



UNIVERSITÉ PARIS 1

PANTHÉON SORBONNE

Data Collection in a Digitised Society and Taxpayers' Rights

The French experimentation

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The order of things

✓ **Context:**

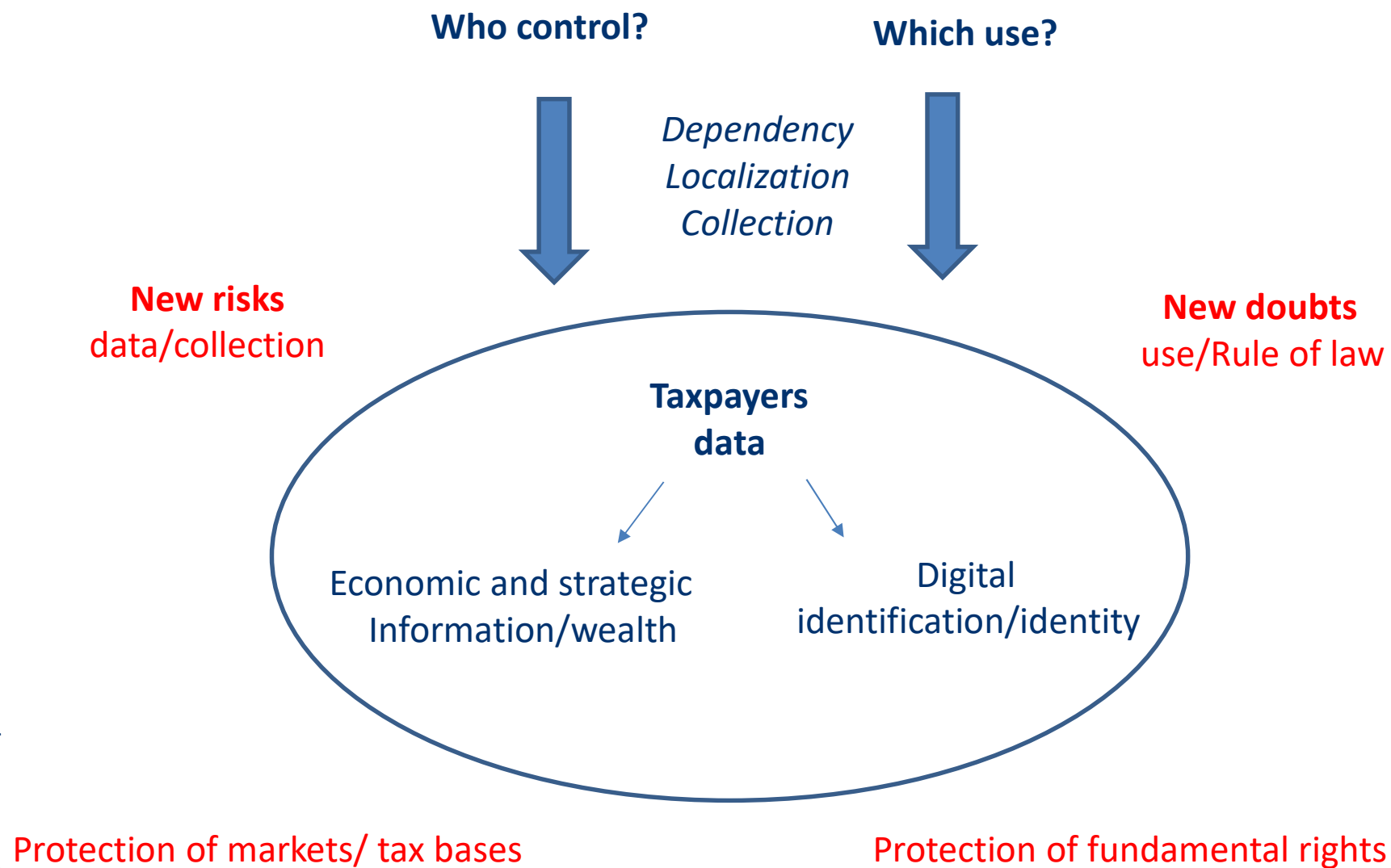
- International: the new data collection age
- Domestic: the state of the law and guarantees

✓ **The French Experimentation:**

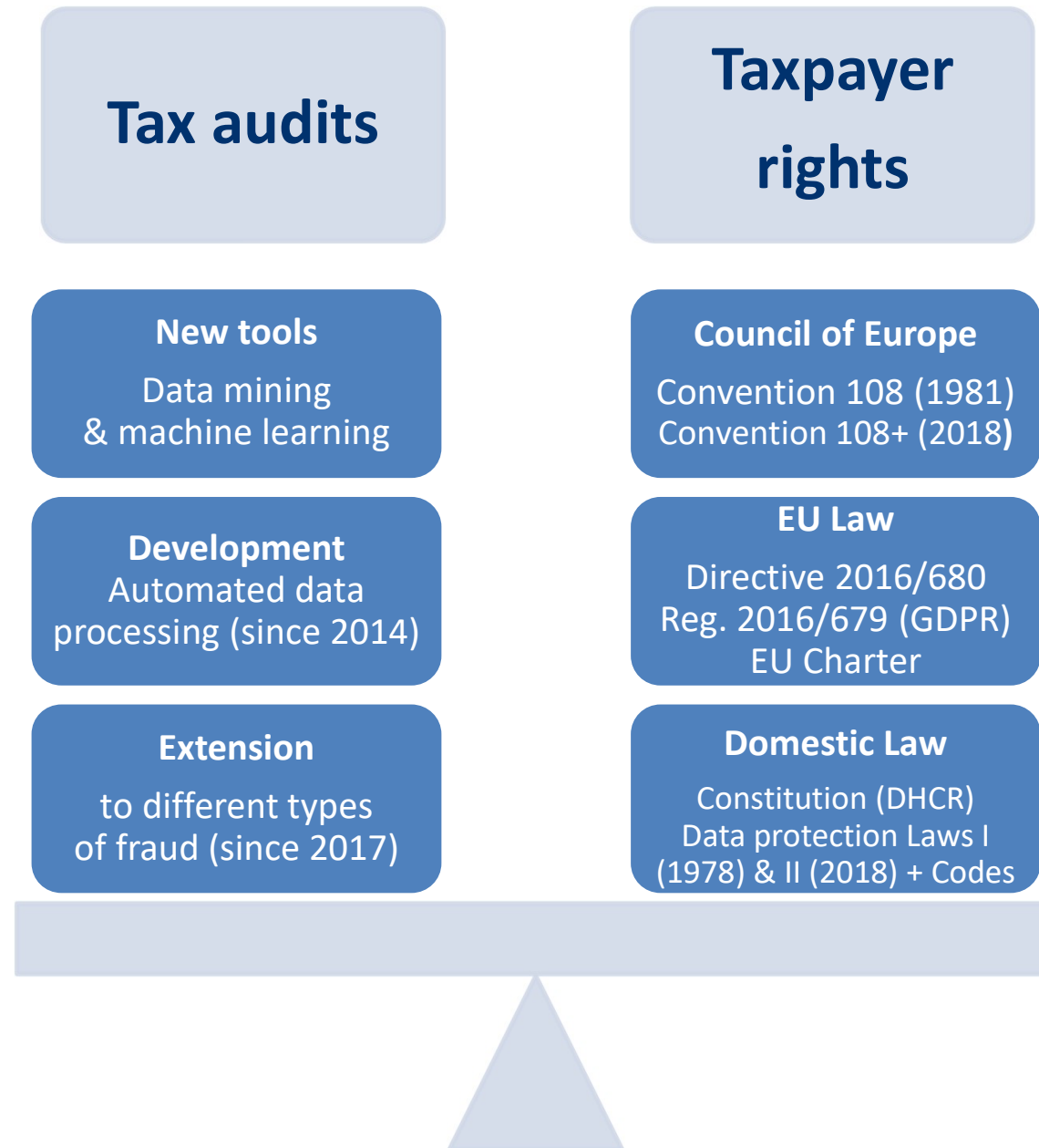
- What and Why ?
- What were the concerns before ?
- How is it designed ?
- What are the current concerns?
- A colossus with feet of clay ?

✓ **Q & A and discussion**

International context: The new data collection age



Domestic context: The state of the law and guarantees



The French experimentation

What ?

Article 154 Financial Law for 2020 (n°2019-1479 28 december 2019):

Experimentation for 3 years by tax and customs administrations to detect fraud through the collection and processing of data published on online platforms

Why ?

Main reasons given by preparatory works:

- 1) Encouraging results from the first automated data processing experiments but limited to the use of certain data, progressively extended since 2014.
- 2) Increasing use of digital tools by the taxpayer, which facilitates fraud.
- 3) Inability of tax and customs authorities to identify tax evaders due to lack of technical means.

Before the experimentation: what were the concerns ?

- **Data protection authority (CNIL):** Deliberation n°2019-114 (12 September 2019)
Advisory opinion on the project of article
- ✓ **Warning on the change of model/method:** a shift from a targeted data processing following a pre-existing suspicion about a person, to a general/prior collection of data in order to target subsequent control actions.
- ✓ **Balance:** between an objective of constitutional value (the fight against tax fraud) and the rights and freedoms of the taxpayer (right of privacy, freedom of opinion and expression, protection of data...) + respect of the proportionality principle.
- ✓ **Main recommendations :**
 1. Offences covered.
 2. Platform operators and the nature of processing.
 3. The nature of data collected.
 4. Data retention period.

Before the experimentation: what were the concerns ?

- **Parliament:** Opinion of the Law Commission n°2368 (30 October 2019) on the project
 - ✓ **Unprecedented question:** no link with the missions of the Law Commission BUT justified because of its fundamental implications.
 - ✓ **Same findings than CNIL:** a change of model/method in the fight against fraud and some questions on the proportionality of the measure.
 - ✓ **Recommendations:** proportionality, scope of the platforms targeted, use of subcontractors, evaluation and precision of the content in a decree.

Art. 154 of the Financial law for 2020 (n°2019-1479 - 28 December 2019)

✓ **A short article, rewritten to take account of the CNIL/Parliament opinions**

§1: **Scope** of the experimentation

§2: Necessity of an **Impact study** relating to the protection of personal data forwarded to the data protection authority (CNIL)

§3: **First evaluation** no later than 18 months before its end forwarded to the Parliament and to the CNIL + **Final assessment** 6 months before its end forwarded to the Parliament and to the CNIL

Scope - Art. 154 §1 of the Financial law for 2020

- ✓ **Duration:** 3 years

- ✓ **Specific breaches and offences:** Failure or delay on reporting and insufficient reporting
 - Tax Code: tax domicile rules; tax penalties and criminal sanctions
 - Customs Code: Customs offences of 1st and 2nd degree

- ✓ **Collect & Use:** computerized and automated processing of contents, with no facial recognition, “freely” accessible on the websites of online platform operators and “clearly” made public by their users.

- ✓ **Guarantees:** destruction of “*sensitive*” or non related data, retention of “*strictly necessary*” data for a maximum period of time, limitation of subcontracting, authorized agents, enforceability only within a tax audit and right of access. Only the right to object is limited.

Decree laying down the modalities of implementation (n°2021-148 - 11 February 2021)

- ✓ **Purpose:** To respect the principle of proportionality and ensure that personal data processed are “adequate, relevant and limited to what is strictly necessary”.
- ✓ **General provisions of the Decree:**
 - **2 phases:** to design and develop the tools (1) and to use the data (2)

Phase 1 Learning/design

- Development of different tools
- Model/identify behavioral characteristics
- Identify geographic location indicators
- Collect/select relevant data

Phase 2 Exploitation

- Collect/select relevant data
- Data transfer for analysis to treatment
- Data transmission when a person may have committed one of the breaches or offences

Decree laying down the modalities of implementation (n°2021-148 - 11 February 2021)

- **Collection of content:**
 - **Some prohibitions addressed to the tax/customs authorities:**
 - No aliases or accounts specifically used for this purpose
 - No password or registration on the site in question
 - No use on a personal page comments/interactions with third parties
 - **BUT** possible to create an account to be used via an *Application Programming Interface* (API) provided by platform operators.

Phase 1

- **Difference of vocabulary:** to identify indicators that are not personal data (i. e. keywords, ratios, indication of Dates/places...) characterizing the breaches and offences for 1 & 2 and to model the detection of fraudulent activities for 3 by collecting personal data.

1. Occult activities

2. Tax domicile rules

3. Customs traffic

➤ **Data:**

- Sensitive (ref. to Art. 6 of the data protection law of 1978) or not related
- Which contributes to the detection of offences

1. Occult activities

- Collection
- Transfer
- When is there an indication of offence?

2. Tax domicile rules

- Collection
- Transfer
- When is there an indication of offence?

3. Customs traffic

- Collection
- Categories of personal data
- Transfer

Decree laying down the modalities of implementation (n°2021-148 - 11 February 2021)

- ✓ **Data:**
 - Limited retention
 - Registration in a journal

- ✓ **Agents:** Strictly authorized persons, using information strictly necessary for their mission and in the context of a tax audit

- ✓ **Taxpayers rights:** Application of the GDPR reg. (2016/679)/Data protection law 1978:
 - Inclusion: rights of access by the data subject, to rectification, to be forgotten and to restriction of processing (Art. 15 to 18 GDPR)
 - Exclusion: rights of information to be provided where personal data have not been obtained from the data subject (Art. 14 GDPR) and to object (Art. 21 GDPR)

What are the current concerns ?

- ✓ **Standby for the moment:** Phase 1 is not yet finished, so we have to wait...

- ✓ **Decision and recommendations have been followed:**
 - **Constitutional decision:** Decision n° 2019-796 (27 December 2019): the unconstitutionality found has been corrected.
 - **Data protection authority (CNIL):** Deliberation n°2020-124 (10 December 2020): Recommendations on the project of decree have been taken into account in the final decree.

- ✓ **What about EU case laws ?** CJEU 6 October 2020 (Cases C-623/17, C-511/18, C-512/18 and C-520/18) La Quadrature du Net and others: ePrivacy Directive
 - No collection or storage of massive and undifferentiated data (transmission, traffic, geolocation) except in the case of a "serious threat to national security, whether actual or foreseeable", with data retention "limited in time to what is strictly necessary".
 - Possible to retain some targeted data.

A colossus with feet of clay ?

Will the given legal conditions make experimentation possible?

- ✓ **§87 of the Constitutional Council decision:** if the content is freely accessible on an online public communication service (...), it excludes content only accessible after entering a password or after registering on the site in question
 - Practical question 1
 - Practical question 2

- ✓ **On the Time period of retention/destruction of data :** Variation of time and two questions:
 - On the 5 days period before the deletion
 - On the duration of a criminal/tax proceedings

Some other questions/comments...

- ✓ The distinction between “personal data” and “indicator”
- ✓ The difference between an identification data (person) and a characterization data (activity)
- ✓ On the notion of "freely accessible content published on the internet"
- ✓ Other experiences in the US and in Italy



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