E/C.18/2016/CRP.11

Distr.: General
6 October 2016

Original: English

Committee of Experts on International Cooperation in Tax Matters
Twelfth Session

Geneva, 11-14 October 2016
Agenda item 3 (b) (v)
Mutual Agreement Procedure –
dispute avoidance and resolution

Secretariat Note

Background

At the eleventh session of the Tax Committee in October 2015, during the agenda item on dispute avoidance and resolution, the subject was raised of taxpayer rights in the dispute resolution process. Mr. Philip Baker and Mr. Pasquale Pistone were invited to prepare a paper on this issue for the information of the Committee and the Subcommittee on the Mutual Agreement Procedure – Dispute Avoidance and Resolution.

The attached paper was subsequently provided and will be briefly presented by Mr Pistone at the Committee's twelfth session.

Blueprints for enhancing the protection of taxpayers' rights in cross-border tax procedures[·]

Philip Baker[*] and Pasquale Pistone[♦]

Introduction

The slow pace of progress made in respect of tax dispute settlement mechanisms under the auspices of the OECD and UN multiply the negative implications on the protection of taxpayers' rights in cross-border situations.

Indeed, the actual facts prove that taxpayers' rights have shrunk in cross-border situations and two examples give evidence of this statement.

First, as demonstrated by our research,[1] even where taxpayers enjoyed rights for taxpayers before information was exchanged by means of mutual assistance,[2] 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.

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.[3]

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.

[·] This paper is part of a longer article entitled "BEPS action 16: the taxpayers' right to an effective legal remedy under European law in cross-border situations", EC Tax Review 5-6/2016 (forthcoming), in which the authors present a proposal for the effective protection of taxpayers' rights in cross-border tax situations.

[*] QC, Field Tax Chambers and Visiting Professor at Oxford University.

[♦] IBFD Academic Chairman. Holder of a Jean Monnet ad Personam Chair in European Tax Law and Policy at WU Vienna University of Economics and Business. Associate Professor of Tax Law at the University of Salerno.

[1] Baker, P., Pistone, P., General report, IFA, cit., p. 62.

[2] Such countries are Austria, Liechtenstein, the Netherlands, Portugal and Switzerland. Furthermore, a significant shrinking of such rights has also occurred in Uruguay.

[3] 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.

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 maximisation 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.

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.

We regard this, as an example of best practice, which we have included in our previous research[4] and whose introduction we are currently monitoring in the framework of our proposal for a global standard of effective protection of taxpayers' rights,[5] based on best practices and minimum standards.

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.

[4] See Baker, P., Pistone, P., General Report, IFA, Cahiers de droit fiscal international, "The Practical Protection of Taxpayers' Rights", vol. 100B, 2015, pp. 1-99.

[5] 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.

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. The 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 authorises 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.

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[6]. 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 European Convention on Human Rights 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.[7]

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.

[6] 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 section 4 of Baker, P., Pistone, P., General Report, IFA, vol. 100B, cit., pp. 35 ff.

[7] See Maisto, G., 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 Kofler, G., Poiares Maduro, M., Pistone, P. (eds.), Human Rights in Europe and the World, IBFD Publications, p. 376. The protection of the right to fair trial during tax auditing procedures was endorsed by the European Court of Human Rights. See ECtHR, 21 February 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, for example, Bendenoun v France, (application 12547/86, judgment of 24th February 1994), para. 52.

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 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 finalise 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.[8]

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.[9]

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.

[8] Such limit is of two years in Article 25.5 OECD MC. For further information concerning the diffusion of this clause in bilateral treaties see Wilkie, S., Article 25, GTTC, IBFD Publications, section 2.

[9] 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, pp. 33 and 40. The report is available at http://ec.europa.eu/taxation_customs/taxation/individuals/expert_group/index_en.htm.

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 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 European Union, 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 European Union 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.

2. 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.[10] 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.

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 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.

[10] Baker, P., Pistone, P., General report, IFA, cit., p. 62 f.

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,[11] 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 US. For such purpose secondary law of the European Union 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 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

[11] See Baker, P., Pistone, P., General Report, cit., p. 57 ff.

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 civilised nations.

3. Conclusions

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.

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 proposal 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.

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.

Our proposal 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.