Paraguay	1	PY
Cook Islands	1	CK	Philippines	1	PH
Costa Rica	1	CR	Poland	1	PL
Croatia	1	HR	Portugal (Madeira)	0,5	PT
Curacao	1	CW	Puerto Rico	1	PR
Cyprus	0,5	CY	Romania	1	RO
Czech Republic	1	CZ	Russia	1	RU
Denmark	1	DK	Samoa	1	WS
Dominica	0,75	DM	San Marino	1	SM
Dominican Republic	0,25	DO	Saudi Arabia	1	SA
Estonia	0,5	EE	Seychelles	1	SC
Finland	1	FI	Singapore	0,75	SG
France	0,75	FR	Slovakia	1	SK
Gambia	1	GM	Slovenia	0,5	SI
Germany	1	DE	South Africa	0,5	ZA
Ghana	0,75	GH	Spain	0,5	ES
Gibraltar	0,75	GI	St Kitts and Nevis	1	KN
Greece	0,5	GR	St Lucia	1	LC
Grenada	1	GD	St Vincent & Grenadines	1	VC
Guatemala	1	GT	Sweden	1	SE
Guernsey	1	GG	Switzerland	0,75	CH
Hong Kong	1	HK	Taiwan	0,25	TW
Hungary	1	HU	Tanzania	1	TZ
Iceland	1	IS	Thailand	1	TH
India	0,5	IN	Trinidad & Tobago	1	TT
Indonesia	0,5	ID	Turkey	0,75	TR
Ireland	0,5	IE	Turks & Caicos Islands	1	TC
Isle of Man	1	IM	Ukraine	1	UA
Israel	1	IL	United Arab Emirates (Dubai)	1	AE
Italy	0,75	IT	United Kingdom	0,5	GB
Japan	0,5	JP	Uruguay	1	UY
Jersey	1	JE	US Virgin Islands	1	VI
Kenya	0,5	KE	USA	0,25	US
Korea	0,5	KR	Vanuatu	1	VU
Latvia	1	LV	Venezuela	1	VE

Moderately Secretive 0 – 0,40	Secrecy Score 0,41 – 0,50	Secrecy Score 0,51 – 0,60	Secrecy Score 0,61 – 0,70	Secrecy Score 0,71 – 0,80	Secrecy Score 0,81 – 0,90	Extremely Secretive 0,91 – 1
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**Table 3: Assessment Logic**

Info_ID	Text_Info_ID	Answers (Codes applicable for all questions: -2: Unknown; -3: Not Applicable)	Valuation % Secrecy
407	Are all court proceedings on criminal tax matters openly accessible to the public, and the public cannot be ordered to leave the court room by invoking tax secrecy, bank secrecy, professional secrecy or comparable confidentiality rules?	Y/N	If answer Y: 0%; otherwise 25%.
408	Are all court proceedings on civil tax matters openly accessible to the public, and the public cannot be ordered to leave the court room by invoking tax secrecy, bank secrecy, professional secrecy or comparable confidentiality rules?	Y/N	If answer Y: 0%; otherwise 25%.
409	Is the full text of judgements / verdicts issued by criminal tax courts published online for free?	0: No, full text of verdicts is not always online (up to 10€/US\$); 1: Yes, full text of verdicts is always online but only at a cost of up to 10€/US\$; 2: Yes, full text of verdicts is always online for free.	If answer 2: 0%; 1: 12.5%; 0: 25%
410	Is the full text of judgements / verdicts issued by civil tax courts published online for free?	0: No, full text of verdicts is not always online (up to 10€/US\$); 1: Yes, full text of verdicts is always online but only at a cost of up to 10€/US\$; 2: Yes, full text of verdicts is always online for free.	If answer 2: 0%; 1: 12.5%; 0: 25%



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<sup>1</sup> Civil and administrative tax matters are treated synonymously throughout this document. They refer to any dispute between a taxpayer and the tax administration which is not governed by criminal law/procedures.

<sup>2</sup>

[https://uk.practicallaw.thomsonreuters.com/Browse/Home/International/TaxLitigationGlobalGuide?transitionType=Default&contextData=\(sc.Default\)&navId=1DAC9212383A024E61CC2AB0DFB085D1&comp=pluk](https://uk.practicallaw.thomsonreuters.com/Browse/Home/International/TaxLitigationGlobalGuide?transitionType=Default&contextData=(sc.Default)&navId=1DAC9212383A024E61CC2AB0DFB085D1&comp=pluk); 18.12.2017.

<sup>3</sup> We consider that for something to be truly available 'on public record' prohibitive cost constraints must not exist, be they financial or in terms of time lost or unnecessary inconvenience caused.

<sup>4</sup> Bocock, Randall S.: Introduction of Topics and Privacy Protection of Taxpayers, presented at: The Court of Canada: 5th International Assembly of Tax Judges Protection of the Taxpayer in Court Panel Presentation, in: [http://www.iatj.net/congresses/documents/Protection\\_Bocock.pdf](http://www.iatj.net/congresses/documents/Protection_Bocock.pdf); 18.1.2017.

<sup>5</sup> Organisation for Security and Co-operation in Europe 2008: Access to Court Decisions. A Legal Analysis of Relevant International and National Provisions, in: [http://www.right2info.org/resources/publications/publications/OSCE\\_AnalysisAccesstoCourtDecision\\_s17092008.pdf](http://www.right2info.org/resources/publications/publications/OSCE_AnalysisAccesstoCourtDecision_s17092008.pdf); 19.12.2017.

<sup>6</sup> Universal Declaration of Human Rights, (10 December 1948), at: [http://www.ohchr.org/EN/UDHR/Documents/UDHR\\_Translations/eng.pdf](http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf); 18.1.2017.

<sup>7</sup> An example of relevant research being enabled through tax court transparency is the study "Corporate Shams" cited in the following article: [http://articles.chicagotribune.com/2012-04-05/news/sns-rt-usa-taxcorporations-court12e8f40g1-20120405\\_1\\_tax-code-tax-transaction-cases-study](http://articles.chicagotribune.com/2012-04-05/news/sns-rt-usa-taxcorporations-court12e8f40g1-20120405_1_tax-code-tax-transaction-cases-study) (19.12.2017). Another example for the potential impact of open tax court judgements on policy decisions and public trust in government are changes at the US tax administration IRS in response to large scale tax avoidance cases, as reported here: <https://www.forbes.com/sites/kellyphillipserb/2012/03/27/irs-brings-a-team-to-crush-transfer-pricing-abuse/#5b167cc96945>; 19.12.2017.

<sup>8</sup> Commonwealth Human Rights Initiative, 'Our rights our information' (2007), in: [http://www.humanrightsinitiative.org/publications/rti/our\\_rights\\_our\\_information.pdf](http://www.humanrightsinitiative.org/publications/rti/our_rights_our_information.pdf); 18.1.2017.

<sup>9</sup> Sujoy Chatterjee 2014: 'Balancing privacy and the open court principle in family law: does de-identifying case law protect anonymity?', in: Dalhousie Journal of Legal Studies, (2014) Vol.23, p.91, in: <https://ojs.library.dal.ca/djls/article/download/4754/4286>; 18.1.2017.

<sup>10</sup> <http://www.financialsecrecyindex.com/PDF/9-Corporate-Tax-Disclosure.pdf>

<sup>11</sup> For more information about this see <http://opencorporates.com/>; 28.11.2016.