

# Article

## *BEPS Action 16: The Taxpayers' Right to an Effective Legal Remedy Under European Law in Cross-Border Situations*

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This article starts from the reasonable assumption that the implementation of the base erosion and profit shifting (BEPS) project increases legal uncertainty in tax matters. The shift from the isolated and bilateral exercise of taxing jurisdiction to international tax coordination in the framework of the BEPS project is not accompanied by a corresponding global convergence in the exercise of legal remedies, which remain confined to their national boundaries.

In line with their previous research, the authors address hereby the right of taxpayers to an effective legal remedy under European tax law, taking into account the dialogue among Courts in respect of legal values contained in national Constitutions of European Union (EU) Member States, the EU Charter of Fundamental Rights and the European Convention on Human Rights.

The focus is on the right to an effective legal remedy in cross-border tax procedures, with special emphasis on mutual agreement procedures and mutual assistance. The authors suggest a two-tier mechanism with the involvement of taxpayers and tax authorities, which allows for an effective exercise of the right of defence and does not require major changes in the wording of treaty clauses modelled after Articles 25 and 26 OECD MC. Hopefully, something that other international institutions, including the United Nations, may consider for the future. The authors suggest filling this gap with their proposal for a BEPS Action 16.

### 1 INTRODUCTION

The political commitment for international tax coordination under the pressure of mass media and the indignation of public opinion towards multinational enterprises paying little or no taxes worldwide have catalysed a consensus for approximation in the exercise of taxing powers across borders with a view to effectively countering base erosion and profit shifting (BEPS) in a framework of global tax transparency.

This article does not address the merits and shortcomings of this process of international tax coordination, but starts from the reasonable assumption that its implementation may lead to legal uncertainty. The implications for European law may add complexity to this framework, also in connection with Brexit,<sup>1</sup> taking into account the need to protect legitimate expectations of taxpayers in connection with the clauses that may be negotiated and agreed between the European Union (EU) and the United Kingdom in the near future.

The goal of this article is to systematically review the impact of such developments on the effective protection of taxpayers' rights in the light of the legal remedies available under European law.

The expression 'European law', as used in this article, includes EU law, singles out the aspects applicable within the European Economic Area (EEA), and also the law that is based on the European Convention on Human Rights (ECHR). The external relations of the EU and the relevant issues of international economic law will also be covered by this article with a view to achieving a comprehensive global approach to issues affecting taxpayers' rights in cross-border situations.

Our thesis is that, insofar as global problems of taxation require global answers, the shift from the isolated and bilateral exercise of taxing jurisdiction to international tax coordination at the global level must be accompanied by a corresponding global convergence in the exercise of legal remedies. Accordingly, if States have decided to approximate the exercise of taxing jurisdiction, they should also do so in respect of legal remedies, with a view to preserving the effectiveness of legal protection of taxpayers in cross-border situations and overcoming the need to seek for a consistent outcome of two or more national procedures.

We acknowledge the commitment of governments to pursue good tax governance. However, our most sincere concern is that the increased legal complexity connected with the current developments of international tax coordination can deprive taxpayers of an immediate and effective protection of their rights.

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<sup>1</sup> The term 'Brexit' indicates the withdrawal of the United Kingdom from the European Union in conformity with Art. 50 TEU.

We regard this as an example of best practice, which we have included in our previous research<sup>2</sup> and whose introduction we are currently monitoring in the framework of our proposal for a global standard of effective protection of taxpayers' rights,<sup>3</sup> based on best practices and minimum standards.

## 2 PROTECTION OF TAXPAYERS' RIGHTS: TWO COMPLEMENTARY PERSPECTIVES

In 1990 Working Party 8 of the Organisation for Economic Co-operation and Development (OECD)'s Committee for Fiscal Affairs<sup>4</sup> published a document entitled 'Taxpayers' rights and obligations – A Survey of the Legal Situation in OECD countries', whose content can be summarized in the following three points.

It acknowledges the general protection of the rights of taxpayers (1) to be informed, assisted and heard, (2) of appeal, (3) to pay no more than the correct amount of tax, (4) to certainty, (5) to privacy, (6) to confidentiality and secrecy.

It establishes a correspondence with the taxpayers' obligation (1) to be honest, (2) cooperative, (3) to provide accurate information and documents on time, (4) to keep records, and (5) to pay taxes on time.

Such rights and obligations should be framed within a charter, which reflects 'the policy and legislative environment, administrative practices and culture of tax administrations seeking to use it'.

This document was approved by the OECD Committee for Fiscal Affairs in 2003 and then published by the OECD Centre for Tax Policy and Administration, introducing a process of incorporation of the protection of taxpayers' rights among the good tax governance objectives of tax authorities, which has then further developed under the guidance of the Forum on Tax Administration. Meanwhile, the number of charters of taxpayers' rights has proliferated around the world, generally reflecting this new governance philosophy promoted by the OECD, and induced scholars and professional organizations to promote notable initiatives<sup>5</sup> that have contributed to change the overall

climate of the relations between taxpayers and tax authorities.

Yet, the actual facts prove the contrary: taxpayers' rights have shrunk in cross-border situations.

Two examples give evidence of this statement.

First, as demonstrated by our research,<sup>6</sup> even where taxpayers enjoyed rights for taxpayers before information was exchanged by means of mutual assistance,<sup>7</sup> such protection was abolished in connection with the peer-review procedures conducted by teams of tax authorities from other countries in order to verify the effective compliance with the global standards of tax transparency.

Second, the path towards global tax transparency keeps mutual assistance as a matter of exclusive competence for tax authorities that does not admit direct involvement of the persons whose rights it affects.

The negative implications on the protection of taxpayers' rights in cross-border situations are enhanced by the slow pace of progress made in respect of tax dispute settlement mechanisms under the auspices of the OECD and UN. In particular, mutual agreement procedures remain a fairly non-transparent instrument in the hands of tax authorities while arbitration is kept hostage to cross-firing between different views of countries that on various legal grounds reject its underlying potential of independent dispute settlement.<sup>8</sup>

Our critical remarks do not question the foundations of the good tax governance approach. Such approach can change the attitude of tax authorities from the authoritarian exercise of the power to impose taxes to the execution of their prerogatives established by law in line with the facts that have actually occurred, also when this goes to the detriment of tax collection.

Nevertheless, for at least two reasons such approach is structurally unsuitable to operate as a single pillar for the effective protection of taxpayers' rights in respect of cross-border disputes.

<sup>6</sup> P. Baker & P. Pistone, *supra* n. 2, at 62.

<sup>7</sup> Such countries are Austria, Liechtenstein, the Netherlands, Portugal and Switzerland. Furthermore, a significant shrinking of such rights has also occurred in Uruguay.

<sup>8</sup> Some countries (such as for instance Brazil and Japan) reject the idea that a court established by law may be deprived of its jurisdiction to adjudicate as a consequence of an option exercised by a taxpayer. Other (in particular developing) countries fear losing control over dispute settlement, when entrusting it to foreign arbitrators, especially those who may predominantly support the interest of developed countries. The application of both views to dispute settlement in international taxation can in our own view be questioned. On the one hand, the existence of two or more national courts established by law with jurisdiction to adjudicate cannot ensure a protection of cross-border dispute that is qualitatively equivalent to that which may be achieved with a single adjudicating body; on the other hand, especially for cases of full arbitration, the technical arguments included in the motivation are sufficient guarantee against possible an improper use of discretionary powers. Accordingly, one may wonder whether the reluctance of countries towards arbitration is rather due to other reasons that are not officially admitted.

<sup>2</sup> See P. Baker & P. Pistone, *General Report*, in *The Practical Protection of Taxpayers' Rights* vol. 100B, 1–99 (IFA, Cahiers de droit fiscal international 2015).

<sup>3</sup> The Observatory on the Practical Protection of Taxpayers' Rights (OTP) is being established in 2016 under the joint auspices of the International Fiscal Association and the International Bureau of Fiscal Documentation with a view to recording changes occurred in tax legislation and interpretation in respect of the best practices and minimum standards identified in the 2015 General Report of the International Fiscal Association.

<sup>4</sup> Available at, [https://www.oecd.org/tax/administration/Taxpayers'\\_Rights\\_and\\_Obligations-Practice\\_Note.pdf](https://www.oecd.org/tax/administration/Taxpayers'_Rights_and_Obligations-Practice_Note.pdf) (accessed 17 Aug. 2016).

<sup>5</sup> M. Cadesky, I. Young & D. Russell, *Towards Greater Fairness in Taxation: A Model Taxpayer Charter* (Confédération Fiscale Européenne, IBFD Publications 2016).

First, the absence of an international tax court prevents solutions that may protect taxpayers' rights also against the interest of one or more States, as well as when both tax authorities reach an agreement that substantially deviates from what a given taxpayer would find fair.

Second, various factors – such as the different ways in which domestic law implements international measures (such as for instance the BEPS project), interpretative guidelines issued by tax authorities, or even actual constitutional principles – may in practice hinder tax officials from adhering to solutions that do not give priority to maximization of the interest to collect revenue by their own State. The latter situation would in our view not change if the acceptance of an interpretation by tax authorities proved to be possible only at the end of a long and burdensome procedure.

In our view, the good tax governance approach constitutes a second pillar for the protection of taxpayers' rights in cross-border situations, which complements the function of legal remedies and reconciles the interest of States to collect taxes with that of reaching global solutions to the global problems of taxpayers without exposing them to an undue additional burden.

In the light of such complementary function we shall now inquire on the legal basis and possible interpretations of the protection of taxpayers' rights in European law.

### **3 A MULTI-TIER EUROPEAN LAW FRAMEWORK FOR LEGAL REMEDIES OF TAXPAYERS**

#### **3.1 The European Minimum Standard of Legal Remedies and Its Legal Bases**

The protection of fundamental rights of taxpayers is secured in Europe by the existence of legal remedies, which operate at different levels and have their legal bases in the ECHR, in supranational law of the EU and in national constitutions.

Despite their different positive dimensions within each legal system, all such remedies share the requirements of effective judicial protection and equivalent treatment for cross-border situations as compared to the purely domestic ones. We consider both such requirements as the cornerstones of the minimum European standard for the protection of taxpayers' rights.

Such standard steers the interpretation of legal remedies and cannot be undermined by the introduction of national or supranational measures that implement international tax coordination.

Accordingly, within the EU, this also implies that all measures of the so-called ATAD – or Anti-Tax Avoidance Directive, which is in essence the EU Directive implementing the BEPS Project inside the EU

– must be formulated and interpreted consistently with such framework.<sup>9</sup>

The absence of an international coordination of legal remedies in the era of coordinated exercise of taxing jurisdiction represents in our view one of the structural flaws for the effective protection of taxpayers' rights in cross-border situations. Insofar as global problems require global answers, the identification of such problems may not just be limited to the need for securing tax collection, but also that of preventing that such need undermines the effective protection of taxpayers' rights.

#### **3.2 The Relations Between the Legal Sources of the European Standard for the Protection of Taxpayers' Rights**

Forty-seven European States are bound by the ECHR,<sup>10</sup> which may be regarded as the top tier of the European standard.

We shall now analyse the relations between legal sources in more depth, giving priority to the Courts that interpret supranational European law, such as the Court of Justice of the EU and the EFTA Court.

In principle, the interpretation and application of the provisions contained in the ECHR may affect the protection of taxpayers' rights under the clauses contained in the Charter of Fundamental Rights of the European Union (hereinafter 'EU Charter'), but the opposite is not necessarily true.

In particular, Article 52.3, 2nd sentence of the EU Charter requires that, to the extent that the provisions enshrined in the Charter have a similar wording and content to that of the corresponding ECHR provisions, the meaning and scope of those rights shall be the same as those laid down by the provisions contained in the Convention. Furthermore, EU Member States have unilaterally bound themselves to comply with the levels of protection secured by the ECHR, which Article 53 EU Charter regards as minimum standards of protection.

Accordingly, when the Court of Justice of the European Union (CJEU) gives a positive dimension to such rights within the supranational legal system of the EU, it in fact ends up in interpreting and applying them in the light of case law by the European Court of Human

<sup>9</sup> Although the European Court of Justice does not intervene frequently to assess the compatibility of secondary law with primary law, including in tax matters, it is required to do so to the extent that rules contained in a directive infringed the legal framework established by primary law. Since the infringement would be caused by measures that are contained in a Directive and therefore were basically proposed by the EU Commission, the activation of the CJEU jurisdiction in such cases would in fact mainly rely on preliminary ruling procedures.

<sup>10</sup> Leaving aside the partial recognition of Kosovo by the international community and temporary suspensions (in summer 2016 applied by Turkey), Belarus and the Vatican are the only European States which have not signed the European Convention on Human Rights.

Rights, though within the limits of the entitlement to legal protection under EU law.

By contrast, the European Court of Human Rights has no legal obligation to interpret and apply the ECHR in a way that takes into account case law of the CJEU on the corresponding provisions of the EU Charter. Besides, the possibility – indicated by Article 52.3, 3rd sentence – that Union law provides a more extensive protection of fundamental rights than that secured by the ECHR complicates the pattern within which the European Court of Human Rights may take CJEU case law into account in the course of its ordinary judicial dialogue with other international Courts.

Two more relevant points should be taken into account when judging the impact of the relations between the two Courts on the interpretation and application of legal remedies for the protection of taxpayers' rights.

First, although both Courts have the power to declare cases as inadmissible, the CJEU in fact only seldom uses this opportunity. It mainly does so either in cases with a pure theoretical value or, in cases referred by national Courts of EU Member States in the framework of a preliminary ruling procedure, when it is absolutely impossible to understand on what specific points guidance is sought on the interpretation of EU law.

Furthermore, the very mechanism of preliminary ruling procedures structurally leads the Court of Justice to frequent interventions in aid to national Courts while cases are pending before them, thus helping them to achieve an effective protection of taxpayers' rights in line with the European standards. This situation may generate a positive trend inside the EU, which anticipates the moment in which judicial protection is secured and also may produce indirect repercussions on interpretation and application by national Courts, which can in some instance find it appropriate to directly set aside national rules incompatible with *acte clair* or *acte éclairé* by the CJEU.<sup>11</sup>

Accordingly, except for cases in which national Courts of EU Member States fail to perceive the problem or are otherwise unwilling to activate the jurisdiction of the CJEU, we expect that it will be Luxembourg, rather than Strasbourg to bear the main responsibility of securing the effective protection of taxpayers' rights in Europe.

We suggest that the CJEU pays particular attention to clarify in its judgments whether the principles and rules of EU law require in fact higher level of protection of a given taxpayer right than that which it could record on the basis of the ECHR. Although such statement would

not be binding on the interpretation by the Strasbourg Court, we believe that the judicial dialogue between the two Courts would at least benefit from a clearer view on the position taken by the Court of Justice.

Specific issues may arise in respect of the protection of taxpayers' rights by the EFTA Court, when interpreting the provisions of the EEA Agreement.

The relation between the EFTA Court and the CJEU does not raise particularly difficult issues to address, since the application of homogeneous interpretative standards allow the two Courts to reach similar results to the extent that the rules contained in the respective treaties have a similar wording.

The interpretative parallelism between the two Courts is easier to assess in respect of provisions respectively contained in the TFEU and in the EEA Agreement. The question may appear more complex when it comes to interpret provisions that are contained in the EU Charter of Fundamental Rights, which finds no equivalent within the EEA Agreement.

However, the CJEU has until present regarded the provisions of the EU Charter of Fundamental Rights as the written expression of principles of EU law. Therefore, when the Court interprets the EU Charter, it is in fact interpreting the principles of EU law.

Consequently, under Article 6 EEA Agreement, such principles are in principle also likely to influence also the interpretation by the EFTA Court. Indirectly, this also applies to some specific provisions contained in the EU Charter, in respect of which the matter seems more problematic to address. Accordingly, insofar as the interpretation of the principles of EU law requires the protection of rights along standards that are not inferior to those established by the ECHR, also the interpretation of the EEA Agreement will eventually require the same in order to avoid drawing a distinction between the protection of rights inside the EU and the EEA.

The exceptions to this equation will have to be determined on the basis of the scope of the rights and obligations enshrined in the EEA Agreement, which is limited to the economic dimension. Accordingly, for instance, to the extent that possible infringements to data protection and confidentiality have no repercussions on such dimension, they will also lack a relevance under the EEA Agreement, regardless of the fact that, given that all EEA Contracting States are also signatories of the ECHR, the issue will still be the legal source of rights and obligations under the top tier constituted by the Convention.

This also applies to the possible implications arising in connection with the issuing of secondary law of the EU. Accordingly, even if secondary law of the EU may not restrict fundamental rights of taxpayers in a way that conflicts with primary law of the EU (including the EU Charter taken as an expression of the principles of EU law), to the extent that such conflicting secondary law with primary law exists and is not declared null and

<sup>11</sup> See further on this in *The Acte Clair in EC Direct Tax Law* (A.P. Dourado & R. Da Palma Borges eds., IBFD Publications 2008), and *Litigating EU Tax Law in International* (D. Sarmiento, & D. Jiménez-Valladolid de l'Hotellerie-Fallois eds., National and Non-EU National Courts, IBFD Publications 2014).

void by the CJEU, it will also create an obligation under Article 7 (b) EEA Agreement for the non-EU Contracting States of the EEA Agreement to introduce measures that are similar to the ones in force in the EU.<sup>12</sup>

We shall now address issues arising in the relations with national Courts interpreting their own constitutional framework.

The existence of a similar set of values concerning taxpayers' rights generally prevents in such context possible conflicts. However, there may be cases of different standards of protection of similar rights and different understanding of fact and law finding in cross-border situations, sometimes also arising in connection with an isolated reading of the common principles. Both scenarios are now briefly analysed together with their implications for the effective protection of taxpayers' rights.

In the first scenario, countries wishing to have higher level of protection of taxpayers' rights than those established by the ECHR should be left free to do so. However, in the opposite context, i.e. when a country does not comply with the minimum standard set by the ECHR, a potential failure to execute the Convention could justify a possible intervention by the Strasbourg Court in respect of specific requests by taxpayers. The judicial dialogue between Courts could justify a parallel development of interpretation of provisions sharing the same rationale.

The relations of national Courts with the CJEU can essentially be developed along similar lines, except for the fact that Article 52.4 EU Charter explicitly requires the interpretation of fundamental rights in harmony with the constitutional traditions common to the EU Member States.<sup>13</sup> Therefore, the Court of Justice must incorporate such common principles in its own interpretation of the dimensions that the same principles have under EU law.<sup>14</sup> A similar obligation exists at the level of interpretation for national Courts to the extent that they must comply with the supremacy of supranational law of the EU.

A more complex situation arises in the second scenario, where mismatches in judicial interpretation – based on different understanding of the factual and

legal framework, or on differences in domestic law – in fact leave taxpayers operating in a cross-border scenario without a single and effective legal remedy. The right to activate administrative procedures, also in the framework of the so-called mutual agreement procedures,<sup>15</sup> is certainly not to be regarded as a sufficient solution, since it gives taxpayers no right whatsoever other than that of presenting their case to the competent tax authorities.

In some cases this type of problems may be due to cross-border tax disparities. Our view is that since international tax coordination currently addresses them in the framework of EU secondary law implementing the BEPS project, legal remedies should be correspondingly made available to taxpayers under EU law in order to achieve an effective protection of rights in cross-border situations.

More in general, we believe that this right should apply to all situations that are connected with the coordinated exercise of taxing jurisdiction across the borders, since the failure to achieve a cross-border consistent framework for legal remedies can go to the detriment of an effective protection of taxpayers' rights.

### 3.3 The Protection of Rights in Connection with Brexit

The referendum on the withdrawal of the United Kingdom from the EU (Brexit) may raise some specific problems in connection with the effective protection of taxpayers' rights in cross-border situations, also considering that UK nationals will lose in such context their entitlement to protection under supranational law within the EU.

In principle, we are highly confident that such issues will be duly taken into account in the framework of the transitional regime to be negotiated between the parties. However, since we expect this process to be long and cumbersome, we find it appropriate to indicate a few points that in our view should be considered.

In our previous writing<sup>16</sup> we have identified the right to stability in legislation, to predictability and legal certainty as important components of a legal system that effectively protects taxpayers' rights.

In this specific case, we find that the effective protection of taxpayers' rights requires an effective protection of legitimate expectations.

Accordingly, the parties should agree a transitional regime applicable after the withdrawal of the United Kingdom from the EU for a sufficient period of time to allow business and private taxpayers potentially affected

<sup>12</sup> Any later repeal by the European Union of specific measures contained in the EU Directive could produce indirect European law repercussions also on the non-EU Contracting States of the EEA Agreement (and thus lead to the obligation to repeal such measures also in the domestic legal systems of such countries) at least to the extent that the existence of different rules can have an impact on the relations within the European Economic Area.

<sup>13</sup> This provision is an expression of the so-called constitutional pluralism, which pursues a common dimension of constitutional and fundamental principles across the different positive legal systems. See further on this in G. Kofler, P. Pistone, *General Report*, in *Human Rights and Taxation in Europe and the World* 14 ss (G. Kofler, M. Poiars Maduro & P. Pistone eds., IBFD Publications 2013).

<sup>14</sup> Indirect repercussions arise for the EFTA Court along a similar pattern to that which has already been analysed earlier in this section.

<sup>15</sup> Arbitration clauses are now being included in tax treaties, often drafted along the pattern of Art. 25.5 OECD MC. However, as indicated by the second sentence of this provision, such procedure does not allow for arbitration if there is already a judicial decision on these issues.

<sup>16</sup> P. Baker & P. Pistone, *supra* n. 2, s. 10, at 66–68.

by the Brexit to take their own decisions as to how they intend to regulate their own matters. Taking into account the usual cycles for taking and implementing business decisions, we consider that this period should be of at least five years.

#### **4 BLUEPRINTS FOR ENHANCING THE PROTECTION OF TAXPAYERS' RIGHTS IN CROSS-BORDER TAX PROCEDURES**

##### **4.1 Cross-Border Tax Procedures Raising Problems of Effective Protection of Taxpayers' Rights**

This section elaborates on a proposal for the effective protection of taxpayers' rights in cross-border tax situations. The proposal builds upon the outcome of the previous sections of this article and of our previous research.

The emphasis of our proposal is on the existing cross-border tax procedures, namely mutual agreement and arbitration procedures, as well as exchange of information and assistance in collection of taxes.

Our goal is to turn those two blocks of procedures into instruments of international tax coordination, with a view to giving taxpayers effective legal remedies that are simultaneously applicable in the national systems of two or more States.

Mutual agreement procedures were conceived as instruments of administrative cooperation, allowing tax authorities of two Contracting States to directly communicate with each other without using the traditional (but formal) diplomatic channels. In line with the traditional vision of tax treaties, they complement the functioning of an agreement of public international law aimed at coordinating the exercise of taxing sovereignty between the Contracting States on cross-border income. They affect the legal sphere of taxpayers without involving them in any phase after the initial submission of their case to the competent authority of their country of nationality/residence.

In more recent years also arbitration procedures have gradually made their way into tax treaties, once it became clear that cross-border disputes could not be properly addressed via administrative procedures or domestic judicial remedies in either Contracting State. Unlike all other cross-border tax procedures, arbitration explicitly authorizes the involvement of taxpayers.

The second block of procedure essentially consists of mutual assistance between tax authorities in information gathering and tax collection.

In particular, exchange of information was the first type of mutual assistance to be included in tax treaties. It was conceived as an administrative procedure reflecting the traditional vision of tax treaties and thus affecting the legal sphere of taxpayers without allowing for their direct involvement. Its function is to allow tax

authorities make direct request to their counterparts to provide information on taxpayers in cross-border tax situations.

The mutual assistance in collection of taxes was developed at a later stage, but reflects the same rationale of exchange of information procedures and follows their dynamics. The different object of mutual assistance can raise some more direct concern for the protection of taxpayers' rights, since it allows tax authorities to exercise coercive activities on the legal sphere of the taxpayer.

Our proposal for improving the functioning of the existing cross-border tax procedures relies on two fundamental premises. The main and most traditional function of tax treaties is to provide for the coordination of taxing rights between the two Contracting States. However, tax treaties also directly affect the legal sphere of taxpayers, which have domestic legal remedies in either Contracting State, but none of such remedies can be activated simultaneously in two (or more) States.

Our proposal therefore suggests that where tax treaties establish procedures with a common framework for action by tax authorities, they should also provide for legal remedies that taxpayers can activate with effects in both Contracting States.

For the purpose of quickly enhancing the levels of protection of taxpayers' rights through coordinated action, our methodology proposes limiting the amendments to the existing treaties as much as possible, supporting common interpretative solutions, or otherwise introducing coordinated changes to domestic law connected with tax treaties.

However, the introduction of such changes would also be possible in the framework of a multilateral instrument, similar to the one that almost 100 countries are now promoting in the framework of BEPS Action 15. Therefore, also this option will be explored more in depth as a possible variation to our main proposal.

The concrete analysis of such issues will bundle together mutual agreement procedures and arbitration within a single package for an agreed settlement of disputes on cross-border income and then address the separate issues that can arise as to mutual assistance in exchange of information and tax collection.

##### **4.2 A New Dimension for Mutual Agreement Procedures and Arbitration with Little Changes to the Existing Tax Treaties**

Our analysis of mutual agreement and arbitration procedures aims to put forward a flexible two-tier system of administrative and judicial (or quasi-judicial) procedures in which tax authorities and taxpayers are directly involved.

Within such model mutual agreement procedures in our view mechanisms should operate for achieving a commonly agreed interpretation of all relevant fact and

law finding between tax authorities with the direct involvement of taxpayers. Accordingly, they should turn into a forum of conciliation between the different measures that result or may result in taxation not in accordance with the convention, thus overcoming the traditional vision of mutual agreement procedures without introducing specific changes to the wording of Article 25 OECD MC.

In the initial phase such commonly agreed interpretation should only be pursued by the taxpayer(s) and tax authorities of one Contracting State. Precisely in line with the current wording of Article 25.2 OECD MC, tax authorities of such State should endeavour to find a satisfactory solution. However, when doing that, they should secure protection of the four pillars for audits that constitute in our view the minimum standards of protection of taxpayers' rights.<sup>17</sup> States that do not yet comply with such requirements for the effective protection of rights should amend their domestic law or achieve equivalent results at the level of interpretation. The latter option is in our view required for all EU Member States in order to provide an effective protection of rights in line with the current interpretation by the European Court of Justice. A similar conclusion may be reached also in respect of the ECHR to the extent that States agree on the importance to protect the right to fair trial in tax matters not only in its judicial phase, but also throughout all administrative procedures that are able to affect the effective exercise of the right of taxpayers to defence and justice before Courts.<sup>18</sup>

The involvement of the taxpayer allows tax authorities to reach a satisfactory solution with the agreement of the taxpayer. This means that even in cases of taxation not in accordance with the provisions contained in the Convention, tax authorities can dismiss the mutual agreement procedure to the extent that the taxpayer considers the solution provided by tax authorities as satisfactory. In such cases the effects will be produced by the act issued by tax authorities and the following endorsement by the taxpayer. The combination of these effects should not lead to the erroneous understanding that the exercise of taxing powers by tax authorities may be subject to the consent of the taxpayer. Rather his

consent produces the effect of preventing his appeal and thus equates the evidence that he needs no further action for effectively protecting his rights.

More in general, we believe that the involvement of the taxpayer in the procedure allows a common understanding of facts and law finding, which may produce some very positive effects for tax authorities, since the taxpayer would be bound by his position and statements in all phases of the procedure.

Not differently from what happens now in respect of Article 25.2 OECD MC tax authorities may be unable to reach a satisfactory solution in certain cross-border tax cases. In such case they shall endeavour to resolve the case by mutual agreement with the competent authority of the other Contracting State.

We believe that the reasons for which tax authorities are unable to reach a satisfactory solution should be included in a formal notice to the taxpayer. Such document should also faithfully reproduce the factual position put forward by the taxpayer, and indicate the different positions as compared to that held by tax authorities and the reasons for which the tax authorities were unable to reach a satisfactory solution.

Such act should be notified to the taxpayer, who should have the opportunity to appeal it in conformity with the legal remedies available under the domestic procedural rules of such country. However, for the purpose of avoiding undue delays in the continuation of the mutual agreement procedure, the appeal of the notice should follow procedural rules that allow for expedited amendments without infringing the *audita alteram partem* principle.

The failure by the taxpayer to appeal should not be considered as his acquiescence to the position held by tax authorities, but rather as a recognition that the respective position and facts indicated in the notice duly correspond to the ones that were held during the procedure until that moment.

The involvement of the taxpayer in the second step of the mutual agreement procedure should reflect the same features outlined in the first phase and requires no amendment to the wording of the treaty, but only an interpretation of domestic procedural tax law in line with the standards that have already been indicated in respect of the first phase.

In line with the minimum standards of protection of taxpayers' rights all meetings between tax authorities are to be held at the presence of the taxpayer(s) involved, giving the taxpayer the possibility to intervene, be heard and submit all documents and allegations that he may regard as useful in order to effectively protect his rights.

The involvement of the taxpayer and full access to documentation (except in the presence of duly motivated exceptional reasons) also plays an additional important role for this second phase of the mutual agreement procedure, namely that the procedure runs in a transparent way, excluding possible discretionary

<sup>17</sup> In particular, such pillars are the principle of proportionality, of prohibition of double jeopardy, the right for taxpayers to be heard before any decision is taken and the principle against self-incrimination, on which see forward in s. 4 of P. Baker & P. Pistone, *supra* n. 2, at 35 ff.

<sup>18</sup> See G. Maisto, *The Impact of the European Convention on Human Rights on Tax Procedures and Sanctions with Special Reference to Tax Treaties and the EU Arbitration Convention*, in *Human Rights in Europe and the World* 376 (G. Koller, M. Poyares Maduro & P. Pistone eds., IBFD Publications). The protection of the right to fair trial during tax auditing procedures was endorsed by the European Court of Human Rights. See ECtHR, 21 Feb. 2008, *Ravon v. France*. The ECtHR has long held that to secure a fair trial it is necessary that the procedures leading up to the trial should respect the rights of the defendant – see, e.g. *Bendenoun v. France*, (application 12547/86, judgment of 24 Feb. 1994), para. 52.

negotiations in respect of different cases pending between the competent authorities of the same Contracting States.

For the sake of avoiding a non-transparent use of discretionary powers by tax authorities, we believe that also this phase should terminate with a formal document, which duly reflects the final position held by tax authorities and the taxpayer. Such document should be co-issued by both tax authorities and be notified to the taxpayer.

Due to the current wording of Article 25, the taxpayer does not have the right to object to the decision reached by tax authorities.

Accordingly, if they believe that they have reached an agreement that solves the case and secures taxation in accordance with the rules of the Convention, they are obliged to promptly implement it in their domestic law. The failure to do so should in our view equal an infringement of a legal obligation, thus allowing the taxpayer to activate the appropriate domestic legal remedies in either Contracting State in order to prompt tax authorities to comply with such obligations.

Furthermore, we believe that the agreement reached by tax authorities does not prevent the activation of judicial remedies by the taxpayer in either Contracting State. In the context of documentary evidence produced throughout the mutual agreement procedure and also including the view of the taxpayer, we believe that the latter can only claim possible legal infringements connected with the action of tax authorities, or the failure to take into account relevant facts that would have produced an impact on the agreement reached.

For treaties that do not include the option for arbitration, the involvement of the taxpayer throughout the second phase of the mutual agreement procedure avoids that competent authorities of both Contracting States continue their consultations *sine die*. We do not mean by this that the taxpayer should be given a right to prompt tax authorities to reach a decision, but rather that the authorities should motivate the reasons for the failure to finalize the procedure in a fully transparent way. We trust that this suggestion also complies with the concept of good tax governance and the standards that modern tax authorities are now committed to pursue on the international scene.

A possible amendment to tax treaties could indicate that mutual agreement procedures are meant to be regarded as unsuccessful to the extent that they do not reach a solution that removes taxation not in accordance with the convention within the time period that (in treaty clauses including an option for arbitration) is regarded as sufficient to allow the taxpayer to submit the case to arbitration. We consider that international tax coordination could steer the introduction of this requirement by means of a treaty protocol with predetermined content in bilateral treaties. However, such a result could also be introduced by means of coordinated

action hardened by means of domestic law. We regard this condition important in order to protect legal certainty and avoid an indefinite exposure of taxpayers to never-ending mutual agreement procedures.

In the absence of the option for arbitration the failure to reach mutual agreement could constitute the starting point of domestic legal remedies to be activated by the taxpayer, or of possible attempts to reach forms of conciliation with either or both Contracting States.

If the treaty clause on the mutual agreement procedure does include the option for arbitration along the pattern of Article 25.5 OECD MC, we consider that access to arbitration should only be possible for procedures that have failed to reach an agreement between the competent authorities within the applicable time limit indicated in the bilateral convention.<sup>19</sup>

In such circumstances the documentary evidence and the involvement of the taxpayer throughout the mutual agreement procedure will play an important role throughout the arbitration procedure, since they can be used as materials that reflect the position of tax authorities of the two Contracting States and of the taxpayer and have been collected in full compliance with the standards of protection of rights.<sup>20</sup>

Since the wording of Article 25.5 refers to arbitration without further specifying, we believe that it would not prevent the use of so-called baseball arbitration, i.e. an expedite procedure in which the mandate of the arbitrators is to choose one out of two different positions that are submitted to their jurisdiction. The existence of ample documentation concerning all phases of the mutual agreement procedure, enriched by the position of the taxpayer, will be particularly important to determine the exact two positions to be submitted for baseball arbitration and possibly provide ample documentation on the views underlying each of them.

The dynamics of mutual agreements initiated by the taxpayer along the model that we have put forward in this article and their interaction with the option for arbitration show that such procedures could constitute the components of a two-tier system for the effective protection of taxpayers' rights in cross-border situations. Our model turns the existing mutual agreement procedures contained in tax treaties into instruments of conciliation or mediation between different fact and law findings without requiring substantial changes to such treaties. We are confident that their operation in a more transparent framework with a more direct involvement

<sup>19</sup> Such limit is of two years in Art. 25.5 OECD MC. For further information concerning the diffusion of this clause in bilateral treaties see S. Wilkie, Art. 25, GTTC, IBFD Publications, s. 2.

<sup>20</sup> The two-steps procedure elaborated in this article in fact develops the proposal included in the Report of the EU Commission Expert Group, Ways to tackle cross-border tax obstacles facing individuals within the EU, Brussels, 2016, 33, 40. The report is available at, [http://ec.europa.eu/taxation\\_customs/taxation/individuals/expert\\_group/index\\_en.htm](http://ec.europa.eu/taxation_customs/taxation/individuals/expert_group/index_en.htm).



of the taxpayer can enhance their functioning, allowing them on the one hand to reduce the number of unsolved cross-border tax disputes for which arbitration is required and, on the other hand, producing important documentation that can be used to speed up and reduce costs of arbitration, including by means of expedite procedures, such as baseball arbitration.

As indicated earlier in this section, our proposal for a two-tier system of settlement of cross-border tax disputes is also suitable for introduction by means of a multilateral instrument, i.e. an international convention. This alternative solution would not change the essence of our proposal, but just let it operate by means of a different legal instrument. Such solution may be more comprehensive than the one indicated in our main proposal, possibly also paving the way for the establishment of an international tax court (also in the form of an international tax arbitration court). However, at present we are fairly sceptical that it may meet the wide international political consensus, which is required for the conclusion of a multilateral convention exclusively geared at protecting taxpayers' rights.

As a preliminary matter, a multilateral convention on the settlement of cross-border tax disputes should clarify its relations with the existing procedures included in tax and non-tax treaties. Our view is that the content of our proposal does not conflict with the wording of Article 25 OECD MC, but only adds some specific requirements concerning the involvement of the taxpayer and the relations with domestic procedures. For this reason, we find that the possible introduction of a multilateral convention on the settlement of cross-border tax disputes would not necessarily require the repeal of Article 25 OECD MC, but coexist with it.

This mechanism essentially resembles the one that applies to the relations between the OECD-Council of Europe multilateral convention on mutual assistance between tax authorities and the clauses on mutual assistance included in Articles 26 and 27 OECD and UN MC. A possible option for the introduction of a multilateral approach to dispute settlement could also be to add a dedicated section to the multilateral convention on mutual assistance.

In line with the flexibility of the approach to enhance the protection of taxpayers' rights proposed in our previous research, we believe that the selection of a given instrument for the introduction of such regime worldwide should not prevent specific countries or groups of countries pursuing higher standards of protection of taxpayers' rights. In other words, our proposal has outlined a minimum standard for the effective protection of taxpayers' rights, which can be superseded by higher levels of protection and spread through the dynamics of best practice.

The need to comply with the requirements of the European standard can easily justify the requirement of securing higher levels of protection of taxpayers' rights

as compared to the minimum standard, but also provides a different legal instrument to introduce our proposal.

For instance, the existing EU multilateral arbitration convention on transfer pricing would be perfectly suitable to convey the content of our proposal within the EU, since EU Member States have already agreed without reservation to comply with a two-tier procedure that includes mutual agreement procedures and arbitration. The required changes to such convention would therefore be limited to broadening its scope beyond the field of transfer pricing disputes and introducing specific provisions for the protection of taxpayers' rights. While the decision concerning a broader scope could be more complex to find unanimous consensus, the other proposal could be easily justified by the need to comply with the requirements of primary EU law and the current developments that are taking place at the level of interpretation also in connection with the case law on the EU Charter.

### 4.3 Mutual Assistance in Exchange of Information and Tax Collection

In line with our vision of cross-border tax procedures, also those concerning mutual assistance should evolve in a way that allows a direct involvement of taxpayers with a view to allowing them to have effective international legal remedies available for an *ex ante* protection of their rights.

As indicated earlier in this document, our proposal pursues the protection of the taxpayers' right of defence in a way that allows him to have access to all relevant information held by tax authorities and to be promptly informed of any action connected with tax collection concerning him.

Also in this case we propose an adaptation of the existing procedures without requiring the introduction of substantial changes to treaty provisions.

In our previous research we have stigmatized the suppression of the taxpayers' rights in some countries in connection with the peer-reviewing procedures on global tax transparency.<sup>21</sup> Therefore, we propose hereby the reintroduction of such procedures along the rules provided by domestic law of each State, but subject to a time limit, with different rules applicable according to the method for exchanging information and a carve-out for suspicious situations.

The time limit should steer such procedures towards an expedited hearing of the taxpayer's arguments, though without undermining the opportunity for him to be heard, present his views and object to the exchange of information before a judicial authority of the State whose tax authorities will then supply the information concerning him.

<sup>21</sup> P. Baker & P. Pistone, *supra* n. 2, at 62 f.

The application of different rules according to the method for exchanging information is a necessary consequence of the need to adapt the protection of rights to the different context in which mutual assistance can operate.

In particular, in the case of exchange of information upon request, the requested State should in our view inform the taxpayer as soon as it receives the information request and invite him, in compliance with the applicable mechanisms under its domestic law, to supply all information that the requested tax authorities do not have. Tax authorities of the requested State should also let the taxpayer know about all information requested from third parties on behalf of foreign tax authorities.

We believe that an *ex ante* protection of taxpayers' rights is also possible in respect of information automatically exchanged, since such procedures currently do not require an exchange in real time, but rather a periodical transfer of information in blocks. Accordingly, tax authorities could set periodical deadlines for taxpayers to present their arguments before information is shared with other countries. This mechanism can also operate in respect of information exchanged automatically in the framework of specific agreements, such as for instance the intergovernmental agreements implementing Foreign Tax Account Compliance Act (FATCA).

The effective protection of taxpayers' rights in respect of exchange of information should not be limited to the right of hearing, presenting his views and objecting to the transfer of information, but also go as far as giving taxpayers the right to have their views and explanations included in the information supplied in the framework of mutual assistance and to be informed about the information that tax authorities have received from their foreign counterparts.

The taxpayers' right to an effective protection should not undermine the right of tax authorities to carry out effective tax audits. For this reason tax authorities should be waived from the obligation to inform the taxpayer in the presence of objective and motivated suspicions or in respect of schemes that have repeatedly been the object of infringements by one or more taxpayers. This carve-out should also apply for cases of requests to supply information in the framework of mutual legal assistance treaties, especially in cases of potential criminal relevance.

Our proposal also supports the strengthening of the protection of taxpayers' rights in respect of cases of mutual assistance on tax collection.

In addition to the arguments already raised in our previous research,<sup>22</sup> we believe that mutual assistance in collection of taxes should be supplemented by three

mechanisms that enhance the protection of taxpayers' rights.

The first two consist in the obligation to notify taxpayers of the request for assistance in tax collection and in the application of measures of conservancy. This notification requirement aims at giving taxpayers a reasonable period of time within which he can present his views and also request payment in instalments. We are aware that the conditions for activating mutual assistance under Article 27 OECD MC are the enforceability of the tax claim and the fact that no more remedies are available to him for preventing the tax collection. However, taking into account the circumstance that the mandate of tax authorities of the requested State is to enforce tax collection, we find it important to give taxpayers an effective tool to resist against improper use of mutual assistance in collection of taxes, in order to prevent that he is left with no other option than making the payment and then requesting for the reimbursement before a judicial body.

For the same reason the taxpayer should also be given the right to object to the request for mutual assistance in cases where the applicable rules in the requested State are below the minimum standards of protection of his rights in the requesting State. Also in this case we find it unnecessary to amend the existing wording of tax treaties, since the protection of this right could be based on the provision included in Article 27.8.a OECD MC, in respect of which domestic law could include the proposed specific legal remedy to the taxpayer.

Although our proposal supports the idea of introducing coordinated amendments to domestic law with a view to achieving an effective *ex ante* protection of taxpayers' rights in connection with mutual assistance procedures, nothing prevents introducing such changes by means of a corresponding adaptation of existing tax treaties, or allowing some countries or groups of countries to include some higher levels of protection of taxpayers' rights than the minimum standard contained in our proposal.

Accordingly, our proposed solution allows EU Member States to comply with higher level of data protection than those that may be required in other countries, such as for instance the United States. For such purpose secondary law of the EU could be issued.

Also, our proposal would make it possible for some countries to re-establish levels in the protection of the right to confidentiality that are currently under threat of being undermined in the framework of the international coordination against BEPS and in connection with the international developments of the Panama Papers.

However, we find it important to stress that our concern for the protection of the right to confidentiality should not be interpreted as the inclination to endorse a use of confidentiality that protects tax evaders, avoiders or fraudsters, or that protects those taxpayers who pursue plans of paying taxes nowhere. The pursued goal by

<sup>22</sup> See *ibid.*, at 57 ff.

our proposal is rather to make sure that the legitimate right to collect taxes and protect the effectiveness of taxing sovereignty is exercised within a framework that allows taxpayers to have an effective legal remedy in respect of all action that can affect their personal sphere, since we consider this to be a fundamental rights in all civilized nations.

## **5 CONCLUSIONS**

The BEPS and tax transparency projects gave a dramatic boost to international tax coordination, which we expect to considerably increase legal uncertainty surrounding the implementation of their standards, the rights and obligations in cross-border situations. This phenomenon will be particularly visible in the United Kingdom, where its effects will interact with the additional legal uncertainty connected with Brexit.

The BEPS and tax transparency projects strengthened the powers of tax authorities across the borders, but kept silent on the protection of taxpayers' rights, which has become almost a taboo word for international tax coordination under the erroneous assumption that honest taxpayers have nothing to worry about this development and may anyway seek for legal protection at the national level in each country.

However, silence won't lead the protection of fundamental rights of taxpayers to oblivion. Global tax law cannot ignore them for long, since it would otherwise severely undermine the natural correspondence with legal remedies that is the quintessence of the rule of law.

The BEPS and tax transparency projects have prompted the pendulum of positive integration within the EU to swing back towards a more intensive protection of tax collection. However, such pendulum is only a mechanism within a bigger pendulum of primary EU

law, which gives EU nationals effective rights with direct effect.

Accordingly, this article has also stressed that the political consensus for the implementation of BEPS within the EU may not lead secondary law to do what primary law of the EU and the principles reflecting the values of the ECHR, of the EU and the national constitutional traditions require EU Member States to do.

Our BEPS 16 is a concrete proposal to fill this gap and put the effective protection of taxpayers' rights on the global agenda as one of the next challenges for international tax coordination.

BEPS 16 promotes a global flexible system for the protection of taxpayers' rights which requires minor changes to the existing tax treaty rules and allows some States to pursue higher standards of protection of specific rights without compromising the overall consistency of the global system. Our article has concretely elaborated on the development of a European standard for the protection of taxpayers' rights, which conforms to the principles of effectiveness and equivalence in protection with purely domestic situations.

The methodology of our proposal postulates the introduction of common minimum standards for cross-border tax procedures by means of coordinated action on domestic procedural tax law, duly backed up by an aligned interpretation of domestic and treaty rules.

Our article has concretely elaborated on the development of a two-tier system for the conciliation and settlement of cross-border tax disputes with the involvement of taxpayers at all stages of the procedure, supplemented by a system of notification requirements applicable in respect of all forms of international mutual assistance between tax authorities, with specific carve-outs for cases in which this would undermine an effective exercise of tax auditing prerogatives.