

Haven Indicator 14: Tax court secrecy

What is measured?

This indicator assesses the openness of a jurisdiction's judicial system in tax matters by analysing the public online availability of verdicts, judgements and sentences. It assesses separately the availability for criminal and civil/administrative tax matters and whether all written judgments are published online for free or at a cost of no more than €10/US\$10/£10.¹ For a judgement to be considered published, only personal details which are not relevant for assessing the tax matter in question, such as personal addresses and account numbers, can be redacted. Tax secrecy, bank secrecy, professional secrecy or comparable confidentiality rules are not acceptable as the basis for exceptions from public disclosure. This component also assesses if the names of the parties are anonymised.

If verdicts, judgements and sentences are published online for free, this indicator's haven score is reduced by 50 points for each criminal and civil tax matters. However, the score is reduced only by 25 points (instead of 50 points) if judgments are available online only with a fee of no more than €10/US\$10/£10 or if judgments are published online for free but in anonymised form.

Thus, for instance, a jurisdiction will have a zero haven score if all the judgements and verdicts resulting from criminal and civil tax proceedings are published online for free and not anonymised. The jurisdiction would have a 50 points haven score if the judgements resulting from both criminal and civil tax proceedings are available online for a fee of up to €10/US\$10/£10 each or if judgements are available online for free, but at least some of them are in an anonymised form.

The information for this indicator has been drawn from the jurisdictions' judiciary website or other government agencies' websites and from the results of the Tax Justice Network's 2020 Survey and earlier surveys.² Government websites were consulted to ensure that both criminal and civil tax judgments are effectively available with full text and that technical problems do not prevent access to information.

The answer has been left as "unknown" if we were unable to find supporting evidence to ensure that all judgments are available online in full. That is, if we were not able to download a sample of judgments or if it appeared that only a few judgments were published but not all of them, as explained in detail in the accompanied note.

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

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bank account, requirement of a local identification number or sending a request by post). The haven scoring matrix is shown in Table 14.1 (on the following page), with full details of the assessment logic given in Table 14.3.

Table 14.1: Scoring Matrix Haven Indicator 14

Regulation		Haven Score [100 points = maximum risk; 0 points = minimum risk]
<u>Criminal tax judgements/verdicts</u>	Not available online	50
	Always available up to €10/US\$10/£10, or available for free but in anonymised form	25
	Always available online for free (not anonymised)	0
<u>Civil tax judgements/verdicts</u>	Not available online	50
	Always available up to €10/US\$10/£10, or available for free but in anonymised form	25
	Always available online for free (not anonymised)	0

All underlying data can be accessed in the Corporate Tax Haven Index [database](#).³ To see the sources we are using for particular jurisdictions please consult the assessment logic in Table 14.3 and search for the corresponding info IDs (IDs 409-410) in the database report of the respective jurisdiction.

Why is it 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.⁴ The public availability of verdicts is often considered to be an important pillar 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.

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. As such, it prevents from 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 with the court through an "amicus curiae" process. In some jurisdictions, only 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 is inevitably 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 precedents and therefore provide clarity among citizens about the right way to interpret the law. They are also 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 law-makers. It 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; and sweetheart deals at court and undue political interference in the administration can neither be detected nor ruled out.

The "Rule of Law Department" of the Organisation 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).⁵

Nonetheless, in practice, in some countries tax judgements are not published. Privacy arguments or official 'tax secrecy' legislation, which may have the power to override the open court principle, are sometimes used as justification for the exclusion of the public or non-disclosure of verdicts. This practice creates fundamental conflicts with the rule of law. While all tax verdicts 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.⁶ 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. Nonetheless, we consider that public availability of the names of the parties (plaintiff, defendant) is relevant for contextual research and media purposes, to ensure accountability. While anonymisation in exceptional circumstances, such as to protect victims' lives or minors (such as in Estonia⁷ and Taiwan⁸) is acceptable, anonymisation of all or most decisions may create obstacles for the process of researching and analysing decisions.

The secrecy emanating from not publishing tax judgements and verdicts shields both domestic and non-resident actors involved in domestic economic activity who seek to aggressively minimise their tax payments



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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 companies may be given special tax deals by local administrations in the race to the bottom which may not withstand legal or public scrutiny. While limited access to information about special tax deals brokered between taxpayers and the tax administration is a different problem to tax court secrecy (and is dealt with in [haven indicator 12](#)), 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.⁹

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Results Overview

Figure 14.1: Availability of Criminal Tax Judgements Online

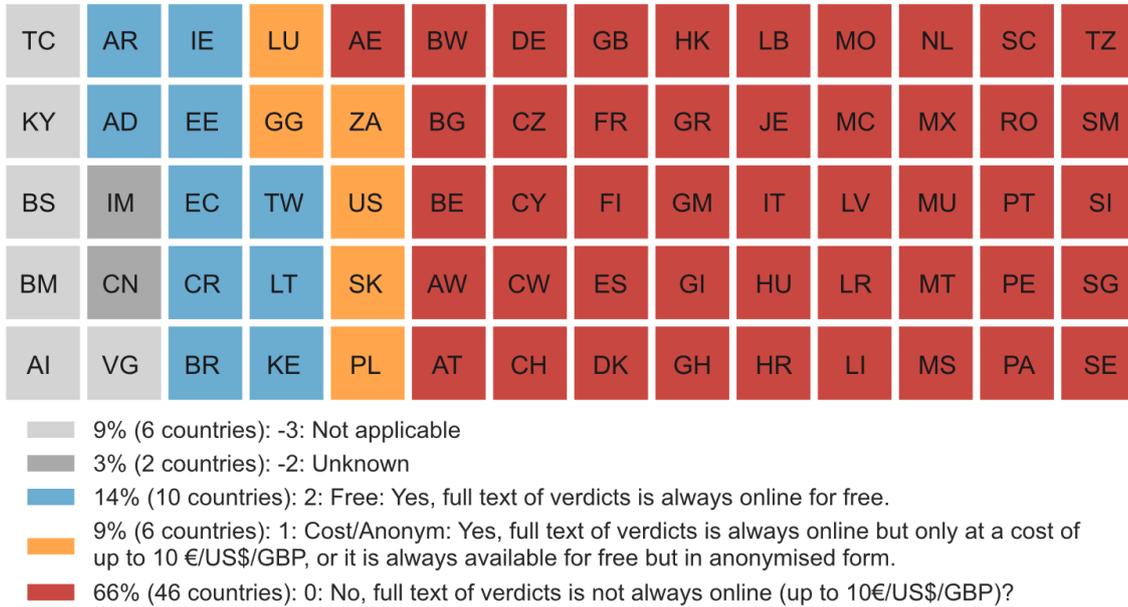
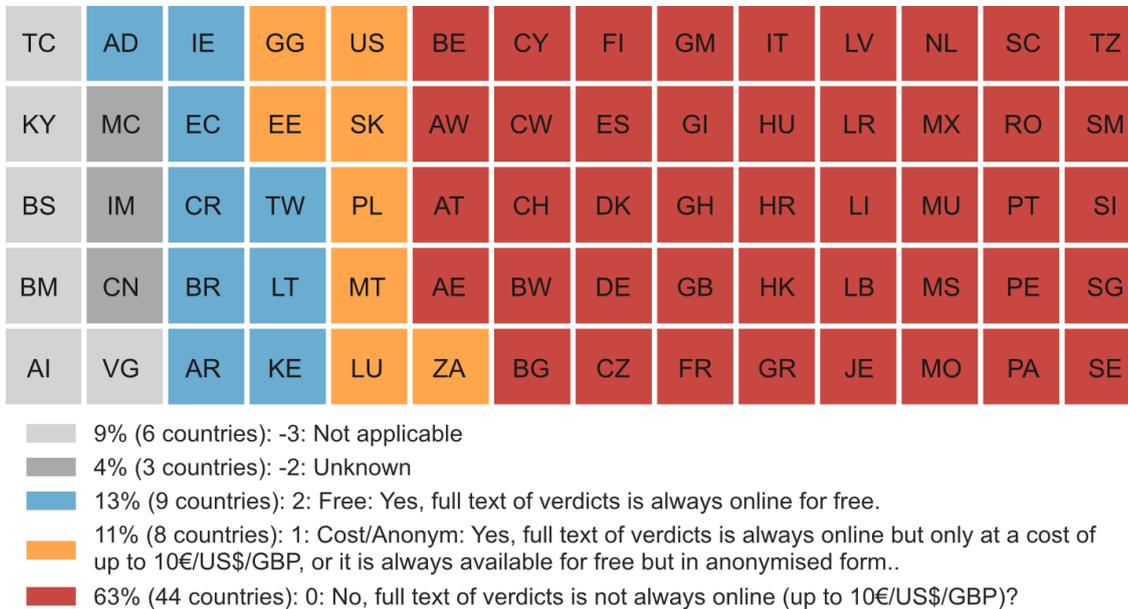


Figure 14.2: Availability of Civil Tax Judgements Online



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Table 14.2: Tax Court Secrecy - Haven Indicator Scores

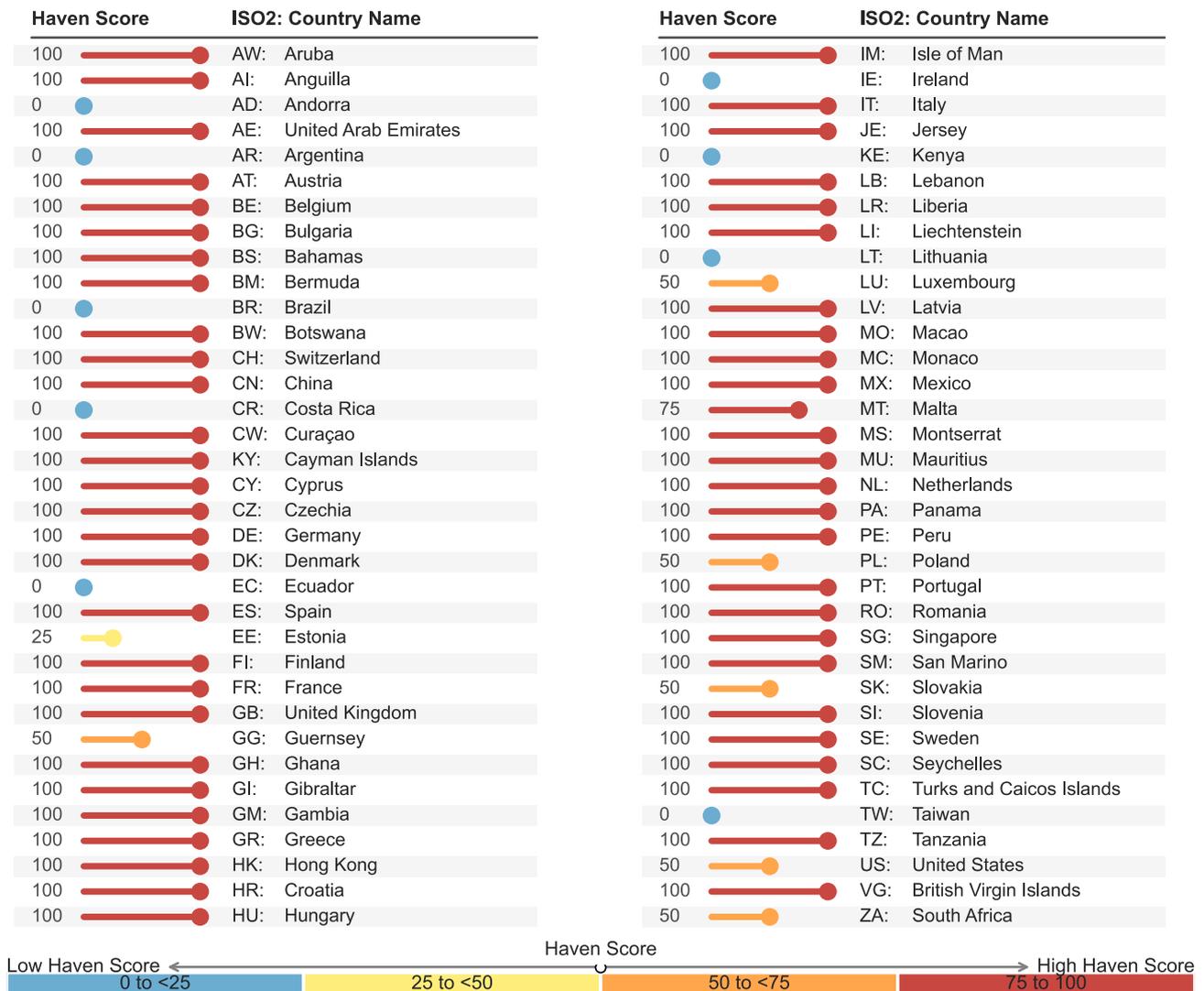


Table 14.3: Assessment Logic

Info_ID	Text_Info_ID	Answers (Codes applicable for all questions: -2: Unknown; -3: Not Applicable)	Valuation Haven Score
409	Is the full text of judgements / verdicts issued by criminal tax courts published online for free, or for a cost of up to 10 €/US\$/GBP?	0: No, full text of verdicts is not always online (up to 10€/US\$/GBP); 1: COST/ANONYM: Yes, full text of verdicts is always online but only at a cost of up to 10 €/US\$/GBP or it is always available for free but in anonymised form.; 2: FREE: Yes, full text of verdicts is always online for free.	0: 50 1: 25 2: 0
410	Is the full text of judgements / verdicts issued by civil tax courts published online for free, or for a cost of up to 10 €/US\$/GBP?	0: No, full text of verdicts is not always online (up to 10€/US\$/GBP); 1: COST/ANONYM: Yes, full text of verdicts is always online but only at a cost of up to 10 €/US\$/GBP or it is always available for free but in anonymised form.; 2: FREE: Yes, full text of verdicts is always online for free.	0: 50 1: 25 2: 0

Reference List

- Chatterjee, Sujoy, 'Balancing Privacy and the Open Court Principle: Does de-Identifying Case Law Protect Anonymity?', *Dalhousie Journal of Legal Studies*, 23 (2014), 91
- 'European E-Justice Portal - Case Law - Estonia', *European E-Justice Portal*, 2021 <https://e-justice.europa.eu/content_member_state_case_law-13-ee-en.do?member=1> [accessed 5 March 2021]
- 'Kõik Kohtumenetlused – Riigi Teataja', *Riigi Teataja*, 2021 <https://www.riigiteataja.ee/kohtulahendid/koik_menetlused.html> [accessed 5 March 2021]
- OpenCorporates, 'Open Company Data Index', 2021 <<http://registries.opencorporates.com/>> [accessed 4 March 2021]
- Organisation for Security and Co-operation in Europe, 'Access to Court Decisions: A Legal Analysis of Relevant International and National Provisions', 2008 <https://www.right2info.org/resources/publications/publications/O SCE_AnalysisAccesstoCourtDecisions17092008.pdf> [accessed 13 March 2019]
- Randall S. Bocoock, 'Protection of the Taxpayer in Court Panel Presentation: Introduction of Topics and Privacy Protection of Taxpayers' (presented at the 5th International Assembly of Tax Judges, Washington, D.C, 2014) <http://www.iatj.net/congresses/documents/Protection_Bocoock.pdf> [accessed 13 March 2019]
- 司法院, '司法院全球資訊網 (Judicial Yuan)', 司法院 (2019) <<https://www.judicial.gov.tw/tw/mp-1.html>> [accessed 5 March 2021]

¹ In the previous edition of the Corporate Tax Haven Index of 2019, the haven score also comprised an analysis of the openness of court proceedings, lawsuits and trials for criminal and civil or administrative tax matters. The assessment considered whether the public had the right to attend the full proceedings of courts and could not be ordered to leave the court room even if a party invoked tax secrecy, bank secrecy, professional secrecy or comparable confidentiality rules. This component of the indicator has been removed because it was often unclear and very time consuming to determine for each country included in the index which exceptions for public access are available and whether or not they can be justified.

² The survey was conducted by the Tax Justice Network in June 2020. The questionnaire sent out to the Ministries of Finance can be viewed here: <http://cthi.taxjustice.net/cthi2021/TJNSurvey2020.pdf> questionnaire sent out to

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<http://cthi.taxjustice.net/cthi2021/TJNSurvey2020.pdf>; and the preliminary assessment of the data assessed by the Tax Justice Network was sent in November 2020 to the Ministries of Finance and can be viewed here: <http://cthi.taxjustice.net/cthi2021/TJNSurvey2020a.pdf>

³ Corporate Tax Haven Index database: <https://cthi.taxjustice.net/cthi21/data-downloads>

⁴ Randall S. Bocoock, 'Protection of the Taxpayer in Court Panel Presentation: Introduction of Topics and Privacy Protection of Taxpayers' (presented at the 5th International Assembly of Tax Judges, Washington, D.C, 2014), 6 <http://www.iatj.net/congresses/documents/Protection_Bocoock.pdf> [accessed 13 March 2019].

⁵ Organisation for Security and Co-operation in Europe, 'Access to Court Decisions: A Legal Analysis of Relevant International and National Provisions', 2008, 5 <https://www.right2info.org/resources/publications/publications/OSCE_AnalysisAccesstoCourtDecisions17092008.pdf> [accessed 13 March 2019].

⁶ Sujoy Chatterjee, 'Balancing Privacy and the Open Court Principle: Does de-Identifying Case Law Protect Anonymity?', *Dalhousie Journal of Legal Studies*, 23 (2014), 91.

⁷ In Estonia, the full text of criminal tax court decisions are available at the website of the State Gazette ('Kõik Kohtumenetlused – Riigi Teataja', *Riigi Teataja*, 2021 <https://www.riigiteataja.ee/kohtulahendid/koik_menetlused.html> [accessed 5 March 2021]). According to the European e-Justice Portal, judgements in criminal matters are published if:

[...] the decision does not contain sensitive personal data or personal data subject to any other restriction on access prescribed by law, or if the judgment replaces names and other personal data with initials or characters, making identification impossible; the decision does not contain information subject to any other restriction on access prescribed by law. ('European E-Justice Portal - Case Law - Estonia', *European E-Justice Portal*, 2021 <https://e-justice.europa.eu/content_member_state_case_law-13-ee-en.do?member=1> [accessed 5 March 2021].)

However, the Ministry of Finance responded to our survey mentioning that criminal decisions must be disclosed as per the Criminal Procedure Code (TJN-Survey 2020). This was confirmed by the Code of Criminal Procedure, §408.1(2):

A published decision shall disclose the name and personal identification code or, in the absence of the personal identification code, date of birth of the accused. The personal identification code and name or date of birth of an accused who is a minor are replaced by initials or characters, except in the case the disclosed decision is at least the third one in which the minor is convicted in a criminal offence. A court shall replace the names and other personal data of other persons with initials or characters. A decision shall not disclose the residence of a person.

⁸ Judicial decisions of national courts and local courts are publicly available for free at the Judicial Yuan's website (司法院, '司法院全球資訊網 (Judicial Yuan)', 司法院 (2019) <<https://www.judicial.gov.tw/tw/mp-1.html>> [accessed 5 March 2021]). The Judicial Yuan's website contains decisions of national courts on all levels and local courts. According to Taiwan's Judicial Yuan, pursuant to Article 83 of the Court Organic Act:

all levels of courts' judgement/verdicts are, in principle, publicly available. Exceptions may apply to the extent that when there are certain special provisions under laws to stipulate restrictions on the judgments to be made



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available to public, those laws may include but not be limited to the Protection of Children and Youth Welfare and Rights Act, the Juvenile Delinquency Act, the Sexual Assault Crime Prevention Act, the Sexual Harassment Prevention Act, the Classified National Security Information Protection Act, and the Intellectual Property Court Organization Act. Judgments may stay unavailable to the public or be published by deleting any related personal information when meeting those special provisions under laws. That is, judgments which were issued by criminal tax courts not meeting the above-mentioned exceptions may be kept publicly available. Correspondence with Taiwan's Judicial Yuan , 08.07.2020

⁹ For more information about this see, OpenCorporates, 'Open Company Data Index', 2021 <<http://registries.opencorporates.com/>> [accessed 4 March 2021].