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THE SETTLEMENT OF CROSS-BORDER TAX DISPUTES WITHIN THE EU: WEAKNESSES, OPPORTUNITIES AND CHALLENGES

GIOVANNI CONSOLO

Matricola 823040

Tutor: Chiar.mo Prof. NICOLA SARTORI

Coordinatore: Chiar.mo Prof. MAURIZIO ARCARI

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CHAPTER I

INTRODUCTORY NOTIONS ON THE EXISTING MECHANISMS TO SETTLE INTERNATIONAL TAX DISPUTES

Definition of the research field.

On 10 October 2017, the Council adopted the "Directive on Tax Dispute Resolution Mechanisms in the EU" n. 2017/1852/UE. The adoption of this Directive stems from the recent trend, raised within the international tax community following the BEPS actions, to improve the international tax dispute resolution framework and, more in general, from the increasing concerns of the EU institutions with international double taxation. It is, indeed, established that the OECD BEPS actions have stipulated wide-ranging modifications to domestic tax laws and to tax treaties, that could increase legal uncertainty for relevant stakeholders and the risk of double taxation or of taxation not in accordance with Double Taxation Conventions, thus leading to a higher number of disputes between taxpayers and tax authorities.

When submitting the proposal for the Arbitration Directive, indeed, the EU Commission posed that the mutual agreement procedures ("MAPs") and the arbitration procedures foreseen in Double Taxation Conventions ("DTCs"), as well as in the EU Convention n. 90/436/EEC (hereinafter "EU Arbitration Convention"), are no longer fit with the complexity of the current global tax environment and, thus, signaled the need to make these mechanisms work better in order to remove the obstacles that international double taxation creates to cross-border activities and investments within the domestic market[1].

After the approval of the Directive n. 2017/1852, many posed the (enthusiastic) conclusion with regard to this "new" legal measure to be far better than the procedures provided for by the existing DTCs and the EU Arbitration Convention and, thus, to meet its purpose of strengthening the taxpayers legal safeguard within international tax disputes.

Throughout this research far more sceptical conclusions will be reached.

The following chapters, precisely, by taking as a landmark the EU Arbitration Directive and by comparing this "brand new" legal instrument with the other existing dispute resolution tools, will "test" the efficiency of the overall dispute resolution mechanisms framework and demonstrate that, although the arbitration Directive provides for some clear improvements, many (relevant) bottlenecks of the existing dispute resolution mechanisms have not been completely superseded.

As the scope of application of the existing dispute resolution mechanisms can be very wide and cover many international double taxation issues, from a substantial point of view our analysis will be conducted with reference to the settlement of international

[1] Although the European Court of Justice has constantly stated that under EU law it can't be inferred a prohibition of double taxation, it is, nevertheless, established that double taxation in a cross-border context as a result of inconsistent interaction of different domestic tax systems, is a major impediment and a real challenge for the EU internal market. See A. CONTRINO, *Contributo allo studio del credito per le imposte estere*, Torino, 2012, 21 – 22: "*la giustificazione dei differenziali d'imposizione sui redditi transnazionali in ambito europeo col legittimo esercizio della sovranità dei singoli Stati membri […] pare difficilmente conciliabile con l'effettiva esistenza di un mercato interno nel campo della fiscalità diretta, rappresentando la doppia imposizione sul medesimo reddito un ostacolo concreto all'esercizio delle libertà fondamentali*".

tax disputes involving *economic* international double taxation arising from the re-writing of transactions between associated enterprises (so called "transfer pricing disputes"). This approach (recently followed also by an influential author[2] that has studied this same topic) seems, indeed, consistent with both the fact that transfer pricing disputes – according to the OECD *Mutual Agreement Procedure Statistics for 2017* – take account of the vast majority of all the pending international tax disputes and that the most frequent cases of double taxation, as well as the cases with the higher amounts at stake, arise with regard to corporate taxpayers.

The research is structured in four chapters.

The first chapter provides for some introductory notions on the existing mechanisms to settle international tax disputes. More specifically, the first chapter will: *(i)* describe the general functioning and – most importantly – the weaknesses of the mechanisms to settle international disputes that exist alongside the EU Arbitration Directive; *(ii)* examine how these mechanisms, together with the Directive, can effectively apply for the settlement of transfer pricing disputes; *(iii)* explore how (and if) these mechanisms can be twisted in order to prevent the rise of transfer pricing disputes in the first place, *i.e.* in order to enable taxpayers and tax administrations to reach "international" Advance Pricing Agreements.

Chapters II and III will examine whether (and in which terms) the Directive has strengthened the legal protection of taxpayers through an in-depth comparison of the procedural rules envisioned therein with the procedural rules envisioned under the other existing mechanisms. More specifically, given that the Directive, as the other coexisting mechanisms, institutes a two-tier procedure, chapter II and chapter III will address the procedural rules envisioned under the existing dispute resolution tools that govern the functioning, respectively, of the first tier (the so called "mutual agreement procedure") and of the second tier (the so called "arbitration procedure").

Finally, by taking as a landmark the Italian administrative and judicial tax legal system, chapter IV will address the many and complex issues arising from the interactions of

[2] M. TRIVELLIN, *Studi sugli strumenti di soluzione delle controversie fiscali internazionali*, Torino 2018; MAPs and arbitration procedures are described, following the same approach, also by F. TESAURO, *Istituzioni di diritto tributario. Parte speciale*, Milano, 2019, 404 – 405

the existing legal instruments to settle international tax disputes with domestic (administrative and judicial) remedies.

SECTION I
OVERVIEW OF THE EXISTING MECHANISMS TO SETTLE INTERNATIONAL TAX DISPUTES

1. Preliminary remarks on transfer pricing disputes.

Rapid advances in technology, transportation and communication have given rise to a large number of multinational enterprises (hereinafter, “MNEs”), which have the flexibility to place their enterprises and activities anywhere in the world.

A significant volume of global trade nowadays consists of international transfers of goods and services, capital and intangibles (such as intellectual property) within a MNE.

“Transfer pricing” is a general term which refers to the “pricing” of cross-border transactions, involving the transfer of property or services, between associated enterprises of a same MNE. These transactions are also referred to as “controlled” transactions, as distinct from “uncontrolled” transactions between companies that are not associated and can be assumed to operate independently in setting terms for such transactions. If, on the one hand, “uncontrolled transactions” between independent parties are, generally, determined by market forces; on the other hand, the structure of “controlled transactions” could likely be determined by a combination of market and group driven forces, and thus differ from the open market conditions operating between independent entities. A large and growing number of international transactions are, therefore, no longer governed entirely by market forces, but driven by the common interests of the entities of a group, thus leading to distortions of the tax revenues of the countries involved in cross-border transactions.

In this context, it has become of pivotal importance to reach common grounds in order to establish “appropriate” transfer prices for intra-group – cross-border – transfers of goods, intangibles and services. Precisely, countries faced the need to reconcile their legitimate right to tax the profits of MNEs that can reasonably be considered to arise within their territory.

In this regard, international consensus has been found as to the adoption of the arm's length principle (ALP) as outlined under the OECD Model Tax Convention on Income and on Capital (hereinafter, "OECD MC"). The United Nations Model Double Taxation Convention between Developed and Developing Countries, the EU Convention n. 90/463/EEC (hereinafter, "EU Arbitration Convention") and the national legislation of many States (including Italy) have, indeed, borrowed this same principle. Under the arm's length principle – whose authoritative statement can be found, *inter alia*, under article 9(1) of the OECD MC – transactions within a group are compared to transactions between unrelated entities under comparable circumstances to determine acceptable transfer prices. The rationale for the arm's length principle itself is that because the market governs most of the transactions in an economy, it is appropriate to treat intra-group transactions as equivalent to those between independent entities.

As it is widely known, the re-writing of transactions between associated enterprises in accordance with the arm's length principle may give rise to economic double taxation[3] when the profit adjustment at the level of an associated enterprise (*i.e.,* a revision upwards of its profits, or a revision downwards of its costs; so called "primary adjustment") is not followed by a "corresponding adjustment" of the taxable profits at the level of another associated enterprise operating in another State (*i.e.*, a revision upwards of its costs, or a revision downwards of its profits).

It is established that if an enterprise (resident in State A) is faced with a profit adjustment for not dealing at arm's length in transactions with a foreign associated enterprise (resident in State B) there are two possibilities – a part from triggering domestic remedies – to have the economic double taxation arising from such a profit adjustment eliminated.

[3] As to the notion of international double taxation, see, among all the legal writings, M. VITALE, *Doppia imposizione. A) Diritto Internazionale*, in *Enc. dir*., XIII, Milano, 1964, 1007 ss.; P. ADONNINO, *Doppia imposizione. B) Diritto Tributario*, in *Enc. dir.*, XIII, Milano, 1964, 1015 ss.; A. FANTOZZI, K. VOGEL, *Doppia imposizione internazionale*, in *Dig. comm*., V, 1990, Torino, 181 ss. For a general overview of the methods for the elimination of international double taxation, see R. FRANZÉ, *I metodi di eliminazione della doppia imposizione internazionale sul reddito*, in C. SACCHETTO (edited by), *Principi di diritto tributario europeo e internazionale*, Torino, 2011, 226 ss.

The first solution is that the associated enterprise resident in State B triggers an administrative procedure in order to obtain, on a domestic level, a correlative adjustment. When taxpayers opt for this solution, the elimination of double taxation is surrounded by many uncertainties. Indeed – following the previous example – obtaining a correlative adjustment in State B is possible only if: *(i)* State A and State B have entered into a tax convention that contains a provision equivalent to article 9(2) of the OECD MC[4] and/or *(ii)* if State B has a domestic provision that – similarly to article 9(2) of the OECD MC – enables taxpayers to obtain a "correlative adjustment" following a final transfer pricing adjustment made in compliance with the arm's length principle in a foreign state[5]. Moreover, *(iii)* even if a tax treaty or the national legislation of a State envision a provision equivalent to article 9(2) of the OECD MC, the "correlative" adjustment is not automatically to be made after the imposition of a "primary" adjustment. Indeed, article 9(2), as the vast majority of domestic provision that govern the issuing of correlative adjustment[6], prescribes that a State shall make a "correlative" adjustment only if it considers that the "primary" adjustment, imposed by a foreign State, is justified both in principle and as regards the amount[7].

[4] Article 9(2) of the OECD MC reads: "*Where a Contracting State includes in the profits of an enterprise of that State — and taxes accordingly — profits on which an enterprise of the other Contracting State has been charged to tax in that other State and the profits so included are profits which would have accrued to the enterprise of the first-mentioned State if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other State shall make an appropriate adjustment to the amount of the tax charged therein on those profits. In determining such adjustment, due regard shall be had to the other provisions of this Convention and the competent authorities of the Contracting States shall if necessary consult each other*".

[5] As to Italy, a similar procedure is envisioned under article 31-*quarter*, comma 1, lett. c), d.P.R. n. 600/1973, recently introduced into the Italian tax legal system by the Law Decree 24 April 2017, n. 50. This provision – and the general aspects of "correlative" adjustments –will be analysed in chapter IV, par. 1.3.

[6] See, inter alia, G. MAISTO, *Il transfer price nel diritto tributario italiano e comparato*, Padova, 1985, 262.

[7] It should also be noted that many States (including Italy) reserved the right to insert in their treaties a provision according to which the issuing of corresponding adjustments pursuant to paragraph 2 of article 9 can be made only as a result of a MAP or of an arbitration procedure provided for the relevant treaty. As far as Italy is concerned, such reservation should be considered superseded in light of the "new" procedure envisioned under art. 31-quater, comma 1, lett. c), which, indeed, as it will be further highlighted in chapter IV, enables the Italian Revenue Agency to issue "unilateral" correlative adjustments, i.e. to issue corresponding adjustment irrespective of an agreement with the foreign tax authority that issues the primary adjustment.

All these uncertainties could – in theory – be avoided by requesting the initiation of one of the existing procedures to settle international tax disputes envisioned under *(i)* article 25 of the OECD MC, as recently improved by article 16 and the provisions included in Part VI of the Multilateral Convention to Implement Tax Treaty related Measures to Prevent Base Erosion and profit Shifting (hereinafter, "MLI"), *(ii)* the EU Arbitration Convention n. 90/463/EEC and *(iii)* the "new" EU Arbitration Directive n. 2017/1852. All these procedures, indeed, imply the involvement of both the tax authority of the State imposing the primary adjustment and of the tax authority that should make the correlative adjustment, so that their outcome may entail, alternatively: *(i)* the annulment of primary adjustments; *(ii)* the issuing of correlative adjustments that match – and, thus, offset – primary adjustments; *(iii)* both the revision downwards, up to a given amount, of a primary adjustment and the issuing of a corresponding adjustment for the same amount.
Section I of this first, introductory chapter will provide for a general overview about the functioning (and weaknesses) of the mechanisms to settle international disputes that exist alongside the Arbitration Directive, *i.e*. the "OECD Procedures" and the EU Arbitration Convention. Section II will examine how these mechanisms, together with the Directive, apply to transfer pricing disputes. Finally, section III will explore how (and if) these mechanisms can be twisted in order to reach international Advance Pricing Agreements (or "international APAs") and, therefore, to prevent the rise of transfer pricing disputes in the first place.

2. The "OECD procedures": from article 25 of the OECD MC to the "improved" dispute resolution mechanisms set forth in the Multilateral Convention to Implement Tax Treaty related Measures to Prevent Base Erosion and profit Shifting.

A common element in all modern tax treaties is the commitment of States to ensure to taxpayers the right to settle double taxation disputes arising from the application of tax treaties. For this purpose, the vast majority of bilateral tax treaties incorporate dispute resolution mechanisms that resemble the ones envisioned under article 25 of the OECD MC.

Article 25 of the OECD MC ("*Mutual Agreement Procedure*") institutes a two-tier procedure: the first tier is the "mutual agreement procedure" (hereinafter "MAP"), the second tier – which operates as an extension of the first tier – is the arbitration procedure.

As to the first tier, article 25 of the OECD MC envisions three distinct types of MAPs. This research will mainly deal with the MAP envisioned under article 25(1), (2) and (4) of the OECD MC – also called the MAP in the "narrow sense" – since this is the only MAP that can be set in motion directly by the taxpayers and that, therefore, embodies an alternative to domestic tax litigation for the elimination of double taxation[8].

The MAP "in a narrow sense" regulated under article 25(1) and (2) can be triggered when taxpayers believe that the actions "*of one or both of the Contracting States result or will result*" in taxation "*not in accordance with the provisions*" of a tax treaty.

This procedure consists of two stages.

The first stage is purely domestic, since it takes place between the taxpayer and the tax authority that receives the taxpayer's request to begin the MAP[9]. In particular, during this stage, the tax authority that receives the taxpayers request has to first evaluate if such request is "well-founded". If the tax administration deems that the taxpayer's

[8] The other types of MAPs envisioned under article 25 of the OECD MC are *(i)* the so called "interpretative" MAP of article 25(3), first sentence ("*The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention*") and *(ii)* the so called "legislative" MAP of article 25(3), second sentence ("*They may also consult together for the elimination of double taxation in cases not provided for in the Convention*"). Both these types of MAPs may be initiated by the competent tax authorities only and are usually related to issues of a general nature. More specifically, on the one hand, the "interpretative" MAP can be triggered by tax authorities in order to eliminate difficulties concerning the interpretation and application of tax treaties with respect to legal as well as to factual matters of a general nature that concern a category of taxpayers (in other words, it allows competent authorities to complete or clarify the definition of a term in the convention). On the other hand, the "legislative" MAP allow tax authorities to consult together in cases of double taxation not expressly provided for in a tax treaty. For further clarifications see OECD, *Model Tax Convention on Income and on Capital*, *Commentary*, 2017, C(25), par. 50 – 54.

[9] Originally, article 25 of the OECD MC stated the rule that taxpayers could present the case only to the competent authority of the State of their residency. In the 2017 – following the BEPS Action 14 – the OECD Model was updated in order to enable taxpayers to submit a complaint before the competent authorities of all the States involved in a tax dispute. As it will be discussed *infra*, this update is aimed to increase taxpayers' legal protection, since it prevents that the tax authority of the State of residence may unilaterally and discretionary reject the request for a MAP if it is unwilling to settle the case on an international stage.

request is not founded, the MAP terminates, otherwise there are two alternative frameworks. The first occurs when the tax administration that receives the taxpayer's claim deems that the matter at stake is due entirely to its actions; if this is the case, the "requested" tax authority has to remove itself the grounds of the taxpayer's objection by adopting a unilateral act (so called "unilateral relief"). The second occurs when the tax administration that receives the claim deems that the matter at stake is caused – totally or in part – by the actions of the other contracting State(s); if this is the case, the MAP moves to the second-international stage, also called the "consultation phase". The second stage of the MAP is a "government to government" procedure, meaning that it is conducted only between the tax authorities of the States concerned with the case, without any particular involvement of the taxpayer[10]. In this stage, precisely, the relevant tax authorities "*shall endeavour*" to reach an agreement that settles the dispute at stake, or by communicating with each other directly, or through a joint commission of themselves or their representatives[11].

The MAP "in the narrower sense" envisioned under art. 25, paragraphs 1 and 2, suffers many and well known weaknesses[12]. The most relevant weakness is that taxpayers have no guarantee to obtain a final decision on cases submitted to a MAP. Firstly, because under article 25 of the OECD MC there is no actual obligation upon the relevant authorities to settle tax disputes, since this provision only imposes a duty to negotiate: the relevant authorities, indeed, pursuant to this provision, are only required to "*endeavour*" to settle tax disputes. Secondly, because if the "requested" tax authority is not willing to solve the case on a international level, it could be able to block – at its own discretion and even arbitrarily – the starting of the MAP, by just

[10] The limited role of taxpayers during the MAP will be further addressed in chapter II; on this topic, among the authors that will be further quoted in this research, see P. BAKER, P. PISTONE, *The Taxpayers' Right to an Effective Legal Remedy Under European Law in Cross-Border Situations*, in *EC Tax review*, n. 5-6/2016, 335 ss.; K. PERROU, *Taxpayer Participation in Tax Treaty Dispute Resolution*, in M. LANG, J. OWENS (edited by), *International Arbitration in Tax Matters*, Amsterdam, IBFD, 2015, 289 ss.; M.G. DE FLORA, *La risoluzione delle controversie internazionali e il ruolo del contribuente*, in F. AMATUCCI, R. CORDEIRO GUERRA (edited by), *L'evasione e l'elusione fiscale in ambito nazionale e internazionale*, Canterano, 2016, 541 ss.

[11] See article 25(4) of the OECD MC.

[12] See, in general, R. BICER, *The Effectiveness of Mutual Agreement Procedure as a Means for Settling International Transfer Pricing Disputes*, in *International Transfer Pricing Journal*, March/April 2014, 79.

arguing that the taxpayer's objection is not "well-founded" (so called "Blocking Method"). Nor article 25 of the OECD MC, nor the OECD Commentary, indeed, set the grounds on which taxpayers requests should be deemed "well-founded" (see, more extensively, chapter II, paragraph 1).

Finally, with specific regard to transfer pricing disputes, because some countries have adopted the approach to preclude to taxpayers access to the MAP (or, in any case, adopted the view that they are not obliged to make corresponding adjustments as a result of the MAP) in the absence of a treaty provision based on article 9(2) of the OECD MC[13] (see, more extensively, section II of this chapter).

For the purpose to render more efficient this procedure and, especially, to grant the taxpayers a final decision on the cases submitted through the MAP, in 2008 the OECD added to article 25 of the Model Convention a new paragraph – paragraph 5 – which regulates the "second tier" of the procedure. This provision, specifically, contains an "arbitration" clause, according to which if the relevant authorities fail to reach a mutual agreement within two years from the presentation of the case, the "*unresolved issues*" at hand are referred to an "arbitral panel", whose decision is binding on both the taxpayers and the relevant tax authorities[14].

[13] This is, for example, the approached adopted by India. At this regard see R. NAYAK, S. RAO, *India*, in A.J. BAKKER, M.M. LEVEY (edited by), *Transfer Pricing and Dispute Resolution: Aligning strategy and execution*, IBFD, 2011, *Online Books*, par. 1.3.: "The OECD Commentary on Art. 25 (MAP) of the OECD Model Convention clarifies that access to a MAP for transfer pricing adjustments should not be denied merely because of the absence of a provision equivalent to Art. 9(2). However, India has recorded a reservation on this aspect of the commentary in the non-member countries' positions section of the Commentary, and is of the view that it would accept a MAP application on transfer pricing matters only if an equivalent to Art. 9(2) exists in the applicable treaty".

[14] The use of arbitration as a dispute settlement mechanism for international tax disputes has been subject to discussions for almost over a century. At the level of the OECD discussions emerged in the year 1984. More specifically, in 1984 the OECD issued the report "*Transfer Pricing and Multinational Enterprises: Three Taxation Issues*", where it was discussed the functioning of the mutual agreement procedure under the OECD Model Convention and it was recognized that the mutual agreement procedure suffered several shortcomings. Nevertheless, in this report the OECD considered the mutual agreement procedure as "*an efficient and flexible instrument in the interpretation, application and development of double taxation agreements and a suitable means for the elimination of both juridical and economic double taxation*" and, therefore, rejected the proposal to insert an arbitration clause as a supplement to the mutual agreement procedure. In the "Transfer Pricing Guidelines" of 1995, the OECD called for a re-analysis of the need of using arbitration as a dispute settlement mechanism and in 2000 the same OECD revealed that it was working on an arbitration clause to be included in the OECD Model Convention. At this purpose, the OECD established in 2003 a Joint Working Group, which published an interim report in 2004. In February 2006, the OECD published a document that included several proposals to supplement Article 25 OECD Model Convention with an arbitration clause. The report was discussed during a public consultation in March 2006 and June 2006. Based on this consultation, the

It should be immediately pointed out that, in the field of taxation, there may be different types of arbitration.

A first distinction should be made between "voluntary" and "mandatory" arbitration. In the former type of arbitration, the case can be submitted to arbitration only if there is the consent of all the parties involved in the dispute (*i.e.* of both the taxpayers and the tax authorities). In the latter type of arbitration, by contrast, once that the taxpayer requests the submission of the case to arbitration, the tax authorities have no right to oppose to such submission. Article 25(5) of the OECD MC expressly provides for a mandatory arbitration, since the decision to submit the case to arbitration is subject only to a request of taxpayers and not to the consent of the tax authorities involved in the case.

Secondly, arbitration procedures can be distinguished depending on the way that the decision is reached by the arbitration panel. If the arbitrators have the power to reach the final decision by evaluating, autonomously, the facts and the circumstances of the case in dispute, it is said that the arbitration is conducted through the "independent opinion approach". If, by contrast, the relevant authorities have the power to submit to the arbitration panel a proposal for the resolution of the case, and the arbitrators have to render the final decision by choosing between one of the proposal presented by the tax authorities, it is said that the arbitration is conducted through the "last best offer approach" (or "baseball arbitration") [15]. Article 25(5) doesn't specifically address whether the arbitration procedure envisioned therein has to be conducted through the "independent opinion approach" or through the "last best offer approach". In this regard, the OECD seems to favour the first approach; nevertheless, according to the

OECD issued in January 2007 an updated document that included a draft update of Article 25 OECD Model Convention, which included an arbitration clause and annex. Finally, the OECD added to article 25 of the Model Convention the new paragraph 5 on 18 July 2008 (see H.M. PIT, *Arbitration under the OECD Model Convention: Follow-up under Double Tax Conventions: An Evaluation*, in *Intertax*, 2014, 445 – 446**)**.

[15] On this distinction, see, in general, R. PETRUZZI, P. KOCH, L. TURCAN, *Baseball Arbitration in Comparison to Other Types of Arbitration*, in M. LANG, J. OWENS, *International Arbitration in Tax Matters*, Amsterdam, IBFD, 2015, 139 ss. and, recently, J.F. AVERY JONES, *Types of Arbitration Procedures*, in *Intertax*, 2019, issue n. 8-9, 674 ss.; N. BRAVO, *Mandatory Binding Arbitration in the BEPS Multilateral Instrument*, *ivi*, 693 ss. and spec. 698 – 699.

same OECD, parties (*rectius*, the tax administrations) are free to choose which of the two approaches to adopt on a case-by-case basis[16].

Given that the number of arbitration clauses included in double tax treaties remained rather limited[17], article 25(5) didn't actually fulfil the goal to solve the main shortcoming of the MAP, *i.e.* to impose an obligation upon tax authorities to settle international tax disputes. Moreover, article 25(5) didn't eliminate the possibility for tax authorities to block – at their own discretion and, as the case may be, even arbitrarily – the resolution of international tax disputes ("Blocking Method"). The arbitration procedure envisioned under article 25(5), indeed, is construed as a mere extension of the MAP and not as an independent dispute resolution mechanism; this circumstance, therefore, implies that only those cases that have been accepted by the relevant authorities during the first stage of the MAP can, ultimately, be submitted to arbitration[18].

The OECD, more recently, has tried to tackle the (relevant) deficiencies of the procedure(s) envisioned under article 25 of the OEC MC by means of Action 14 of the BEPS Action Plan ("*Make dispute resolution mechanisms more effective*"). In the Action 14 Final Report (that was released in 2015) OECD member countries and non-OECD countries participating in the OECD/G20 BEPS initiative (the "BEPS Members") agreed to bring some changes in their approach to dispute resolution and developed a new set of rules for the improvement of the resolution of treaty-related disputes[19]. A relevant aspect of the Final Report was, however, the lack of consensus

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[16] See N. BRAVO, *op. cit.*, 698.

[17] H.M PIT, *Arbitration under the OECD Multilateral Instrument: Reservations, Options and Choices*, in *Bulletin for International Taxation*, 2017, vol. 71, issue 10: "In 2013, when the OECD/G20 BEPS initiative was launched, only approximately 160 tax treaties included an arbitration clause to settle dispute as a final stage to the MAP. Of these 160 tax treaties, 63 incorporated the arbitration clause of article 25(5) of the OECD Model, thereby providing for a mandatory and binding arbitration procedure. The remaining tax treaties mainly provided for voluntary arbitration, the initiation of which mostly depends on the consent of both the competent authorities involved".

[18] See E. FARAH, *Mandatory Arbitration of International Tax Disputes: A Solution in Search of a Problem*, in *Florida tax review*, 2009, vol. 9, n. 8, 734: "The link between MAP and arbitration and the fact that arbitration operates only as an extension to the MAP weaken the proposal", since "if the competent authority (say for policy reasons) isn't willing to solve the case, it could prevent the arbitration from starting by just refusing to initiate the MAP".

[19] See OECD, *Making dispute resolution mechanisms more effective*, Action 14, 2015, Final Report, par. 4. The BEPS Action 14 Final Report, precisely, is composed of seventeen elements, that aim to pursue three general objectives: (i) "*that treaty obligations related to the mutual agreement procedure*

among States to include in all their tax treaties a binding and mandatory arbitration procedure. Therefore, Action 14 didn't actually pursue the goal to impose upon States an actual obligation up to settle international tax disputes by means of article 25[20]. Action 14, nevertheless, has dealt (at least *prima facie*) with the other weaknesses of this same provision. For example – in order to prevent that the MAP can be discretionary blocked, at its very beginning, by just one tax authority not willing to solve the case on an international stage ("Blocking Method") – element 3.1 of Action 14 ensures that the relevant authorities of *all* the contracting States involved in a dispute are made aware of the taxpayers request to start a MAP and that *all* such tax authorities jointly determine whether to accept or to reject the MAP request (this issue will be further discussed in chapter II, paragraph 1.1.)[21]. Moreover, with specific regard to transfer pricing disputes – in order to prevent the possibility for States to "block" access to the MAP in the absence of a treaty provision based on article 9(2) of the OECD MC – on the one hand, element 1.1. of Action 14 states that Countries "*should [always] provide access to MAP in transfer pricing cases and should [always] implement the resulting mutual agreements ... by making appropriate adjustments to the tax assessed*"; on the other hand, the Final Report "best practices" suggest that Countries should in any case include a provision equivalent to article 9(2) of the OECD MC in their tax treaties.

are fully implemented in good faith and that MAP cases are resolved in a timely manner"; (ii) "*that administrative processes promote the prevention and timely resolution of treaty-related disputes*"; (iii) "*that taxpayers that meet the requirements of paragraph 1 of article 25 can access the mutual agreement procedure*". For an exhaustive analysis of Action 14's Final Report, see, *inter alia*, H. ARORA, *An Evaluation of the Measures in Action 14 of the Action Plan of the OECD/G20 BEPS Initiative Intended to Make Dispute Resolution More Effective*, in *Bulletin for International Taxation*, n. 5/2017, *Online version*.

[20] A group of twenty States, nevertheless, recognized that the best way to ensure the effectiveness of the MAP was to adopt in their treaties an arbitration clause and, therefore, in the Final Report it was announced that an arbitration clause would be developed as part of the OECD Multilateral Convention under Action 15 ("*Develop a multilateral instrument*").

[21] Accordingly, in 2017, the OECD updated the Model Convention by including in paragraph 1 the possibility to present the case to the competent authority of "*either*" the contracting States. The prior version of this paragraph, indeed, provided that taxpayers had to submit MAP's requests (only) to the tax authority of the State in which they were residents or (if the case concerned the non-discrimination article) of which they were nationals.

On the 7 June 2017, seventy States – including Italy[22] – signed the *Multilateral Convention to Implement Tax Treaty related Measures to Prevent Base Erosion and profit Shifting* (hereinafter "MLI"), whose article 16 and Part VI (articles from 18 to 26) are dedicated to the resolution of tax disputes. In particular, art. 16 of the MLI "improves" the MAP regulated under article 25 of the OECD MC (*rectius*, under the tax treaties that contain a provisions equivalent to article 25 of the MC) by ensuring the implementation of Action 14 elements in all the tax treaties falling within the scope of application of the MLI. Part VI of the MLI, instead, regulates a "brand new" mandatory arbitration procedure, which, unlike the MAP envisioned in article 16, remains optional, meaning that the signatory States can freely decide whether to implement it in their tax treaties that fall within the scope of the MLI.

3. (Follows). General overview of the dispute resolution procedures laid down under the MLI.

The MLI, pursuant to article 2, paragraph 1, applies with respect to tax treaties *(i)* that are entered into by States that are both parties of the MLI and *(ii)* that both States have expressly listed as "Covered Tax Agreements" (hereinafter "CTAs")[23].

The MLI modifies the existing CTAs not directly, by amending their texts, but applying alongside with them[24]. As a consequence, the existing tax treaties' provisions that fall within the scope of application of the MLI (*rectius*, that both the contracting States have listed as CTAs) have now to be read in light of the MLI.

[22] At the present moment, the MLI still hasn't been ratified by Italy. For an overview of the foreseen effects of the MLI on the tax treaties concluded by Italy see G. CUZZOLARO, *Prime riflessioni sulle modifiche che verranno apportate dalla Convenzione Multilaterale al preambolo dei Trattati contro le doppie imposizioni stipulati dall'Italia*, in *Riv. dir. trib.*, *Supplemento Online*, 18 January 2018.

[23] The term "Covered Tax Agreement" is defined under article 2, paragraph 1, lett. a), of the MLI as an "*agreement for the avoidance of double taxation with respect to taxes on income that is in force between two or more parties*". The same provision specifies that a tax treaty can be qualified as a CTA only if each signatory State has made a notification to the Depositary listing the tax treaty – along with any other instrument that has amended the tax treaty – as being covered by the MLI.

[24] See OECD, *Explanatory statement to the MLI*, par. 13: "The Convention operates to modify tax treaties between two or more Parties to the Convention. It will not function in the same way as an amending protocol to a single existing treaty, which would directly amend the text of the Covered Tax Agreement; instead, it will be applied alongside existing tax treaties, modifying their application in order to implement the BEPS measures".

For this reason, in order to fully examine, in the following chapters, the procedural aspects of the MAP and of the arbitration procedure envisioned under article 25 of the OECD MC (*rectius*, under the existing tax treaties that contain a provisions equivalent to article 25 of the MC), it is essential to briefly analyse the complex interactions between the MLI and the existing tax treaties that fall within the scope of application of the MLI ("CTAs") [25].

3.1. The MLI types of provisions, compatibility clauses and notifications.

The provisions of the MLI can be grouped in three categories.

The *first category* consists in the so called "minimum standard" provisions; these are those provisions that implement Action 7 (articles 6 and 7 of the MLI) and Action 14 (article 16 of the MLI) of the BEPS. Where a provision reflects a BEPS "minimum standard", opting out of that provision is possible only in limited circumstances, such as where a particular Covered Tax Agreement already meets that minimum standard.

The *second category* consists in all the provisions of the MLI that apply only if the States do not formulate a reservation to their application[26]. The MLI, indeed, provides a set of reservations that grants to the contracting States the possibility to opt out from some of its provisions (or parts of provisions) either *(i)* with respect to *all* its Covered Tax Agreements[27] or *(ii)* to a *subset* of Covered Tax Agreements[28]. The *third category* consists in "options" or "alternative" provisions.

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[25] On this complex topic see, *inter alia*: C. GARBARINO, *Diritto convenzionale tributario*, Milano, 2019, 54 – 55; S. DORIGO, *L'impatto della Convenzione multilaterale BEPS sul sistema dei trattati contro le doppie imposizioni: verso un diritto tributario internazionale dell'incertezza?*, in *Riv. trim. dir. trib.*, 2018, 559 ss.; D.W. BLUM, *The Relationship between the OECD Multilateral Instrument and Covered Tax Agreements: Multilateralism and the Interpretation of the MLI*, in *Bulletin for International Taxation*, 2018, *Online version*; A. BOSMAN, *General Aspects of the Multilateral Instrument*, in *Intertax*, 2017, 642 SS.; H.M. PIT, *Multilateral Instrument: Reservations, Options, and Choices*, in *Bulletin for International Taxation*, 2017, *Online version*; N. BRAVO, *The Multilateral Tax Instrument and Its Relationship with Tax Treaties*, in *World Tax Journal*, 2016, 279 ss.

[26] The possible reservations to each substantive Article of the MLI are listed under article 28 of the MLI.

[27] In this case, where a Party reserves the right to opt out of a provision of the Convention with respect to all its Covered Tax Agreements, that provision will not apply between the reserving Party and all other Parties to the Convention. Accordingly, the modification foreseen by that provision will not be made to any of the Covered Tax Agreements of the reserving Party (see OECD, *Explanatory statement to the MLI*, par. 14).

[28] In this case, where a Party reserves the right to opt out of a provision with respect to a subset of Covered Tax Agreements, that provision will not apply only between the reserving Party and the Parties

MLI provisions can modify existing CTAs' provisions in four different ways, through the so called "compatibility clauses".

Specifically, MLI provisions can, alternatively, *(i)* "*apply in place of*"[29], *(ii)* "*modify*"[30], *(iii)* "*apply in absence of*"[31], or *(iv)* "*apply in place of or in the absence of*"[32] an existing CTA provision".

With respect to *each* CTA, however, it should be considered that the amendments made by the MLI also depend on whether *each* contracting Party to that CTA notifies to the OECD ("the Depository") the specific CTAs' provisions that are intended to be superseded or modified by the MLI.

In this regard there are three different possibilities.

Firstly, if a MLI provision applies "*in place of*" or "*modifies*" an existing CTA provision, such provision will be applicable only where all the Parties of a CTA notify to the Depository the existing CTA provision that has to be replaced or modified by that MLI provision. Secondly, if a MLI provision "*applies in absence of*" an existing CTA provision, such provision is applicable only where all the Parties of the CTA notify to the Depository the absence of an equivalent provision in their CTA. Thirdly, if a MLI provision "*applies in place of or in the absence of*" an existing CTA provision, such provision is applicable anyway, notwithstanding the notification procedure[33].

In light of the above, the interactions between the MLI and existing tax conventions seem clearly to be very cumbersome, as depending on a wide range of potential

of the Covered Tax Agreements related to the reservation (see OECD, *Explanatory statement to the MLI*, par. 14).

[29] These are, precisely, MLI's provisions that replace existing CTAs' provisions.

[30] These are, precisely, MLI's provisions that change existing CTA's provisions without replacing them.

[31] These are, precisely, MLI's provisions that are added to the CTAs if the latters do not contain any equivalent provision.

[32] These are, precisely, MLI's provisions that apply in all cases, since they, alternatively, replace any equivalent existing CTAs' provision or are added to the CTAs if they do not contain any equivalent provision.

[33] More precisely: (i) if all Contracting Jurisdictions notify the existence of an existing provision, that provision will be replaced by the provision of the Convention; (ii) if the Contracting Jurisdictions do not notify the existence of a provision, the provision of the MLI will still prevail over that existing provision, superseding it to the extent that it is incompatible with the relevant provision of the MLI; (iii) if there is no existing provision, the provision of the Convention will, in effect, be added to the Covered Tax Agreement (see OECD, *Explanatory statement to the MLI*, par. 15).

combinations that can only be determined through a "case by case" approach[34]. Indeed, in order to verify the possible interactions between a specific tax treaty and the MLI it has (at least) to be assessed: *(i)* if, pursuant to article 2 of the MLI, both the contracting States of a tax treaty have listed such treaty as a CTA, *(ii)* which reservations and which options have been formulated by each of the contracting State and *(iii)* if there are mismatches in the notification of the single CTA provisions that are intended to be superseded or modified by the MLI.

3.2. Overview of the MAP regulated under article 16 of the MLI.

Article 16 of the MLI is aimed to "improve" the MAPs envisioned under the tax treaties falling within the scope of application of the MLI, by ensuring the implementation of Action 14 elements.

The MAP envisioned under article 16 of the MLI resembles, almost exactly, the MAP envisioned under article 25 of the OECD MC. The interactions between the MAP of the MLI and the MAP envisioned under the existing CTAs (*i.e.* the amendments that article 16 of the MLI will bring to the CTAs' provisions that resemble article 25 of the OECD MC) are set forth under article 16(4) of the MLI.

More specifically, paragraph 4(a)(i) of article 16 states that the first sentence of paragraph 1 (according to which a "*...person may, irrespective of the remedies provided by the domestic law of those Contracting Jurisdictions, present the case to the competent authority* of either *Contracting Jurisdiction*") applies: *(i)* "*in place of*" CTA provisions that do not grant the possibility to trigger the MAP before the tax authorities of "*either*" the contracting States; or *(ii)* "*in the absence of*" an equivalent provision.

Paragraph 4(a)(ii) of article 16 states that the second sentence of paragraph 1 (according to which "*The case must be presented within three years from the first notification of the action resulting in taxation not in accordance with the provisions of the Convention*) applies: (i) "*in place of*" CTA provisions according to which the mutual agreement procedure case must be presented within a specific time period that

[34] For this purpose, the OECD has prearranged the *MLI Matching* Database, available at https://www.oecd.org/tax/treaties/mli-matching-database.htm.

is shorter than three years from the first notification of the action resulting in taxation not in accordance with the CTA; or (ii) "*in the absence of*" a CTA provision that explicitly describes a time period within which a case must be presented to the relevant authority.

Paragraph 4(b)-(c) of article 16 states that paragraph 2 (according to which "*the competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States*") applies "*in the absence of*" an equivalent provision in a CTA.

3.3. Overview of the arbitration procedure regulated under Part VI of the MLI.

Part VI of the MLI includes a mandatory arbitration procedure.

As hinted above, unlike the MAP regulated under article 16, the arbitration procedure hasn't been elevated to a "minimum standard" and, as a result, every State may choose whether or not to apply the arbitration procedure set therein with respect to their CTAs. Article 18 of the MLI, indeed, states that Part VI only applies if both the parties to a CTA have notified the depositary that they have opted for Part VI.

Although the arbitration procedure envisioned under the MLI is constructed similarly to the one regulated under article 25(5) of the OECD MC, since it functions as an extension of the MAP[35] and not as an independent procedure, Part VI of the MLI has significantly developed the arbitration procedure envisioned in article 25(5), by laying down in detail the procedural rules that shall govern the arbitral proceeding[36].

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[35] See, *inter alia*, G. GROEN, *The Nature and Scope of Mandatory Arbitration Provision in the OECD Multilateral Convention (2016)*, in *Bullettin for International Taxation*, 2017, 608.

[36] Note that under article 25(5) of the OECD MC the procedural rules of arbitration have to be established through an ad hoc MAP between the competent tax authorities. At this regard, see, more extensively, D. GUTMANN, *Some Thoughts on Procedural Rules in International Tax Arbitration*, in M. LANG, J. OWENS (edited by), *International Arbitration in Tax Matters*, IBFD, 2015, 311 ss.

As to the procedural aspects of the arbitration procedure envisioned under the MLI, Part VI of the MLI includes the possibility for States to make a wide range of options and reservations[37].

For example (limiting the analysis to the most relevant options and reservations) States may: *(i)* opt for a "different resolution of the case", *i.e.* opt for the possibility for tax authorities to modify the decision delivered by the arbitration "panel"[38]; *(ii)* reserve the right to prevent access to arbitration if the case at stake has already been decided by a court or an administrative tribunal of one of the contracting States[39]; *(iii)* reserve the right to set the termination of the arbitration if during the proceeding intervenes a "national" Court decision[40]; *(iv)* reserve the right to replace the "last-best-offer arbitration" approach – which under the MLI operates by default – with the "independent opinion arbitration" approach[41]; *(iv)* limit the option *sub (i)* (i.e. the "agreement on a different resolution") only if the arbitration is conducted under the "independent opinion arbitration" approach[42]; *(v)* limit the scope of application of the arbitration procedure, by choosing which cases shall be eligible for being arbitrated (for example, reservations may cover specific kind of disputes, or certain type of taxes)[43].

[37] Note, however, that Part VI operates as a cohesive arbitration provision, since there aren't single compatibility clauses for each article of Part VI, but there is a unique compatibility clause covering all the provisions of Part VI. Precisely, according to article 26, par. 1, the provisions of Part VI apply, all together, "*in place of or in the absence of*" any existing equivalent provision.

[38] See article 24, par. 2.

[39] See the combination between article 28, par. 1, and article 19, par. 12, lett. a).

[40] See the combination between article 28, par. 1, and article 19, par. 12, lett. b).

[41] See the combination between article 28, par. 1, and article 23, par. 2. Moreover, according to paragraph 3 of article 23, if one State reserves the right to apply the "independent opinion arbitration" approach, the other State can reserve the right not to apply this approach. In these cases the States involved must reach an agreement on the type of approach to be adopted. Until such agreement isn't reached, the arbitration clause remains inoperative.

[42] See the combination between article 28, par. 1, and article 24, par. 3.

[43] Note that this type of reservation – unlike the other ones – is particularly delicate for the functioning of the arbitration procedure, given that, according to art. 28, par. 2, lett. b), if the other contracting State raises an objection to such reservation, the consequence is that the entirety of Part VI will no longer apply to the CTA entered into between the objecting and the reserving States. At this regard see, more extensively, N. BRAVO, *Mandatory Binding Arbitration*, *cit.*, 707, who notes that this specific regime is justified in light of the fact that the MLI does not include an exhaustive list of defined reservations that states can make with respect to the scope of the arbitration procedure.

4. General overview of the European Arbitration Convention.

The goal[44] of the EU Arbitration Convention is to eliminate double taxation (both economic and juridical) arising from transfer pricing adjustments between: *(i)* "associated enterprises" [45] of Member States; *(ii)* an "enterprise of a Member State" and its "permanent establishment" in another Member State[46]; *(iii)* an "enterprise of a Member State" and a "permanent establishment" of an enterprise of another Member State that is situated in a third Member State[47].

In order to attain this goal, the EU Arbitration Convention, as the "OECD Procedures", sets forth a two-tier procedure: the first tier, *i.e.* the "mutual agreement procedure", is

[44] It should be mentioned that in 2006 the EU Commission formally set up the Joint Transfer Pricing Forum (hereinafter "EU JTPF), which is a group of Member States representatives and experts from the private sector (hereinafter "Business representatives") with the task to find solutions to practical problems posed by transfer pricing practices in the EU. One of the main objectives of the EU JTPF is to achieve a more effective and uniform application of the EU Arbitration Convention. The most significant instrument to attain this goal is the Code of Conduct for the effective implementation of the Convention. The Code of Conduct was adopted in 2006 and subsequently revised in 2009 by the EU Council. The Code of Conduct, essentially, is a explanatory document to the EU Arbitration Convention, which does not have the status of a convention or of a treaty. Therefore, it is up to each Member State to decide if (and how) implement its provisions in either its domestic legislation or administrative practices (see the Code of Conduct's preamble, according to which: "*the Code of Conduct is a political commitment and does not affect the Member States' rights and obligations or the respective spheres of competence of the Member States*"). On the legal nature of the Code of Conduct see, *inter alia*, M. HELMINEN, *EU Tax law – Direct Taxation*, Amsterdam, IBFD, 2012, *Online Books*, par. 5.4.1.3.; H. KOGELS, *Unity divided*, in *EC Tax Review*, n. 3-2012, 121.

[45] See Art. 4, par. 1, according to which an "*associated enterprise" is, alternatively, "an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of another Contracting State*" (lett. a) or "*the same persons participate directly or indirectly in the management , control or capital of an enterprise of one Contracting State and an enterprise of another Contracting State*" (lett. b).

[46] See art. 4, par. 2. The terms "*enterprise of a Contracting State*" and "*permanent establishment*" are not expressly defined by the Convention. Art. 3, par. 2, however, states that "*Any term not defined in this Convention shall, unless the context otherwise requires, have the meaning which it has under the double taxation convention between the States concerned*".

[47] As pointed out by P. PISTONE, *The Settlement of Cross-Border Tax Disputes in the European Union*, in J. WATTEL, O. MARRES, H. VERMEULEN (edited by), *European Tax Law*, Wolters Kluwer, 331 ss, the substantive scope of the Convention is, at the same time, broader and narrower than the one of all the other instruments. On the one hand, it is narrower because it only covers transfer pricing disputes on the ground of non-observation of the arm's length principle: the OECD procedures and the Directive, indeed, cover all sort of disputes arising from the interpretation and application of double taxation conventions. On the other hand, it is broader because it includes within its scope also disputes that do no arise from a tax treaty (only five bilateral relations within the EU are, however, not covered by a tax treaty).

regulated under article 6; the second tier, *i.e.* the arbitration procedure, is regulated under articles from 7 to 12.

The MAP laid down in the Convention is substantially identical to the one provided for in article 25 of the OECD MC and article 16 of the MLI: *(i)* it is divided in two phases (the "review" and the "consultation" phases); *(ii)* the "consultation phase" is construed as a "government to government" procedure that doesn't grant the taxpayer an official position in the proceedings; *(iii)* the relevant authorities have a strict (even if extendable[48]) deadline of two years for the completion of the MAP.

If the relevant tax authorities fail to reach a mutual agreement that eliminates double taxation during the MAP, the EU arbitration Convention prescribes that the case in dispute is referred, by default, to a "mandatory" arbitration procedure [49]. In light of this circumstance, the Convention is considered a quite effective[50] mechanism for the settlement of double taxation disputes, since, unlike what occurs under the "OECD Procedures" (where the arbitration stage is optional), it always imposes upon the signatory Member States an obligation to eliminate double taxation[51]. Moreover, unlike most of the bilateral tax conventions drafted accordingly to the OECD MC, the EU Arbitration Convention sets rigid time limits on Member States to conclude the procedure envisioned therein, thus preventing that the tax authorities en-charged to conduct the procedure can lengthen *ad nutum* the settlement of a case.

[48] See article 7, par. 4, of the Convention.

[49] Pursuant to articles from 9 to 12 of the Convention, the arbitration has to be conducted by an "Advisory Commission". These provisions, among other things, require that: *(i)* the competent authorities have to take all the necessary steps in order to establish the Advisory Commission; *(ii)* the Advisory Commission has to deliver its opinion within 6 months from its appointment, and *(iii)* the decision is implemented within 6 months from its delivery. Article 12, however, leaves open for the tax authorities involved the possibility to "*take a decision which deviates from the advisory commission's opinion*" which becomes binding upon them only if they fail to reach such an agreement (all these aspects will be extensively analyzed *infra* in chapter III).

[50] See, inter alia, J.M. HENCKAERTS, *International Arbitration and Taxation. The EC Arbitration Convention for Transfer Pricing Disputes*, in *Journal of international Arbitration*, 1993, 111 ss.; M. MARKHAM, *The Resolution of Transfer Pricing Disputes through Arbitration*, in *Intertax*, 2005, issue n. 2, 68 ss.; G. KOFLER, *Tax Disputes and the EU Arbitration Convention*, in E BAISTROCCHI (edited by), *A Global Anlysis of Tax Treaties Disputes*, Cambridge Tax Law Series, 2012, 205 ss.

[51] Pursuant to art. 14, in particular, "*double taxation of profits shall be regarded as eliminated if either: (a) the profits are included in the computation of taxable profits in one State only; or (b) the tax chargeable on those profits in one State is reduced by an amount equal to the tax chargeable on them in the other*".

It should be highlighted that the EU Arbitration Convention also provides, under article 5, for a preliminary procedure which constitutes a *unicum* in the international tax dispute resolution framework, since a similar procedure can't be found nor under the Directive, nor under the "OECD Procedures". More specifically, article 5 of the Convention requires the contracting State that intends to adjust the profits of an enterprise "*to inform the enterprise of the intended action in due time and give it the opportunity to inform the other enterprise so as to give that other enterprise the opportunity to inform in turn the other Contracting State*". This notification procedure, therefore, grants the possibility to both taxpayers and relevant tax authorities to agree in advance on the transfer prices – *i.e.* before the issuing of a primary adjustment – thus avoiding the unnecessary application of the international procedure envisioned under the Convention[52]. Moreover, this provision seems particularly relevant with respect to the domestic assessment procedures in the field of transfer pricing, in so far as taxpayers seem to be expressly granted the right to be informed prior to the notification of a primary adjustment [53].

Although, as hinted above, the EU Arbitration Convention is deemed to be a quite effective mechanisms to settle international tax disputes, it still suffers – as it will be widely highlighted in the next chapters[54] – severe weaknesses.

Firstly, according to article 5, at the initial stage of the procedure, the "requested" authority – exactly as stated above with respect to the OECD procedures – has the power to determine whether "*the complaint appears to it to be well-founded*" and, only if this is the case, "*endeavour to resolve the case by mutual agreement with the competent authority of any other Contracting State concerned*". Therefore, also under the Convention, there is the risk that the initiation of the MAP could be denied if the

[52] L. HINNEKENS, *Different interpretation of the European Tax Arbitration Convention*, in *EC Tax Review*, n. 4/1998, 253.

[53] M. TRIVELLIN, *op. cit*., 190 – 191 ("*La descritta procedura informativa ricorda i meccanismi di comunicazione preventiva disciplinata dall'art. 10-bis della L. n. 241/1990, e potrebbe essere inquadrata nei più ampi doveri statutari di cui agli artt. 5 e 6 della L. n. 212/2000* […] *L'inosservanza della regola convenzionale* […] *potrebbe dunque mettere in discussione la validità delle rettifiche "a sorpresa", non precedute da un preventivo confronto*") and ivi the reference to M. PIERRO, *Il dovere di informazione dell'Amministrazione finanziaria*, Torino, 2013.

[54] For a preliminary overview see P. ADONNINO, *La Convenzione europea 90/436 sulla cosidetta procedura arbitrale. Limiti e problemi*, in *Riv dir. trib*., 2002, I, 1211 ss.

tax authority that receives the taxpayer's complaint isn't willing to solve the case ("Blocking method"). Moreover, under the EU Arbitration Convention, this same deadlock occurs even at a later stage of the procedure, namely in the "transition" from the MAP to the arbitration procedure, since the Convention doesn't set any deadline within which the relevant tax authorities must appoint the arbitral panel (i.e. the "Advisory Commission"), nor it provides for a default mechanism that ensures such appointment when tax authorities fail to establish such panel. The absence of such rules – as it will be extensively highlighted in chapter III – is a serious shortcoming, since the relevant tax authorities may discretionary and arbitrarily "block" the flowing of the procedure, by just refusing to appoint the arbitral panel.

Secondly, pursuant to article 8, paragraph 1, the Convention may not apply if the enterprises involved in the dispute are "*liable to a serious penalty*". This raises many concerns in light of the fact that the notion of "serious penalties" differs among the different Member States, thus leading to the risk that each contracting State could – in the abstract – have great discretion in order to unilaterally narrow the scope of application of the Convention.

Finally, pursuant to article 7(3) (according to which "*Where the domestic law of a Contracting State does not permit the competent authorities of that State to derogate from the decisions of their judicial bodies*", the arbitration procedure may start only if "*the associated enterprise of that State has allowed the time provided for appeal to expire, or has withdrawn any such appeal before a decision has been delivered*") taxpayers are forced to abandon domestic judicial remedies in order to start the arbitration procedure. In other words, taxpayers have to make a choice on whether to apply the Convention or the national procedures that have been triggered in parallel with the former[55]. As it will be extensively discussed in chapter IV, indeed, the termination of domestic judicial proceedings before the reaching of a mutual agreement or of an arbitral award could have ruinous consequences for taxpayers, given that tax authorities – under the Convention, as under the other existing dispute resolution mechanisms – may have different ways to block the whole course of the

[55] See, inter alia, D. SCHELPE, *The Arbitration Convention: Its Origin, Its Opportunities and Its Weaknesses*, in *EC Tax Review*, n. 2/1995, 75.

procedure, thus leading to the risk that taxpayers could be deprived of every possible safeguard.

4.1. Brief clarifications as to the legal status of the EU Arbitration Convention.

The legal status of the EU Arbitration convention has been the object of many and complex discussions among scholars.

The preferable orientation is to consider the EU Arbitration convention as a multilateral treaty (applicable in all the EU Member States) under public international law and not, therefore, part of EU law[56-57].

[56] The doctrine (almost unanimously) excludes that the EU Convention is part of EU Law. See, specifically: L. HINNECKENS, *The Tax Arbitration Convention. Its Significance for the EC Based Enterprise, the EC Itself, and for Belgian and International Tax Law*, in *EC Tax Review*, n. 2/1992, 82 – 83; ID., *The European Tax Arbitration Convention and its Legal Framework (I)*, in *British Tax Review*, n. 2/1996, 145 – 146; ID., *European Arbitration Convention: Thoughts on Its Principles, Procedures and First Experience*, in *EC Tax Review*, n. 3/2010, 115; A. DE GRAAF, *Avoidance of international double taxation: Community or joint policy?*, in *EC Tax Review*, n. 4/1998, 258 ss.; M. ZUGER, *The ECJ as arbitration court for the new Austria-Germany tax treaty*, in *European Taxation*, n.3/2000, 104 – 105; ID., *Arbitration under tax treaties: improving legal protection in international tax law*, IBFD, 2001, *Online books*, par. 4.2.4.; P. PISTONE, *The impact of Community law of tax treaties: issues and solutions*, Kluwer Law International, 2002, 69, 78; ID., *Settlements of disputes in Italian tax treaty law*, in M. LANG, M. ZUGER, (edited by), *Settlement of disputes in tax treaty law*, Kluwer Law International, 2003, 342; ID., *The Settlement of Cross-Border Tax Disputes in the European Union*, in B. TERRA, P. WATTEL (edited by), *European Tax Law*, Wolters Kluwer, 2018, 331 ss.; G. MAISTO, *Shaping EU company tax policy- the EU Model Tax Treaty*, in *European Taxation*, n. 8/2002, 307; D. DE CAROLIS, *The European Arbitration Convention on Transfer Pricing: Legal Fossil or Instrument of New European Governance?*, in *Intertax*, n. 5/2013, 310 – 311; K. PERROU, *Taxpayer participation in tax treaty dispute resolution*, IBFD, 2014, *Online books*, par. 7.2.2.; H.M. PIT, *Dispute Resolution in the EU*, IBFD, 2018, 194 – 195.

[57] In light of the Convention's legal basis under article 220 of the EEC Treaty (see infra), in light of the fact that the Convention "serves internal market objectives" (L. HINNECKENS, *European Arbitration Convention: Thoughts on Its Principles, Procedures and First Experience*, op. cit., 115) and in light of the fact that the Council adopted a Code of Conduct which contains practical recommendations for the application of the EU Arbitration Convention (D. DE CAROLIS, *op. cit*., 310 – 311), the vast majority of the Authors quoted in the previous footnote highlighted that the EU Arbitration Convention has a "special connection" with the European Law and, therefore, posed that such Convention – although is not part of EU Law – should be considered as part of the *acquis communnautaire* (in a broad sense) of the EU Law, "likewise enjoying a higher legal status than international agreements" (L. HINNECKENS, *The European Tax Arbitration Convention and its Legal Framework (I)*, *op. cit*., 146). The juridical grounds (and the practical consequences) of this qualification are not entirely clear (see A. DE GRAAF, *Avoidance of international double taxation: Community or joint policy?*, *op. cit*., 269). In our humble opinion seem, indeed, sharable the remarks of H.M. PIT, *loc. ult. cit*.: "A measure is either part of EU law or not. There is no kind of no-man's land in-between EU law and international law. […] because the Convention's objective also has an impact on the functioning of European Union's internal market, this does not make the convention quasi EU law".

Indeed, although the Convention has its legal basis in article 220 of the EEC Treaty[58], this conclusion should be reached on the grounds that: *(i)* the Convention was concluded by Member States in their capacity as sovereign state and not in their capacity as Member States of the European Community; *(ii)* treaties based on article 220 of the EEC Treaty need to be ratified by the Member States; *(iii)* when a State accesses to the European Union it does not automatically accede to treaties concluded on the basis of article 220 of the EEC Treaty; *(iv)* the ECJ has no competence over the implementation and interpretation of such treaties[59].

5. The EU Arbitration Directive: objectives and basic features.

As hinted in the introduction of this research, the following chapters, by taking as a landmark the EU Arbitration Directive and by comparing this "brand new" legal instrument with the other existing dispute resolution tools, are aimed to "test" the efficiency of the overall dispute resolution mechanisms framework.

In order to assess whether the Directive improves the latter, the aims of this "new" legal measure must first be understood .

The underlying rationale for the EU Commission to issue its proposal for the EU Arbitration Directive was that the mechanisms provided for under double tax conventions drafted accordingly to article 25 of the OECD MC and the EU Arbitration Convention don't function satisfactorily – as hinted in the previous paragraphs – in terms of enforceability, effectiveness and efficiency[60]. In the EU Commission view, moreover, the introduction of a procedure that actually ensures the elimination of double taxation in an effective and efficient manner could – in the long-term – make no longer necessary for taxpayers to trigger, simultaneously, international procedures

[58] See the EU Arbitration Convention's preamble: "*THE HIGH CONTRACTING PARTIES TO THE TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, DESIRING to give effect to Artcile 220 of that Treaty, by virtue of which they have undertaken to enter into negotiations with one another with the view to securing for the benefit of their nationals the elimination of double taxation, CONSIDERING the importance attached to the elimination of double taxation in connection with the adjustment of profits of associated enterprises, HAVE DECIDED to conclude this Convention, and to this end have designed as their Plenipotentiaries* […]".

[59] A. DE GRAAF, *Avoidance of international double taxation: Community or joint policy?*, *op. cit.*, 269.

[60] For an historical overview of the long process that conducted to the approval of the EU Arbitration Directive allow us to refer to H.M. PIT, *Dispute Resolution in the EU*, *cit.*, 1149 – 1182 and to P. PISTONE, *The Settlement of Cross-Border Tax Disputes in the European Union*, *op. cit*., 333 – 338.

and domestic judicial remedies and, thus, improve the functioning of the domestic market and ensure the connected economic growth[61].

More specifically (despite the many similarities with the other existing dispute resolution tools, and despite the fact that, exactly as the “OECD Procedures” and the EU Arbitration Convention, the Directive envisions two dispute resolution mechanisms that operate in the framework of a two-tier procedure: the MAP and the arbitration procedure[62]) the Directive pursues these objectives by introducing a series of enforcing mechanisms that (should) limit opportunistic and discretionary attitudes of the relevant tax authorities and by expanding the involvement of taxpayers during the procedures envisioned therein[63].

Whether the “procedural novelties” of the Directive actually contribute to the improvement of the international tax dispute resolution framework will be discussed in the following chapters.

Besides the procedural features that will be further discussed in this research, it should be preliminary highlighted that a relevant element of differentiation that makes the Directive distinct from other instruments for solving international, and that could – in the abstract – contribute to render the Directive far more efficient than the other existing dispute resolution mechanisms, relates to the fact that this new legal instrument is a piece of secondary law of the European Union. This circumstance, indeed, implies that the settlement of international tax disputes within the EU will be

[61] See EU Commission, SWD(2016)344, final, par. C, where it is stated that the Directive “is expected to increase the fairness of tax systems and to create a level playing field by effectively removing double taxation in the EU. This would help to ensure that corporations pay a fair share of the tax burden and enhance the overall fairness of the tax systems. Furthermore, cross-border tax obstacles would be effectively eliminated within the EU. Substantial economic distortions would be reduced creating a favourable climate for growth and investment”. Moreover, at this regard, see S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, forthcoming: “it should be noted that the Directive has a distinctively own purpose, namely the enhancement of the internal legal market, which is embodied in Article 115 TFUE and constitutes the legal basis of reference for the enactment of the Directive”.

[62] Therefore, also under the Directive the resolution of disputes can be achieved through a MAP between the tax authorities of the Member States concerned and, only in the absence of an agreement during this procedure, through an arbitration procedure.

[63] For instance, the Directive enables taxpayers to seek protection against arbitrary rejections of their cases and, thus, to have access to the MAP even when the competent tax authorities deny such access, as well as it provides for a mandatory arbitration procedure that is enforceable even when the competent tax authorities (deliberately) fail to appoint the arbitrators, by enabling taxpayers to obtain such appointment via national Courts (see, extensively, chapters II and III).

conducted through provisions uniformly implemented and interpreted in all the States concerned with such disputes, given that: *(i)* Member States cannot decide not to be bound by the Arbitration Directive; *(ii)* the EU Commission has the power (and the duty) to investigate and, as the case may be, set into motion an infringement procedure upon a Member State whereas it fails to conform and correctly apply any rule of the Directive; *(iii)* the European Court of Justice could – in the abstract (see, however, the critical remarks that will be made on this aspect in chapters II and III) – have jurisdiction, on the basis of Article 267 of the TFEU, over matters concerning the interpretation of such legal instrument.

SECTION II
REMARKS AS TO THE APPLICATION OF THE EXISTING LEGAL INSTRUMENTS TO SETTLE INTERNATIONAL TAX DISPUTES TO TRANSFER PRICING DISPUTES.

1. Preliminary remarks on the application of the existing legal instruments to settle international tax disputes to transfer pricing cases.

As hinted in the introduction of this research, the profit adjustment of the transfer prices at the level of an associated enterprise (*i.e.,* a revision upwards of its profits, or a revision downwards of its costs: "primary adjustment") can give rise to economic double taxation when such adjustment is not followed by a "corresponding adjustment" of the taxable profits at the level of the other associated enterprise (*i.e.*, a revision upwards of its costs, or a revision downwards of its profits).

Although the existing legal instruments differ as to the personal entitlement to activate the procedure (personal scope), the tax covered (objective scope), the types of tax disputes that can be settled (substantive scope) and their territorial scope of application[64], one may give for granted that these instruments are all concurrent in the field of transfer pricing disputes within the territory of the EU, given that – as stated in the introduction of this research – transfer pricing disputes constitute the vast majority of international tax disputes. However, if it is undisputed that transfer pricing

[64] At this regard, see P. PISTONE, *The Settlement of Cross-Border Tax Disputes in the European Union*, *op. cit.*, 344 – 349.

disputes can be settled through the "OECD Procedures" and the EU Arbitration Convention, some doubts may rise with respect to the EU Arbitration Directive.

According to article 3(1) of the Directive, "*a complaint*" can be put forward only by the person "*affected*" by the "*question in dispute*". Moreover, article 2(1)(d) of the same Directive defines the term "*affected person*" as "*any person, including an individual, that is a resident of a Member State for tax purposes and whose taxation is directly affected by a question in dispute*". Hence, from the literal interpretation of the combination of articles 3(1) and 2(1)(d) – which requires a taxpayer to be "directly affected" by double taxation in order to trigger the Directive – the Directive could be regarded as covering only cases of double taxation suffered by a person (i.e. legal double taxation) and not transfer pricing cases, i.e. cases of economic double taxation, where at least two taxpayers are involved[65]. Or, in any case, the Directive could be deemed applicable only to enterprises receiving a primary adjustment and not to associated enterprises which, after a primary adjustment has been enforced, would have the right to obtain a 'correlative' adjustment.

This conclusion could appear strengthened from a comparison between the wording of the Directive and of the initial Commission Directive proposal (hereinafter "the Proposal"). More specifically, in light of the amendments made to the Commission proposal in the final version of the Directive, the drafters of the Directive could validly be expected to have wilfully reduced the scope of the Directive as described above, given that, *(i)* while, on the one hand, article 3 of the final Directive requires that the complaint can be submitted only by the person "*affected*" by the "*question in dispute*"; on the other hand, article 3 of the Proposal stated, more broadly, that "*Any taxpayer subject to double taxation*" should have been entitled to submit a complaint under the Directive. *(ii)* Moreover, while, on the one hand, article 2(1)(d) of the Directive defines the "*affected person*" entitled to file a complaint as "*any person … directly affected by*

[65] This conclusion has been hypothesised – with regard to the Directive's Proposal – by S. GOVIND, L. TURCAN, *The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive*, in *Bulletin for International Taxation*, n. 3-4/2017, par. 3.2.; "the phrasing of article 3 of the proposed EU Arbitration Directive, which requires taxpayer to be 'subject to double taxation', may indicate that only double taxation suffered by the same person is covered […]. This restricted interpretation would still be in line with the definition of double taxation and the method of elimination of double taxation in the proposed EU Arbitration Directive".

a question in dispute"; on the other hand, article 2(4) of the Proposal defined, more broadly, the "*taxpayer*" entitled to file a complaint as "*any person ... subject to income taxes*".

Such interpretation of the combination of articles 3(1) and 2(1)(d), however, should be disregarded for the following reasons.

The first reason is that, according to the recital n. 1, one of the Directive goals is to precisely eliminate "*double taxation in connection with the adjustments of profits of associated enterprises*". From this provision, indeed, the Directive clearly applies to transfer pricing disputes and enables all affiliated enterprises of the same MNE to pursue – jointly and in a coordinated manner – a solution to their case.

The second reason lies within the definition of double taxation provided for under article 3(1)(c) of the Directive. This article, indeed, states that the Directive applies to "*double taxation*" issues, without distinguishing between juridical and economic double taxation. Therefore, all associated enterprises of a MNE can – according to Article 3(1) – be considered as "*directly affected*" by a primary adjustment carried out on another associated enterprise of the same MNE, since – in the absence of a correlative adjustment – they would "directly" suffer the effects of economic double taxation.

The third reason lies within the fact that similar doubts have never been raised with respect to the "OECD Procedures" even if – similarly to what occurs under the combination between article 2(1)(d) and 3(1) of the Directive – article 25 of the OECD MC [and, *mutatis mutandis*, article 16(1) of the MLI] state that the procedures set forth therein can be initiated only by a person that considers that the action of a State results or will result "*for him*" in taxation not in accordance with the tax treaty[66]. Therefore, given that the Directive is expressly pre-ordinated to improve the existing tools to

[66] See OECD, *Model Tax Convention on Income and on Capital*, *Commentary*, 2017, C(25), par. 10: "Article 25 also provides machinery to enable competent authorities to consult with each other with a view to resolving, in the context of transfer pricing problems, not only problems of juridical double taxation but also those of economic double taxation, and especially those resulting from the inclusion of profits of associated enterprises under paragraph 1 of Article 9; the corresponding adjustments to be made in pursuance of paragraph 2 of the same Article thus fall within the scope of the mutual agreement procedure, both as concerns assessing whether they are well-founded and for determining their amount".

settle international tax disputes, deeming that the Directive, unlike the "OECD Procedures", doesn't apply to transfer pricing disputes would turn into a paradox[67-68].

Having briefly clarified that all the existing disputes to settle international tax disputes are potentially concurrent in the field of transfer pricing disputes, it has to be further highlighted that, in order to effectively settle these disputes, such mechanisms should, jointly[69]: *(a)* enable taxpayers to both "challenge" the primary adjustment and request a correlative adjustment; *(b)* cover triangular/multilateral cases, since nowadays, in many MNEs, more than two associated enterprises are involved in chain of transactions.

In order to test the overall efficiency of the international tax dispute resolution framework in the field of transfer pricing disputes, it should, therefore, be preliminary examined whether these two conditions are met both under the Directive and under the other existing mechanisms to settle international tax disputes[70].

2. The possibility to trigger the Directive and the other existing mechanisms in order to both challenge primary adjustments and to request correlative adjustments.

The Directive, according to article 1, covers disputes that arise from the "application" or "interpretation" of agreements and conventions that provide for the elimination of double taxation of income.

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[67] Accordingly, see H.M. PIT, *Dispute Resolution in the EU*, *op. cit.*, 1245; LUTS, F. DEBELVA, *Directive*, *op. cit.*, par. II(c): "In our opinion, this should not imply that disputes involving economic double taxation should be excluded, since those disputes fall within the scope of the EU Arbitration Convention and most DTCs, and the directive is intended to make the resolution of those disputes more efficient and effective. Thus, taxpayers affected by economic double taxation should be considered 'directly affected'"; ID., *The European Commission's Proposal for Double Taxation Dispute Resolution: Turning the Tide?*, in *Bulletin for International Taxation*, n. 5/2017, par. 3.4.5.

[68] It is worth noting that the EU Arbitration Convention – unlike the Directive and the "OECD Procedures" – expressly grants to all the enterprises of a same MNE the possibility to trigger the procedures envisioned therein, regardless of whether they have received a primary adjustment. Indeed, article 6 states – very generally – that the MAP can be triggered by "*an enterprise*" that "*considers that, in any case to which the Convention applies, the principles set out in article 4 have not been observed*".

[69] See M. TRIVELLIN, *Studi sugli strumenti di soluzione delle controversie fiscali internazionali*, Torino, 2018, 70 – 76.

[70] The analysis on whether the "OECD Procedures" and the EU Arbitration convention fulfil the requirement *sub (a)* will be mainly conducted in the footnotes.

As recital n. 6 of the Directive explains, these disputes are, precisely, the ones arising from the application of bilateral tax treaties ("DTCs") and of the EU Arbitration Convention.

Therefore, whether the Directive grants the possibility to both challenge the primary adjustment and request a secondary adjustment depends on whether this possibility is envisioned in the existing DTCs and in the EU Arbitration Convention, since the Directive provides for the procedural harmonization of dispute resolution procedures in relation to disputes that – *ratione materiae* – fall within the scope of DTCs or the EU Arbitration Convention[71].

The possibility to both "challenge" the primary adjustment and to request a secondary adjustment is undisputed both under the EU Arbitration Convention[72] and under the

[71] J. LUTS, F. DEBELVA, *Directive on Tax Dispute Resolution Mechanisms in the EU*, in *Journals Tax Analysts*, published on 29 December 2017, par. II(a).

[72] This remark needs a brief clarification, since the relevant provisions of the Convention are not extremely clear on this matter. Article 6 of the Convention enables taxpayers to seek protection when "*an enterprise considers that, in any case to which this Convention applies, the principles set out in Article 4 have not been observed*". Article 4(1) of the Convention, on the one hand, (substantially mirroring article 9, paragraph 1, of the OECD MC) enables States to impose a primary adjustments when they believe that transfer prices agreed between associated enterprises are not in line with the arm's length principle; on the other hand, however (unlike article 9, paragraph 2, of the OECD MC), doesn't address expressly the possibility to make correlative adjustments. The absence in the Convention of a provision that expressly deals with corresponding adjustments has been criticized by the doctrine, however such absence should merely be seen "as an omission and sloppy drafting of the Convention", since "The obligation of the State of the receiving enterprise to exclude the transferred profits, as the corollary of the right of the State of the transferring enterprise to add back the same profits, is implied in the Convention's heading and *ratio contrahendi* ('Convention on the elimination of double taxation in connection with the adjustment of profits of associated enterprises') and in its context, in particular the definition and methods of elimination of double taxation" (L. HINNEKENS, *The Tax Arbitration Convention. Its Significance for the EC Based Enterprise, the EC Itself, and for Belgian and International Tax Law*, in *EC Tax Review*, n. 2/1992, 94; ID., *The European Tax Arbitration Convention and its legal Framework-II*, in *British Tax Review*, n. 3/1996, 295; similarly, see also H.M. PIT, *op. cit.*, 380 – 381: "the Convention […] provides for a binding mechanism to end or avoid double taxation arising from profit adjustments", which renders substantially useless a provision such as article 9(2) of the OECD MC, which "only obliges states to grant a corresponding adjustment if they consider the primary adjustment justified").

"OECD Procedures" (if triggered in relation to DTCs that contain a provision equivalent to article 9 of the OECD MC[73-74]).

Accordingly, there shouldn't be doubts as to the fact that the Directive can be triggered in order to both challenge the primary adjustment and to request a correlative adjustment.

Under this aspect there seem to be no need of further clarifications.

[73] Article 25 of the OECD MC enables taxpayers to seek protection against "taxation not in accordance with the Convention"; therefore taxpayers are expressly enabled to seek protection against taxation not in accordance with article 9 of the OECD MC and, precisely, to seek an agreement/decision between the different tax administrations as to *(i)* the decrease (or the elimination) of the primary adjustment and/or *(ii)* the determination of an appropriate corresponding adjustment. Indeed, on the one hand, article 9(1) of the OECD MC allows States to impose a "primary adjustment" if they consider that the associated enterprises didn't deal at "arm's length" in their transactions with each other. On the other hand, article 9(2) of the OECD MC provides for "corresponding" adjustments in cases where one tax administration increases the taxable profits of an associated enterprise (i.e. makes a primary adjustment) and the other tax administration considers the primary adjustment to be justified (see OECD Commentary to article 25, par. 10; in the doctrine see, *inter alia*, R. BICER, *The Effectiveness of Mutual Agreement Procedures as a Means for Settling International Transfer Pricing Disputes*, in *International Transfer Pricing Journal*, 2014, 76 ss). In light of the above, there shouldn't be doubts as to the fact that also under the Directive, when triggered for the resolution of disputes arising from existing tax treaties that include a provision equivalent to article 9 of the OECD MC, taxpayers can seek an agreement/decision between different tax administrations as to obtain both/either *(i)* the decrease-elimination of the primary adjustment and/or *(ii)* an appropriate corresponding adjustment.

[74] Some doubts may rise if the Directive is triggered for the application or interpretation of an existing DTC that doesn't contain a provision equivalent to article 9(2) of the OECD MC. Some countries, indeed, take the view that they are not obliged to grant to taxpayers access to the MAP or, in any case, to make correlative adjustments, in the absence of a treaty provision based on article 9(2) of the OECD MC (see OECD, Transfer Pricing Guidelines, par. 4.32: "*the overlap between the two Articles has caused OECD member countries to consider whether the mutual agreement procedure can be used to achieve corresponding adjustments where the bilateral income tax convention between two Contracting States does not include a provision comparable to paragraph 2 of Article 9*)". This circumstance, however, doesn't seem to affect the Directive's application since – as far as it is known – this view has never been taken by EU Member States (see J. KOLLMAN, L. TURCAN, *Overview of the Existing Mechanisms to Resove Disputes and Their Challenges*, in M. LANG, J. OWENS (edited by), *International Arbitration in Tax Matters*, Amsterdam, 2015, 27). Moreover, the OECD has clarified that in these circumstances the mere fact that Contracting States inserted in the convention a provision that resembles paragraph 1 of article 9 should *per se* indicate that the intention of the contracting States was to have economic double taxation covered by the Convention and, therefore, allow to have correlative adjustments falling within the scope of the MAP (see OECD Commentary to article 25, paras 10 and 11). In conclusion, it should also be added that: *(i)* the inclusion of Article 9(2) of the OECD MC in tax treaties is a best practice under Action 14 of the BEPS (see element 1.1.); *(ii)* article 17 of the MLI mirrors article 9 of the OECD MC; *(iii)* reservations to article 17 of the MLI are possible only where the Party making the reservation will make the adjustment as referred to in Article 17(1), or its competent authority will, in any case, endeavour to resolve a transfer pricing case under the mutual agreement procedure provision of its tax treaty.

3. The application of the existing tools to settle international tax disputes to triangular/multilateral disputes.

In recent years, the economic integration of the world economy has created unique challenges for the international tax dispute framework.

Indeed, whilst the existing mechanisms to settle international tax disputes have been modeled for the resolution of bilateral disputes, phenomena such as the adoption of regional and global business models, and the accelerated integration of national economies and markets, have emphasized the need for effective mechanisms to resolve multi-jurisdictional tax disputes[75].

Although MNEs with large chains of transactions may be involved in very complex triangular/multilateral transfer pricing cases, for the purpose of this research it seems sufficient to consider – very basically and in general terms[76] – triangular/multilateral transfer pricing cases as those situations in which, within a MNE, there is a chain of transactions entered into between multiple associated enterprises.

The following (very general[77]) example could be useful in order to address the reasons why it is of pivotal importance that international tax disputes mechanisms should cover triangular/multilateral transfer pricing cases.

Company A (Dutch) is the sole parent company of companies B (Greek) and C (Italian). Suppose that this MNE produces and sells an airplane to a customer in Italy through the following scheme: *(i)* company A produces the parts of the airplane at the cost of 700; *(ii)* company A sells to company B the parts of the airplane for the price of 1000, thus generating a profit of 300; *(iii)* company B assembles the parts for the cost of 400 and sells the assembled product to C at the price of 1450, thus generating a profit of 50; *(iii)* company C (the distributor), in order to sell the airplane, sustains

[75] See OECD, *Action 14: Making dispute resolution mechanisms more effective – Final Report*, par. 58, which concluded that "*Countries should accordingly develop and include in their published MAP and advance pricing arrangement programme guidance appropriate guidance on multilateral MAPs and APAs*". Also the EU JTPF identified that triangular/multilateral cases should be dealt with under the EU Arbitration Convention and, finally, included in the Code of Conduct guidance in order to settle such disputes (see *infra*).

[76] For more detailed analysis, see OECD, Commentary to article 25, par. 38.

[77] For more exhaustive examples see M.VAN HERKSEN, *International Developments*, in A.J. BAKKER, M.M. LEVEY (edited by), *Transfer Pricing and Dispute Resolution*, Amsterdam, 2011, *Online books*, paras 2.3.3. and 2.3.4; ID., *How the Arbitration Convention Lost its Lustre: the Threat of Triangular Cases*, in *Intertax*, 2008, issue n. 8-9, 332 ss.

costs with third party suppliers for 50; *(iv)* company C sells the airplane market at 1400, thus generating a loss of 100[78].

Basic framework	Costs	Revenues	Net profit
A (Netherlads)	-700,00	1.000,00	300,00
B (Greece)	-1.400,00	1.450,00	50,00
C (Italy)	-1.500,00	1.400,00	-100,00
Total			**250,00**

Suppose, then, that the Italian Revenue Agency considers that the loss of company C is not at arm's length on the grounds that between independent parties the normal profit margin for a distributor in the specific industry would be equal to 50 and, consequently, adjusts the profits of C by reducing from 1450 to 1300 the price paid to company B. Such adjustment would lead to double taxation, since, on the one hand, the aggregated taxable profit of the whole transactions would be of 250[79]; and, on the other hand, following the adjustment, the total taxable profit of the MNE would be of 400[80].

No adjustment	Costs	Revenues	Net profit
A (Netherlands)	-700,00	1.000,00	300,00
B (Greece)	-1.400,00	1.450,00	50,00
C (Italy)	-1.350,00	1.400,00	50,00
Total			**400,00**

If Italy enters into a bilateral MAP with Greece, in order to avoid double taxation Greece should reduce (accordingly to the primary adjustment of thee profits of company C) the price charged by company B to company C; however, this result is highly unlikely, because in granting such corresponding adjustment, company B would generate a loss and Greece would *de facto* be the only party to deprive itself of tax revenue.

Correlative adjustment	Costs	Revenues	Net profit
A (Netherlands)	-700,00	1.000,00	300,00
B (Greece)	**-1.400,00**	**1.300,00**	**-100,00**
C (Italy)	-1.350,00	1.400,00	50,00
Total			**250,00**

[78] Note that this example makes no reference to the tax rates of the States and assumes that all the revenues are taxable and all the costs are deductible in the hands of all the companies involved.

[79] Resulting from the difference between the market price of 1400 and the costs sustained by company A (700), company B (400) and company C (50).

[80] Company A is taxed on a profit of 300; plus company B is taxed on a profit of 50; plus company C is taxed on a profit of 50.

Greece loss of tax revenue could be avoided by imposing a downward adjustment of the price charged to (the Greek) company B by (the Dutch) company A; this possibility, however, wouldn't be possible in a bilateral MAP between Italy and Greece, since it would imply the review of the transactions carried out with the company of a third country (the Netherlands). Therefore, the only solution in order to supersede such stalemate would be to adopt a trilateral MAP between Italy, Greece and Netherlands, so that: *(a)* the three States can determine jointly the transfer prices of both the transactions (i.e. the transaction between companies A and B, and the transaction between companies B and C); *(b)* if Greece would still need to make a correlative adjustment of the price charged by company B to company C, it could ultimately agree with the Netherlands a corresponding downward adjustment of the price charged by company A to company B.
Before analyzing whether the existing international instruments to settle international tax disputes cover triangular/multilateral cases, it should be briefly pointed out that – consistently with the object of this research – the following sub-paragraphs will only address "EU transfer pricing triangular/multilateral cases", *i.e.* cases where all associated enterprises of a same MNE are situated within the European Union; no reference, by contrast, will be made to "non-EU triangular/multilateral cases", *i.e.* cases where one (or more) associated enterprise of a same MNE is (are) situated outside the European Union, since these latter cases seem to fall outside scope of application of both the Directive and the EU Arbitration Convention[81].

3.1. The resolution of triangular/multilateral transfer pricing cases under the "OECD Procedures".

Although the dispute resolution mechanism envisioned under article 25 of the OECD MC is construed for bilateral disputes – *i.e.* for disputes between two States that have entered into with each other a double taxation convention – the OECD, in the action

[81] For further considerations as to the works conducted by the EU JTPF in order to address these dispute with the EU Arbitration Convention see M.VAN HERKSEN, *International Developments*, op. cit., paras 2.3.3. and 2.3.4; ID., *How the Arbitration Convention Lost its Lustre*, *op. cit.*, 332 ss.; H.M. PIT, *Dispute Resolution*, *op. cit.*, 885 – 889.

14 Final Report, emphasized the need of mechanisms to settle multi-jurisdictional tax disputes and, accordingly, concluded that, on the one hand, countries should "*develop and include in their published MAP and advance pricing arrangement program appropriate guidance on multilateral MAPs and APAs*" and, on the other hand, announced some "*amendments to the Commentary on Article 25 as part of the next update of the OECD Model Tax Convention in order to address the issue of multilateral MAPs and APAs*"[82].

Following the BEPS, the Commentary to article 25 of the OECD MC has been amended accordingly, and now expressly addresses the possibility to enter into multilateral MAPs or "international" APAs (see, *infra*, section III)[83] through the following two approaches: *(i)* the first approach ("multilateral approach") is that the relevant authorities of the States involved in a triangular/multilateral transfer pricing case negotiate, all together, a single mutual agreement; *(ii)* the second approach ("bilateral approach") is that the relevant authorities involved in a triangular/multilateral transfer pricing case initiate multiple, "parallel", bilateral negotiations, in order to reach multiple mutual agreements consistent with each other[84].

The possibility to reach multilateral MAPs – by either the "multilateral" or the "bilateral approach" – under the existing tax treaties, however, could be complex, due

[82] OECD, *Action 14: Making dispute resolution mechanisms more effective – Final Report*, par. 58.

[83] OECD, Commentary to article 25, par. 38.5: "The desire for certainty may result in taxpayers seeking multilateral advance pricing arrangements ("APAs") to determine, in advance, the transfer pricing of controlled transactions between associated enterprises of several States. Where there exist bilateral tax conventions among all these States and it appears that the actions of at least one of these States are likely to result for the taxpayer in taxation not in accordance with the provisions of a convention, Article 25 of these conventions allows the competent authorities of these States to negotiate on a multilateral basis an appropriate set of criteria for the determination of the transfer pricing for the controlled transactions. A multilateral APA may be achieved either through the negotiation of a single agreement between all the competent authorities of the States concerned or through the negotiation of separate, but consistent, bilateral mutual agreements".

[84] OECD, Commentary to article 25, par. 38.1: "the combination of bilateral tax conventions concluded among several States may allow the competent authorities of these States to resolve multilateral cases by mutual agreement under paragraphs 1 and 2 of Article 25 of these conventions. A multilateral mutual agreement may be achieved either through the negotiation of a single agreement between all the competent authorities of the States concerned or through the negotiation of separate, but consistent, bilateral mutual agreements".

to the fact that tax treaties entered into between States could provide for different set of rules in order to settle the case.

It should, however, be briefly noted that such difficulties could be overcome whether all the tax treaties entered into between the States involved in the case fall within the scope of application of the MLI. Indeed – although the system of options, reservations and notifications may still cause differences between the applicable tax treaties (see, *supra*, section I, par. 2) – the MLI should provide for a greater uniformity of the rules (at least of the ones relating to the MAP, since article 16 of the MLI is a "minimum standard" provision) that are relevant for the settlement of triangular transfer pricing cases and, therefore, facilitate the reaching of multilateral MAPs and APAs[85].

3.2. The resolution of triangular/multilateral transfer pricing cases under the EU Arbitration Convention.

The multilateral character of the EU Arbitration Convention should permit, in the abstract, the participation in the same proceedings of more than two states[86]. However, in this regard, the provisions of the Convention are ambiguous, given that, if, on the one hand, some provisions could be interpreted at the extent to include triangular/multilateral disputes under the coverage of the Convention[87], on the other hand, some provisions seem to refer only to disputes involving two associated enterprise[88].

[85] On the difficulties that may rise in order to reach multilateral MAPs under the "OECD Procedures", see M. TRIVELLIN, *op. cit*., 123 and *ivi* – as to the fact that multilateral disputes could be better addressed in a multilateral treaty – the reference to L. DEL FEDERICO, S. GIORGI, *Associazione italiana per il diritto tributario Latinamericano, Relazione nazionale. Il multilateralismo nelle convenzioni internazionali in materia fiscale: la prospettiva europea e l'esperienza italiana*, in *Dir. prat. trib. internaz*., 2015, 783 ss. and to J. MALHERBE, *The issues of Dispute Resolution and Introduction of a Multilateral Treaty*, in I*ntertax*, 2015, issue 1, 91 ss.

[86] K. PERROU, *Taxpayer Participation inTax Treaty Dispute Resolution*, IBFD, 2014, Online books, par. 8.2.1.2.2.

[87] For example, article 6 refers to Member States in a plural form and reads that: "*if other Contracting States may be concerned in the case [...] the competent authority shall notify the competent authorities of those other Contracting States*"; accordingly, it is submitted that this provision expressly refers to triangular/multilateral disputes (see L. HINNEKENS, *The European Tax Arbitration Convention and its legal Framework-II*, *op. cit*., 280 and H.M. PIT, *Dispute Resolution*, *op. cit*., 862).

[88] Article 1 defines the scope of application of the convention as to the cases where "*profits which are included in the profits of an enterprise of a Contracting State are also included or are also likely to be included in the profits of an enterprise of another Contracting State*": this provision uses the singular form when addressing the subjects involved in a dispute ("*enterprise of a contracting State*" and

These uncertainties have been superseded by the EU JTPF, which inserted in the Code of Conduct specific rules dealing with EU triangular/multilateral cases. Precisely: *(i)* paragraph 1.1(a) of the Code of Conduct provides for a definition of EU triangular/multilateral cases[89]; *(ii)* paragraph 1.1(b) of the Code of Conduct expressly recognizes that "*The scope of the Arbitration Convention includes all EU transactions involved in triangular cases*"; *(iii)* paragraph 6.2. of the Code of Conduct provides for procedural rules that have to be followed when dealing with triangular cases.
As to the rules to be followed when dealing with triangular cases, it should be briefly mentioned that the Code of Conduct – unlike the OECD Commentary to article 25 of the MC – envisions three different, alternative approaches that can be followed by the relevant tax authorities. Specifically: (i) "*competent authorities can decide to take a multilateral approach (immediate and full participation of all the competent authorities concerned)*"; (ii) "*competent authorities can decide to start a bilateral procedure, whereby the two parties to the bilateral procedure are the competent authorities that identified […] the associated enterprise situated in another Member State that had a significant influence in contributing to a non-arm's length result in the chain of relevant transactions or commercial/financial relations, and should invite the other EU competent authority(ies) to participate as (an) observer(s) in the mutual*

"*enterprise of another Contracting State*"), thus it seems to refer only to disputes where two associated enterprises are involved; the same occurs under article 4(1)(a) which reads: "*an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of another contracting State*" and under article 5 which reads: "*Where a Contracting State intends to adjust the profits of an enterprise in accordance with the principles set out in Article 4, it shall inform the enterprise of the intended action* […] *and give it the opportunity to inform the other enterprise*". Accordingly, see L. HINNEKENS, *The European Tax Arbitration Convention and its legal Framework-II*, *op. cit*., 280 ("The text of the Convention and the principles of its Article 4 seem to suggest that its application will deal with each pair of associated enterprises as a separate case […]. The international procedure would thus be applied strictly on a bilateral basis") and H.M. PIT, *Dispute Resolution*, *op. cit*., 861 – 862.

[89] "*For the purpose of this Code of Conduct, a EU triangular case is a case where, in the first stage of the Arbitration Convention procedure, two EU competent authorities cannot fully resolve any double taxation arising in a transfer pricing case when applying the arm's length principle because an associated enterprise situated in (an)other Member State(s) and identified by both EU competent authorities (evidence based on a comparability analysis including a functional analysis and other related factual elements) had a significant influence in contributing to a non-arm's length result in a chain of relevant transactions or commercial/financial relations and is recognised as such by the taxpayer suffering the double taxation and having requested the application of the provisions of the Arbitration Convention*".

agreement procedure discussions"; (iii) "*competent authorities can decide to start more than one bilateral procedure in parallel*"

3.3. The resolution of triangular/multilateral transfer pricing cases under the Directive.

The Directive – as the "OECD Procedures" and the EU Arbitration Convention – doesn't expressly regulate whether it covers triangular/multilateral disputes.

As already stated in the previous paragraphs, however, according to article 1, the Directive covers disputes that arise from the "application" and "interpretation" of agreements and conventions that provide for the elimination of double taxation of income. Therefore, given that both the "OECD Procedures" (even if with some difficulties) and the EU Arbitration Convention seem to cover triangular/multilateral disputes, there shouldn't be doubts as to the fact that triangular/multilateral disputes can fall within the scope of application of the Directive when triggered for the resolution of disputes arising from the application of existing tax treaties drafted accordingly to the OECD MC or from the application of the EU Arbitration Convention.

This conclusion seems reinforced by the fact that under the Directive there is no provision that expressly rules out triangular/multilateral disputes from its scope of application, but, rather: *(i)* the Directive fourth recital of the preamble expressly seems to refer to such disputes by stating that "*Improvements to dispute resolution mechanisms are also necessary to respond to the risk that the number of double or multiple taxation disputes will increase*"; *(ii)* in general, almost all the provisions of the Directive make reference to the "*competent authorities*" of the "*Member States*" in plural form, thus implying that the relevant authorities and the Member States involved in a dispute could be more than two (see, *ex multis*, article 1 refers to "*disputes between Member States*" and article 3 states that the complaint has to be submitted to "*each of the competent authorities of each of the Member states concerned*") ; *(iii)* article 2 ("*Definitions*") states that the term "*double taxation*" is linked to "*the imposition by two or more Members State* […]".

4. The interactions between the European Arbitration Directive and the other tools to settle international tax disputes.

As stated in the previous paragraphs, all the existing mechanisms to settle international tax disputes are concurrent in the field of transfer pricing disputes.

For this reason, a final issue that should be preliminary addressed before analyzing in detail – in the following chapters – the procedural rules that govern the existing dispute resolution mechanisms, is whether taxpayers can freely choose one of these mechanisms over the others, or if, by contrast, the Directive, as a piece of secondary EU law, will have to take precedence over the other mechanisms for the resolution of international tax disputes within the European Union.

According to the majority of the authors that have faced this complex issue, the Directive is a dispute resolution tool that supplements – without replacing – the other existing mechanisms[90].

This conclusion can be drawn in light of the combination of articles 3(3) and 16(5) of the Directive, which provides for the termination of the MAPs and of the arbitration procedures (envisioned under the other dispute resolution mechanisms) that are already pending before the starting of the procedures envisioned under the Directive[91].

[90] See, precisely, P. PISTONE, *The Settlement of Cross-Border Tax Disputes in the European Union*, op. cit., 340 – 341: "Although the EU Tax Arbitraion Directive is secondary law of the European Union, it does not imply a complete shift of powers from EU Member States to the European Union, or establish an actual hierarchy among the fur legal instruments that operate in this field within their respective scope. […] In our view, this is due to the intention to preserve a wide range of solutions among which the affected taxpayer can choose the legal instrument that pursues the settlement of a given cross-border tax dispute"; ID., *The BEPS Multilateral Instrument and EU Law*, in A.J. MARTIN JIMÉNEZ (edited by), *The External Tax Strategy of the EU in a Post-BEPS Environment*, IBFD, Online Books, par. 7.3.; H.M. PIT, *Dispute Resolution in the EU: The EU Arbitration Convention and the Dispute Resolution Directive*, *op. cit*., chapter 32, par. 3.1.2.1.: "the Dispute Resolution Directive sufficiently clarifies that it does not replace existing dispute resolution mechanisms"; S. GOVIND, *The New Face of International Tax Dispute Resolution: Comparing the OECD Multilateral Instrument with the EU Dispute Resolution Directive*, in *EC Tax Review*, n. 6/2018, 322: "Although one may instinctively feel that the procedure under the Directive should take precedence over proceedings under the MLI in EU Member States owing to the Directive being supranational law, such a conflict should not arise. This is because the taxpayer is given the option of applying for dispute resolution under either instrument (or the EU Arbitration Convention as well, in fact) and thus, there would be no conflict as long as the taxpayer chooses one procedure over the other".

[91] According to article 16(5), the filing of a complaint under the Directive "*shall put an end to any other ongoing proceedings under the mutual agreement procedure or dispute resolution procedure under an agreement or convention that is being interpreted or applied in relation to the relevant question in dispute*". According to article 3(3), the taxpayers, in order to initiate the Directive's procedure, have to submit the information on any MAP or arbitration that have already been triggered before filing the

Indeed, by providing the termination of previous MAPs and arbitration procedures, the combination of these two provisions necessarily implies that the taxpayers have the option to choose among different dispute resolution mechanisms.

Although the Directive doesn't impose an actual hierarchy among the different tools, it still takes precedence over the other existing remedies both *(i)* when – as just stated above – the taxpayer resorts to the Directive after having triggered another legal instrument and *(ii)* when (on the contrary) the taxpayer resorts to another legal instrument after having triggered the Directive. Indeed, regardless the absence of an express provision that regulates the case *sub (ii)*, it seems reasonable to argue that the Directive – as all the other dispute resolution mechanisms – imposes the rule *electa una via non datur recursus ad alteram*, *i.e.* the rule according to which, after the filing of a complaint under the Directive, it is precluded to taxpayers to switch to a procedure envisioned under a different legal instrument. This rule, precisely, on the one hand, should be implicitly derived from the mentioned articles 3 and 16 of the Directive and, on the other hand, seems to operate in light of the fact that the procedures set forth under the existing dispute resolution tools "are similar but not identical" and, therefore, "any switch from one to the other legal instrument during the procedure may alter the effectiveness of legal protection and certainty in the applicable rules"[92].

As a final remark, it should be mentioned that there could be the grounds to reach a different conclusion, *i.e.* to argue that, once the Directive will kick-off, the taxpayers will no longer be free to choose one instrument over the others, but will, necessarily, have to trigger the Directive.

Precisely, one may infer this conclusion from the recent European Court of Justice decision in the *Achmea* case[93].

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complaint and expressly commit to "*abide by the provisions of Article 16(5)*", *i.e.* to terminate such MAPs or arbitrations.

[92] P. PISTONE, *The Settlement of Cross-Border Tax Disputes in the European Union*, op. cit., 342 – 343, who also points out that, from a practical point of view, it is "hard to imagine that the affected person(s), not accepting a given mutual agreement, would still be in time to file a second complaint for the same tax year and factual pattern, except insofar as such person(s) can prove that it was the mutual agreement itself to generate the problem".

[93] ECJ, 6 March 2018, Case C-284/16, *Achmea*. On this topic see F. BOULOGNE, *Implications of the CJEU's Achmea decision (C-284/16) on tax treaty arbitration*, in *Kluwer International Tax Blog*, that can be read at the link http://kluwertaxblog.com/2018/03/26/implications-cjeus-achmea-decision-c-28416-tax-treaty-arbitration/. Also H.M. PIT, *Dispute Resolution in the EU: The EU Arbitration*

In this case, the Grand Chamber of the CJEU stated that a bilateral investment treaty (BIT) between two Member States violated EU law because it allowed – under article 8[94] – an arbitral tribunal to interpret EU provisions in a dispute between investors and States.

In particular, after having: *(i)* recalled article 344 of the TFUE; *(ii)* stated that, "in accordance with Article 19 TEU, it is for the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States" and *(iii)* that it is "Article 267 TFEU, which, by setting up a dialogue between one court and another, specifically between the Court of Justice and the courts and tribunals of the Member States, has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy"; the ECJ concluded that article 8 of the examined BIT "has an adverse effect on the autonomy of EU law"[95] and "could prevent […] disputes from being resolved in a manner that ensures the full effectiveness of EU law"[96].

This decision, precisely, was taken on the grounds of three elements.

The first element was that the "arbitral tribunal referred to in Article 8 of the BIT" was "called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital"[97].

The second element was that the "tribunal such as that referred to in Article 8 of the BIT cannot be regarded as a 'court or tribunal of a Member State' within the meaning

Convention and the Dispute Resolution Directive, *op. cit*., chapter 32, par. 3.1.2.1. seems to have raised some doubts at this regard by recalling the judgment ECJ, 27 September 1988, case C-235/87, *Matteucci* (where, at par. 19 and 22, the ECJ stated that EU law takes precedence over bilateral treaties if they impede the application of EU law) and by pointing out that "the Directive would, by its very legal status, already take precedence over … a double tax convention … if and in so far as the application of that convention would impede the application of the Directive. Whether this would be the case can only be established on a case-by-case basis"

[94] Specifically, article 8 of the BIT in question provided – among other things – that "*All disputes between one Contracting Party and an investor of the other Contracting Party concerning an investment of the latter shall if, possible, be settled amicably*" and that "*Each Contracting Party hereby consents to submit a dispute* […] *to an arbitral tribunal, if the dispute has not been settled amicably within a period of six months from the date on which either party to the dispute requested amicable settlement*".

[95] ECJ, 6 March 2018, Case C-284/16, *Achmea*, par. 59.

[96] ECJ, 6 March 2018, Case C-284/16, *Achmea*, par. 56

[97] ECJ, 6 March 2018, Case C-284/16, *Achmea*, par. 42

of Article 267 TFEU"[98], *i.e.* as judicial body entitled to refer preliminary questions to the CJEU.

The third and last element – strictly linked to the second – was that the "the arbitral award made by such a tribunal is not in accordance with Article 19 TEU since it isn't subject to review by a court of a Member State"[99]. According to the ECJ, indeed, the existence of the second element (i.e. the fact that the arbitral tribunal is not entitled to refer questions directly to the CJEU) wasn't *per se* sufficient to violate the "autonomy of EU law" if the decision could have been "subject to review" by a court of a Member State, since this Court would have been eventually entitled to submit the case to the ECJ by means of article 267 of the TFUE.

The level of abstraction of the *Achmea* judgment may suggest to extend the principles laid down therein also to international tax disputes[100]. Precisely, it should be explored whether the three elements of the *Achmea* decision occur in disputes conducted under the "OECD Procedures" and under the EU Arbitration convention, and if, as a consequence, these procedures could prevent disputes from being resolved in a manner that "ensures the full effectiveness of EU law".

As to the first element, it is quite complex to assess whether the substantive subject matters of international tax disputes may fall within the scope of EU law[101].

Limiting the analysis to the field of transfer pricing disputes (*i.e.* to disputes that arise because to or more States do not share the same view on the correct application of the arm's length principle with regard to specific transactions), the interpretation of the

[98] ECJ, 6 March 2018, Case C-284/16, *Achmea*, par. 49.

[99] ECJ, 6 March 2018, Case C-284/16, *Achmea*, par. 50.

[100] Accordingly see F. BOULOGNE, *loc. ult. cit.* and J. MONSENEGO, *Does the Achmea Case Prevent the Resolution of Tax Treaty Disputes through Arbitration?*, in *Intertax*, 2019, issue n. 8-9, 725 ss. (to which reference should be made also for a comparison between bilateral investment treaties disputes and tax treaties disputes).

[101] On this complex issue see, recently, S.M. RONCO, *Meccanismi arbitrali per la risoluzione delle dispute in materia fiscale e diritto dell'Unione europea: una complessa relazione. Spunti alla luce della Direttiva n. 2017/1852/UE*, in *Dir. prat. internaz.*, forthcoming, and, more in general, inter alia, C. HJI PANAYI, *Double taxation, tax treaties, treaty shopping and the European community,* Kluwer Law International, 2007, spec. 163 ss.; E.C.C.M KEMMEREN, *Double Tax Conventions on Income and Capital and the EU: Past, Present and Future*, in *EC Tax Review*, n. 3/2012, 157 ss.; H. HOFMANN, *Double Tax Agreements: Between EU Law and Public International Law*, in A. RUST (edited by), *Double Taxation within the European Union*, Kluwer Law International, 2011, 75 ss.; J. LUTS, C. KEMPENEERS, *Case C-648/15 Austria v. Germany: Jurisdiction and Powers of the CJ to Settle Tax Treaty Disputes Under Article 273 TFEU*, in *EC Tax Review*, n. 1/2018, 9 ss.

arm's length principle could be considered as having been frequently accepted by the European Commission under Article 107 TFEU (see Section III below)[102] and, at present, could be deemed as a legal concept of EU law[103].

As to the second and the third elements, under both the Arbitration Convention and the OECD procedures, uncertainty seems to exist as to whether the case concerned can be referred to the European Court of Justice: nor directly, during the MAPs and the arbitration procedures, since neither the tax administrations – during the MAP – nor the "arbitral panels" – during the arbitration procedures – can be deemed "judicial bodies" for the purposes of article 267 of the TFUE[104]; nor indirectly, by national tax Courts, since none of the existing dispute resolution procedures expressly entitle taxpayers to challenge before domestic Courts "mutual agreements" or "arbitral awards".

Therefore, in light of the above, all three elements of the Achmea decision could be regarded as fulfilled when the "OECD Procedures" or the EU Arbitration Convention are triggered with regard to transfer pricing disputes and that, as a consequence, the Directive would be the only tool available for the resolution of such disputes within the territory of the European Union, given that – following the wording of the ECJ in the *Achmea* case – this is the only instrument that (by definition) should "ensure the full effectiveness of EU law".

This conclusion, however, won't be followed in this research. Indeed, the following chapters will attempt to demonstrate that taxpayers should be entitled – at least in the abstract – to challenge before domestic courts both mutual agreements and "arbitral decisions" reached under both these two procedures (as under the Directive).

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[102] As it will be briefly discussed in section III of this chapter, starting from June 2014, the EU Commission has opened several investigations for alleged aid granted to some multinational groups granted by means of advance pricing agreements (APAs). As a result of these investigations, the EU Commission issued several final decisions of recovery of unlawful State aids on the grounds, *inter alia*, that the APAs under review did not comply with the arm's length principle. For an accurate analysis of these decisions, see – among the authors that will be quoted *infra* – C. FRANCIOSO, *State Aid and Tax Rulings: Managing the Risk of Recovery*, in P. DE VINCENTIIS, F. CULASSO, S.A. CERRATO (edited by), *The Future of Risk Management*, vol. I, Palgrave macmillan, 2019, 351 ss.

[103] Accordingly, see J. MONSENEGO, *op. cit.*, 730.

[104] On this issue see, more extensively, chapter III.

SECTION III

THE EMPLOYMENT OF THE EXITING DISPUTE RESOLUTION MECHANISMS ON A PREVENTIVE BASIS

1. Preliminary remarks on "international" Advance Pricing Agreements (or "international" APAs).

In order to provide for the full framework on the functioning of the mechanisms to settle international tax disputes in the field of transfer pricing, this section will briefly address the international Advance Pricing Agreements (hereinafter "APAs").

The MAPs and the arbitration procedures briefly described in the previous sections can all be triggered after the imposition of a tax assessment or, in any case, when the imposition of a tax assessment is highly probable (*i.e.* once the tax administrations have already commenced an audit proceeding)[105].

It should, nevertheless, be highlighted that, in the field of transfer pricing, the procedures envisioned under the existing dispute resolution mechanisms may be "twisted" in order to reach "preliminary" agreements between taxpayers and the tax administration of two (or more) States as to the determination of the transfer prices, *i.e.* in order to reach pricing agreements with respect to transactions that have still to be undertaken by taxpayers (so called international Advanced Pricing Agreements or "APAs").

Precisely, according to the OECD, these agreements can be reached by means of the "interpretative" MAP regulated under article 25of the OECD MC. Moreover– as recently pointed out by an influential author[106] – International APAs do not seem impossible to achieve, even via the EU Arbitration Directive 2017/1852.

Before describing, in detail, the legal rules that should govern the reaching of international APAs, this introductory paragraph will offer a general oversight of what are, according to the OECD, the key features of these agreements.

[105] See, more extensively, J.S. WILKIE, *Article 25: Mutual Agreement Procedure*, in *Global Tax Treaty Commentaries*, IBFD, 2018, *Online Books*, par. 2.3.1.

[106] M. TRIVELLIN, *op. cit.*, 46 – 50.

In particular, this paragraph will address: *(i)* the legal definition of APAs and the distinction between “international” and “domestic”-“unilateral” APAs; *(ii)* the general aspects regarding the initiation and the implementation in the domestic systems of “international” APAs; *(iii)* the criticisms that may rise during the process that leads to the conclusion of “international” APAs. This brief description will also offer the grounds to highlight – in the footnotes – the many similarities between the functioning of “international” APAs and the Italian “domestic” APA regulated under article 31-*ter*, d.P.R. n. 600/1973.

According to the OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*[107], “international” APAs are agreements[108] that determine an appropriate set of criteria (e.g. method, comparables and appropriate adjustments thereto, critical assumptions as to future events) for the advance determination of the transfer pricing over a fixed period of time[109].

“International” APAs should be distinguished from “domestic APAs.

“International” APAs, indeed, are agreements that involve the taxpayer and two (“bilateral APAs”) or more (“multilateral APAs”) tax administrations of different jurisdictions[110], that can be reached only by triggering the MAP envisioned under

[107] See OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, par. 4134; for a general overview of international APAs in literature, see M. MARKHAM, *Advance Pricing Agreements – Past, Present and Future*, Wolters Kluwer, 2012.

[108] It should be immediately noted that in the following paragraphs the term “agreement” will be used in an a-technical way and is not intended to give any legal status to APAs; the issue concerning the legal nature of multilateral APAs will be, indeed, specifically addressed in paragraph 5.4.

[109] According to the OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, par. 4142, however, international APAs can be reached not only for the purpose of determining the transfer prices applicable to their transactions, but also with regard to one single legal entity (for example, to an enterprise resident in one State, that has permanent establishments in several other States) for the resolution of issues relating to allocation problems, permanent establishments, and branch operations. Similarly, also the Italian APA regulated under art. 31-ter, comma 1, d.P.R. n. 600/1973 has a wide subjective and objective scope: the provision, indeed, states that internal APAs can be reached “mainly” (“*con principale riferimento*”) – therefore not exclusively – in connection to the subjects and to the cases referred to under lett. a), b), c) and d) of the same comma (see M. TRIVELLIN, *op. cit*., 24, footnote 72). As to the subjective and objective scopes of application of art. 31-*ter*, see, *ex multis*, D. CONTE, *Imposizione fiscale e nuovi accordi preventivi per le imprese con attività internazionale*, in *Riv. dir. trib*., 2016, I, 682 – 688 and M. GRANDINETTI, *Gli accordi preventivi per le imprese con attività internazionale*, in *Rass. trib*., 2017, 667 - 676.

[110] E.A. BAISTROCCHI, *Transfer pricing in the 21st Century: A Proposal for both Developed and Developing Countries*, in Annual Papers (University of California, Berkley), n. 20/2005, 10: “the central difference between bilateral and multilateral APAs is the number of players involved […] in the transfer

article 25 of the OECD MC. "Domestic" APAs, by contrast, are agreements between the taxpayer and the tax administration of one jurisdiction, that are entirely governed by domestic legislations[111]. Moreover, only "international" APAs are precisely aimed to avoid the rising of international double taxation, since only these type of APAs involve the tax authorities of different States[112].

According to the OECD, international APAs must be formally initiated by taxpayers and require negotiations between the taxpayer, one or more associated enterprises, and one or more tax authorities[113]. The cooperation of taxpayers is considered to be "vital" for the reaching of APAs. Indeed, on the one hand, taxpayers have to provide for full cooperation in assisting the tax administration with the evaluation of the case and all the information that the administration deems necessary for that evaluation[114]. On the

pricing dispute. In bilateral APAs, two competent authorities are involved, whereas in multilateral APAs that figure rises to three or more competent authorities".

[111] On this distinction, see, *ex multis(simi)*, G. RAGUCCI, Alternative dispute resolution *e amministrazione finanziaria*, in *Riv. dir. fin. sc. fin*., 2018, I, 208 ss. and spec. 210.

[112] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, par. 4156. For this reason, the OECD encourages bilateral APAs: "Wherever possible, an APA should be concluded on a bilateral or multilateral basis between competent authorities through the mutual agreement procedure of the relevant treaty" (see par. 4173). At this regard, among scholars, see, *inter alia*, M. MARKHAM, *op. cit.*, 282 – 285; I. KERSCHNER, M. STIASTNY, *The Experience with Advance Pricing Agreements*, in *Intertax*, 2013, issue 11, 589 – 590; J. BERGQUIST, *Experience concerning Advance Pricing Agreements*, in *Intertax*, 1992, issue 6/7, 338. The greater efficiency of multilateral APAs in the avoidance of double taxation, as compared to unilateral APAs, is also clearly stated in the Italian Revenue Agency's, *Bollettino del Ruling di standard internazionale* (II ed.), par. 3.1.: "*Il raggiungimento di un accordo di ruling internazionale, in quanto sostanzialmente assimilabile ad un APA unilaterale, attenua sensibilmente ma non elimina in toto il rischio di doppia imposizione internazionale degli imponibili relativi alle operazioni intercompany con carattere di transnazionalità. Un APA bilaterale o multilaterale, al contrario, assicura che il reddito delle imprese associate, derivante dalle operazioni che ricadono nel perimetro dell'accordo, non sia assoggettato a doppia o multipla imposizione, poiché l'APA è condiviso e sottoscritto anche dalle autorità competenti delle giurisdizioni estere interessate*").

[113] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, par. 4134. As to the procedure that must be followed in order to initiate an Italian unilateral APA, article 31-ter, comma 6, d.P.R. n. 600/1973, refers to the Italian's Revenue Agency decree *Provvedimento Direttore Agenzia delle Entrate*, 21 March 2016, prot. n. 2016/42295, par. 2.

[114] The taxpayer, for instance, should provide the tax administrations with the methodology that it considers most reasonable in order to determine the transfer prices; submit all the relevant documentation needed to support the reasonableness of the proposal; and even identify businesses that are comparable to the associated enterprises' businesses (sse OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, par. 4144). Also the Italian Revenue Agency requires a great amount of information from the taxpayers in order to initiate a unilateral APA; these are accurately listed in the *Provvedimento Direttore Agenzia delle Entrate*, 21 March 2016, prot. n. 2016/42295, par. 2.4.

other hand, if taxpayers misrepresent or omit some information[115], APAs are subject to cancellation[116] or revocation[117].

As to the duration of APAs, the OECD guidelines state that these agreements should bind the parties only *pro futuro*[118]. However, in the same Guidelines, it is also suggested that States involved in an international APA should provide for "rollback" mechanisms (*i.e.* the application of the agreement with reference to transactions that have already occurred before the reaching of such agreement) if the relevant facts and circumstances of the previous years are the same of the ones covered by the APA[119]. If, during the duration of the agreements, there are material changes of the facts and/or of the circumstances that form the basis of the agreement, the OECD suggests two

[115] As to the Italian internal APA, according to the *Provvedimento Direttore Agenzia delle Entrate*, 21st march 2016, prot. n. 2016/42295, if the taxpayer fails to comply with the duty to disclose all the information listed in par. 2, the APA request may be declared inadmissible (see par. 3.1. and par. 3.3.) or may not proceed further until such information is provided by the taxpayer (par. 3.2.). However, how it has been sharply pointed out by M. TRIVELLIN, *op. cit.*, 28 – 33, art. 31-ter doesn't expressly consider the possibility that an APA may be revoked or cancelled, after its conclusion, if the taxpayer misrepresents or fails to file some relevant information during the "negotiations" with the tax authority. This possibility, with regard to the Italian unilateral APA, appears, therefore, to be questionable; this complex issue will be discussed more extensively *infra* in this section, when examining the legal nature of APAs (see par. 4).

[116] According to the OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, Annex II to chapter IV, par. 79, lett. a), "cancellation" means that the taxpayer is treated as if the APA had been effective only up to the cancellation date and not for the whole period originally agreed. "Cancellation" occurs, more specifically, when the misrepresentation, mistake or omission is not attributable to the neglect, carelessness, or willful default of the taxpayer.

[117] According to the OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, Annex II to chapter IV, par. 77, lett. a), "revocation" differs from "cancellation" because it is retroactive, i.e. it has the effect that the taxpayer is treated as if the APA had never been entered into. Revocation occurs, more specifically, when the misrepresentation, mistake or omission is attributable to the neglect, carelessness, or willful default of the taxpayer.

[118] Pursuant to article 31-ter, comma 2, first sentence, the Italian unilateral APA covers the tax period in which it has been concluded and the four following tax periods. The Italian doctrine has wondered whether the APA may be extended for even a longer period. According to M. TRIVELLIN, *op. cit.*, 27, footnote 75, if the tax administration wishes to extend the APA, at the taxpayer should be granted the right to challenge the extension of the agreement. The OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, par. 4153, seems to have proposed a very similar solution, stating that: "In some cases, an APA may also provide an option to extend the period of time to which it applies", however, in this case, tax administrations and the taxpayers should "renegotiate the APA".

[119] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, par. 4147. The conditions under which the Italian unilateral APA may "roll-back" to previous tax periods are stated under comma 2, of article 31-ter. This provision will be extensively examined infra in paragraph 4.

possibilities: the revision of the agreement[120] or – if the revision is not possible due to the fact that the tax administration and the taxpayer do not agree on the need of a revision, or on how to revise the APA – the cancellation of the agreement[121].

As to the implementation and the monitoring of APAs in the domestic systems, the OECD has acknowledged, on the one hand, that taxpayers should have the guarantee that no transfer pricing adjustment will be made as long as they act in compliance with the terms of the arrangements[122], and, on the other hand, that tax administrations

[120] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, Annex II to chapter IV, paragraphs 83 – 85. It appears that the material changes might result in a revision of the agreement both advantageous or disadvantageous for the taxpayer, since the annex provides that these changes might be detected by both the tax administration and the taxpayers (see, specifically, par. 84). As to the Italian internal APA, the circumstances under which the agreement can be revised are listed under paragraphs from 9.1. to 9.3. of the *Provvedimento Direttore Agenzia delle Entrate*, 21 March 2016, prot. n. 2016/42295. At this regard, see M. GRANDINETTI, op. cit., 679; G. PIZZONIA, *Gli accordi preventive per le imprese con attività internazionale: opportunità e critictà*, in *Riv. dir. fin. sc. fin.*, 2016, I, 50500 – 504 and D. CONTE, *op. cit.*, 694, according to which "material changes" could regard not only – as stated by the Italian Revenue Agency – the facts and the laws on which the agreement is based, but also the changes of the case-law orientation. As to the possibility that the revision is asked by the taxpayer if the material changes are advantageous for him, see L. TOSI, *Il ruling: tra natura negoziale e principio di indisponibilità dell'obbligazione tributaria*, in L. TOSI, A. TOMASSINI, R. LUPI, *Il ruling di standard internazionale*, in *Dialoghi tributari*, 2004, 500: "*mi pare [si] possa escludere anche che il contribuente sia vincolato al rispetto dell'accordo quando si modificano in senso a lui più favorevole le condizioni di fatto e di dritto su cui si è formato l'accordo*". At this regard, however, it should be mentioned that, according to paragraph 9.3. of the same *Provvedimento*, the taxpayer can ask for the revision of the agreement only if the "material changes" were unforeseeable at the moment that the agreement was concluded; according to G. ZIZZO, *Accordi preventivi e prospettive evolutive della cooperazione tra Fisco e imprese*, in *Corr. trib.*, 2019, 66 ss. "*questa limitazione mi pare segue una logica di responsabilizzazione dell'impresa, coerente con il modello cooperative che inform ail procedimento di cui trattasi*". On the same issue see, *inter alia*, F. CROVATO, *Il consenso nella determinazione dei tributi*, Roma, 2012, 205 - 207 and G. PIZZONIA, *Gli accordi preventive per le imprese con attività internazionale: opportunità e critictà*, in *Riv. dir. fin. sc. fin.*, 2016, I,I, 503.

[121] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, Annex II to chapter IV, par. 79, lett. d), and par. 85. As to the Italian internal APA, the same is stated under paragraph 9.2. of the *Provvedimento Direttore Agenzia delle Entrate*, 21 March 2016, prot. n. 2016/42295, according to which if the taxpayer and the Italian Revenue Agency don't agree on the need to revise the agreement, or if the material changes render impossible such revision, the agreement will be considered terminated from the moment in which the material changes occurred or, if it is impossible to detect this moment, from the time in which it has been filed the revision's request. See G. PIZZONIA, *op. cit.*, 501 – 501 as to the many uncertainties that may arise from this approach and as to the possibility, for the taxpayer, to challenge before a tax Court the decision of the Italian Revenue Agency to revise (or to not revise following the taxpayer's request) the agreement.

[122] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, par. 4146. Accordingly, article 31-ter states, in comma 2, that the agreement is binding for both the taxpayer and he Italian Revenue Agency ("*Gli accordi di cui al comma 1 vincolano le parti*") and, in comma 5, that it is inhibit to the Italian Revenue Agency to audit the taxpayer over matters that are covered by a unilateral APA ("*Per i periodi d'imposta di validita' dell'accordo, l'Amministrazione finanziaria esercita i poteri di cui agli articoli 32 e seguenti soltanto in relazione a questioni diverse da quelle oggetto dell'accordo medesimo*"). Scholars, almost unanimously, although on the grounds of different

should be, in any case, able to monitor and verify such compliance and to cancel or revoke the APA if taxpayers fail to comply with any term or conditions of the APA[123]. Precisely, in order to balance the interests of taxpayers and of tax administrations, according to the OECD the monitoring of the implementation of the agreement may be conducted in two ways: *(a)* or by requiring the taxpayer to file annual reports in addition to their tax return; or *(b)* by auditing the taxpayer on the basis of an agreed regular audit cycle[124].

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arguments and although article 31-ter doesn't expressly provide for their nullity, believe that any tax assessment issued in contrast with the content of the agreement can be challenged by the taxpayers. On this aspect – that will be further examined infra – see G. ZIZZO, *op. cit*., 66 ss.: "*Un eventuale avviso di accertamento* […] *deve pertanto essere considerato emesso in carenza di potere, e perciò nullo, ancorché l'art. 31-ter non ne commini espressamente la nullità*"; M. TRIVELLIN, *op. cit*., 25, n. 73: "*ci sembra condivisibile l'assunto secondo cui, se si vuole dare un senso alla sussistenza del vincolo, bisogna riconoscere l'invalidità degli atti contrari*"; M. GRANDINETTI, *op. cit*., 685 – 686: "*Pur se non espressamente prevista dalla legge, l'invalidità dell'atto impositivo emesso in violazione dell'accordo ci sembra pertanto discendere in via interpretativa dal "vincolo" previsto dall'art. 31-ter, D.P.R. n. 600/1973*"; F. PISTOLESI, *Gli interpelli tributari*, Milano, 2007, 105: "*l'atto impositivo e/o sanzionatorio che dovesse interessare i rapporti dedotti nell'intesa è illegittimo*"; G. GAFFURI, *Il ruling internazionale*, in *Rass. trib*., 2004, 500: "*l'atto dell'Amministrazione, contrario al patto, non è nullo, poiché la legge che regola il ruling non lo qualifica tale* […]. *Il contribuente ha, quindi, l'onere di impugnarlo, poiché esso è solo annullabile* […] *e, quindi, suscettibile di divenire definitivo in mancanza di contestazione, prevalendo – si badi – sul contenuto precettivo dell'intesa*"; D. CONTE, *op. cit*., 703: "*negli accordi preventivi, l'agenzia delle entrate, nel caso di invarianza delle condizioni di fatto e di diritto, può, comunque, esercitare il proprio potere di autotutela e l'atto dell'amministrazione finanziaria contrario al patto non è nullo ipso iure perchè la nuova disciplina del ruling non lo qualifica tale. Il contribuente ha, quindi, l'onere di impugnarlo*"; G. PIZZONIA, *op. cit*., 509: "*Se, invece, inadempiente è l'Amministrazione, non è espressamente previsto nessun rimedio* […] *tranne, ovviamente, l'ordinaria impugnazione dell'eventuale provvedimento emesso in violazione dell'accordo*". *Contra*, in light of the particular legal nature that this Author attributes to such agreements (see, *infra*, par. 4), L. DEL FEDERICO, *Autorità e consenso nella disciplina degli interpelli fiscali*, in S. LA ROSA (edited by), *Profili autoritativi e consensuali del diritto tributario*, Milano, 2008, 170: "*per accertati sopravvenuti motivi di pubblico interesse l'Amministrazione potrà recedere unilateralmente dall'accordo, sia pure con l'obbligo* […] *di provvedere alla liquidazione di un indennizzo in relazione agli eventuali pregiudizi verificatisi in danno del privato*".

[123] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, Annex II to chapter IV, par. 77, lett. b), and par. 79, lett. b). Accordingly, see *Provvedimento Direttore Agenzia delle Entrate*, 21 March 2016, prot. n. 2016/42295, par. 7 ("*Verifica degli accordi*").

[124] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, par. 4148. As to the Italian internal APA, the same is stated under the *Provvedimento Direttore Agenzia delle Entrate*, 21 March 2016, prot. n. 2016/42295, par. 7.1.: "*Al fine di verificare il rispetto dei termini dell'accordo sottoscritto* […] *l'accordo stesso prevede, a carico dell'impresa, l'onere di: (a) predisporre e mettere a disposizione dell'Ufficio, periodicamente, ovvero dietro specifica richiesta, documentazione ed elementi informativi; (b) consentire a funzionari dell'Agenzia delle Entrate di accedere, nei tempi concordati con l'impresa, presso la sede o i luoghi di svolgimento delle attività, allo scopo di prendere diretta visione di documenti e in generale di apprendere elementi informativi utili ai fini della verifica di cui alla lett. a*".

Although – as hinted above – international APAs may be very efficient tools to avoid double taxation, if the procedure for the reaching of APAs is not appropriately administrated, taxpayers could be exposed to several risks.
One risk could be that the tax administrations involved may ask for more information than needed[125] in order to obtain useful elements for future or parallel investigations[126]. Another risk could be that the tax administrations involved may even withdraw from the "negotiations" of international APAs and file a tax assessment on the grounds of the information collected during such "negotiations". This second risk, in particular, seems quite real and concrete in light of the long[127] time needed for the reaching of international APAs. Indeed, it may well occur that the "negotiations" of an international APA would need to continue beyond the time limits laid down in the domestic legislations for the filing of tax assessments; so that, in this case, the tax administrations would have no other choice than to withdraw from the "negotiations" and to file without delay a tax assessment[128].

2. Legal rules for the reaching of international APAs: the Italian perspective.
As hinted above, according to the OECD, international APAs can be reached by means of the MAP (also called "interpretative" and "consultative" MAP, regulated under article 25(3), first sentence, of the OECD MC, even though this provision doesn't

[125]OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, par. 4165- 4165. On this aspect, see also I. KERSCHNER, M. STIASTNY, *op. cit.*, 590: "confidentiality issues must be taken into account, in particular if a tax administration has misused information that was obtained in an APA […]. Disclosing sensitive information to a tax administration might potentially open he door to further investigation"; .J. BERGQUIST, *op. cit.*, 390: "the procedure may merely highlight an issue for audit that the agent might not otherwise have spotted".

[126] For an extensive analysis of this topic, with regard to Italian internal APAs, see M. TRIVELLIN, *op. cit.*, 37 – 42.

[127] See, indeed, the EU Joint Transfer Pricing Forum, Statistics on APAs in the EU at the End of 2015, released on 20 October 2016, which reports an average period of over 35 months for international APAs between EU members to complete. As to Italy, according to *Agenzia delle Entrate, Bollettino del ruling di standard internazionale – II edizione*, par. 6, lett. b), the average time for the conclusion of APAs is approximately 16 months; however, this statistic seems to refer only to unilateral APAs, therefore, the time for the conclusion of multilateral APAs can be reasonably expected to be even longer.

[128] In this perspective, it wouldn't seem unreasonable the introduction in the domestic legal systems of provisions that suspend – for a fixed period – the terms of assessment if the taxpayers file a request to reach a multilateral APA.

expressly mention APAs[129] and even if this MAP can't be – ordinarily – triggered by taxpayers[130].

Nevertheless, the OECD leaves open for relevant authorities to additionally rely on general domestic legislation, if such legislation is broad enough to facilitate the conclusion of international APAs"[131]. In order to describe the legal rules that govern the reaching of APAs, therefore, to some extent, domestic legislation should also be addressed. This research will describe such rules from an Italian perspective, *i.e.* by taking into account the provisions of the Italian tax legal system that may interact with article 25(3) of the OECD MC for the reaching of "international" APAs.

According to the Italian Revenue Agency, Italian taxpayers may request the reaching of international APAs by means of the combination[132] between article 25(3) of the OECD MC and article 8, D.L. n. 269/2003 (which has now been substituted by article 31-*ter*, d.P.R. n. 600/1973[133]). In order to describe – from an Italian perspective – the legal of international APAs it has, therefore, to be explored at which extent, and in

[129] OECD *Commentary*, C(25), par. 52: "under this procedure the competent authorities can […] conclude bilateral advance pricing arrangements as well as conclude multilateral APAs"; see also OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, par. 4150: "In a number of cases, APAs arise from cases where the application of transfer pricing to a particular category of taxpayer gives rise to doubts and difficulties. Paragraph 3 of Article 25 also indicates that the competent authorities may consult together for the elimination of double taxation in cases not provided for in the Convention. Bilateral APAs should fall within this provision because they have as one of their objectives the avoidance of double taxation. Even though the Convention provides for transfer pricing adjustments, it specifies no particular methodologies or procedures other than the arm's length principle as set out in Article 9. Thus, it could be considered that APAs are authorised by paragraph 3 of Article 25 because the specific transfer pricing cases subject to an APA are not otherwise provided for in the Convention".

[130] As it was highlighted in section I of this chapter, article 25 of the OECD MC envisions three different types of MAPs. The so called "interpretative" MAP, precisely, is the one envisioned under article 25(3), first sentence ("*The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention*"). This type of MAP – ordinarily – can be triggered (only) by tax authorities, in order to eliminate difficulties concerning the interpretation and application of tax treaties with respect to legal as well as to factual matters of a general nature that concern a category of taxpayers (in other words, it allows competent authorities to complete or clarify the definition of a term in the convention).

[131] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, par. 4151.

[132] See *Agenzia delle Entrate, Bollettino del ruling di standard internazionale – II edizione*, par. 5.

[133] Article 31-*ter*, d.P.R. n. 600/1973 has replaced article 8, D.L. 30 September 2003, n. 269. Although art. 31-*ter*, d.P.R. n. 600/1973 has renewed and modified (under some aspects that are not relevant for our purposes) article 8, D.L. 30 September 2003, n. 269, the following paragraphs will the address the Italian unilateral APA by making no distinction between these two provisions. For the differences between these two provisions see, inter alia, D. CONTE, *Imposizione fiscale*, *op. cit*., 677 ss.

which terms, article 31-*ter*, d.P.R. n. 600/1973 operates together with article 25, paragraph 3, of the OECD MC.

Given that international APAs involve tax administrations of different States, the Italian rules seem reasonably unlikely to govern either the process of reaching an agreement between the tax authorities[134], and the conditions for nullifying, revoking or amending the agreement. All these aspects should, therefore, be addressed *directly* by the tax authorities on an international stage (*i.e.* during the MAP)[135].

The Italian regulation, on the contrary, should regulate the first and the final phases of the proceedings, namely the introduction of the APA request and – once the APA has been concluded by the relevant authorities under the MAP provided for in paragraph 3 of article 25 – the implementation in the domestic system of the agreement.

Precisely, on the one hand, the introduction of APAs seems regulated by article 31-ter, comma 6, according to which the formal requirements that have to be included in the APAs' requests (and the conditions under which these requests are admissible) are the ones listed in the Italian Revenue Agency Guidelines[136]. On the other hand, the implementation in the domestic system of the agreement, seems regulated under comma 2, last sentence, of article 31-ter[137], according to which *unilateral* APAs entered into on the grounds of a "mutual agreement" between the Italian tax authority and one (or more) foreign tax authorities can apply retroactively up to five fiscal years[138]. It is, indeed, striking to note that the Italian legislator, by means of article 31-

[134] *Provvedimento Direttore Agenzia delle Entrate*, 21st march 2016, prot. n. 2016/42295, paragraphs 4 and following.

[135] On this aspect see, accordingly, R. SUCCIO, *Advanced pricng agreements e procedure negoziate di determinazione del valore normale: la Cassazione nega il potere di veto dell'amministrazione finanziaria*, in *Riv. dir. trib*., 2016, V, 50.

[136] See *Provvedimento Direttore Agenzia delle Entrate*, 21 March 2016, prot. n. 2016/42295, paras 2.4. and 3.

[137] Article 31-ter, comma 2, last sentence, d.P.R. n. 600/1973, reads: "*Tuttavia, qualora conseguano ad altri accordi conclusi con le autorità competenti di Stati esteri a seguito delle procedure amichevoli previste dalle convenzioni internazionali contro le doppie imposizioni, gli accordi di cui al comma 1 vincolano le parti, secondo quanto convenuto con dette autorità, a decorrere da periodi di imposta precedenti purché non anteriori al periodo d'imposta in corso alla data di presentazione della relativa istanza da parte del contribuente*".

[138] Although the wording of the provision is not entirely clear, it should be specified that the "*roll-back*" mechanism provided for under art. 31-ter, comma 2, second sentence, appears to be applicable only on a residual basis, *i.e.* only if the international APA doesn't specifically set out its own commencement

ter, comma 2, seems to expressly refer to the implementation of "international" APAs, given that – as stated in the guidelines of the OECD – these agreements are, precisely, the result of two different agreement. The first agreement is the one concluded (following the MAP regulated under art. 25, paragraph 3, of the OECD MC) between two or more tax authorities in order to determine the appropriate method of calculation of the transfer prices[139]. The second agreement is the one concluded between national tax authorities and taxpayers in order to implement, in the domestic legal system of reference, the first agreement[140].

Domestic rules should also govern both the power of the tax administrations to conduct examinations on the same matters covered by such agreements. From an Italian perspective, in this regard, seems to come into play article 31-*ter*, comma 5, which expressly prevents the Italian Revenue Agency from auditing the taxpayer over matters that are covered by an (internal) APA. More specifically, although article 31-ter,

date (see M. TRIVELLIN, *op. cit*., 44, footnote 136: "*suscita qualche dubbio il fatto che, in sede di attuazione interna di un* Agreement *internazionale, si possano limitare gli effetti temporali concordati tra Autorità competenti*"). A different conclusion could prevent international APAs from serving their pre-ordinated goal, i.e. the prevention of double taxation. Indeed, pursuant to article 31-ter, comma 2, the date of effectiveness of an international APA in Italy could not coincide with the date of effectiveness of the same APA in the other State(s). Therefore, during the tax period in which the APA is effective only in "Italy" and not in the other State (or vice-versa), double taxation could rise if the other State(s) deem(s) that the methods agreed in the APA for the calculation of the transfer prices are not valid for that specific tax period (this circumstance has been clearly detected by A. FANTOZZI, F. PAPARELLA, *Lezioni di diritto tributario dell'impresa*, Milano, 2019, 321: "*non può, dunque, escludersi la coesistenza di due intese e la conseguente difficoltà di individuare la disciplina applicabile al caso concreto*"). This conclusion seems to be compatible with the explanatory report of the D.Lgs. n. 147/2015 (which has introduced in the d.P.R. n. 600/1973 art. 31-*ter*), according to which the scope of article 31-ter, comma 2, is to regulate the effectiveness, in the domestic system, of international agreements only as far as such regulation is needed in order to safeguard the specific content of the agreement determined by the tax authorities of the States involved.

139 See OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, Annex II to chapter IV, par. 63: "The role of the taxpayer in this process is necessarily more limited, than in the fact finding process, given that the finalisation of a MAP-APA is a government to government process".

140 This seems also the conclusion of M. GRANDINETTI, *Gli accordi preventivi per le imprese con attività internazionale*, in *Rass. trib*., 2017, 678: "*Nell'ipotesi in cui la procedura amichevole tra i due Stati si concluda positivamente e contestualmente si acceda agli accordi preventivi di cui all'art. 31*-ter*, D.P.R. n. 600/1973, l'effetto finale è quello di giungere ad un "accordo multilaterale"*". See, though, the doubts raised by M. TRIVELLIN, *op. cit*., 44, footnote 136: "*Non mi è chiaro [...] se la previsione voglia regolare gli effetti temporali dell'accordo raggiunto in sede di procedura amichevole, implementato nell'ordinamento nazionale tramite apposito ulteriore accordo interno con il contribuente (di sostanziale ratifica), oppure se si riferisca ad altro, differente e successivo Agreement tra amministrazione nazionale e contribuente, relativo ad annualità diverse, ma comunque conseguente ad un precedente Agreement "stipulato" in sede MAP"*.

comma 5, doesn't expressly refer to international APAs, it seems validly arguable that if the Italian Revenue Agency issues a tax assessment that is in contrast with the content of an international APA, such assessment should be deemed void for "lack of power" [141].

3. (Follows). Brief remarks as to the possibility to enter into an international APA through the EU Directive n. 2017/1852.

In the previous paragraph it has been outlined that, according to the OECD, the legal scheme/framework of international APAs results from the combination between article 25, paragraph 3, of the OECD MC and domestic rules governing the reaching of "internal"-"domestic" APAs.

However, it should be highlighted that international APAs seem likely to be finalized even via the procedure provided for in the Directive n. 2017/1852, with no need to apply domestic legislation.

The influential case-law that has faced this issue[142] has pointed out that the possibility to reach an APA under the Directive could be challenged in light of the fact that, according to article 1 ("*Subject matter and scope*"), the Directive applies only to "*disputes*" (already risen) and not, therefore, for the reaching of precautionary measures – as APAs – to prevent them. At a first glance, the Directive seems, indeed, to cover only double taxation issues that have already caused *(i)* an additional tax charge; *(ii)* an increase in tax liabilities; or *(iii)* the cancellation or reduction of losses that could be used to offset taxable profits (see art. 3 of the Directive)[143].

[141] This conclusion has been reached, with respect to tax assessments that are in contrast with the content of internal APAs, by G. ZIZZO, *op. cit*. 66 ss. and, before this Author, has been ventilated by M. TRIVELLIN, *op. cit*., 25, n. 73, according to which is "*teoricamente prospettabile una qualche forma di carenza di potere, argomentando dal comma 5 dell'art. 31-ter, che limita esplicitamente l'azione di controllo*".

[142] This issue – that has been almost ignored by the doctrine – has been extensively addressed only by M. TRIVELLIN, *op. cit*., 46 – 50, although also H. MOOIJ, *MAP Arbitration in Tax Treaty Disputes*, forthcoming, seems to give for granted that this legal instrument could be employed for the reaching of international APAs ("an APA can be the subject of MAP arbitration, too, like any disputed topic, and in that way taxpayers would in any case be guaranteed of an internationally convergent resolution. […] The MLI does not include any such provision, nor do the European Arbitration Convention and the new EU Directive, apparently because it was considered self-evident that APAs might be fit for arbitration and a provision to this effect unnecessary").

[143] This seems the position of J. MAS HERNÁNDEZ, *The New Tax Dispute Resolution Mechanisms in the European Union: The "Arbitration Directive"*, in J. M. ALMUDI CID, J. A. FERRERAS GUTIÉRREZ, P. A.

The mentioned case-law, however, has sharply pointed out that article 1 of the Directive could be extensively interpreted in order to include in its subject matter also the reaching of preliminary agreements, since a literal interpretation of article 1 wouldn't be fully in line with the (main) goal of the Directive to supersede the obstacles that double taxation creates to the functioning of the EU domestic market.

In several occasions, indeed, the EU Commission has pointed out that double taxation may "deter affected citizens from taking full advantage of their right to operate freely across borders in the EU domestic market"[144] and these same concerns have been expressly absorbed in the recital n. 1 of the Directive, according to which "*double taxation in connection with the adjustments of profits of associated enterprises* […] *can create serious tax obstacles for business operating across borders*" and "*are likely to cause economic distortions and inefficiencies*". Thus, it would sound unreasonable to conclude – only in light of a strict and literal interpretation of some of its provisions – that the Directive cannot be employed in order to avoid, in every possible way, the rising of double taxation[145].

4. Insights on the legal nature of international APAs.

If the issue concerning the legal nature of domestic APAs has been quite extensively discussed by the Italian (and the international) case-law, the issue concerning the legal nature of "international" APAs it hasn't been – as far as we are concerned – as widely discussed. In order to provide some insights on the legal nature of "international"

HERNÁNDEZ GONZÁLEZ-BARREDA (edited by), *Combating Tax Avoidance in the EU*, Wolters Kluwer, 2019, 342, according to which the Directive "does not intend to allow the extension of the coverage to cases that go beyond those provided in Article 25(1) of the OECD Model".

[144] EU Commission, Summary report of the 2016 public consultation, sections I and III. Moreover, see, *inter alia*, EU Commission, COM(2011)712, final, par. 3; Id., COM(2006)823, final, par. 2.2.where it is stated that double taxation is one of the issues of most concern for cross-border economic activity and source of legal uncertainty. On this topic, see S. DORIGO, *Doppia imposizione internazionale e diritto dell'Unione Europea*, in *Riv. trim. dir. trib*., 2013, 28 – 31.

[145] M. TRIVELLIN, *op. cit*., 49 – 50. A similar conclusion seems implicitly inferred also by S.M. Ronco, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, forthcoming, who agrees that "for a dispute to exist under the Directive, it suffices that the taxpayer is subjected to an 'increase in tax liabilities', which means that the MAP could be initiated both against present taxation and against future taxation not in accordance with the convention in question".

APAs, our analysis will, therefore, take as a basis the (Italian) case-law orientations on the legal nature of "domestic" APAs.

According to some Authors[146], unilateral (Italian) APAs should be viewed as acts of a contractual nature, between the tax administration and the taxpayer, which can be governed – to some extent – by the provisions of the Italian Civil Code[147-148]. Consequently, these agreements might – according to these Authors – take the form of "settlement agreements" ("*accordi transattivi*"), with which the Italian Revenue Agency and the taxpayers determine, jointly, the *an* and the *quantum* of the tax obligation through negotiations that could even derogate from the legality principle ("*principio di indisponibilità dell'obbligazione tributaria*")[149].

The arguments in favour of this conclusion are essentially two.

Firstly, it has been pointed out that the wording of article 31-*ter*, d.P.R. n. 600/1973 (and, previously, of article 8, D.L. 30 September 2003, n. 269) expressly qualifies

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[146] G. GAFFURI, *op. cit.*, 493 – 501; L. TOSI, *Il ruling: tra natura negoziale e principio di indisponibilità dell'obbligazione tributaria*, *op. cit.*, 496 – 501; P. ADONNINO, *Considerazioni in tema di ruling internazionale*, in *Riv. dir. trib.*, 2004, IV, 69 – 71.

[147] See, precisely, G. GAFFURI, *op. cit.*, 494: "*l'atto negoziale e il conseguente regolamento concordato sono soggetti, almeno per tendenza, compatibilmente con le peculiarità del contesto e se non siano previste deroghe, alle regole proprie del contratto contenute nel codice civile*".

[148] It should be also recalled the orientation according to which these agreements are "public-administrative contracts" regulated under article 11 of L. n. 241/1990: see L. DEL FEDERICO, *op. cit.*, 169 – 170 ("*Posto che ... il ruling internazionale è certamente un accordo pubblico ..., sembra praticabile l'integrazione analogica, riprendendo il più affine referente normativo, e cioè l'art. 11 della novellata legge n. 241/1990, recante la disciplina degli accordi integrativi e sostitutivi del provvedimento*"); M. VERSIGLIONI, *Accordi amministrativi (Dir. trib.)*, in AA.VV., *Dizionario di diritto pubblico*, vol. I, Milano, 2006, 91 – 92 ("*La l. n. 241/1990 ... ha visto affiancare al provvedimento una nuova figura strutturale, distinta dal contratto, ma al quale si applicano, in quanto compatibili, le norme civilistiche sulle obbligazioni e sui contratti ... linfa vitale a numerose nuove gemmazioni (concordati preventivi, pianificazione fiscale, interpello ordinario, ruling internazionale*)".

[149] This seems to be, precisely, the position of P. ADONNINO, *op. cit.*, 70: "*L'accordo costituisce atto bilaterale a possibile contenuto transattivo limitato*" and of L. TOSI, *Il ruling: tra natura negoziale e principio di indisponibilità dell'obbligazione tributaria*, *op. cit.*, 496: "*il ruling in esame parla di <<accordo>> e sembra alludere a una negoziazione anche sull'an e sul quantum dell'obbligazione tributaria. Non a caso, la norma, anziché impreniarsi su un provvedimento unilaterale dell'amministrazione, rinvia alla tipica figura negoziale, per sottolineare, appunto, come tra le parti possa svolgersi una vera e propria trattativa alla stregua non solo di un criterio di legalità, ma, verosimilmente, anche di un criterio di opportunità*". It should, however, be mentioned that the latter Author, in the same article, seems to withdraw from this conclusion when stating that "*Ciò non deve indurre a ritenere che la procedura in questione sia insensibile al tema della parità di trattamento: al contrario, pur in assenza di una puntuale regolamentazione in sede legislativa, si deve comunque ritenere che l'Amministrazione non possa derogare al canone dell'uguaglianza sostanziale dell'imposizione di tutti i contribuenti e che la stessa Amministrazione non sia svincolata dal criterio di imparzialità del proprio agire*" (see. pages 498 – 499).

domestic APAs as "*agreements*" ("*accordi*") and expressly states that such agreements are binding among the "*parties*" ("*sono vincolanti tra le parti*"), *i.e.* between the taxpayers and the Italian Revenue Agency[150]. Secondly, the contractual nature of domestic APAs has been valued by stressing the differences between these agreements and the existing types of advance rulings under the Italian law ("*interpelli*"). For instance, it has been pointed out that if, on the one hand, the advance rulings regulated by article 11 of Law n. 212/2000 are, in some ways, similar to APAs, because with both these legal instruments the taxpayers request to the tax administration a preliminary opinion on a specific matter. On the other hand, unlike domestic rulings – which are proper administrative (*i.e.* one-sided) acts, where taxpayers are only requested to submit to writing their view on a specific matter – the latter require, necessarily, a direct and frequent exchange of views between the taxpayers and the tax administration[151].

According to other Authors[152], domestic APAs should be viewed as "one-sided-administrative" acts through which the Italian tax administration exercises unilaterally, even if confronting with the taxpayer, its power to tax. In particular, these Authors challenge the opposite thesis according to which domestic APAs are "contracts" that can (even) discretionary determine the *an* and the *quantum* of the tax obligation, on the grounds that, on the one hand, the legality principle ("*principio di indisponibilità dell'obbligazione tributaria*") cannot be derogated by the Italian tax authority and, on the other hand, that this conclusion would likely envisage the possibility that tax rulings could be qualified as State aids *ex* article 107 of the TFUE (see below, paragraph 6.2.)[153].

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[150] See L. TOSI, *op. cit*., 496

[151] See G. GAFFURI, *op. cit*., 493; L. TOSI, *op. cit*., 495 – 497.

[152] See, *inter alia*, G. ZIZZO, *op. cit*., 66 ss.: "*Nonostante la denominazione, gli accordi restano atti espressivi della funzione impositiva dell'Ufficio. Nessun potere di disporre dell'obbligazione tributaria è infatti conferito a quest'ultimo dalla relativa normativa*"; G. MELIS, *op. cit*., 407: "*Tale accordo, tuttavia, non va inteso come avente natura ed efficacia negoziale, bensì meramente dichiarativa, in quanto frutto della corretta identificazione dei valori di trasferimento, delle norme operanti e dei relativi effetti, in ossequio alle vigenti disposizioni normative*"; G. PIZZONIA, *op. cit*., 511: "*Non sono dunque condivisibili le tesi che tendono a configurare un vero e proprio negozio giuridico, poiché non si tratta di costituire, modificare o estinguere rapporti giuridici, né una fattispecie transattiva, non potendovi essere reciproche concessioni, né posizioni disponibili*"

[153] L. DEL FEDERICO, *op. cit*., 164: "*In relazione alle problematiche procedimentali, ed alle variegate ipotesi di ruling e di definizione amministrativa dei rapporti tributari, sembra opportuno evidenziare*

This last mainstream opinion seems the most consistent also with regard to international APAs.

International APAs, precisely, don't seem "contracts" between the tax administrations and the taxpayer for the mere reason that the merits of the agreement (*i.e.* the fixation of the transfer prices' calculation methods) are determined – on an international stage – exclusively by the tax authorities during the MAP, without any involvement of the taxpayers. As it will be further discussed in the following chapters of this research, indeed, the MAPs and arbitration procedures envisioned under the existing international tax dispute resolution mechanisms are pure interstate procedures, with no enforceable right of involvement of the individuals, since they are based on the "Diplomatic Protection Theory", *i.e.* on the assumption that, on the international level, individuals have no international personality and, therefore, only States may act at on an international level on behalf of their nationals ("diplomatic protection")[154].

This implies that taxpayers are not to be considered "parties" to such proceedings.

As a consequence, also international APAs should be viewed, rather than acts of a "contractual nature" between the tax administrations and the taxpayers, as "one-sided-administrative" acts, *i.e.* as acts through which the tax administrations of different States exercise their power to tax. In other words, APAs could be defined as tax administrative acts through which the tax authorities exercise *partially* (since APAs are only aimed to determine the calculation of the methods of transfer pricing and not of the whole taxable base of the taxpayer) their power to tax[155].

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che la discrezionalità amministrativa è stata considerata dalla Core di giustizia come tratto caratterizzante in concreto la selettività di una misura […]. *Assumono quindi indubbio interesse i rilievi di recente dottrina che ha evidenziato come il nostro ruling internazionale rischi di essere considerato illegittimo in base ai parametri elaborati dalla Commissione*", which refers to E.A. LA SCALA, *I principi fondamenali in materia tributaria in seno alla costituzione dell'Unione Europea*, Milano, 2005, 397. This topic, with reference to "international" APAs, will be further addressed below in this section.

[154] As to the possibilty to examine jointly APAs and MAPs see, recently, A. PERRONE, *Sull'inquadramento sistematico e sulla natura giuridica degli accordi preventivi per le imprese con attività internazionale e sulla loro estensibilità all'Iva*, in *Riv. dir. trib.*, *Supplemento Online*, 7 October 2019.

[155] This conclusion seems even strengthened if one considers the procedural rules that govern the reaching of international APAs. As it was previously highlighted, indeed, international APAs are the result of the combination between two agreements. The first agreement is the one "mutually agreed" between the tax authorities during the MAP, in order to determine the appropriate method for the calculation of the transfer prices. The second agreement is the one concluded between the domestic tax administrations and the taxpayer in order to ratify, in the Italian legal system, the first agreement. Note, indeed, that some Authors have challenged the contractual nature of the legal instrument set forth under

This conclusion, however, needs to be further substantiated.
This conclusion, indeed, could be challenged in light of the OECD and the Italian Revenue Agency approach whereby (see above) should the tax administrations discover that taxpayers have misrepresented or omitted any key information when applying for an international APA, the final agreement may be "revoked" or "cancelled". The approach followed by the OECD and the Italian Revenue Agency, indeed, could confirm – at least form an Italian perspective – the "contractual" nature of international APAs, since the cancellation or the revocation of the agreement could be obtained only through the exercise of the power of self-protection ("*autotutela*") by invoking article 1429 of the Italian civil code ("*errore essenziale*")[156].
In this regard, however, it seems preferable to argue that if taxpayers misrepresent or omit relevant information during the conclusion of an APA there would be no need to adopt a specific act in order to "revoke" or "cancel" such agreement. More specifically, in this case, the international APA would be *ab origine* not effective, since it would cover a case that – due to the misrepresentations or the omissions of the taxpayers – does not exist in the reality. In other words, it could be assumed that the "revocation" or "cancellation" of the agreement due to the taxpayer's misrepresentation and/or omission only implies that tax administrations could lawfully notify to the taxpayer a

article 50 d.P.R. n. 634/1972 by, precisely, stressing the fact that this legal instrument is the result of a "*combinazione procedimentale di atti distinti, l'uno del fisco e l'altro del contribuente*" (at this regard see G. GAFFURI, voce *Concordato tributario*, in *Dig. disc. priv. sez. comm*., vol. III, Torino, 1988, 301, who recalls the thesis of G. PUOTI, *Spunti critici in tema di concordato tributario*, in *Riv. dir. fin. e sc. fin*., 1969, I, 317 ss.).

[156] See, precisely, G. GAFFURI, *Il Ruling*, *op. cit*., 494: "*Mi riferisco in primo luogo [...] all'annullabilità per errore, il quale sia rilevante e riconoscibile dall'altra parte, ovverosia dalla parte opposta a quella incorsa nella falsa percezione della realtà. [...] Da un canto la Pubblica Amministrazione, che fosse o ritenesse di essere incorsa in errore, rilevante e riconoscibile dalla controparte, dovrebbe comunicare a questa, con atto di autotutela di cui è capace, la circostanza e quindi l'invalidità contrattuale che intende far valere*"; M. TRIVELLIN, *op. cit*., 32, n. 96: "*occorre considerare il caso in cui il contribuente consapevolmente ometta di fornire elementi rilevanti, sottraendosi ai doveri di buona fede, collaborazione, e cooperazione che sembrano immanenti in una procedura a struttura* latu sensu *partecipativa. Emerge, dunque, anche il tema dell'errore in cui l'Amministrazione finanziaria sia indotta a cadere, delineandosi così il problema dell'eventuale rilevanza dei vizi della volontà*".

tax assessment on the same matter covered by the agreement, as if this agreement has never existed[157-158].

5. Possible limitations in the reaching of international APAs

As it will be further discussed in this research, a relevant issue that arises with respect to the MAPs and the arbitration procedures envisioned under the existing dispute resolution mechanisms is the lack of rules stating the legal grounds on which mutual agreements and arbitration procedures should be based. In light of this circumstance, the relevant tax authorities could be granted the right to reach international APAs on the basis of equity: *i.e.* to reach agreements that determine *ex aequo et bono* the transfer prices; "fifty/fifty" deals; agreements that take into account elements unrelated to the tax system.

This solution, however, could be challenged by arguing that tax authorities are not entitled to freely "negotiate" the content of international APAs, but, rather, have to determine the methods for the calculation of transfer prices by referring to the arm's length principle and by employing the OECD transfer pricing calculation methods[159-160].

[157] From an Italian perspective, this conclusion seems to be consistent with the one reached by the Italian Revenue Agency in the case in which taxpayers misrepresent or omit relevant information with regard to the ruling regulated under art. 2, D. Lgs. n. 147/2015 ("*interpello sui nuovi investimenti*"). More specifically, in the Italian Revenue Agency's notice ("*Circolare*") Cir. Ag. Entr., 1 June 2016, n. 25/E, par. 8, is stated that: "*nelle ipotesi in cui si ravvisi una rappresentazione non complete o non veritiera di dette circostanze da parte dell'istante, la risposta resa non è mai produttiva dei relative effetti giuridici*". At this regard see G. VANZ, *Investitori esteri e interpello sui nuovi investimenti*, in *Rass. trib.*, 2017, 978 – 982.

[158] From an Italian perspective, this conclusion entails, in the substance, that if taxpayers omit or misrepresent relevant information when submitting an APA request article 31-ter, comma 5, Decree n. 600/1973 no longer applies.

[159] See, accordingly, A.P. DOURADO, P. PISTONE, *Arbitrating Tax Disputes in Line with EU Law*, in J. MONSENEGO, J. BJUVBERG (edited by), *International Taxation in a Changing Landscape*, Kluwer Law International, 2019, 65, who recognize that both the competent tax authorities, during the MAP, and the "arbitration panels", during the arbitration stage, "apply rules of law [in transfer pricing issues] because they [interpret] the arm's length principle and its application to the concrete case"; P. N. SILVERIRA DA CUNHA, *Settlement of Disputes in Portoguese Tax Treaty Law*, in M. LANG, M. ZÜGER (edited by), *Settlement of Disputes in Tax Treaty Law*, Kluwer Law International, 2002, 405: "the mutual agreement does not allow solutions based on equity".

[160] Note that the considerations below hold equal relevance with respect to the limitations for the reaching of MAPs and arbitration decisions. These same considerations will, therefore, be recalled, *mutatis mutandis*, also in chapter II, with respect to MAPs, and in chapter III, with respect to arbitration decisions.

Several arguments may be brought to support such conclusion.

The first argument is that – as hinted in the incipit of this section – international consensus has been found as to the adoption of the arm's length principle (ALP) as outlined under the OECD Model Tax Convention on Income and on Capital (hereinafter, "OECD MC"), so that this principle has achieved an internationally recognized status[161].

Secondly, from a purely Italian perspective, it could be held that (only) as long as international APAs are reached in accordance with one of the OECD methods of calculation of transfer prices, the agreement would be consistent with the legality principle[162]. It should, indeed, be recalled that paragraph 7 of article 110 of the Italian Income Tax Code has been recently amended by the Decree n. 50/2017[163] in order to incorporate into the Italian legislation the arm's length principle set forth by both the OECD Model and the OECD Transfer Pricing Guidelines. More specifically, while the previous version of article 110(7) of the Italian Income Tax Code stated that the transfer prices for intercompany cross-border transactions had to be determined on the basis of the so-called "normal value"[164], the new rule now generally refers to the "conditions and prices that would have been agreed between independent parties acting on arm's length basis and in comparable circumstances". Moreover, it should

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[161] R.S. AVI-YONAH, *Tax Competition, Tax Arbitrage and the International Tax Regime*, in *Bulletin for International Taxation*, 2007, 137 ss.

[162] Accordingly, see P. ADONNINO, *op. cit.*, 69 ("*E' necessario puntualizzare* […] *come nessun problema di irrinunciabilità dell'obbligazione tributaria da parte dell'amministrazione finanziaria si ponga* [fin tanto che si tratti] *di identificare metodologie, con l'accordo della parte contraente, attività quindi che riguarda aspetti qualificabili quali tecnici, e che devono essere precisati al fine di consentire la quantificazione dell'elemento in base a quanto previsto dai principi emanati dall'ordinamento internazionale: fondamentalmente il valore normale*") and A. GUNN, J. LUTS, *op. cit.*, 121, n. 18 ("most authorities competent for granting tax rulings do not have a 'discretionary margin' [..], i.e. a broad discretion in relation to the choice of beneficiaries, the amount of the financial assistance and the conditions under which it is provided on the basis of criteria unrelated to tax system").

[163] Decree 24 April 2017, n. 50, converted, with amendments, by the Law 21 June, n. 96. At this regard, see, among all, A. FANTOZZI, F. PAPARELLA, *Lezioni di diritto tributario dell'impresa*, *op. cit.*, 309 – 310.

[164] Among all, see: L. CARPENTIERI, *Redditi in natura e valore normale nelle imposte sui redditi*, Milano, 1997; ID., *Valore normale e transfer pricing "interno" ovvero alla ricerca dell'arma accertativa perduta*, in *Riv. dir. trib.*, 2013, II, 448 ss.; C. SACCHETTO, *Sui presupposti per ricondurre a valore normale costi e ricavi nelle relazioni tra imprese residenti e non residenti*, in *Dir. prat. trib.*, 1977, II, 546 ss.; S. CIPOLLINA, *Il "valore normale" nel transfer pricing: mercato rilevante e metodo del "confronto del prezzo"*, in *Riv. dir. fin. sc. fin.*, 2013, 103 ss.

also be considered that, on 14 May 2018, the Italian Ministry of Economic and Finance released a Decree that sets out the general guidance for the correct application of the ALP envisioned under article 110(7) and that, for this purpose (as confirmed by the preamble of the Decree), the Decree makes express reference to the 2017 version of the OECD Guidelines[165-166].

Finally – as it will be discussed, in extreme summary, in the following paragraph – it could be argued that the conclusion according to which international APAs should always be reached through the strict application of one of the methods of calculation provided by the OECD Tp Guidelines appears to be (the only one) consistent with the EU State aid law[167].

[165] Precisely, among other things, the Decree: *(i)* provides for the definitions of "associated enterprises", "participation in the management, control or capital", "independent enterprises", "controlled and uncontrolled transactions" and "financial indicator" following the OECD standards; *(ii)* draws from the OECD Guidelines (and, precisely, from the definition of "comparability analysis" provided therein), the general criteria by which a transaction between independent parties (uncontrolled transactions) should be considered to be comparable to a transaction between associated enterprises (controlled transactions); *(iii)* provides for transfer pricing methods to be used for the evaluation of a controlled transaction on the basis of the ALP that correspond to the one listed in the OECD Transfer Pricing Guidelines; *(iv)* as for the selection of the correct method, explicitly refers to the "most appropriate method" rule provided for under the OECD Transfer Pricing Guidelines; *(v)* finally, following the OECD Guidelines, allows the taxpayers to apply a method other than the ones set forth therein, if they are able to demonstrate that none of those methods can be applied in a reliable manner. At this regard see

[166] As far as the Italian Revenue Agency is concerned, there shouldn't be doubts that this will always occur. See, indeed, the Italian Revenue Agency's press release of 22 March 2018: "*Gli accordi previsti nel nostro Paese, così come negli altri Paesi Ocse, rientrano invece nella categoria degli APA (advance pricing agreements), ovvero accordi che hanno il solo scopo di fornire certezza preventiva relativamente ai criteri e ai metodi adottati per la determinazione dei prezzi di trasferimento (Transfer pricing). Questi accordi, come detto, sono presenti in tutte le Amministrazioni avanzate e in Italia sono disciplinati dall'art. 31-ter del Dpr n. 600/1973. […] L'Agenzia precisa, inoltre, che gli accordi preventivi non fissano in modo arbitrario l'imponibile o le aliquote d'imposta di un soggetto, ma definiscono i criteri e metodi di calcolo di determinazione del valore normale delle operazioni infragruppo in base agli standard previsti dalle previsioni OCSE. In nessun caso, quindi, gli accordi sottoscritti dalle Entrate hanno avuto ad oggetto - né potrebbero avere - la previsione di differenti aliquote fiscali rispetto a quelle ordinarie o la riduzione della base imponibile di alcuni contribuenti*".

[167] M. TRIVELLIN, *op. cit*., 113 – 117 notes that a different conclusion – i.e. that APAs can be reached on the base of elements unrelated to the tax system – could be reached by arguing that the determination of the transfer prices between associated enterprises can be determined by deviating from the arm's length principle if there are "valid commercial reasons" justifying such a deviation. This possibility, indeed, seems to have been recently admitted by the judgment ECJ, 31 May 2018, C-382/2016, *Hornbach-Baumarkt AG v. Finanzamt Landau* (see specifcally paragraphs from 50 to 52) in light of the proportionality principle. Due to its great complexity, this issue necessarily falls outside the scope of this research.

6. *(Follows). Limitations in the reaching of international APAs in light of EU State aid (nods).*

According to both the EU Commission and the ECJ, from the legal definition of State aid provided under article 107 of the TFUE is possible to discern a number of requirements which should be met in order to qualify a national measure as Stated aid[168]. *(i)* Firstly, the measure at issue has to be financed by an intervention of the State or through State resources. *(ii)* Secondly, the measure must confer an "advantage" to the recipient. *(iii)* Thirdly, the "advantage" has to be of a "selective" nature (i.e. it has to favour certain undertakings or industry sectors). *(iv)* Fourthly, the measure has to be liable to affect trade between Member States and to distort (or threaten to distort) competition.

In extreme summary, the analysis as to the compatibility of international APAs with the EU State aid law should be focused on the second element of the State aid notion, *i.e.* on the existence of an "advantage".

Indeed, as to the first and last requirements, the ECJ has constantly stated that if a tax measure fulfils both elements *sub (ii)* and *(iii)*, it should be implied – almost automatically – that such measure has been financed by an intervention of the State (or through State resources) and that it has an impact on intra-EU trade and competition[169].

Moreover, the same ECJ has clarified that the assessment of the "selectivity" requirement *sub (iii)*[170] has to be conducted only where *(a)* a tax measure is granted on the grounds of specific national provisions and *(b)* the tax authorities issuing the measure don't have any discretion in determining the essential elements of the measure in question and as to whether it is appropriate to grant it (so called "general schemes

[168] For a general overview allow us to refer, among all, to G. FRANSONI, *Profili fiscali della disciplina degli aiuti di Stato*, Pisa, 2007 and C. FONTANA, *Gli aiuti di Stato di natura fiscale*, Torino, 2012.

[169] At this regard see M. ORLANDI, *op. cit.*, 139; S. DOUMA, *State Aid and Direct Taxation*, in B. TERRA, P. WATTEL (edited by), *European Tax Law*, Wolters Kluwer, 2018, 886 and 897.

[170] *I.e.* the identification on whether the measure granting an advantage actually differentiates between economic operators who are in comparable factual and legal situations according to the tax system of the Member State concerned.

of aid"[171]) [172]. By contrast, if – as it appears to occur in the case of APAs[173] – the tax administrations have the discretion to determine the conditions under which a tax measure is provided to single taxpayers (so called "individual aid"), the detection of an "advantage" it's in principle sufficient to support the presumption that is selective [174-175].

[171] More precisely, under article 1(d) of the Regulation n. 2015/1589, an aid scheme is defined as "*any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid, which is not linked to a specific project, may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount*".

[172] See, inter alia, ECJ, 18 July 2013, C-6/12, *P Oy*, par. 26 and ECJ, 4 June 2015, C-15/14 P, *Commission v. Mol*, par. 60: "the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid […]; [only] when examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity".

[173] It seems, indeed, established that there are no fixed rules for the determination of transfer pricing and that tax administrations necessarily need to enter into some sort of bargaining in order to agree with each other on the specific method for the calculation of the transfer prices. Accordingly, see W. HASLEHNER, *Double Taxation Relief, Transfer Pricing Adjustments and State Aid Law*, in I. RICHELLE, W. SCHÖN, E. TRAVERSA (edited by), *State Aid Law and Business Taxation*, Berlin, 2016, 147 – 148: "as the arm's length principle is not very precisely defined, but leaves a rather wide range of possible ways to implement it, a Member State may apply that principle in various different ways in practice. The arm's length principle doesn't provide a correct answer to the question how profits of an MNE should be allocated".

[174] See ECJ, 18 July 2013, C-6/12, *P Oy*, par. 26 and ECJ, 4 June 2015, C-15/14 P, *Commission v. Mol*, par. 60: "In the latter case [i.e. "individual advantage"], the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective".

[175] This is the orientation followed by the EU Commission with respect to tax rulings (see *Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union*, par. 169 – 174). Accordingly, see F. PEPE, *Tax rulings e aiuti di Stato: la potenzialità "egemonica" dell'arm's length principle ed i suoi riflessi giuridici e geo-politici*, in P. BORIA (a cura di), *La concorrenza fiscale tra stati*, Milano, 2019, 110: "*Sono infatti i caratteri peculiari dei rulings a concentrare (di fatto ed inevitabilmente) la valutazione sul primo requisito (vantaggio), marginalizzando l'analisi degli altri elementi […] la dimensione individuale dei rulings ne implica […] la selettività, proprio perché indirizzati a una singola impresa*". *Contra*, L. GORMSEN, C. MIFSUD-BONNICI, *Legitimate Expectation of Consistent Interpretation of EU State Aid Law: Recovery in State Aid Cases Involving Advanced Pricing Agreements on Tax*, in *Journal of European Competition Law and Practice*, n. 6/2017, 1 ss.; A. GUNN, J. LUTS, *Tax Rulings, APAs and State Aid: Legal Issues*, in *EC Tax Review*, 2015, 122; D. RUSSEL, T. GRAHAM, *The EU Commission's finding that Irish tax rulings in relation to Apple amounted to illegal state aid: reflections on this and the legislative underpinning of Common Reporting Standard*, in *Trusts & Trustees*, 2016, 1043 and G. ALLEVATO, *State Aid and Advance Tax Rulings*, in J. M. ALMUDI CID, J. A. FERRERAS GUTIÉRREZ, P. A. HERNÁNDEZ GONZÁLEZ-BARREDA (edited by), *Combating Tax Avoidance in the EU*, Wolters Kluwer, 2019, 493, who highlights that "the fact that due to an advantage tax ruling an undertaking has benefitted from an advantageous tax treatment as compared to the regime it would have been subject to absent the ruling does not necessarily imply that the undertaking at issue has been the beneficiary of a selective tax measure. Indeed, it can be argued that other undertakings in the same legal and factual situation […] could have benefited from the same advantage if they had only applied for the advantage ruling as well".

The "advantage" requirement can be (very briefly) defined as "any economic benefit which an undertaking could not have obtained under normal market conditions"[176]. It is established that, in order to assess whether a tax measure grants an advantage, it should be performed a comparison with a standard situation, which serves as a benchmark ("benchmark rule"). With regard to (direct) tax measures, such counterfactual benchmark has to be derived from the general treatment provided under the national tax system at issue, given that direct taxation falls within the exclusive competence of Member States. Hence, when the domestic legislation of the States involved in a MAP embed the ALP (as it now occurs in Italy under article 110, comma 7, t.u.i.r.), it could be argued that international APAs can't be based on equity, but, rather, should always be reached through the strict application of one of the methods of calculation provided by the OECD Tp Guidelines, since only APAs entered into in such a manner would implement the "normal" domestic rule and, therefore, wouldn't grant to taxpayers an "advantage" under article 107 of the TFUE[177].

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[176] "*Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union*", 19 July 2016, par. 66.

[177] It is worth noting that the EU Commission tends to assess a State aid when a tax rulings is not consistent with the arm's length principle "independently of whether a Member State has incorporated this principle into its national legal system and in what form" (see "*Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union*", 19 July 2016, par. 172). This orientation has been widely criticized by the doctrine, indeed: *(i)* on the one hand, it alters the established "benchmark rule" according to which the "advantage" has to be assessed by comparing the measure in dispute with the "normal situation" that would occur through the application of the domestic law of the State whose measure is contested (see, inter alia, D.A. KYRIAZIS, *From Soft Law to Soft Law Through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings*, in *European State Aid Law Quarterly*, 2016, 435); *(ii)* on the other hand, by adopting such orientation, the Commission seems to arrogate to itself the power to "harmonize" transfer pricing law in breach of the Member States' exclusive competence in the field of direct taxation (see G. ALLEVATO, *loc. ult. cit.*). At this regard, seem remarkable – especially for the time in which they have been made – the arguments of A. FANTOZZI, *The applicability of State Aids Rules to Tax Competition Measures: a Process of 'De Facto' Harmonization in Tax Field*, in W. SCHÖN, *Tax Competition in Europe*, IBFD, 2003, 131: "it may be validly argued that the current development in the EC praxis, namely the applicability of State aid rules to harmful tax measures initially identified under the Code of Conduct, reflects ongoing attempts by the EC and the EC Court of Justice to push the boundaries of direct tax harmonization, thus by passing the unanimity requirement provided for by Article 94 in the direct taxation field. Consequently, such approach is vulnerable to the accusation that it is creating a European Union dominated by technocrats, who only comply with esoteric principles of decision making, and not with 400 million people expressing their willing accordance with the basic principle of representation, which should be the only irrefutable pillar of the western economy". As to the challenges of the armonisation of direct taxation see F. PAPARELLA, *The armonisation of domestic corporate income tax with European Law: the Italian experience*, in *Revista International de Direito Tributario*, 2006, I 3 ss.

This conclusion apparently collides with the European Commission orientation according to which the arm's length principle to be applied in assessing transfer pricing rulings under the EU State aid law is a direct application of article 107 of the TFUE and, as a consequence, both the OECD standards dealing with the calculation of transfer prices are of no relevance for this purpose[178]. It should, nevertheless, be highlighted that differences seem not to exist between the EU arm's length principle envisioned (according to the EU Commission) under article 107 of the TFUE and the arm's length principle envisioned under the OECD Tp Guidelines. Indeed, on the one hand, the Commission poses the existence of such – autonomous – principle by taking as a reference [179] the ECJ decision in the *Forum 187 ASBL* case[180]. However, as it has been sharply pointed out by the case-law, in the *Forum 187 ASBL* case the ECJ linked the existence of an "advantage" to a deviation from the arm's length principle by referring to the OECD arm's length principle and not – as argued by the Commission – to an EU law-specific principle[181]. Moreover, on the other hand, it should be noted that although the Commission infers an autonomous EU arm's length principle under

[178] See "*Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union*", 19 July 2016, par. 172: "The arm's length principle the Commission applies in assessing transfer pricing rulings under the State aid rules is therefore an application of Article 107(1) of the Treaty, which prohibits unequal treatment in taxation of undertakings in a similar factual and legal situation. This principle binds the Member States and the national tax rules are not excluded from its scope". This same orientation has been confirmed in some recent Commission's decisions that followed the enquiry conducted by the same EU Commission on the the tax rulings practice of all Member States in the field of transfer pricing (see, inter alia, Decision of the EU Commission, 21 October 2015, C(2015)7152 final, *Fiat*; Decision of the EU Commission, 21 October 2015, C(2015) 7143 final, *Starbucks*; Decision of the EU Commission, 30 August 2016, n. C(2016)5605 final, *Apple*). Due to the complexity of the issues ivi addressed, these decisions will not be analysed in this research.

[179] "*Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union*", 19 July 2016, par. 172, footnote n. 255.

[180] ECJ, 22 June 2006, Joined cases C-182/03 and C-217/05, *Belgium and Forum 187 ASBL*.

[181] P.J. WATTEL, *The Cat and the Pigeons: Some General Comments on (TP) Tax Rulings and State Aid After the Starbucks and Fiat Decisions*, in I. RICHELLE, W. SCHON, E. TRAVERSA (edited by), *State Aid Law and Business Taxation*, Berlin, 2016, 186; G. ALLEVATO*, op. cit*., 492 – 493; M. ORLANDI, *op. cit*., 157 – 163; G. ALLEVATO*, op. cit*., 492 – 493; M. ORLANDI, *op. cit*., 157 – 163.

article 107 of the TFUE, it always refers, in practice, to the arm's length principle envisioned in the OECD Tp Guidelines[182-183].

On a final note, it should be highlighted that, unlike the above conclusion, EU State aid rules could be deemed as inapplicable to international APAs[184].

More specifically, given that international APAs – unlike "domestic" APAs – involve the tax administrations of two (or more) jurisdictions, it could be argued that even if an international APA deviates from the correct application of the EU (*alias* OECD) arm's length principle, it wouldn't cause any distortion of the competition among Member States, since the tax saving obtained by the taxpayer (MNE) in one State would be offset by a higher taxation in the other State(s) [185].

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[182] Such contradictory approach can be detected, *(i)* firstly, in the "Commission Notice on the notion of State aid as referred to in Article 107(1) of the Treaty on the Functioning of the European Union", 19 July 2016, par. 172. Here, indeed, if, on the one hand, the Commission states that "*The arm's length principle the Commission applies in assessing transfer pricing rulings under the State aid rules is … an application of Article 107(1) of the Treaty*"; on the other hand, the same Commission states that "*if a transfer pricing arrangement complies with the guidance provided by the OECD Transfer Pricing Guidelines, including the guidance on the choice of the most appropriate method and leading to a reliable approximation of a market based outcome, a tax ruling endorsing that arrangement is unlikely to give rise to State aid*" (this same orientation can be detected, mutatis mutandis, in the Decision of the EU Commission, 30 August 2016, n. C(2016)5605 final, *Apple*). *(ii)* Secondly, such a contradiction results from the fact that the European Commission, in some of its recent decisions concerning tax rulings (see supra footnote n. 173 and, in particular, the decisions regarding the *Fiat* and the *Amazon* cases) has questioned the choice of the methods of calculation of the transfer prices by making express reference to the OECD's Tp Guidelines (at this regard see C. FRANCIOSO, *State Aid and Tax Rulings: Managing the Risk of Recovery*, *op. cit*., 366 – 368).

[183] See, accordingly, M. ORLANDI, *Interpelli (tax ruling), accordi preventivi sui prezzi di trasferimento, principio di libera concorrenza ed aiuti di stato: la nuova frontiera della disciplina della concorrenza*, in P. BORIA (a cura di), *La concorrenza fiscale tra stati*, Milano, 2019, 154 – 155: "*nelle più recenti Decisioni in materia di aiuti di Stato, la commissione ha sempre dichiarato esplicitamente di non voler applicare il principio di libera concorrenza come sancito nelle linee guida OCSE […]. Contraddittoriamente, però, la Commissione ritiene che esse possano comunque costituire una utile guida […] e, concretamente, in ogni Decisione adottata in materia di aiuti di Stato […] ha puntualmente provveduto a verificare in quale misura l'interpello si discostasse dalle linee guida OCSE*".

[184] Note that both the EU Commission and the legal writings quoted above have only addressed the compatibility of internal-unilateral APAs with the EU's State aid law; a similar analysis – as far as we are aware – has never been made with respect to international APAs.

[185] This appears to be the position of W. HASLEHNER, *Double Taxation Relief, Transfer Pricing Adjustments and State Aid Law*, *op. cit*., 158 – 159: "if a Member State makes a corresponding (downward) adjustment to avoid economic double taxation in a situation where the corresponding first (upward) transfer pricing adjustment was not in line with the arm's length principle, the question arises whether such relief would constitute illegal aid. […] In the case at hand […] the granting of relief, if fully matched by an upward adjustment in the other country, does not result in any advantage to the undertaking as a whole, as any reduction in tax base in one country is matched by a matching increase in the other state".

Although this argument seems fascinating, it may lead down a slippery slope for two reasons.

The first reason is that the assessment of State aids – according to current orientation of the EU Commission and of the ECJ – must be performed within the legal framework of the State under investigation, *i.e.* purely at a national level, so that the advantage at the level of one company (resident in State A) cannot be offset by the disadvantage at the level of another company (resident in State B), even if that company is part of the same group[186].

Moreover, even if one accepts that the assessment of State aids can be performed by taking into consideration MNEs as a whole, APAs could always enable MNEs to achieve a lower overall tax burden and, therefore, be liable to affect trade between Member States and to distort competition. Take, for instance, the case in which: *(i)* a MNE operates in State A and State B; *(ii)* State A has a higher level of taxation than State B; *(iii)* the MNE enters into an international APA with these two States that fixes the transfer prices of the purchases made by the enterprise operating in State A from the one operating in State B at a level that is significantly far from the arm's length. In this case, the MNE would be able to: *(a)* divert its profits to a State with a lower level of taxation (*i.e.* would be able to tax in State B a higher amount of profits then the ones that it would be "normally" taxed on in that State) and *(b)* divert its costs to a state with a higher level of taxation (*i.e.* would be able deduct in State A a higher amount of costs than the ones that it would be "normally" be allowed to deduct in that State)[187].

[186] See, *inter alia*, Commission Decision of 28 October 2009, n. 2010/95/CE, par. 131: "The Commission is, however, of the opinion that an advantage at the level of one company cannot be offset by the disadvantage at the level of another company, even if that company is part of the same group. The assessment whether there is an advantage has to be made at the level of the individual company, not of the group. In addition, it must be underlined that group companies can easily reorganise their financing activities and influence the outcome of the application of the measure". *Contra*, P. ROSSI-MACCANICO, *A New Framework for State Aid Review of Tax Rulings*, in *European State Aid Law Quarterly*, 2015, 371 ss. and M. ORLANDI, *op. cit.*, 170 – 171: "*Tale rifiuto, di per sè poco razionale, si pone in aperto contrasto con il fatto che, al momento di ordinare l'eliminazione degli effetti negative degli aiuti di Stato concessi illegittimamente, l'appartenenza ad un gruppo di imprese diviene rilevante, tnat'è vero che la Commissione ne impone in via principale il recupero presso l'impresa che ne aveva beneficiate, ma in via sussidiaria anche presso l'impresa capogruppo*".

[187] In relation to this example, one may argue that it is highly unlikely that State A would agree to conclude such APA, since State A, as a result such an agreement, would unjustifiably loose part of its tax revenues. Nevertheless, it cannot be excluded that APAs may be employed as vehicles for "unlawful deals between tax authorities and taxpayers" (M. LANG, *Tax Rulings and State Aid Law*, in *British Tax Review*, 2015, issue n. 3, 395). In other words, it cannot be excluded that States may agree to enter into

international APAs that grant to taxpayers a tax advantage in exchange of other advantageous deals unrelated to the tax system (see, at this regard, F. PEPE, *"Concorrenza fiscale dannosa" e tax rulings: l'uso "strategico" dell'arm's length principle nella disciplina europea sugli aiuti di Stato e l'imprevista (?) "egemonia" della Commissione europea nell'area della fiscalità internazionale*, in *Federalismi.it*, n. 5/2018, 17: "*l'addomesticabilità dell'ALP […] permette infatti agli Stati e alle MNEs di nascondere dietro le mentite spoglie di stime in materia di TP accordi anche di altra natura, elaborati all'interno di un quadro di interessi più ampio e con possibili benefici e "concessioni" reciproche*"). Hence, following the example made above, it may well be that State A decides to enter into such APA as long as the MNE agrees to maintain – for example – a certain level of employment within its territory. In this case, indeed, although State A would loose part of its tax revenues, it would compensate such a loss with the increase of employment in its territory.

CHAPTER II

THE MUTUAL AGREEMENT PROCEDURE (“MAP”): A COMPARISON BETWEEN THE MAP ENVISIONED IN THE DIRECTIVE AND THE MAPS ENVISIONED IN THE OTHER DISPUTE RESOLUTION MECHANISMS

remedies. – 4.5. (Follows). Focus on the "OECD Procedures" and on the EU Arbitration Convention as to the need to renounce to domestic remedies in order to implement the MAP. – 4.6. Process and time limits for the implementation of the final decision. – 5. The possibility for taxpayers to appeal against the mutual agreement. – 6. (Follows). Critical remarks as to the effectiveness of domestic appeals against undue mutual agreements: is there the need of judicial means to settle international tax disputes (referral to chapter III)?

1. The first stage of the MAP: the review of the complaint.

The previous chapter has brought forward that the MAPs regulated under the existing dispute resolution mechanisms are divided in two stages.

The first stage takes place between the taxpayers and the tax authorities receiving the taxpayers' request. In particular, during this MAP stage, the tax authorities first have to evaluate if the taxpayers' claims are well-grounded. Subsequently, if the case is considered to be well-grounded, the same should be, alternatively, resolved unilaterally, by adopting the so called "unilateral relief", or – if not – by initiating the second stage of the procedure (*i.e.* the "consultation phase").

The previous chapter has also brought forward that one of the main concerns of this first stage of the MAP is the possibility for tax administrations to arbitrarily block the flowing of the procedure if not willing to solve the case ("Blocking Method"), or by denying access to the MAP, or even by ignoring the taxpayers' requests.

In the field of transfer pricing disputes this could easily occur if: *(i)* the MAP request is presented to the tax authority that has imposed the primary adjustment and this tax authority isn't willing to revise the tax assessment on an international level; or *(ii)* the MAP request is submitted to the tax authority that would have to issue a "correlative adjustment", *i.e.* recognize a reimbursement of taxes already collected as a consequence of a previous adjustment imposed in another State.

Therefore, in this stage of the procedure, the highest level of protection for taxpayers would be – ideally – granted by a dispute settlement mechanism that: *(a)* requires that all the relevant authorities involved in a dispute have to *jointly* examine and assess whether the taxpayer's complaint is well founded; *(b)* provides for a strict deadline within which the relevant tax authorities have to take a decision on whether the taxpayer's request is "well-founded"; *(c)* defines clearly on which grounds the taxpayers' request can be deemed "not founded"; *(d)* grants to taxpayers the right to challenge before national courts the acts that deny access to the procedure on the grounds that the request is "not founded".

All these requirements, indeed, would substantially contribute to prevent conservative or opportunistic attitudes of tax administrations not willing to settle tax disputes on an international level.

This paragraph will assess whether these requirements are actually met under the Directive and if (or to which extent) the Directive, as compared to other existing mechanisms to settle international tax disputes, guarantees taxpayers the greatest level of protection.

1.1. The possibility, for all the relevant authorities involved in a dispute, to examine and assess jointly whether the taxpayers' complaints are well founded.

Article 3(1), first sentence, of the Directive states that the "*affected person*" can file a complaint before the relevant tax authorities of "*each*" of the Member States concerned with the "*question in dispute*".

Moreover, article 3(1), third sentence, of the Directive specifies that taxpayers shall submit such a complaint "*simultaneously*" to "*each*" of the relevant tax authorities involved in the dispute .

In light of these two provisions there shouldn't be doubts as to the fact that the Directive (not only grants the possibility, but actually) requires all the authorities involved in a dispute to reach a common view on whether the taxpayers' complaints are well founded. This conclusion is strengthened by the fact that the Directive envisions an *ad hoc* mechanism so as to overcome possible conflicts among tax authorities on this matter. Precisely (as it will be further clarified *infra*; see par. 5), in the case one relevant authority accepts, while the other rejects, the taxpayer complaint, article 6(1)(a) of the Directive grants taxpayers the possibility to request the setting up of an "Advisory Commission" in order to overcome such a conflict.

As hinted above, these provisions are of great importance for the effective and impartial resolution of transfer pricing disputes. Precisely: on the one hand, they prevent that MAP requests submitted to challenge primary adjustments are addressed only by the tax authorities that have made such adjustments; on the other hand, they prevent that MAP requests submitted in order to obtain correlative adjustments are addressed only by the tax authorities that would have to issue a "correlative adjustment", *i.e.* by the tax authorities that would have to recognize a reimbursement of taxes already collected as a consequence of a previous adjustment enforced in another State.

Although, at a first glance, the Directive seems, in this regard, perfectly in line with any other existing mechanism[1], the following subparagraphs are going to highlight that, after careful analysis of such instruments, the Directive actually (greatly) improves both the "OECD Procedures" and the EU Arbitration Convention[2].

1.1.1. A focus on the "OECD Procedures".

Prior to Action 14 of the BEPS, article 25(1) of the OECD MC stated that taxpayers had to submit the requests for a MAP *only* to the tax authority of the State where they were residents for tax purposes. Therefore, the past version of article 25 didn't enable all the relevant authorities to work together in order to mutually agree on whether the taxpayers requests were well founded.

Following the adoption of the BEPS Action 14[3], on the one hand, article 25(1) of the OECD MC was amended so as to enable taxpayers to submit the request for a MAP before the tax authorities of "*either*" the contracting States involved in a dispute.

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[1] According to P. PISTONE, *The Settlement of Cross-border Tax Disputes in the European Union*, in J. WATTEL, O. MARRES, H. VERMEULEN (edited by), *Terra/Wattel European Tax Law*, Wolters Kluwer, 2018, 353, "All such instruments admit filing of the complaint […] before all competent authorities of the States involved".

[2] It should be noted that article 17 of the Directive provides for a special procedure in the cases in which the complaint is submitted by individuals or small and medium-sized enterprises. Precisely, according to this provision, the submission of the complaint, and most of the communications' entrustments on the part of the affected person provided within the Directive, shall be directed only to the competent authority of the taxpayers' residence Member State. This provision will be addressed *infra* in paragraph 1.1.3.

[3] OECD, *Making Dispute Resolution Mechanisms More Effective, Action 14: Final Report*, Element 3.1.: "Both competent authorities should be made aware of MAP requests being submitted and should be able to give their views on whether the request is accepted or rejected. In order to achieve this, countries should either": (i) "amend paragraph 1 of Article 25 to permit a request for MAP assistance to be made to the competent authority of either Contracting State", or (ii) "where a treaty does not permit a MAP request to be made to either Contracting State, implement a bilateral notification or consultation process for cases in which the competent authority to which the MAP case was presented does not consider the taxpayer's objection to be justified (such consultation shall not be interpreted as consultation as to how to resolve the case)".

Accordingly, on the other hand, article 16(1) of the MLI ensures this possibility with respect to the tax treaties that fall within the scope of application of the MLI.
At a first glance, it could appear that the "OECD Procedures" – as the Directive – require that all the tax authorities involved in a dispute shall reach a common view on whether or not the taxpayers complaints are well founded [4].
Precisely, this conclusion could be reached, alternatively: *(i)* with regard to tax treaties containing a provision drafted according to the latest version of article 25 of the OECD MC; or *(ii)* with regard to tax treaties containing a provision drafted according to the prior version of article 25 of the OECD MC, but that fall within the scope of application of the MLI. Indeed, although States may reserve the right to opt out from article 16(1) of the MLI (and, therefore, maintain in their treaties the "previous version" of article 25), article 16(5) of the MLI can be argued to still secure that all the tax authorities involved in a dispute shall *jointly* examine and address the substance of the taxpayers requests. In particular, pursuant to article 16(5) of the MLI, States are allowed to opt out from paragraph 1 of the same article only if the authority that receives the taxpayers request "*will implement a bilateral notification or consultation process with the relevant authority of the other Contracting Jurisdiction for cases in which the relevant authority to which the mutual agreement procedure case was presented does not consider the taxpayer's objection to be justified*".
As to the case *sub (i)*, however, this conclusion can be challenged by arguing that, according to article 25(2) of the OECD MC, the taxpayers' requests have to be deemed "well founded" only by one tax authority. This provision, indeed, refers to the relevant authority that has to evaluate the taxpayers' request by using the singular form[5-6].

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[4] See OECD, *Model Tax Convention on Income and on Capital*, *Commentary*, 2017, C(25), par. 17: "Paragraph 1 permits a person to present his case to the competent authority of either Contracting State; it does not preclude a person from presenting his case to the competent authorities of both Contracting States at the same time"; P. PISTONE, *loc. ult. cit*.

[5] Article 25(2) of the OECD MC states that: "*The competent* authorit*y shall* [proceed to the second stage] *if the objection appears to* it *to be justified and if* it is not itself *able to arrive at a satisfactory solution*" (emphasis added).

[6] This remark, nevertheless, seems surmountable. Indeed, if – as it is commonly agreed (see supra) – the term "*either*" contained in paragraph 1 of article 25 allows the submission of the request to "*both*" the competent authorities; then, accordingly, paragraph 2 of article 25 should be read in the following way: "*The competent* authorities *shall* [proceed to the second stage] *if the objection appears to* them *to be justified and if* neither of them are *able to arrive at a satisfactory solution*" (emphasis added).

As to the case *sub (ii)*, the conclusion reached above could be disputed whereby a State – as Italy – reserves the right, pursuant to article 16(5) of the MLI, to opt out from paragraph 1 of the same article 16. Indeed, article 16(5) of the MLI doesn't seem to actually guarantee that all the authorities involved in a dispute shall reach a common view on whether the taxpayers' complaints are well founded. Firstly, because this provision doesn't seem to impose any obligation upon the "requested authority" to "confront" with the tax authority of the other contracting State, but rather deems sufficient that the latter is "informed of" (*rectius*, "notified") the existence of a complaint (article 16, paragraph 5, precisely, states that the requested tax authority can, alternatively, implement "*a bilateral notification* or *consultation process*")[7]. Secondly, because even if the "requested authority" implements a "*consultation process*" with the tax authority of the other contracting State, article 16(5) of the MLI doesn't expressly provide whether the former is actually bound to adopt the solution proposed by the latter. In other words, article 16(5) doesn't expressly require for the decision to be reached through a "mutual agreement" between the two tax authorities[8].

1.1.2. A focus on the EU Arbitration Convention.

Unlike the Directive, the EU Arbitration Convention seems to specifically exclude that *all* the relevant authorities involved in a tax dispute shall reach a common view on whether the taxpayers' complaints are well founded.

Article 6(1) of the Convention, indeed, states that the case has to be submitted (only) "*to the competent authority of the Contracting State of which it is an enterprise or in which its permanent establishment is situated*".

However, the same provision establishes a compulsory notification mechanism similar to the one set forth in article 16(5) of the MLI.

Precisely, the last two sentences of article 6(1) of the EU Arbitration Convention state that *(i)* the enterprise, when submitting the request, shall also "*notify the competent*

[7] See, accordingly, M. TRIVELLIN, *Studi sugli strumenti di soluzione delle controversie fiscali internazionali*, Torino, 2018, 68 – 69.

[8] See, accordingly, M. TRIVELLIN, *op. cit.*, 77: "*In questi casi, infatti, il contribuente non potrebbe che sperare che le eventuali consultazioni con l'Autorità competente dell'altro Paese valgano a convincere quella nazionale, il che rende più debole il meccanismo di instaurazione della MAP ed in parte pregiudica gli strumenti che, nel quadro della* Multilateral Convention, *ne assicurano la conclusione*".

authority if other Contracting States may be concerned in the case" and that *(ii)* "*the competent authority shall then without delay notify the competent authorities of those other Contracting States*".

According to this provision, therefore, it could be validly argued that this mechanism secures the result to involve in the unilateral phase all the authorities concerned with the dispute[9].

Nevertheless – similarly to what has been argued *supra* with reference to article 16(5) of the MLI – it could also be suggested that such provision: *(i)* doesn't impose any obligation upon the "requested authority" to actually "confront" with the tax authority of the other contracting State, since it only impose to "inform" (*rectius*, "notify") the latter administration of the existence of a complaint; *(ii)* nor does it provide that the requested authority must reach a decision through a "mutual agreement" with the other tax authority involved in the dispute.

This concern – even if it hasn't been often highlighted by the mainstream opinion[10] – doesn't seem to be groundless.

The EU JTPF, indeed, felt the need to amend the EU Arbitration Convention in order to both: *(i)* allow taxpayers to submit the MAP requests to *all* the relevant authorities involved in a dispute, and *(ii)* "force" the tax authorities involved in a dispute to reach a *common* position on the soundness of taxpayers' requests[11].

However, while the proposal *sub (i)* has been effectively included in paragraph 7.3, lett. d), of the Code of Conduct[12]; no agreement was found among Member States in

[9] P. PISTONE, *op. cit.*, 353, footnote 68: "Article 6(1), first sentence EU Tax Arbitration Convention requires the filing of the complaint before one single tax authority, namely the one of the EU Member State of the enterprise or of the permanent establishment. However, article 6(1), third sentence EU Tax Arbitration Convention establishes compulsory notification mechanisms, which secure an equivalent result to the one applicable under the requirements established by the corresponding provisions of the BEPS MLI and the EU Tax Arbitration Directive".

[10] For similar concerns see L. HINNEKENS, *The Tax Arbitration Convention. Its Significance for the EC Based Enterprise, the EC Itself, and for Belgian and International Tax Law*, in *EC Tax Review*, n. 2/1992, 104.

[11] See H.M. PIT, *Dispute Resolution in the EU*, IBFD, 2018, 513 – 514.

[12] See par. 7.3, lett. d), of the Code of Conduct: "*Enterprises should submit a copy of their request for a mutual agreement procedure under the Arbitration Convention to the other competent authority involved at the same time and with the same set of information as to the competent authority to which the request is addressed in accordance with Article 6(1) of the Arbitration Convention*". Although most Member States have implemented this provision in their administrative practices, it should be highlighted that the Italian administrative guidelines are not compliant with this provision, since they

order to include in the Code of Conduct also the proposal *sub (ii)*. Rather, Members States have expressly excluded that relevant authorities should mutually reach an agreement in order to determine if a request is "well founded", specifying that tax authorities shall only "*exchange views*" and "*strive as far as possible*" to reach a common position[13].

1.1.3. Critical remarks on the "special" procedure envisioned under the Directive for small or medium-sized enterprises (or individuals).

As hinted above, the Directive envisions a "special" procedure for the cases in which the complaint is submitted by small and medium-sized enterprises[14] (or individuals). Precisely, article 17 of the Directive[15], by means of derogation to article 3 (according to which taxpayers have to simultaneously submit the complaint to all of the relevant authorities involved in an international tax dispute) allows these categories of taxpayers to submit the complaint only in the State of residence.

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require that the request of a MAP under the Convention should be filed only to the Italian Revenue Agency. See Ag. Entr. Circ. 21/E of 2012, 28 – 29: "*l'istanza di apertura della procedura amichevole deve essere redatta in carta libera e spedita per raccomandata con avviso di ricevimento al Ministero dell'Economia e delle Finanze, Dipartimento delle Finanze - Direzione Relazioni, ovvero consegnata a mano alla medesima Direzione con contestuale rilascio di copia della prima pagina dell'istanza con timbro della segreteria e data di ricezione*".

[13] See paragraph 7.3, lett. e) of the Code of Conduct.

[14] Article 17 of the Directive refers to the distincion between "small and medium-sized" enterprises and "large" enterprises made under the Directive n. 2013/34/EU. Precisely, article 3(4) and (7) of this Directive considers enterprises to be large undertakings or large groups when at least two of the following conditions are met: *(i)* a balance sheet total of at least 20 million Euro; *(ii)* a net turnover of at least 40 million Euro; *(iii)* an average number of employees during the financial year of 250.

[15] Article 17 of the Directive reads: "*Where the affected person is either: (a) an individual; or (b) not a large undertaking and does not form part of a large group (both as defined in Directive 2013/34/EU of the European Parliament and of the Council, the affected person may submit the complaints, replies to a request for additional information, withdrawals and requests specified in Articles 3(1), 3(4), 3(6) and 6(1), respectively ('communications'), by way of derogation from those provisions, only to the competent authority of the Member State in which the affected person is resident. The competent authority of that Member State shall notify the competent authorities of all the other Member States concerned at the same time and within 2 months of receipt of such communications. Once such a notification has been made, the affected person shall be deemed to have submitted the communication to all the Member States concerned as of the date of such notification. In the case of additional information received under Article 3(4), the competent authority of the Member State that received the additional information shall transmit a copy to the competent authorities of all the other Member States concerned at the same time. Once this submission has been made, it shall be deemed that additional information has been received by all Member States concerned as at the date of such receipt of information*".

Moreover, this same provision establishes a compulsory notification mechanism similar to the ones set forth in article 16(5) of the MLI and in article 6 of the EU Arbitration Convention. Precisely, article 17 of the Directive states that the relevant authority of the Member State in which the taxpayer is resident, once it receives the complaint, "*shall notify the competent authorities of all the other Member States concerned at the same time*" and, eventually, transmit the additional information requested according to article 3 of the Directive.

Although some authors have positively addressed this provision (mainly because it makes less costly and burdensome for small-sized taxpayers to benefit from the Directive procedure[16]), this provision seems to weaken the safeguards of taxpayers against conservative or opportunistic attitudes of the tax administrations that receive the taxpayers' complaints.

Indeed, exactly as it occurs under articles 16 of the MLI and 6 of the EU Arbitration Convention, article 17 of the Directive *(i)* doesn't impose any obligation upon the "requested authority" to actually "confront" with the tax authority of the other contracting State and *(ii)* neither provides that the requested authority should reach a decision through a "mutual agreement" with the other tax authority involved in the dispute. Nevertheless, it should be highlighted that, unlike what occurs under the MLI and the EU Arbitration Convention, these concerns seem somewhat mitigated in light of the fact that the "special" procedure set forth under article 17 seems to be optional, since article 17 only states that taxpayers "*may*" submit the complaint "*only to the competent authority of the Member State in which* [it] *is resident*". Therefore, nothing should prohibit small or medium enterprises to follow the ordinary regime provided for under article 3 and, accordingly, submit the complaint to all the relevant tax authorities concerned with the dispute.

1.2. Time-limits within which competent authorities have to conclude the review of the complaint.

Neither the "OECD Procedures", nor the EU Arbitration Convention set a time limit for relevant authorities to review the taxpayers' complaints.

[16] This, precisely, is the position of H.M. PIT, *op. cit.*, 1282 – 1284.

This is a significant pitfall of these mechanisms, since taxpayers have no legal certainty as to *if* and *when* the case will be resolved.
Moreover, the absence of a strict time limit for the review of the taxpayers' complaints may enable the relevant tax authorities to ignore the taxpayers' complaint and, thus, to prevent the beginning of the MAP ("Blocking Method")[17] or, in any case, to cause undue delays by keeping the procedure in hold for an indefinite period.
At this regard, the Directive has greatly improved both the "OECD Procedures" and the EU Arbitration Convention, given that: *(i)* on the one hand, it provides for a defined timeframe for the review of the complaint[18] and, *(ii)* on the other hand, it envisions a default mechanism that deals with the case in which relevant authorities fail to review the taxpayers' complaints. Precisely, according this mechanism, the tax authorities' silence on the review of the complaint has to be deemed as a tacit acceptance of such complaint[19] (for further clarifications on this mechanisms see *infra* par. 1.5.5.).

1.3. The circumstances under which the relevant authorities may reject the taxpayers' complaints.

As hinted above, a clear definition of the circumstances under which the relevant tax authorities may deny access to the procedure is of great importance in order to both *(i)* ensure certainty upon taxpayers on whether a case of double taxation can be resolved under a particular legal instrument and *(ii)* "steal" from tax authorities the power to

[17] It is worth noting that under the EU Arbitration Convention such a concern seems – at some extent – mitigated given that (unlike what occurs under the "OECD Procedures", where the deadline for the termination of the MAP commences from the moment in which the tax authority "accepts" the taxpayers requests), pursuant to article 7(1), the 2-year deadline for the termination of the MAP commences from the moment in which the taxpayer's request is submitted. This circumstance, indeed, entails that if competent tax authorities ignore the taxpayer's request, once the 2-year deadline is expired, the procedure will automatically depart to the arbitration stage.

[18] Specifically, article 3(5) of the Directive imposes upon the competent tax authorities an obligation to take a decision on whether a complaint raised by the taxpayers is admissible and can be accepted within 6 months from the receipt of the complaint or, if in addressing the admissibility of the taxpayers' complaint, within 6 months from the receipt of the "additional information" that tax authorities may request according to article 3(3)(f).

[19] See article 5(2) of the Directive: "*Where a competent authority of a Member State concerned has not taken a decision on the complaint within the time provided for in Article 3(5), the complaint shall be deemed to be accepted by that competent authority*".

discretionary decide not to grant access to a particular procedure in cases that, in the abstract, are perfectly eligible for that procedure.

The Directive provides for a strict set of the grounds for tax authorities to reject the taxpayers' complaints.

These ground are listed in article 5(1) of the Directive, which states that: "*The competent authority of a Member State concerned may decide to reject a complaint within the period provided for in Article 3(5) if: (a) the complaint lacks information required under Article 3(3) (including any information requested under Article 3(3)(f) that was not submitted within the deadline specified in Article 3(4); (b) there is no question in dispute; or (c) the complaint was not submitted within the 3-year period set out in Article 3(1)*".

Article 5(1) of the Directive should be seen as a great improvement both in respect to the "OECD Procedures" and to the EU Arbitration Convention, since both these legal instruments do not clearly set the grounds under which the relevant tax authorities may deny access to the procedure, thus giving tax authorities "*carte blanche*" as to whether considering the taxpayers' complaints as justified and well founded[20].

Nevertheless, article 5(1) of the Directive doesn't seem to have completely overcome the criticisms detected in the other legal instruments, given that – as it will be discussed here below – some of the "grounds to dismiss " envisioned therein are far from being compelling and rigorous.

1.3.1. Critical remarks on the first condition under which, according to the Directive, a complaint can be rejected: the lack of information required for the filing of the complaint.

The first condition under which a complaint can be rejected ["*the complaint lacks information required under Article 3(3) including any information requested under Article 3(3)(f) that was not submitted within the deadline specified in Article 3(4)*"] seems, at a first glance, actually unambiguous and objective, since it is linked to article 3(3), that is, itself, also exhaustive and precise in listing the "*information required*" for the submission of the complaint.

[20] P. PISTONE, *op. cit*., 355.

It could, nevertheless, be argued that article 3(3), lett. (a) – (e), requires an excessively high level of detail to submit the complaint and that this provision could have, therefore, the unintended outcome to enable the tax administrations to discretionary block the initiation of the procedure[21].

Another pitfall of this first condition could be detected in the fact that, according to article 5(1)(a) of the Directive, the complaint can be rejected also if it lacks of the additional information that relevant authorities may request according to article 3(3)(f), *i.e.* if it lacks of "*any specific additional information* […] *that is considered necessary to undertake the substantive consideration of the particular case*".

Indeed, the ambiguity of the expression "*substantive consideration of the particular case*" could lead to the risk that relevant authorities may request additional information that is so excessive that a taxpayer cannot reasonably comply therewith within the given timelines, thus causing – as the case may be, even intentionally – a discretionary ground on which to reject a complaint.

Although these risks appear to be real and need, therefore, to be neutralized, it should be mentioned that the Directive offers additional protection if the relevant authorities adopt a formalistic approach as to the fulfillment of the information required for the filing of the complaint[22].

More specifically, the Directive: *(i)* requires the relevant authorities to provide for the "general reasons" that have led to the rejection of the complaint; *(ii)* grants to taxpayers the right to appeal against the rejection of the complaint; *(iii)* ensures that the rejection of the complaint by one relevant authority alone is not *per se* sufficient to determine the termination of the procedure (all these aspects will be addressed *infra* in paragraph 1.5.).

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[21] See the critical remarks of M. TRIVELLIN, *op. cit.*, 214: "*Incrementare la complessità dell'istanza è, già di per sé, scelta discutibile, soprattutto se eventuali lacune comportano il rigetto in rito […]. Più nello specifico, però, l'impiego dell'aggettivo "particolareggiate" immette anche un elemento che consente di apprezzare il grado di completezza dell'informativa ed introduce un concetto relativo, che si presta a diverse valutazioni. Vi è, dunque, il rischio che la previsione fornisca all'Autorità competente che intenda affermare l'insufficienza degli elementi dedotti ed allegati il pretesto per attuare un* Blocking Method, *ostacolando così l'avvio delle trattative*". *Contra* H.M. PIT, *op. cit.*, 1268: "such a list affords taxpayers certainty as to what information is to be submitted and avoids them being faced with uncertainty as to whether the information provided is sufficient".

[22] Accordingly, see S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, forthcoming.

1.3.2. Critical remarks on the third condition for a complaint to be rejected under the Directive: the delay in lodging an appeal.

The third condition under which a complaint can be rejected [*the complaint was not submitted within the 3-year period set out in Article 3(1)*"] is also far from being objective, since it appears uncertain the *dies a quo* from which the 3-year deadline for the notification of the complaint has to be calculated.

Indeed, according to article 3, paragraph 1, the count of the 3 years can start from the "*first*" notification of either *(i)* the action "*resulting*" in the question in dispute or *(ii)* the action "*that will result*" in the question in dispute.

For example, from an Italian perspective, it could, indeed, be argued that the commencement date of the 3-years' period could start either from *(i)* the notification to the taxpayers of a proper tax assessment (or equivalent act) or *(ii)* the notification to the taxpayer of a mere "tax audit" ("*processo verbale di constatazione*").

In this regard it could be concluded that the commencement of such period should be interpreted in the way most favorable for the taxpayers, exactly as it occurs under both the "OECD Procedures" and the EU Arbitration Convention[23]; however, this matter should have been addressed more clearly by the drafters of the Directive, due to the sensitivity of the consequence that may arise from a discretionary interpretation of this provision: the denial of access to the Directive procedure.

1.4. (Follows). Two more "hidden" restrictions that could prevent the access of taxpayers to the Directive procedures: (i) penalties for "tax fraud", "willful default" and "gross negligence"; (ii) the absence of a case involving "double taxation".

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[23] See, for instance, the OECD, *Model Tax Convention on Income and on Capital*, *Commentary*, 2017, C(25), par. 21, which states that: "The provision fixing the starting point of the three year time limit as the date of the 'first notification of the action resulting in taxation not in accordance with the provisions of the Convention' should be interpreted in the way most favourable to the taxpayer. Thus, even if such taxation should be directly charged in pursuance of an administrative decision or action of general application, the time limit begins to run only from the date of the notification of the individual action giving rise to such taxation, that is to say, under the most favourable interpretation, from the act of taxation itself, as evidenced by a notice of assessment or an official demand or other instrument for the collection or levy of tax. Since a taxpayer has the right to present a case as soon as the taxpayer considers that taxation will result in taxation not in accordance with the provisions of the Convention, whilst the three year limit only begins when that result has materialised, there will be cases where the taxpayer will have the right to initiate the mutual agreement procedure before the three year time limit begins".

The previous paragraph of this chapter addressed the circumstances under which the relevant tax authorities may reject the taxpayers' complaints and, therefore, deny access to the Directive's procedures under article 5(1). It was mentioned, indeed, that – in order to both ensure certainty upon taxpayers and to "steal" from tax authorities the power to discretionary decide whether a case can be settled under a particular procedure – it is of great importance that instruments to settle tax disputes set down clear definitions of the circumstances under which the relevant tax authorities may deny access to the procedure.

The analysis and the considerations presented in the previous paragraph with regard to article 5(1) of the Directive have to be further developed in light of article 16, paragraphs 6 and 7, of the Directive.

Indeed, article 16, paragraphs 6 and 7, of the Directive lay down two more grounds for Member States to deny access to the Directive's procedures.

More specifically, on the one hand, article 16(6) (first sentence) states that – by "*way of derogation from article 6*" – a Member State may deny access to the Directive's dispute resolution procedure in cases where "*penalties were imposed in that Member State*" for "*tax fraud, willful default and gross negligence*".

On the other hand, article 16(7) states that a Member State may deny access to the Directive's dispute resolution procedure "*under Article 6*" where "*a question in dispute does not involve double taxation*".

Both articles 16(6) and (7) expressly derogate from the "*procedure under Article 6*".

Article 6 regulates two procedures that have to be conducted by an "Advisory Commission".

The first procedure is set forth in article 6(1)(a). This provision entails the possibility to set up an "Advisory Commission" in order to review the decisions to reject the taxpayers' complaints under article 5(1) of the Directive (see above) if such rejections are made by "*at least one, but not all of the competent authorities of the Member States concerned*", *i.e.* when the relevant authorities' decisions diverge as to whether reject the taxpayers' complaints (see *infra* par. 1.5.2.).

The second procedure is set forth in article 6(1)(b). This provision regulates the Directive's arbitration procedure, *i.e.* the possibility to set up the "Advisory Commission" if the relevant authorities fail to conclude the MAP within the time limit of two years provided for in article 4(1) (this procedure will be extensively examined in chapter III).

In light of the derogation made to article 6 of the Directive, some authors have pointed out that when a Member State decides to invoke paragraphs 6 and 7 of article 16, the relevant authorities would still have to take a decision on whether to accept the complaint under article 5(1) and – if this decision is positive – to initiate the MAP under article 4. In particular, it has been argued that since both paragraphs 6 and 7 of article 16 only derogate to the procedures regulated under article 6, both articles 5(1) and 4 would be disregarded from the scope of application of these two provisions[24]. In other words, according to these authors, paragraphs 6 and 7 of article 16 of the directive only prevent the initiation of the arbitration stage envisioned under article 6(1)(b) of the Directive.

This interpretation, however, could be challenged for the following reason.

When a Member State decides to invoke paragraphs 6 or 7 of article 16, on the one hand, the decision on the rejection of the complaint under article 5(1) would almost automatically be negative for the taxpayers; on the other hand, even if such decision would be positive, the tax authorities are unlikely to be available to conclude the MAP, provided the fact that if they cannot reach a mutual agreement they wouldn't be "forced" to enter into the arbitration stage [*i.e.* to initiate the procedure envisioned under article 6(1)(b) of the Directive][25].

Therefore, the derogation made by article 16(6) and (7) to article 6 of the Directive seems to be regarded as a derogation only to article 6(1)(a) of the Directive, *i.e.* to the possibility to set up the "Advisory Commission" if the relevant authorities' views

[24] S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, cit.: "the derogation embodied in Article 16(6) does not prevent the affected person neither to file his complaint nor it allows competent authorities to disregard the complaint for purposes of accepting it and carrying out the MAP. On the contrary, since the scope of application of the rule is to act as a derogation to Article 6 alone, that would mean, theoretically speaking, that competent authorities remain under an obligation to carry out every step required under the Directive up to the arbitration-like phase provided for in Article 6 and following". Accordingly, see P. PISTONE, *op. cit.*, 375 – 376.

[25] This, precisely, is the view of H.M. PIT, *op. cit.*, 1333-1334, who concludes that a different interpretation can't be accepted because both the decision under article 5(1) and the MAP would "most likely be negative".

diverge as to the opportunity to deny access to the Directive's procedure under these two provisions.

In other words, it seems that [unlike what occurs if the relevant authorities' views diverge as to the opportunity to deny access under article 5(1) of the Directive: in this case, pursuant to article 6(1)(a) of the Directive, the taxpayers can request the establishment of an Advisory Commission in order to reach a decision on the soundness of the complaint] if a Member State tax authority invokes article 16(6) or (7), the denial of access to the procedure is purely unilateral[26], as it is effective even if there is a disagreement between the tax authorities involved in a dispute as to the existence of the grounds to invoke such provisions.

In light of this remark, it appears that the Directive hasn't completely overcome the possibility for tax authorities to block, unilaterally, the resolution of a case of double taxation. As it will be briefly discussed in the following sub-paragraphs, this weakness seems even exacerbated by both the fact that the grounds to invoke article 16(6) and (7) are far from being objective (see par. 1.4.1. and par. 1.4.2.) and by the fact that the denials of access issued on the basis of these two provisions are not challengeable before domestic courts (see par. 1.5.4.).

1.4.1. Critical remarks on the denial of access provided for under Article 16(6): penalties for "tax fraud", "willful default" and "gross negligence".

Article 16(6) originates from article 8 of the EU Arbitration Convention (see chapter I, section I, paragraph 3)[27].

Indeed, according to article 8 of the EU Arbitration Convention, tax authorities "*shall not be obliged*" to initiate the mutual agreement procedure or the arbitration procedure

[26] This conclusion seems particularly evident with regard to article 16(6) of the Directive, since the notion of penalties for "*tax fraud, willful default and gross negligence*" is of a domestic nature.

[27] No equivalent provision can be found in the "OECD Procedures". However, it should be recalled (see retro chapter I, section I, paragraph 2.5.) that article 28(2)(a) of the MLI grants to States – who choose under article 18 to apply Part VI – the possibility to "*formulate one or more reservations with respect to the scope of cases that shall be eligible for arbitration*". Indeed, pursuant to this provision, some States – including numerous EU Member States, such as Italy, France, Germany, Spain, Portugal, Ireland and Slovenia – made, precisely, the reservation not to apply the arbitration procedure in cases where a penalty has been imposed for "*tax fraud*", "*willful default*" or "*gross negligence*". Given that such a reservation only prevents the starting of the arbitration procedure, article 28(2)(a) of the MLI will be analysed in the next chapter (see chapter III, par. 4).

"*where legal or administrative proceedings have resulted in a final ruling*" according to which "*the enterprises concerned is liable to a serious penalty*"[28].

By comparing article 16(6) of the Directive with article 8 of the Convention the following differences can immediately be noted.

Firstly, while, on the one hand, article 16(6) of the Directive applies if the penalty is "*imposed*" [29]; on the other hand, article 8 of the Convention applies if the penalty is the result of "*a final ruling*".

At this regard, the Directive seems to create greater uncertainties as compared to the EU Arbitration Convention.

Indeed, unlike article 8 of the Convention, article 16(6) of the Directive doesn't detect the moment in which a penalty can be considered "*imposed*" (is it the moment in which the tax administration "imposes" the penalty, or is it the moment in which the penalty is definitely "imposed" as a result of a Court's ruling?) [30].

Secondly, while, on the one hand, article 16(6) of the Directive states that the penalty has to be imposed for "*tax fraud*", "*willful default*" and "*gross negligence*"; on the other hand, article 8 of the Convention only covers "*serious penalties*"[31].

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[28] For an in depth analysis on how this provision interacts with the Italian tax penalty system(s) see M. TRIVELLIN, *op. cit*., 193, footnote 16.

[29] This aspect has been addressed as an improvement from the Directive's proposal, which, indeed, didn't contain the requirement that the penalty has to be imposed. Precisely, it has been argued that the final version of the Directive prevents that States can invoke arbitrarily such provision a if no action has actually been undertaken in order to impose penalties for "tax fraud", "willful default" and "gross negligence": see F. DEBELVA, J. LUTS, *The European Commission's Proposal for Double Taxation Dispute Resolution: Turning the Tide?*, in *Bulletin for International Taxation*, n. 5/2017, par. III.B.3. and S. GOVIND, L. TURCAN, *The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive*, in *Bulletin for International Taxation*, 2017, par. 3.2.

[30] Accordingly, see M. TRIVELLIN, *op. cit*., 222: "*la preclusione* [rispetto alla Convenzione] *sembra avere portata più ampia e, almeno prima facie, non essere nemmeno più subordinata all'accertamento definitivo della violazione*", and H.M. PIT, *op. cit*., 1330: "The provision … does not require the finality of such a penalty. This is a deviation from the requirement under the EU Arbitration Convention, which, in article 8(1), requires that a taxpayer's liability for a serious penalty becomes final following legal or administrative proceedings".

[31] From an Italian perspective, it is worth noting that Italy has taken the view (by means of a unilateral declaration attached to the EU Arbitration Convention) that: "*the term 'serious penalties' means penalties laid down for illicit acts, within the meaning of the domestic law, constituting a tax offence*". According to the Italian Revenue Agency's Circular letter n. 21/E/2012, this notion should be related to cases where a fraudulent and/or fictitious behaviour arose, as described by articles 2 ("*Fraudulent Tax Return by means of invoices or other documents regarding non-occurred transactions*") and 3 ("*Fraudulent Tax Return via other devious means*") of the Legislative Decree n. 74/2000. Moreover, with specific regard to transfer pricing disputes, the same Italian Revenue Agency

At this regard, the Directive – exactly as the Convention with regard to the term "*serious penalties* – gives no definition to the terms "*tax fraud*", "*willful default*" and "*gross negligence*".

The definition of these terms seem to be – as it is under the Convention – a matter of the domestic law of each Member State, therefore some Authors have pointed out that under the Directive there is the risk – which also occurs under the Convention with regard to the notion of "serious penalties" [32] – that the terms "*tax fraud*", "*willful default*" and "*gross negligence*" could be interpreted non-uniformly by the Member States.

Moreover, it could also be pointed out that the scope of article 16(6) could turn to be even wider than the one of article 8 of the EU Convention, leading to the risk that each Member State could have a greater discretion under the Directive than the one that they already have under the Convention in order to unilaterally narrow the scope of application of such procedure[33].

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has highlighted that a denial of access pursuant to article 8 of the EU Arbitration Convention is hardly conceivable, since transfer pricing issues – although a judicial prosecutor is always entitled to evaluate whether the topic is relevant for criminal purposes – fall out of the scope of application of Articles 2 and 3 of the Legislative Decree n. 74/2000. More specifically, the Italian Revenue Agency highlighted that although – theoretically speaking – transfer pricing issues could fall under the "residual" scope of Article 4 ("*Unfaithful Tax Return*") of the above mentioned Decree n. 74/2000, article 7 ("*Accounting and Balance-Sheet Records*") of the same Decree should come into play, which provides for the exclusion of criminal liability for valuation assessments, such as those applying to transfer pricing cases. In this regard, precisely, the governmental report accompanying the Legislative Decree No. 74 of 2000 clarified that such provision (article 7) aims at avoiding that the new legislation on tax crimes applies to valuation matters, since these matters are very much uncertain both from a statutory and a factual standpoint (see Circ. Ag. Entr., 5 June 2012, n. 21/E, par. 5.3.). On the criminal relevance of transfer pricing issues, see, *inter alia*, A. ALBANO, *Illecito tributario e sanzioni improprie in materia di prezzi di trasferimento*, in *Riv. dir. trib*., V, 2013, 73 ss.; I. CARACCIOLI, *La convenzione arbitrale in materia di prezzi di trasferimento*, in *Riv. dir. trib*., III, 2013, 3 ss.; A. TOPPAN, L. TOSI, *Lineamenti di diritto penale dell'impresa*, Padova, 2017, 207.

[32] For an analysis of the definition of "serious penalty" given by the different Member States, see H.M. PIT, *op. cit*., 535 – 540. As to how the Italian Revenue Agency interprets this term, see CIRC. AG. ENTR. n. 21/E of 2012.

[33] According to T. WIERTSEMA, *Council Directive on Double Taxation Dispute Resolution Mechanisms: "Resolving Companies' Areas of Concern?"*, in *Derivatives & Financial Instruments*, n. 5/2017, 10 ss., all the concerns highlighted above are neutralized in light of the fact that the Directive allows taxpayers to appeal before a domestic court against a refusal of a Member State to set up the Advisory Commission in case of a (serious) penalty and that because the Directive forms part of EU law, a domestic court may also refer to the EU Court of Justice in order to provide its (final) view on the interpretation of the terms "tax fraud", "wilful default" and "gross negligence". This conclusion doesn't seem sharable, given that – as it was hinted above and as it will be further clarified *infra* (par. 1.5.4.) – the denial of access issued on the grounds of article 16(6) of the Directive is not challengeable before domestic courts.

1.4.2. Critical remarks on the denial of access provided for under Article 16(7): no cases of double taxation.

Article 16(7) represents a *unicum* in the tax dispute mechanisms scenario; a similar provision, indeed, cannot be found neither in the EU Arbitration Convention, nor in the "OECD Procedures".

As stated above, this provision enables the tax authority of a Member State to unilaterally deny access to the Directive's procedure "*on a case-by-case basis where a question in dispute does not involve double taxation*".

According to an influential Author the rational of article 16(7) is "twofold": on the one hand, "in the absence of double taxation, the settlement of the cross-border tax dispute usually generates obstacles that have more limited importance within the internal market and therefore may be addressed by other legal instruments"; on the other hand, "in such circumstances the settlement of cross-border tax disputes may potentially generate an exposure to double non-taxation, which is potentially undesirable"[34]

Although the term "double taxation" is defined in article 2(1)(c) of the Directive and, therefore, it could be argued that there is no leeway for Member States to discretionary decide whether the question in dispute "*does not involve double taxation*", the procedural functioning of article 16(7) – precisely, the derogation made therein to article 6(1)(a) – actually seems to grant this option to Member States. Indeed, on the one hand, such denial can be unilaterally invoked by a Member State, without the possibility – as seen above – to appoint the "Advisory Commission" if the other Member State concerned disagrees with such decision; on the other hand, it is precluded to taxpayers the possibility – has it will be discussed *infra* – to appeal such denial before a national court.

This is a relevant deadlock of the Directive, that affects, in particular, transfer pricing disputes. As stated in the first chapter, indeed, there is the risk that a relevant tax authority may invoke article 16(7) of the Directive, arguing that from the combination between articles 3(1)(c) and 2(1)(d) of the Directive – according to which a taxpayer has to be "*directly affected*" by "*double taxation*" in order to trigger the Directive –

[34] See P. PISTONE, *op. cit*., 377.

the Directive only covers cases of double taxation suffered by one person (i.e. juridical double taxation) and not cases of economic double taxation where at least two taxpayers are involved. Or, in any case, that the Directive is applicable only to enterprises receiving a primary adjustment and not to associated enterprises which, after a primary adjustment has been enforced, would have the right to obtain a correlative adjustment[35].

1.5. *The possibility for taxpayers to appeal the decisions of the competent authorities that deny access to the procedures envisioned under the existing tools to settle international tax disputes.*

As described above at the beginning of paragraph 2, the first stage of the MAP consists of two steps.

Firstly, relevant authorities have to evaluate whether the taxpayer request is well founded; secondly, if this is the case, they have to evaluate whether it is possible for one of them to solve the question on a unilateral level ("unilateral relief"), or if the proceeding has to advance to the second stage ("consultation process").

Ideally, in order to grant taxpayers the greatest level of protection, a dispute resolution mechanism should grant the possibility to challenge the decisions of the relevant authorities that deny access to the procedure.

The Directive is the only mechanism that envisions such possibility.

It has, indeed, to be immediately highlighted that neither the "OECD Procedures", nor the EU Arbitration Convention, expressly provide for the possibility to challenge before national Courts the denial of access to the procedures envisioned therein and

[35] As stated in the first chapter, indeed, from a comparison between the final text of the Directive and the Commission's Directive proposal ("the Proposal"), it could be validly argued that the drafters of the Directive have intentionally narrowed down the scope of application of the Directive only to disputes involving "juridical" double taxation. Indeed: while, on the one hand, article 3 of the Directive requires that the complaint can be submitted only by the person "*affected*" by the "*question in dispute*"; on the other hand, article 3 of the Proposal stated, more broadly, that "*Any taxpayer subject to double taxation*" should have been entitled to submit a complaint under the Directive. Moreover: while, on the one hand, article 2(1)(d) of the Directive defines the "*affected person*" entitled to file a complaint as "*any person … directly affected by a question in dispute*"; on the other hand, article 2(4) of the Proposal defined, more broadly, the "*taxpayer*" entitled to file a complaint as "*any person … subject to income taxes*".

that this possibility has only been admitted – by mean of interpretation – by the case law of some Member States and by a consistent part of the legal theory opinion[36].

The analysis on how the taxpayers can, under the Directive, appeal the decisions of relevant authorities that deny access to dispute resolution procedure envisioned therein has to be conducted by distinguishing the possible outcomes of the complaints' review phase.

Indeed, given that the Directive – unlike the other dispute resolution mechanisms (see above) – requires the taxpayers to submit their complaints before the tax authorities of *all* the Members State involved in a dispute, the review of the taxpayers' complaints may lead to six possible outcomes. Taking into account a bilateral tax dispute: *(i)* a first, possible outcome is that *both* the relevant tax authorities involved in the dispute *accept* the taxpayer's complaint; *(ii)* a second, possible outcome is that one relevant authority accepts the taxpayer's complaint, while the other relevant authority rejects such complaint; *(iii)* a third, possible outcome is that *both* the relevant authorities *reject* the taxpayer's complaint; *(iv)* a fourth, possible outcome is that *both* the relevant authorities *remain silent* over the acceptance of the complaint; *(v)* a fifth, possible outcome is that *one* tax authority *remains silent* over the acceptance of the complaint, while the *other accepts* the complaint; *(vi)* a last, possible outcome is that *one* tax authority *remains silent* over the acceptance of the complaint, while the *other rejects* the complaint.

For the sake of clarity, these six possible outcomes will be separately addressed in the following subparagraphs.

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[36] See, for instance, the Italian Supreme Court's judgments Cass., SS.UU., 19 June 2015, nn. 12759 and 12760, commented by A. TURCHI, *Giurisdizione tributaria e Convenzione europea sull'arbitrato*, in *Giur. it.*, 2015, 2632 ss.; D. DE CAROLIS, *Sull'impugnabilità dei provvedimenti di accesso alla Convenzione arbitrale europea sul Transfer Pricing*, in *Riv. dir. trib.*, 2016, V, 7 ss.; ID., *Jurisdiction of th Italian Tax Judge on Administrative Acts Denying Access to the Arbitration Convention on Transfer Pricing: Towards a Dispute Resolution Procedure Ever More Indipendent of State Control*, in *Intertax*, 2016, issue n. 2, 180 ss.; G. BERETTA, *La giurisdizione sul diniego di accesso alla procedura arbitrale in tema di transfer pricing*, in *Rass. trib.*, 2016, 171 ss. As to the case law of other States, both with respect to the denials of access under the EU Arbitration Convention and the "OECD Procedures", see C. SILVANI, *Dispute Resolution Procedures in International Tax Matters*, IFA Report Paper, 2014; A. RIBES, *New Spanish Draft Regulation on the Mutual Agreement Procedures Concerning Direct Taxation*, in *Intertax,* 2008, issue n. 4,, 172 ss.; D.G. DUFF, *Canada: Judicial Review of the Canada's Revenue Agency's Response in a Mutual Agreement Procedure under the Canada-United States Tax Treaty*, in M. LANG, A. RUST, J. OWENS, P. PISTONE, J. SCHUCH, C. STARINGER, A. STORCK, P. ESSERS, D. SMIT, E. KEMMEREN (edited by), *Tax Treaty Case Law around the Globe 2017*, Linde, 2018, 379 ss.

1.5.1. The first possible outcome of the complaints' review: (i) all the competent authorities accept the complaint.

If *both* the relevant tax authorities involved in the dispute *accept* the taxpayer's complaint, the possible scenarios are essentially two: *(a)* the termination of the procedure if one of the relevant authorities decides to adopt a "unilateral relief" according to article 3(5) of the Directive or *(b)* the initiation of the second stage of the procedure (the "consultation phase")[37].

According to article 4 of the Directive, indeed, "*Where the competent authorities of the Member States concerned accept a complaint, they shall endeavor to resolve the question in dispute by mutual agreement within 2 years from the last notification of a decision of one of the Member States on the acceptance of the complaint*" (both the "unilateral relief" and the consultation phase will be addressed infra, respectively, in paragraph 2 and paragraph 3).

1.5.2. The second possible outcome of the complaints' review: (ii) one relevant authority accepts the taxpayer's complaint, while the other relevant authority rejects such complaint.

As to the second possible outcome – *i.e.* the case in which one relevant authority accepts, while the other rejects, the taxpayer's complaint – article 6(1)(a) of the Directive grants to taxpayers the possibility to request the setting up of the "Advisory Commission", which will then be entitled to decide on whether the rejection of the complaint made by one of the tax authorities involved in the dispute is founded.

In the event that the Advisory Commission confirms that the rejection of the complaint is founded, the proceeding terminates and, consequently, the taxpayer has no longer the possibility to settle the case in dispute through the Directive.

[37] The same occurs under both the "OECD Procedures" and the EU Arbitration Convention. Precisely, with reference to the tax authority that receives the taxpayer's complaint/proposal to start the MAP: on the one hand, both article 25(2) of the OECD MC and article 16 of the MLI state that "*The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State*"; on the other hand, article 6(2) of the EU Arbitration Convention states that "*If the complaint appears to it to be well-founded and if it is not itself able to arrive at a satisfactory solution, the competent authority shall endeavour to resolve the case by mutual agreement*".

By contrast, if the Advisory Commission deems that the taxpayer's complaint is founded (or, from another perspective, decides that the rejection decision was not founded) the proceeding has to depart to the "consultation phase", needing, though, that one of the relevant authorities concerned makes an express request at this purpose[38]. If the tax authorities fail to make such request and, therefore, fail to start the consultation phase, article 6(2), third sentence, of the Directive provides for a safeguard mechanism which disregards the "consultation phase" of the MAP and ensures the reaching of a decision on the case by vesting the Advisory Commission with the power (and the duty) to directly render an opinion on how the question in dispute has to be resolved[39].

The possibility to appoint an Advisory Commission when at least one of the relevant authorities involved rejects the complaint constitutes a *unicuum* in the dispute resolution mechanisms scenario, since the Directive is actually the only existent dispute resolution tool under which the rejection of the complaint by one relevant authority alone does not *per se* suffice to terminate the intergovernmental process, thus preventing the possibility for States to unilaterally and discretionary block the beginning of the procedure[40].

Although this last conclusion seems entirely acceptable, few concerns still remain.

First, as it has already been brought forward above (see retro par. 1.4.), the possibility for States to unilaterally and discretionary block the beginning of the procedure is still available under article 16(6) and (7) of the Directive. Precisely, it is sufficient that one of the tax authorities involved in a dispute invokes one of these two provisions in order to block the whole dispute resolution procedure. In these cases, indeed, if the other tax authority doesn't agree with such denial, article 6(1)(a) of the Directive is inapplicable.

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[38] Article 6(2), second sentence, of the Directive states that "*Where the Advisory Commission has confirmed that all of the requirements under Article 3 have been satisfied, the mutual agreement procedure provided for in Article 4 shall be initiated at the request of one of the competent authorities. The competent authority concerned shall notify the Advisory Commission, the other competent authorities concerned and the affected person of that request*".

[39] Article 6(2), third sentence, of the Directive states that "*Where none of the competent authorities has requested initiation of the mutual agreement procedure within 60 days of the date of the notification of the decision of the Advisory Commission, the Advisory Commission shall provide an opinion on how to resolve the question in dispute as provided for in Article 14(1)*".

[40] See S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, forthcoming.

Secondly, the Directive doesn't expressly address an important issue, namely the one concerning the case in which the Advisory Commission fails to take a decision on the acceptance of the complaint.

This seems a relevant gap, since if no such decision is taken by the Advisory Commission, the affected person has no other remedy in order to enforce a decision on the case.

According to an Author, in this case the complaint should be considered rejected in light of article 6(2), last sentence, of the initial Directive proposal, according to which "*By default of any decision notified in the six month period, the complaint is deemed to be rejected*". More specifically, according to this author, the lack of a similar provision in the final version of the Directive should be seen as a confirmation of that provision, since the directive doesn't include a more sophisticated rule in relation thereto[41].

This conclusion, however, doesn't seem entirely acceptable for two reasons.

Firstly, because for taxpayers to suffer the consequences of the malfunctioning of the Advisory Commission, seems unreasonable[42].

Secondly, because, in this case, the complaint should be considered "tacitly" accepted pursuant to article 5(2) of the Directive[43] (for an analysis of this provision see *infra* par. 1.5.5.). The case in which the Advisory Commission fails to take a decision on the acceptance of the complaint, indeed, seems fully comparable with the case – regulated under the mentioned article 5(2) – in which all the relevant authorities fail to take a decision on the taxpayer's complaint. A confirmation of this conclusion can be traced in the same initial Directive's proposal, where, precisely, the provision of article 6(2) (according to which if the Advisory Commission failed to take a decision "*the complaint is deemed to be rejected*") was perfectly in line with the provision –

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[41] See H.M. PIT, *op. cit.*, 1314.

[42] This argument has been employed by S. GOVIND, L. TURCAN, *The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive*, in *Bulletin for International Taxation*, 2017,, par. 3.3.2., footnote 79, in order to criticize the provision of Directive proposal according to which if the Advisory Commission failed to take a decision "*the complaint is deemed to be rejected*".

[43] Article 5(2) of he Directive states that "*Where a competent authority of a Member State concerned has not taken a decision on the complaint within the time provided for in Article 3(5), the complaint shall be deemed to be accepted by that competent authority*".

that has been eventually modified in the final version of the Directive – of article 5(2) regarding the case in which all the relevant authorities involved failed to take a decision Article 5(2) of the initial proposal, indeed, read as follows: "*Where the competent authorities of the Member States concerned have not taken a decision on the complaint within six months following receipt of a complaint by a taxpayer, the complaint shall be deemed to be rejected*"

1.5.3. The third possible outcome of the complaints' review: (iii) all the competent authorities reject the complaint.

When all the competent authorities reject the complaint, article 5(3) of the Directive states that "*The affected person shall be entitled to appeal against the decision of the competent authorities of the Member States concerned in accordance with national rules where all competent authorities of the Member States concerned have rejected the complaint*". This provision, precisely, introduces an "appeal mechanism", before the domestic courts of the Member States involved in a dispute, against the tax authorities' decisions that deny access to the MAP[44].

It is submitted that article 5(3) of the Directive requires that taxpayers appeal the rejection of the complaint before the national courts of *all* the Member States that are involved in a dispute.

Therefore, the domestic appeals triggered pursuant to article 5(3) of the Directive could lead to three possible outcomes.

The first, possible outcome is that *all* the national judicial proceedings terminate with decisions favorable to the taxpayer (*i.e.* with decisions that overrule the rejection of the complaint). In this case, the rejections of the complaint are to be considered

[44] It should briefly be recalled that the appeal mechanism regulated under article 5(2) of the Directive constitutes a great improvement for the efficiency of the tax dispute resolution scenario. Neither the "OECD Procedures", nor the EU Arbitration Convention, indeed, expressly provided for the possibility to challenge the denial of access before national Courts, although this possibility has been recently admitted – by mean of interpretation – by the case law of some Member States (see supra). Such improvement appears even more clear considering the fact that the Directive now includes defined criteria as to the grounds on which relevant authorities can reject a complaint (see supra) and expressly states that the decisions of rejection taken by the relevant authorities shall provide the 'general reasons' that justify the dismissal of the complaint. Such rules, indeed, seem to strengthen greatly the review remedy before national courts provided for article 5(3). See, at this regard, S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, forthcoming.

overruled and the relevant authorities are obliged to either *(a)* adopt a "unilateral relief" according to article 3(5) of the Directive or *(b)* initiate the "consultation phase"[45].

The second, possible outcome is that *all* the national judicial proceedings terminate with a decision that confirms the rejection of the complaint. In this case, the Directive's procedure terminates and the taxpayer has no longer the possibility to settle the case under this legal mechanism[46].

The third, possible outcome is that one domestic judicial proceeding terminates with a decision favorable to the taxpayer (*i.e.* with a decision that overrules the rejection of the complaint), while the other one terminates with a decision that confirms the rejection of the complaint. In this case (and only in this case), article 5(3), last sentence, of the Directive states that "*the decision of the relevant court or other judicial body shall be considered for the purpose of Article 6(1)(a)*". This provision, indeed, seems to ensure the possibility for taxpayers to request the set up of the Advisory Commission exactly as it would have occurred if the decision was initially accepted by (at least) one of the tax authorities involved in the proceeding.

This last conclusion, however, has to be further clarified, since it raises the question on whether the tax authority of the Member State in which the Court decided that the rejection decision was justified is forced to cooperate in establishing an advisory commission whereas its national Court decided that there was no obligation to do so. In other words, it should be answered the question on whether it is possible for tax authorities to derogate from the decisions of their national courts.

[45] *Contra* – even if with regard to the Directive's proposal – S. GOVIND, L. TURCAN, *The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive*, in *Bulletin for International Taxation*, 2017, par. 3.3., according to which "even assuming that both courts issue a decision confirming that the rejection was not justified, the legal effect would be questionable, as the courts could not enforce the initiation of the MAP, unless the relevant authorities were bound by the decisions". The argument of the authors does not seem entirely sharable. Indeed, if this argument were accepted the effect of article 5(3) of the Directive would be nullified, given that there would never be any obligation for Member States to initiate the MAP in the case in which all the tax authorities involved in a dispute reject the complaint (see, accordingly, H.M. PIT, *op. cit.*, 1301, footnote 2627).

[46] F. DEBELVA, J. LUTS, *The European Commission's Proposal for Double Taxation Dispute Resolution: Turning the Tide?*, in *Bulletin for International Taxation*, n. 5/2017, par. III.B.1.

The answer to this question seems to be negative in light of article 5(3)(c) of the Directive, which states that "*An affected person who exercises this appeal right shall be barred from making a request under Article 6(1)(a:* […] *when a rejection decision has been confirmed under the appeal procedure in point (a) but it is not possible to derogate from the decision of the relevant court or other judicial bodies in any of the Member States concerned*". More specifically, in light of this provision, when a domestic judicial procedure ends with a positive decision for the taxpayer, while the other ends with a decision confirming the rejection of the complaint, the possibility of appointing the advisory commission seems not to be allowed unless the tax authority of the Member State where the Court rejected the appeal is entitled to derogate from such a decision.

Given that a relevant number of EU Member States legislations do not allow their tax authorities to derogate from the decisions of their national Courts[47], it is evident that such a provision limits greatly the effectiveness of the Directive, since it may well lead to a deadlock of the procedure[48].

[47] H.M. PIT, *op. cit*., 842, notes that in the annex to the EU Arbitration Convention 13 of the 28 EU Member States have declared that their relevant tax authorities can't derogate from the decisions of their national judicial bodies. Precisely, these States are: Italy, Belgium, France, Czech Republic, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Slovakia, Slovenia and the United Kingdom.

[48] Such a deadlock could be overcome by assuming that taxpayers are entitled to pursue a forum-shopping, i.e. to appeal the decision of rejection before the Member State's domestic court whose case-law may be more open to the taxpayer's arguments, in order to obtain "the reversal of the decision of rejection by just one domestic court" and, consequently, "seek the initiation of the proceeding before the Advisory Commission". This, precisely, is the position of S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, forthcoming and of J. VOJE, *EU Tax Dispute Resolution Directive (2017/1852): Paving the Path Toward a European Tax Court?*, in *European Taxation*, 2018, 310 ("While the Directive remains silent on this point, the author is of the opinion that a taxpayer can submit an appeal in any of the relevant Member States and, as such, is able to choose the jurisdiction of his appeal, provided the appeal is allowed under the relevant national law. In addition, the taxpayer can even waive his right to appeal under national law and request that an Advisory Commission be set up in accordance with article 6(1) of the Directive. In this scenario, it is the Advisory Commission that then decides on the admissibility of the complaint within the prescribed time limits"). Although this conclusion seems fascinating, since it could contribute to improve the effectiveness of the Directive, it could, nevertheless, be questioned for two reasons. The first reason is that taxpayers do not seem to have the right, under the Directive, to forum-shopping; rather, it seems that they have to appeal the decision that rejects the complaint before the national courts of all the Members States concerned with the question in dispute. This conclusion, precisely, seems implied in the wording of article 5(3), first sentence, of the Directive, according to which "*The affected person shall be entitled to appeal against the decision of* [all] *the competent authorities of the Member States concerned in accordance with national rules* [of the State of each tax authority concerned]". The second reason is that taxpayers can appoint the advisory commission only when there is a contrast among the decisions of the national courts. This last observation, precisely, seems consistent with the last sentence of article 5(3), which,

The reasons that lead the drafters of the Directive to include a provision such as article 5(3)(c) are not entirely sharable. A different approach, indeed, would have been possible, given that the Directive is a piece of secondary legislation of the EU law and could have – in theory – legitimately overruled the domestic laws regarding the *res judicata* effects of the judgments[49].

1.5.4. (Follows). More critical remarks on the "appeal mechanism" set forth under article 5(3) of the Directive.

Article 5(3) of the Directive seems exposed to several other weaknesses.

As hinted above, there are two "hidden" denials of access to the Directive, namely the ones provided for in article 16(6) and (7) of the Directive. From a strict, literal interpretation of the combination between article 5(3) and article 16(6) and (7) of the Directive it appears that the appeal mechanism set forth in the former provision is not applicable to denials of access regulated under the latters provisions. Indeed: on the one hand, article 5(3) of the Directive makes no reference to article 16(6) and (7) of the Directive; on the other hand, article 16(6) and (7) make no reference to the possibility for taxpayers to appeal the denials of access set forth therein.

The impossibility to appeal before domestic courts the denials of access set forth under article 16(6) and (7) of the Directive, together with the fact that – as stated above (see supra par. 1.4.) – the grounds to invoke such provisions are not objective, seems to reinforce the conclusion (previously reached in paragraphs 1.4.1 and 1.4.2.) that tax authorities, by invoking article 16(6) and (7), have the possibility to block, unilaterally and discretionary, the beginning of the procedure ("Blocking Method")[50].

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for the appointment of the Advisory Commission pursuant to article 6(1)(a), expressly requires that "*the appeal right has been* [already] *exercised* [before the competent Courts of all the concerned Member States]".

[49] See the sharable remarks of S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, forthcoming, who criticizes this provision on the grounds that the final resolution of a case can still depend on the law of the single Members States: "the principle in question may also have some drawbacks as it may lead to certain level of uncertainty, considering that taxpayers' remedies would depend on competent authorities' empowerment to derogate from decision issues by their judicial bodies, which, in turn, would ultimately depend o applicable domestic laws of Member States involved in the complaint".

[50] J. VOJE, *EU Tax Dispute Resolution Directive (2017/1852): Paving the Path Toward a European Tax Court?*, in *European Taxation*, 2018, 310, by contrast, leaves open the possibility for taxpayers to appeal

This is another relevant criticism of the appeal mechanism envisioned under article 5(3) of the Directive; however, even more pitfalls can be detected.
Firstly, article 5(3) doesn't seem to ensure a timely resolution of the disputes falling within the Directive's scope. Article 5(3) entitles taxpayers to start appeals "*in accordance with national rules*"; therefore – as these rules most likely differ among the twenty eight EU Member States – a final decision is likely to take a long time to obtain in all the Member States concerned , since the decision of a first-tier tax court could be appealed before a second-tier tax court and, ultimately, before a Supreme Court.
Moreover, since article 5(3) could lead to twenty-eight different procedures, the taxpayers may have different levels of protection, depending on the Member States before which the appeal is brought.
Finally, the mechanism envisioned in article 5(3) could be unaffordable for some taxpayers, given that the need to enter into multiple judicial proceedings in different Member States are likely to increase significantly the costs of the whole procedure[51].
According to an author, all these pitfalls could have been overcome by extending the procedure set forth under article 6(1)(a) of the Directive (*i.e.* the procedure before the Advisory Commission that is applicable when only one of the relevant tax authorities involved in a dispute rejects the taxpayer's complaint: see supra par. 1.5.2.) also to the cases in which all the relevant authorities reject the complaint[52].

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against the denial included in article 16(6) by arguing that "if the taxpayer appeals against such a rejection, it would be up to the national court to decide if the penalties imposed are related to one of the stated forms of misconduct". The same conclusion has been reached by T. WIERTSEMA, *loc. ult. cit*. These authors, however, do not provide any argument on how to supersede the fact that, on the one hand, article 5(3) of the Directive seems to refer only to the denials of access provided in article 5(1) and, on the other hand, article 16(6) and (7) makes no reference to the possibility to appeal the denial of access set forth therein.

[51] See RONCO S.M., *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, forthcoming.

[52] This, precisely, is the solution posed by H.M. PIT, op. cit., 1330: "there is no specific need to make a distinction between both situations in terms of legal protection for taxpayers. In fact, as will be discussed in this section, the domestic appeals route is cumbersome and bears the risk of divergent decisions among Member States' domestic courts. It would have therefore been more logical to combine both outcomes into a single procedure, therby ensuring consistency and a less cumbersome procedure and avoiding affected persons incurring additional costs for initiating separate legal proceedings".

This conclusion, however, doesn't seem entirely practicable, since the majority of the Advisory Commission's members are representatives of the relevant tax authorities[53]. Therefore, when both relevant authorities of the Member States involved in a dispute reject the taxpayers' complaint, the setting up of an Advisory Commission would be very unlikely to lead to an overruling. Rather, an effective solution in order to overcome such pitfalls could have been to appoint directly the ECJ as the relevant judge to decide on the taxpayers' appeals[54].

1.5.5. The remaining possible outcomes of the complaints' review: (iv) all the competent authorities fail to take a decision over the acceptance of the complaint; (v) one tax authority remains silent over the acceptance of the complaint, while the other accepts the complaint; (vi) one tax authority remains silent over the acceptance of the complaint, while the other expressly rejects the complaint.

As to the case in which all the relevant authorities fail to take a decision over the acceptance of the complaint, article 5(2) reads: "*Where a competent authority of a Member State concerned has not taken a decision on the complaint within the time provided for in Article 3(5), the complaint shall be deemed to be accepted by that competent authority*".

This provisions states that if the relevant authorities do not adopt an express decision on the acceptance of the complaint, their silence has to be deemed as a tacit acceptance of the complaint.

Article 5(3) of the Directive constitutes a *unicum* in the international tax disputes resolution scenario and shall be seen as a great improvement, since it prevents the possibility for relevant authorities to remain passive and, therefore, block the initiation

[53] As it will be further described in chapter III, The composition of the Advisory Commission is defined by article 8(1) of the Directive. According to this provision, the Advisory Commission (in bilateral disputes) will standardly be composed of five members: one representative per Member State concerned; two independent persons appointed by each competent authority of the Member States concerned; one chairman. Article 8(1), however, grants the possibility to alter the composition of the Advisory Commission by enabling each of the Member States concerned to appoint one additional representative of their tax administrations and/or one additional independent person. Consequently (in bilateral disputes) an Advisory Commission can, at a maximum, be composed of nine members.

[54] As to the role of the ECJ in the existing dispute resolution mechanisms see *infra* chapter III.

of the procedure if they are not willing to settle the case in dispute[55]: as seen above, this was one of the main pitfalls of both the "OECD Procedures" and of the EU Arbitration Convention, which, indeed, do not contain an equivalent provision[56].

It is worth mentioning that article 5(2) of the directive refers to single decisions ("*a decision*") of single tax authorities ("*Where a competent authority of a Member State*"). Therefore, the implicit acceptance of the complaint under Article 5(2) seems to be effective not only when all tax authorities fail to take a decision on the acceptance of the complaint, but also, as a rule, when at least one (but not all) of the tax authorities involved in a dispute fail to take such a decision.

As a consequence, article 5(2) of the Directive turns to be applicable also when: *(i)* one tax authority remains silent over the acceptance of the complaint, while the other expressly accepts the complaint[57] and *(ii)* one tax authority remains silent over the acceptance of the complaint, while the other expressly rejects the complaint[58].

2. The unilateral relief.

The third sentence of article 3(5) states that "*a competent authority may decide to resolve the question in dispute on a unilateral basis, without involving the other competent authorities of the Member States concerned*".

This provision provides the Member States' tax authorities for the possibility to settle the case without referring to the tax authorities of the other Member States involved in a dispute.

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[55] Accordingly, see, inter alia, J. VOJE, *EU Tax Dispute Resolution Directive (2017/1852): Paving the Path Toward a European Tax Court?*, in *European Taxation*, 2018, 310; H.M. PIT, *op. cit.*, 1315-1316.

[56] See, however, M. TRIVELLIN, *op. cit.*, 93, who (with reference to the prior considerations of C. GARBARINO, *La tassazione del reddito transnazionale,* Padova, 1990, 585 and of O. REALE*, Le procedure amichevoli nelle convenzioni internazionali contro le doppie imposizioni*, in *Riv. dir. trib*., 2003, I, 368) envisions such a possibility also under the "OECD Procedures". Precisely, this author hypothesises "*la fattispecie come silenzio inadempimento, con ogni relativa conseguenza (anche eventualmnte risarcitoria), integrando i principi generali dell'azione amministrativa (L. n. 241/1990) con quelli processuali della tutela avverso l'inerzia (art. 31, D.Lgs. n. 104/2010)*".

[57] Precisely, in this case it is as if all the relevant authorities had accepted the complaint (see supra par. 1.5.1.); hence, the possible scenarios are essentially two: *(a)* the termination of the procedure if one of the relevant authorities decides to adopt a "unilateral relief" according to article 3(5) or *(b)* the initiation of the second stage of the procedure (the "consultation phase").

[58] Precisely, in this case it is as if some, but not all, the relevant authorities have rejected the complaint (see supra par. 1.5.2.); hence, article 5(3) becomes applicable and the taxpayer has the possibility to request the set up of the Advisory Commission according to article 6(1)(a).

As it was highlighted in the first chapter (see retro, chapter I, section I), this option is also granted under both the “OECD Procedures” and the EU Arbitration Convention through provisions that resemble almost exactly article 3(5) of the Directive. Hence, the Directive’s unilateral relief stage remains exposed to the same weaknesses that can be detected in the unilateral relief stage provided for under the other existing mechanisms.

For this reason, the following considerations upon the weaknesses of article 3(5) of the Directive should be extended, *mutatis mutandis*, to the equivalent provisions included in the other existing mechanisms to settle international tax disputes.

The first weakness of this stage of the procedure is that the Directive – as the other existing mechanisms – doesn’t define the grounds on which the tax authorities may decide to adopt a unilateral relief, *i.e.* when a case should be “satisfactory resolved” on a unilateral basis. The Member States, therefore, seem to have considerable discretion on whether to decide if there are valid grounds in order to adopt a “unilateral relief”[59]. This – evidently – bears the risk that a relevant authority closes a case on the basis of the argument that a certain solution presented solved the case under review, while in practice it doesn’t do so.

With specific regard to transfer pricing disputes, however, it should be noted that the assessment on whether the solution adopted by means of a unilateral relief is satisfactory appears not so difficult to perform. Indeed, in these cases, a unilateral relief can be deemed satisfactory only when the tax authority that adopts it either annuls the profit adjustment or grants a corresponding adjustment that completely offsets the former.

The second weakness of this stage of the procedure is strictly linked to the previous one and also involves transfer pricing disputes.

According to article 3(5) of the Directive, after having adopted a unilateral relief, “*the relevant competent authority shall notify the affected person and the other competent authorities of the Member States concerned without delay, following which the proceedings under the Directive shall be terminated*”. In light of this provision, the

[59] At this regard, see, more extensively, J.S. WILKIE, *Article 25: Mutual Agreement Procedure*, in *Global Tax Treaty Commentaries*, IBFD, *Online Books*.

Directive doesn't seem to grant to taxpayers any remedy against unilateral that they may deem unsatisfactory. Indeed, pursuant to article 3(5) of the Directive, after the adoption of a unilateral relief, the proceeding under the Directive shall terminate regardless the acceptance of the taxpayers. Similarly, the Directive doesn't seem to regulate the case in which one of the relevant authorities involved decides to unilaterally resolve the question in dispute even if the other authority involved deems more appropriate to proceed with the second stage of the procedure, *i.e.* with the "consultation phase".

This seems a quite relevant weakness of the procedure, that could be overcome only by granting to taxpayers the possibility to appeal, before national Courts, against such unilateral reliefs, in order to obtain the re-opening of the MAP[60].

3. The second stage of the MAP: the "consultation phase".

Pursuant to article 4(1) of the Directive, when all the relevant authorities of the concerned Member States accept a complaint they "*shall endeavor*" to settle the question in dispute by mutual agreement. More specifically, as seen in the previous paragraphs, the "consultation phase" may start if (a) the complaint submitted by the taxpayer is accepted and (b) in so far as the relevant tax authorities are not able to resolve the question in dispute on a unilateral basis.

The next subparagraphs will explore in detail the most relevant aspects of the consultation phase envisioned under the Directive.

Moreover, the next subparagraphs will compare the consultation phase envisioned under the Directive with the consultation phase envisioned under the other existing dispute resolution mechanisms, in order to assess whether the Directive constitutes an improvement and solves the many deficiencies that can be detected in the OECD Procedures' and in the EU Arbitration Convention's MAPs.

3.1. Brief remarks on the two-year deadline for the reaching of the mutual agreement.

Pursuant to article 4(1) of the Directive, relevant authorities have a two years deadline in order to reach a mutual agreement on the case in dispute. Should the relevant

[60] See, infra, chapter IV.

authorities be unable to reach an agreement within this deadline, taxpayers shall be entitled to call for the setting-up of the Advisor Commission to initiate the arbitration procedure. (see chapter III).

The two years deadline provided for under the Directive is identical to the one provided for by article 7(1) of the EU Arbitration Convention, article 25 of the OECD MC and article 19(1)(b) of the MLI. Hence, the existing dispute resolution mechanisms actually mirror each other as to the duration of the MAP and to the moment from which it is possible to begin the arbitration procedure[61-62].

The existing dispute resolution mechanisms also mirror each other in granting the possibility to extend such two year term: article 4(1) of the Directive states that the two years deadline "*may be extended by up to 1 year*"; article 7(4) of the EU Arbitration Convention states that the "*competent authorities may by mutual agreement and with the agreement of the associated enterprises concerned waive the time limits referred to in paragraph 1*"; article 19(1)(b) and (11) of the MLI state, respectively, that the relevant authorities of the Contracting Jurisdictions have the possibility to agree on "*a different time period*" and that "*a Party may reserve the right to replace the two-year period set forth in subparagraph b) of paragraph 1 with a three-year period*".

The possibility to extend the consultation phase seems to reduce the overall efficiency of these procedures, since only strict and peremptory time limits ensure the right of taxpayers to obtain a solution to the case in dispute within a reasonable time.

[61] As to the "OECD Procedures", it should be reminded, on the one hand, that the number of arbitration clauses included in double tax treaties remained rather limited (see retro chapter I, par. 2) and, on the other hand, that arbitration is optional (see retro chapter I, par. 3). Therefore, with regard to the OECD Procedures – unlike what happens under the Directive and the EU Arbitration Convention, where the arbitration is always mandatory – it remains the risk that the consultation phase might continue open-ended, causing a stalemate of the whole procedure.

[62] Moreover, always with regard to the "OECD Procedures", it is worth highlighting that the deadline for the completion of the MAP is contained under the provisions that regulate the arbitration stage, i.e. paragraph 5 of article 25 and article 19 of the MLI (which is, indeed, a provision of Part VI of the MLI). This circumstance could entail that if the contracting States do not opt for the arbitration procedure (or by inserting in the treaty entered into with each other a provision equivalent to paragraph 5 of article 25, or, if that treaty falls within the scope of application of the MLI, by opting for part VI of the MLI) the MAP could continue to run for an indefinite period of time and, as the case may be, never reach an end.

This weakness is reinforced by the fact that both the Directive and the other existing legal instruments establish a rather discretionary framework within which relevant authorities may obtain an extension of the two year deadline; as a consequence, such extension may well become the standard and not the exception, thus leaving taxpayers at the mercy of the relevant tax authorities as to the duration of the procedures[63].

On a final note, it's worth noting that, under this aspect, the Directive not only doesn't constitute an improvement as compared to the other existing dispute resolution mechanisms, but, in comparison with the EU Arbitration Convention, seems to have even weakened the position of taxpayers. Indeed, while, on the one hand, article 7(4) of the EU Arbitration Convention requires the taxpayers' consent as to the extension of the MAP, on the other hand, this requirement has been completely put aside in the final version of article 4 of the Directive.

3.2. The taxpayers' involvement in the consultations between the tax authorities: brief remarks in light of the "Diplomatic Protection Theory".

The Directive, as the "OECD Procedures" and the EU Arbitration Convention, doesn't include any rule on how the relevant authorities shall conduct the mutual agreement procedure.

One of the main issues that arises from the lack of such a provision concerns the possibility for taxpayers to be involved during the consultation phase.

The doctrine[64] has highlighted that all the existing dispute resolution mechanisms (included the Directive, even if, unlike the other instruments, is a piece of the EU's legislation) are based on the "Diplomatic Protection Theory", i.e. on the assumption that, on the international level, individuals have no international personality and, therefore, only States may act at on an international level on behalf of their nationals ("diplomatic protection"). Hence, where a State takes up the individual's dispute through diplomatic protection, this dispute becomes a pure interstate dispute with no enforceable right of involvement of the individuals who suffered the breach of

[63] Accordingly, see P. PISTONE, *op. cit.*, 358.

[64] See D. DE CAROLIS, *A New Approach to International Taxation Dispute Resolution Process (ITDRP)*, in *Intertax*, n. 5/2017, 391 ss. and K. PERROU, *Taxpayer Participation in Tax Treaty Dispute Resolution*, IBFD, 2013, Online Books, chpater II.

international law. This approach implies the view that taxpayers are not to be considered "parties" to the proceedings and, as a consequence, that mutual agreements should be viewed, rather than acts of a "contractual nature" between the tax administrations and the taxpayers, as "one-sided-administrative" acts, i.e. as acts through which the tax administrations exercise unilaterally their power to tax.

The influence of the "Diplomatic Protection Theory" in all the existing tax dispute resolution mechanisms is evident.

Indeed, despite their differences, they all follow this same pattern: *(i)* the procedure is initiated by the taxpayer, but it is conducted by the tax authorities of the two (or more) states involved in the dispute; *(ii)* the taxpayer concerned can express – at least in the initial stage of the procedures – his view on the facts, but there is no provision which expressly grants him the power to give instructions on how to handle the case or to express his preferred solution; *(iii)* the degree of involvement of the taxpayer depends entirely on the discretion of the relevant tax authorities; *(iv)* if the taxpayer is not satisfied with the way in which the procedure is conducted, it has no power to remove from the procedure one or more of the relevant tax authorities taking part to that procedure.

The following paragraphs will analyze in detail all these aspects.

3.2.1. The lack of provisions in both the "OECD Procedures" and in the EU Arbitration Convention concerning the taxpayers' involvement in the MAP.

As to the MAP envisioned under the "OECD Procedures", neither article 25 of the OECD MC, nor article 16 of the MLI contain an express provision regulating the involvement of taxpayers during the proceeding.

This issue is mainly dealt with under the OECD's Manual on Effective Mutual Agreements Procedures (MEMAP).

In particular, from the OECD's orientation emerges that the MAP is conceived as an "inter-governmental" procedure, where the taxpayers' involvement is very limited and, in any case, subject to the discretion of the relevant authorities involved[65].

[65] At this regard see also OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, par. 4.59: "The mutual agreement procedure envisaged in Article 25 of the OECD Model Tax Convention and adopted in many bilateral agreements is not a process of litigation. While

Indeed, even if, on the one hand, it is established that the MAP initiates only when there is a specific request of a taxpayer, on the other hand, it is also established that, during the proceedings: *(i)* taxpayers may present their view on the case and assist the relevant authorities in the fact-finding or/and submit their views on the case *only* if expressly invited to do so by the relevant authorities[66]; *(ii)* tax authorities have no legal obligation to communicate with the affected person and/or inform him about the status of the process[67].

The EU Arbitration Convention's MAP substantially mirrors – at this regard – the "OECD Procedures". Also under this legal instrument, indeed, there are no particular provisions regarding the taxpayers' involvement during the MAP.

This topic has been the object of many discussions among the EU JTPF: on the one hand, the "Business representatives" emphasized that taxpayers should be granted the same rights during the MAP as are available to them under the domestic remedies, since the taxpayers have all the relevant information regarding the case under review; on the other hand, Member States' representatives didn't favor the view of granting taxpayers a formal right to participate during the MAP, since such a right would have adversely affected their sovereignty in tax matters.

This discussion, however, only resulted in a compromise solution that has been reflected in paragraph 7(1)(e) of the Code of Conduct, according to which (only) "*Where appropriate, the enterprise will be invited to make a presentation to its competent authority*". Therefore, exactly as it occurs under the "OECD Procedures",

input from the taxpayer in some cases can be helpful to the procedure, it must be recalled that the mutual agreement procedure is a government-to-government process and that any taxpayer participation in that process should be subject to the discretion and mutual agreement of the competent authorities".

[66] See OECD, *Manual on effective mutual agreement procedures (MEMAP)*, par. 3.3.2., best practice n. 13: "Particularly on fact-intensive, unusual, or complex cases it may be a valuable exercise to have the taxpayer make a presentation to both competent authorities at the same time, typically prior to the commencement of discussions. The purpose of the presentation would be to clarify issues, transactions, etc., and the presentation is typically limited to this type of information. It does not imply taxpayer involvement in the actual negotiations between competent authorities. Such a presentation would normally be pursuant to a mutual agreement by the competent authorities".

[67] At this regard is very clear the OECD, *Manual on effective mutual agreement procedures (MEMAP)*, par. 3.7., where it is stated that "competent authority proceedings are a government-to-government process and taxpayers do not have a specific right to attend or observe discussions between the competent authorities, the competent authorities recognize that the taxpayer is a stakeholder and client in the MAP process".

taxpayers may participate to the MAP only on a case-by-case basis and when the relevant authorities deem appropriate such participation. The only difference that can be detected is that under the EU Arbitration Convention, as compared to the "OECD Procedures", taxpayers are most likely to be informed about the developments of the procedure. Indeed, according to article 7(3)(b) of the Code of Conduct, taxpayers shall always "*be kept informed … of all significant developments*" regarding the MAP.

3.2.2. Also the Directive lacks of a provision that deals directly with the taxpayers' involvement in the MAP; nevertheless, as compared to the other dispute resolution tools, the Directive envisions more procedural safeguards that enable taxpayers to be part – at some extent – of the whole procedure.

As all the other existing dispute resolution mechanisms, the Directive doesn't include a specific provision dealing, directly, with the taxpayers' involvement in the MAP[68].

The Directive, however, still represents an improvement as compered to both the "OECD Procedures" and the EU Arbitration Convention, since, unlike these dispute resolution mechanisms, it envisions many procedural safeguards that enable taxpayers to be part of (and even – at some extent – to govern) the whole procedure.

Firstly, as to the first stage of the MAP, the Directive expressly requires that the relevant tax authorities inform "*without delay*" the affected person of their decision on the acceptance or rejection of the complaint and – in the latter case – that they "*provide the general reasons*" that justify the rejection.

Secondly, as to the second stage of the MAP, in both the cases in which the relevant authorities are able to reach an agreement and the procedure expires without an agreement, the Directive expressly obliges the relevant authorities to, respectively, "*notify the agreement to the affected person*" and "*inform the affected person indicating the general reasons for the failure to reach* [the] *agreement*".

Finally, as to the conclusion of the MAP, the taxpayers are granted – explicitly – the right on whether to accept or not to accept the agreement reached by the tax authorities.

[68] On the involvement of taxpayers under the Directive see, in general: H.M. PIT, *op. cit*., 1541 - 1548; K. PERROU, *Taxpayer Rights and Txpayer Participation in Procedures Under the Dispute Resolution Directive*, in *Intertax*, n. 8-9/2019, 715 ss.; D. DE CAROLIS, *The EU Dispute Resolution Directive (2017/1852) and Fair Trial Protection under Article 47 of the EU Charter of Fundamental Rights*, in *European Taxation*, 2018, 495 ss.; M. TRIVELLIN, *op. cit*., 205 ss.

3.3. (Follows). The possible impact of article 41 of the Charter of Fundamental Rights of the European Union ("Right to good administration") on the existing dispute resolution tools.

In the previous paragraph it was concluded that taxpayers are not to be considered "parties" to the MAPs and, as a consequence, that mutual agreements should be viewed as "one-sided-administrative" acts, *i.e.* as acts through which the tax administrations exercise unilaterally (even if confronting – at some extent – with taxpayers) their power to tax.

Nevertheless, even in light of this conclusion, a complete denial of the taxpayers' involvement in the tax dispute resolution system seems improper.

Indeed, the involvement of taxpayers seems to play a crucial role for an effective resolution of international tax disputes, since it ensures that: *(i)* the tax authorities gather a common understanding and a complete awareness of the relevant facts; *(ii)* the procedures run in a transparent way, avoiding a non-transparent use of discretionary powers by tax authorities; *(iii)* tax authorities may not continue their consultations *sine die* without being able to reach a satisfactory solution. In other words, it seems validly arguable that only through a direct involvement of the taxpayer in the procedure, the tax authorities will ultimately be able to exercise optimally their power to tax[69].

This appears to be particularly true in complex, fact-intensive transfer pricing cases in which it may be challenging for the relevant authorities involved in the dispute to develop a complete and accurate understanding of the associated enterprises' activities[70].

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[69] Accordingly, see P. BAKER, P. PISTONE, *BEPS Action 16: The Taxpayers' Right to an Effective Legal Remedy Under European Law in Cross-Border Situations*, in *EC Tax Review*, n. 5-6/2016, 335 ss.

[70] See OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, par. 4.60. A similar view has been expressed by the Italian Revenue Agency. See Ag. Entr. Circ., 5 June 2012, par. 5.9: "*Attesa inoltre, la particolare complessità delle tematiche connesse con la determinazione dei prezzi di trasferimento, è riconosciuta al contribuente l'iniziativa di presentare all'autorità competente fatti e argomenti relativi al caso, che potranno essere oggetto di valutazione congiunta da parte del Dipartimento delle Finanze e dell'Agenzia delle Entrate*".

Therefore, the very nature and the general goal of international tax disputes should actually call for – rather than exclude – the taxpayers' right to participate in the international law mechanisms for the resolution of such disputes[71].

Precisely, in order to ensure the effectiveness of these procedures, taxpayers should ideally be granted the possibility to: *(i)* participate to all the meetings between tax authorities; *(ii)* be heard and submit all documents and allegations that they may regard as useful in order to settle the case; *(iii)* have full access to the relevant documentation; *(iv)* receive a formal notice at the end of the procedure, indicating the different positions put forward by the parties involved in the proceeding, the reasons that have led to reach a specific solution to the case and, as the case might be, the reasons that have justified the rejection of the position put forward by the taxpayer.

Given that none of the existing dispute resolution mechanisms expressly grant to taxpayers such rights, the question may arise as to whether taxpayers could claim their existence according to the principles that (should) govern – at least within the EU – administrative proceedings.

Article 41 of the Charter of Fundamental Rights of the European Union ("Right to good administration"), indeed, expressly states that "*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union*" and specifies that this right includes: (a) "*the right of every person to be heard, before any individual measure which would affect him or her adversely is taken*"; (b) "*the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy*"; and (c) "*the obligation of the administration to give reasons for its decisions*".

[71] As to the legal grounds of the taxpayers' right to be involved in administrative procedures involving taxation, see, *inter alia*, M.C. FREGNI, *Convenzione Europea dei Diritti dell'Uomo e tassazione*, in *Riv. dir. fin. sc. fin.*, 2014, I, 210 ss.; G. MARONGIU, *Il contraddittorio non è d'obbligo*, in *Dir. prat. trib.*, 2016, I, 702 ss.; A. MARCHESELLI, *Il giusto procedimento tributario. Principi e discipline*, Padova 2013; A. FANTOZZI, *La violazione del contraddittorio e l'invalidità degli atti tributari*, in A. BODRITO, A. CONTRINO, A. MARCHESELLI, *Consenso, equità e imparzialità nello Statuto del contribuente, Studi in onore del Prof. G. Marongiu*, Torino, 2012, 479 ss.; S. MULEO, *Il contraddittorio procedimentale e l'affidamento come principi immanenti*, *ivi*, 406 ss.; L. SALVINI, *La partecipazione del privato all'accertamento tributario*, Padova, 1990.

The initial premise for this analysis is that, according to article 51 of the Charter of Fundamental Rights of the European Union (hereinafter, "the Charter"), the provisions of the Charter are addressed only to "*the institutions and bodies of the Union*" and to "*the Member States only when they are implementing Union law*".

The case law related to article 51 makes it sufficiently clear that the term "implement" must be given a broad interpretation, including not only cases where Member States implement EU law within their national jurisdiction but also where Member States adopt measures that fall within the scope of EU law[72].

Hence, in light of this broad interpretation of article 51 of the Charter, there seem to be no doubts as to the fact that the Charter is applicable to the MAP laid down by the Directive.

Indeed, the relevant authorities in charge of the MAP envisioned in the Directive (i.e. in a piece of secondary legislation of the European Union) can be considered – following the wording of article 51 of the Charter, as broadly interpreted by the relevant case law – as agents of Member States acting within the scope of EU law[73].

This conclusion seems further strengthened in light of the fact that there is an explicit acknowledgement , under Recital 9 of the Directive, to the "*fundamental rights*" and to "*the principles recognized* […] *by the Charter of Fundamental Rights of the European Union*"[74].

[72] More specifically, the ECJ's case law distinguishes three types of situations in which the Member States are acting in the scope of Union law and, therefore, are bound by the Charter of Fundamental Rights of the European Union. *(i)* The first category consists of the classical implementation of secondary Union law by the Member States. This category includes, for example, the national application of EU regulations and decisions, the transposition of directives and the application of national transposition legislation. *(ii)* The second category contains all acts of the Member States whereby a free movement right or the Union citizen-ship of Article 20 TFEU is restricted. *(iii)* The third category contains all acts of the Member States which are as such not Europeanized by secondary or primary Union law, but are necessary for an effective application and enforcement of primary or secondary Union law or for effective judicial review in cases concerning primary or secondary Union law. See P. PISTONE, *The EU Charter of Fundamental Rights, General Principles of EU Law and Taxation*, in J. WATTEL, O. MARRES, H. VERMEULEN (edited by), *European Tax Law*, Wolters Kluwer, 2018, 91 – 92; 100-101.

[73] Accordingly, see D. DE CAROLIS, *loc. ult. cit.*

[74] Accordingly, see K. PERROU, *Taxpayer Rights and Taxpayer Participation in Procedures Under the Dispute Resolution Directive*, cit., 715; J. VOJE, *EU Tax Dispute Resolution Directive (2017/1852): Paving the Path Toward a European Tax Court?*, in *European Taxation*, 2018, 310 – 311: "Special attention needs to be given to the Charter of Fundamental Rights when implementing the EU Tax Dispute Resolution Directive (2017/1852). The legal nature of the Directive differs in comparison to the Arbitration Convention (90/436) and, as such, the Charter of Fundamental Rights is applicable".

This same conclusion, by contrast, cannot be so easily reached nor with regard to the "OECD Procedures", nor with regard to the EU Arbitration Convention, for two reasons: *(i)* the first reason is that both these legal mechanisms – unlike the Directive – are not part of the EU's legislation, but are instruments of public international law; *(ii)* the second reason is that, even from a substantive point of view, these procedures may not involve "Union law", since the ECJ[75] has repeatedly stated that under the European law it can't be inferred (nor from the fundamental freedoms, nor under the European legislation[76]) a prohibition of double taxation.

With specific regard to transfer pricing disputes, however, there could be margins to conclude that such disputes fall within the "Union law" and, as a consequence, that the Charter of Fundamental Rights of the European Union is applicable also to MAPs conducted under these two legal instruments. As it was stated in the first chapter, indeed, the arm's length principle has been repeatedly embraced by the EU Commission under article 107 of the TFUE (see chapter I, section III, par. 5), so that – at the present moment – this principle could be considered as a notion of EU law[77]

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[75] See, for instance, ECJ, 12 February 2009, C-67/08, *Block*, par. 30 – 31: "Community law, in the current stage of its development and in a situation such as that in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Community. Consequently […] no uniform or harmonization measure designed to eliminate double taxation has as yet been adopted at Community law level […]. It follows from this that, in the current stage of the development of Community law, the Member States enjoy a certain autonomy in this area provided they comply with Community law, and are not obliged therefore to adapt their own tax systems to the different systems of tax of the other Member States in order, *inter alia*, to eliminate the double taxation arising from the exercise in parallel by those Member States of their fiscal sovereignty and, in consequence thereof, to allow the inheritance tax paid in a Member State other than that in which the heir is resident to be deducted in a case such as that of the main proceedings".

[76] And this even if, until the enter into force of the Treaty of Lisbon, primary European legislation addressed the avoidance of double taxation with art 293 of the EC Treaty, according to which "*Member States shall, as far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals* […] *the abolition of double taxation within the Community*". On this provision, see, *ex multis*, M LEHNER, *EC Law and the Competence to Abolish Double Taxation*, in W. GASSNER, M. LANG, E. LECHNER (edited by), *Tax Treaties and EC Law*, Kluwer Law International, 1997, 1 – 13; E.C.C.M. KEMMEREN, *After repeal of Article 293 EC Treaty under the Lisbon Treaty: the EU objective of eliminating double taxation can be applied more widely*, in *EC Tax Review*, n. 4/2008, 156 – 158; L. HINNEKENS, *The Uneasy Case and Fate of Article 293 Second Indent EC*, in *Intertax*, n. 37/2009, 602 – 609; M. NIEMINEN, *Abolition of Double Taxation in the Treaty of Lisbon*, in *Bulletin for International Taxation*, n. 6/2010, 330 – 335; HOFMANN, *Double tax agreements: between EU law and public international law*, in A. RUST (edited by), *Double taxation within the European Union*, Kluwer Law International, 2011, 75 – 86; E. REIMER, *The abolition of Article 293 EC: Comments on Hofmann's analysis*, *ivi*, 87 – 96.

[77] Accordingly, see J. MONSENEGO, *Does the Achmea Case Prevent the Resolution of Tax Treaty*

(the enforceability of article 41 of the Charter will be further discussed infra in paragraph 5, when exploring whether taxpayers are entitled to challenge undue mutual agreements before domestic Courts if these agreement are reached in breach EU law)[78].

3.4. The legal grounds for the reaching of mutual agreements: an Italian and European perspective (brief remarks).

Another, relevant issue that arises from the lack of a provision that lays down the rules on how relevant tax authorities shall conduct the mutual agreement procedure, regards the legal grounds on which the relevant tax authorities shall base the mutual agreement.

Indeed, a part from the EU Arbitration Convention (see infra), neither the Directive, nor the "OECD Procedures" clearly set on which grounds relevant tax authorities shall reach an agreement during the MAP.

In light of this circumstance, during a MAP conducted under the Directive or under the "OECD Procedures", the relevant tax authorities could be regarded as entitled to reach agreements based on equity: *i.e.* agreements that determine *ex aequo et bono* the transfer prices; "fifty-fifty" deals; agreements reached through negotiations that take into account elements that are unrelated to the tax system.

Disputes through Arbitration?, in *Intertax*, 2019, issue n. 8-9, 729 – 730: "the domestic source of the taxes included in the scope of a treaty does not prevent the potential relevance of EU law. For example […] a country could apply the arm's length principle enshrined at Article 9 of a treaty; however this might infringe on the State aid rules, either because this interpretation is not in line with the normal interpretation of the arm's length principle in the relevant country, or because the material content of Article 9 is, in itself, in breach of the State aid rules".

[78] It should be highlighted that, as far as Italy is concerned, one could argue that the applicability of article 41 to both the "OECD Procedures" and the EU Arbitration Convention is not disputable. Indeed, according to article 1 of the Italian Administrative Procedure Act (law 241/90), the administrative activity has to be governed by the principles of European law. Moreover, since article 1 of the Italian Administrative Procedure Act expressly refers to the principles of European law, it must be assumed that the "right to good administration" envisioned under article 41 of the Charter also refers to the relations between Italian citizens and national public administrations even when the latters are not acting as agents of the Union (as required under article 52 of the Charter). Indeed, if the assimilation of the principles of European law by the Italian Administrative Procedure Act also concerned the conditions attached to their application by article 52 of the Charter, article 1 of the Italian Administrative Procedure Act would have no meaning. See M. TRIMARCHI, *The impact of article 41 of the EU Charter of Fundamental Rights on Italian administrative law: some observations*, in *www.ius-publicum.com*.

This solution, however, could be challenged by arguing that tax authorities are not entitled to freely "negotiate" the content of mutual agreements, but, rather, have to determine the methods for the calculation of transfer prices by referring to the arm's length principle and by employing the OECD's transfer pricing calculation methods[79]. Several arguments may be brought to support such conclusion.

The first argument is that – as hinted in the incipit of this section – international consensus has been found as to the adoption of the arm's length principle (ALP) as outlined under the OECD Model Tax Convention on Income and on Capital (hereinafter, "OECD MC"), so that this principle has achieved an internationally recognized status[80].

Secondly, from a purely Italian perspective, it could be held that (only) as long as international APAs are reached in accordance with one of the OECD's methods of calculation of transfer prices, the agreement would be consistent with the legality principle[81]. It should, indeed, be recalled that paragraph 7 of article 110 of the Italian Income Tax Code has been recently amended by the Decree n. 50/2017[82] in order to incorporate into the Italian legislation the arm's length principle set forth by both the OECD Model and the OECD Transfer Pricing Guidelines. More specifically, while

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[79] See, accordingly, A.P. DOURADO, P. PISTONE, *Arbitrating Tax Disputes in Line with EU Law*, in J. MONSENEGO, J. BJUVBERG (edited by), *International Taxation in a Changing Landscape*, Kluwer Law International, 2019, 65, who recognize that both the competent tax authorities, during the MAP, and the "arbitration panels", during the arbitration stage, "apply rules of law [in transfer pricing issues] because they [interpret] the arm's length principle and its application to the concrete case"; P. N. SILVERIRA DA CUNHA, *Settlement of Disputes in Portoguese Tax Treaty Law*, in M. LANG, M. ZÜGER (edited by), *Settlement of Disputes in Tax Treaty Law*, Kluwer Law International, 2002, 405: "the mutual agreement does not allow solutions based on equity".

[80] See, at this regard, R.S. AVI-YONAH, *Tax Competition, Tax Arbitrage and the International Tax Regime*, in *Bulletin for International Taxation*, 2007, 137 ss.

[81] Accordingly, see P. ADONNINO, *op. cit.*, 69 ("*E' necessario puntualizzare* […] *come nessun problema di irrinunciabilità dell'obbligazione tributaria da parte dell'amministrazione finanziaria si ponga[...]. Si tratta di identificare metodologie, con l'accordo della parte contraente, attività quindi che riguarda aspetti qualificabili quali tecnici, e che devono essere precisati al fine di consentire la quantificazione dell'elemento in base a quanto previsto dai principi emanati dall'ordinamento internazionale: fondamentalmente il valore normale.* […] *Non vi sarebbe, quindi, altra discrezionalità negli interventi dell'amministrazione finanziaria*") and A. GUNN, J. LUTS, *op. cit.*, 121, n. 18 ("most authorities competent for granting tax rulings do not have a 'discretionary margin' [..], i.e. a broad discretion in relation to the choice of beneficiaries, the amount of the financial assistance and the conditions under which it is provided on the basis of criteria unrelated to tax system").

[82] Decree 24 April 2017, n. 50, converted, with amendments, by the Law 21 June, n. 96. At this regard, see A. FANTOZZI, F. PAPARELLA, *Lezioni di diritto tributario dell'impresa*, Milano, 2019, 309 – 310.

the previous version of article 110(7) of the Italian Income Tax Code stated that the transfer prices for intercompany cross-border transactions had to be determined on the basis of the so-called "normal value" [83], the new rule now generally refers to the "conditions and prices that would have been agreed between independent parties acting on arm's length basis and in comparable circumstances". Moreover, it should also be considered that, on 14 May 2018, the Italian Ministry of Economic and Finance released a Decree that sets out the general guidance for the correct application of the ALP envisioned under article 110(7) and that, for this purpose (as confirmed by the preamble of the Decree), the Decree makes express reference to the 2017 version of the OECD Guidelines[84-85].

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[83] Among all, see: L. CARPENTIERI, *Redditi in natura e valore normale nelle imposte sui redditi*, Milano, 1997; ID., *Valore normale e transfer pricing "interno" ovvero alla ricerca dell'arma accertativa perduta*, in *Riv. dir. trib.*, 2013, II, 448 ss.; C. SACCHETTO, *Sui presupposti per ricondurre a valore normale costi e ricavi nelle relazioni tra imprese residenti e non residenti*, in *Dir. prat. trib.*, 1977, II, 546 ss.; S. CIPOLLINA, *Il "valore normale" nel transfer pricing: mercato rilevante e metodo del "confronto del prezzo"*, in *Riv. dir. fin. sc. fin.*, 2013, 103 ss.

[84] Precisely, among other things, the Decree: *(i)* provides for the definitions of "associated enterprises", "participation in the management, control or capital", "independent enterprises", "controlled and uncontrolled transactions" and "financial indicator" following the OECD standards; *(ii)* draws from the OECD Guidelines (and, precisely, from the definition of "comparability analysis" provided therein), the general criteria by which a transaction between independent parties (uncontrolled transactions) should be considered to be comparable to a transaction between associated enterprises (controlled transactions); *(iii)* provides for transfer pricing methods to be used for the evaluation of a controlled transaction on the basis of the ALP that correspond to the one listed in the OECD Transfer Pricing Guidelines; *(iv)* as for the selection of the correct method, explicitly refers to the "most appropriate method" rule provided for under the OECD Transfer Pricing Guidelines; *(v)* finally, following the OECD Guidelines, allows the taxpayers to apply a method other than the ones set forth therein, if they are able to demonstrate that none of those methods can be applied in a reliable manner.

[85] As far as the Italian Revenue Agency is concerned, there shouldn't be doubts that this will always occur. See, indeed, the Italian Revenue Agency's press release of 22 March 2018: "*Gli accordi previsti nel nostro Paese, così come negli altri Paesi Ocse, rientrano invece nella categoria degli APA (advance pricing agreements), ovvero accordi che hanno il solo scopo di fornire certezza preventiva relativamente ai criteri e ai metodi adottati per la determinazione dei prezzi di trasferimento (Transfer pricing). Questi accordi, come detto, sono presenti in tutte le Amministrazioni avanzate e in Italia sono disciplinati dall'art. 31-ter del Dpr n. 600/1973. […] L'Agenzia precisa, inoltre, che gli accordi preventivi non fissano in modo arbitrario l'imponibile o le aliquote d'imposta di un soggetto, ma definiscono i criteri e metodi di calcolo di determinazione del valore normale delle operazioni infragruppo in base agli standard previsti dalle previsioni OCSE. In nessun caso, quindi, gli accordi sottoscritti dalle Entrate hanno avuto ad oggetto - né potrebbero avere - la previsione di differenti aliquote fiscali rispetto a quelle ordinarie o la riduzione della base imponibile di alcuni contribuenti*". As to the possibilty to assess jointly APAs and MAPs see, recently, A. PERRONE, *Sull'inquadramento sistematico e sulla natura giuridica degli accordi preventivi per le imprese con attività internazionale e sulla loro estensibilità all'Iva*, in *Riv. dir. trib.*, *Supplemento Online*, 7 October 2019.

Finally, from a European perspective, this same conclusion seems the only one consistent with the EU State aid law, given that the European Commission tends to detect a violation of the EU's State aid law in all those tax measures that deviate from the arm's length principle as advocated by the OECD (see retro chapter I, Section III)[86].

From a theoretical point of view, the issue on whether tax authorities are entitled to reach agreements based on equity is extremely complex and, inevitably, falls out of the scope of the present research[87]. However, a brief remark on this aspect – at least from an Italian point of view – should still be made.

[86] As stated in the previous chapter with regard to international APAs, there could be some arguments in order to assume that EU's State aid law is inapplicable with regard to mutual agreements. More specifically, on the one hand, it could be argued that, in order to settle international double taxation disputes, mutual agreements are naturally and precisely aimed to grant a level of taxes among Member States consistent with the arm's length principle and, therefore, consistent with the EU's State aid law. On the other hand, it could also be argued that even if mutual agreements deviate from the correct application of the EU's (alias OECD's) arm's length principle envisioned under article 107 of the TFUE there wouldn't be any distortion of the competition among Member States, since in these agreements there is always the involvement of two (or more) States so that if a MNE has a tax saving in one State, such advantage would result in an higher taxation in the other State. This, precisely, seems to be the orientation of M. TRIVELLIN, *op. cit.*, 118 - 119 ("*la MAP non parrebbe contrastare con il divieto di aiuti di Stato, perché il suo scopo è pur sempre rimediare ad un pregiudizio derivante da un eccesso di imposizione dovuto al prelievo su valori normali, non coordinato con la tassazione sui valori reali di scambio operata nel Paese che non ha agio in rettifica. Lo scopo dell'istituto è, dunque, proprio quello di ripristinare gli equilibri che si avrebbero in un vero assetto di libera concorrenza, equilibri che sono alterati vuoi dall'azione impositiva di uno Stato non raccordata ad adeguate contromisure dell'altro, vuoi da ricostruzioni accertative non rispettose dei criteri dell'*arm's length"). Nevertheless, this conclusion seems to lead down a slippery slope, mainly because, according to the most recent orientation of the EU Commission, the "advantage" requirement stated under article 107 of the TFUE must be assessed within the legal framework of the State under investigation, i.e. purely at a national level with regard to the single "undertaking" and not to the MNE as a whole (see, *inter alia*, Commission Decision of 28 October 2009, n. 2010/95/CE, par. 131: "The Commission is, however, of the opinion that an advantage at the level of one company cannot be offset by the disadvantage at the level of another company, even if that company is part of the same group. The "advantage" requirement, indeed, has to be assessed at the level of the individual company, not of the group. In addition, it must be underlined that group companies can easily reorganise their financing activities and influence the outcome of the application of the measure").

[87] For example, from an Italian perspective, it should be questioned whether the Italian Revenue Agency is subject to the legality principle (i.e. "*principio di indisponibilità dell'obbligazione tributaria*") even when acting on an international stage, i.e. whether articles 23, 53 and 97 of the Italian Constitution, in this specific context, should be counterbalanced with articles 10 and 11 of the same Constitution (for some hints on this matter, see M. TRIVELLIN, *op. cit.*, 120 – 121). What exactly is the "*principio di indisponibilità dell'obbligazione tributaria*" and whether the Italian Revenue Agency is subject to this principle when conducting a MAP are two questions that fall out of the scope of the present research. On these complex topics, see, among all the Scholars: on the one hand, G. FALSITTA, *Funzione vincolata di riscossione dell'imposta e intransigibilità del tributo*, in *Riv. dir. trib.*, 2007, I, 1047 ss.; ID., *Natura e funzione dell'imposta, con speciale riguardo al fondamento della sua "indisponibilità"*, in S. LA ROSA (edited by), *Profili autoritativi e consensuali del diritto tributario*, Milano, 2008, 45 ss.; A FEDELE, *Autonomia negoziale e regole privatistiche nella disciplina dei rapporti tributari*, *ivi*, 125 ss.; P. RUSSO,

The Italian Revenue Agency, indeed, seems to confirm that, when conducting a MAP in the field of transfer pricing, it cannot derogate from the Italian transfer pricing legislation and that it always have to comply with the EU State Aid law. More specifically: on the one hand, in the circular letter n. 21/E of 5 June 2012, the Italian Revenue Agency has expressly stated that, when conducting a MAP in the field of transfer pricing, it should always apply article 110, comma 7, of the Italian Income Code[88]; on the other hand, in the press release of 22 March 2018, the Italian Revenue Agency has confirmed that its *modus operandi* in the field of transfer pricing international agreements is always compliant with the OECD's *Transfer Pricing Guideline*s and, thus, with the EU State Aid law[89].

Therefore (at least when the Italian Revenue Agency is involved in a dispute) it seems that mutual agreements reached under both the Directive and the "OECD Procedures" cannot be based on equity, but must rather be based on the arm's length principle as advocated by the OECD, pursuant to both the EU State Aid rules and the Italian provisions on transfer pricing.

This same conclusion applies to agreements reached through the MAP envisioned under the EU Arbitration Convention.

As hinted above, unlike the other legal instruments, the EU Arbitration Convention states the legal principles that competent tax authorities must follow during the MAP

Indisponibilità del tributo e definizioni consensuali delle controversie, *ivi*, 89 ss.; M. VERSIGLIONI, *Accordo e disposizione nel diritto tributario*, Milano, 2001; E. MARELLO, *L'accertamento con adesione*, Torino 2000. On the other hand, G. FRANSONI, *La territorialità nel diritto tributario*, Milano, 2004, 222 ss.; G. BIZIOLI, *Il principio della capacità contributiva nella dimensione internazionale*, in AA.VV., *L'evoluzione del sistema fiscale e il principio di capacità contributiva*, Padova, 2014, 243 ss.

[88] See Ag Entr. Circ., 5 June 2012, n. 21/E, par. 2 ("*BASI GIURIDICHE INTERNE*").

[89] See the Italian Revenue Agency's press release of 22 March 2018: "*Gli accordi previsti nel nostro Paese, così come negli altri Paesi Ocse, rientrano invece nella categoria degli APA (advance pricing agreements), ovvero accordi che hanno il solo scopo di fornire certezza preventiva relativamente ai criteri e ai metodi adottati per la determinazione dei prezzi di trasferimento (Transfer pricing). Questi accordi, come detto, sono presenti in tutte le Amministrazioni avanzate e in Italia sono disciplinati dall'art. 31-ter del Dpr n. 600/1973. […] L'Agenzia precisa, inoltre, che gli accordi preventivi non fissano in modo arbitrario l'imponibile o le aliquote d'imposta di un soggetto, ma definiscono i criteri e metodi di calcolo di determinazione del valore normale delle operazioni infragruppo in base agli standard previsti dalle previsioni OCSE. In nessun caso, quindi, gli accordi sottoscritti dalle Entrate hanno avuto ad oggetto - né potrebbero avere - la previsione di differenti aliquote fiscali rispetto a quelle ordinarie o la riduzione della base imponibile di alcuni contribuenti*".

for the reaching of an agreement, thus excluding the possibility to reach agreements based in equity.
Precisely, article 6(2) of the EU Arbitration Convention states that the competent tax authorities shall endeavor to resolve the case by mutual agreement on the basis of the arm's length principle set out in article 4. Although article 4 doesn't properly define the arm's length principle, nor how to apply it or how to arrive at the correct arm's length price in an individual case, it is submitted that paragraph 6(a) of the Code of Conduct provides a solution to these problems, by stating that the arm's length principle to be applied by competent tax authorities during the MAP is the ALP "*as advocated by the OECD*".

4. The implementation of the mutual agreement.
Under the Directive (as it occurs under the "OECD Procedures" and the EU Arbitration Convention), the outcome of the MAP can be, alternatively, that the relevant authorities reach an agreement on how to settle the question in dispute, or that they fail to reach such an agreement.
In the latter case, pursuant to article 4(3) of the Directive, the tax administrations have to "*inform the affected person indicating the general reasons for the failure to reach* [an] *agreement*" (see supra par. 3.2.) and, pursuant to article 6(1)(b), the taxpayer may request the initiation of the arbitration procedure (see chapter III).
In the former case, that will be further addressed in this paragraph, pursuant to article 4(2) of the Directive, "*the competent authority of each of the Member States concerned shall, without delay, notify this agreement to the affected person, as a decision that is binding on the authority and enforceable by the affected person, subject to the affected person accepting the decision and renouncing the right to any other remedy, where applicable*". Hence, according to article 4(2) of the Directive, once the agreement is reached, its implementation in the domestic legal systems of the States involved in a dispute is subject to two conditions: *(i)* the first condition is that the taxpayer accepts the agreement; *(ii)* the second condition is that the taxpayer renounces or ends the pending domestic remedies.
This paragraph will analyze both these conditions in order to assess whether the Directive has improved – as compared to the corresponding discipline of the other

existing tools to settle international tax disputes – the safeguards of taxpayers during the implementation phase.

4.1. The first condition for the implementation of the mutual agreement: the acceptance of the affected person.

The right of the taxpayers to accept the mutual agreement is pivotal for the safeguard of taxpayers.

Indeed, a provision such as article 4(2) of the Directive, that grants to taxpayers the right on whether to accept the agreement, constitutes the only available tool for taxpayers in order to react against undue agreements, given that: on the one hand, taxpayers have no role in determining the content of such acts (as stated *supra*, indeed, mutual agreements should be viewed as "one-sided-administrative", *i.e.* as acts through which the tax administrations exercise unilaterally their power to tax); and, on the other hand, the Directive doesn't expressly grant to taxpayers the right to challenge "the merits" of such agreements before the domestic Courts of the Stets involved in the dispute (for further clarifications as to the existence of such a right see *infra* par. 5).

Moreover, if no such a right of acceptance were to exist and, as a consequence, the mutual agreement were automatically enforceable, the taxpayers would be deprived of their right of defence, given that, in order to implement such an agreement, they would ultimately be forced to abandon the domestic remedies pending on the same issues of the MAP. The termination of domestic remedies is, indeed, the second requirement for the implementation of mutual agreements (see infra par. 4.4.).

4.2. (Follows). Focus on the "OECD Procedures" and on the EU Arbitration Convention as to the existence of the affected person's right on whether to accept, or not to accept, the outcome of the MAP.

Unlike the Directive, neither the "OECD Procedures", nor the EU Arbitration Convention include explicitly the right of taxpayers on whether to accept, or not to accept, the outcome of the MAP, as article 25 of the OECD MC, article 16 of the MLI and article 6(2) of the EU Arbitration Convention only stipulate, with regard to the implementation of the mutual agreement, that the agreement will be implemented notwithstanding domestic time limits.

This circumstance, therefore, leaves open the question on whether the affected persons have, under these legal instruments, an effective right to accept the outcome of the MAP (which – as seen in the previous sub-paragraph – is of pivotal importance for the safeguard of the taxpayers).

The existence of such a right with regard to the "OECD Procedures" seems to be undisputed: indeed, the general view held by both the OECD[90] and the doctrine[91] seems precisely to be that the acceptance of the mutual agreement by the taxpayers should be seen as a prerequisite for its implementation.

By contrast, the existence of such a right is debated under the EU Arbitration Convention.

Indeed, if, on the one hand, some Member States have explicitly confirmed that the taxpayers' acceptance of the mutual agreement is a prerequisite for its implementation, on the other hand, others Member States consider, by contrast, that mutual agreements

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[90] See: (i) OECD, *Model Tax Convention on Income and on Capital*, *Commentary*, 2017, C(25), par. 45, where it is stated that "the implementation of such a mutual agreement should normally be made subject […] to the acceptance of such mutual agreement by the taxpayer"; (ii) OECD, *Manual on effective mutual agreement procedures (MEMAP)*, par. 3.8.: "If the terms and conditions of the resolution are not satisfactory to the taxpayer, the taxpayer may be entitled to withdraw from the MAP process and pursue other domestic redress mechanisms still available. If the terms are satisfactory, the taxpayer usually accepts the MAP results in writing and agrees to withdraw its domestic objections (if filed) or to refrain from seeking any further recourse on the same issue and years" (but see also paragraphs 3.1. and 3.6. which also confirm that taxpayers have a right of acceptance).

[91] See, *inter alia*, J.F. AVERY JONES, *The legal nature of the mutual agreement procedure under the OECD Model Convention*, in *British Tax Review*, 1979, 338 and ID., *The relationship between the mutual agreement procedure and internal law*, in *EC Tax Review*, n. 1/1999, 7.

have to be implemented regardless of the taxpayers' acceptance herewith [92 - 93]. Moreover, also the doctrine has adopted divergent views on this matter[94].

In order to overcome this non-uniformity among Member States, the EU JTPF discussed whether such a right should be granted to taxpayers and, notwithstanding the divergent views emerged during the discussions[95], eventually inserted in paragraph 7.7. of the Code of Conduct the recommendation that, when a mutual agreement is reached according to article 6(2), "*the implementation of this agreement should be subject to* [the taxpayers'] *acceptance*".

For the purpose of this research, it can be concluded that, by means of article 4(2), the Directive – as compared to the EU Arbitration Convention – has sensibly improved the taxpayers' safeguard during the implementation of mutual agreements, since it now ensures uniformity among Member States as to the fact that the taxpayers' acceptance of the MAP should be seen as a prerequisite for its implementation.

4.3. (Follows). Brief considerations as to the existence of the right of the taxpayer to end – at his own discretion – the MAP once it has already begun.

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[92] For the positions taken by the different EU Member States see H.M. PIT, *op. cit*., 817.

[93] The position of Italy in this respect is unclear. See Ag. Entr. Circ., 5 June 2012, n. 21/E, par. 5.10, where no reference is made to the acceptance of the MAP conducted under the EU Arbitration Convention ("*La procedura amichevole si conclude con: (a) l'accordo fra le autorità competenti entro due anni dall'attivazione della procedura amichevole ovvero entro un termine più ampio concordato tra autorità competenti e contribuenti; oppure (b) l'accordo raggiunto dalle autorità competenti entro i sei mesi successivi all'emissione del parere della commissione consultiva, tanto in conformità dello stesso quanto in deroga ai sensi dell'articolo 12, paragrafo 1, della Convenzione arbitrale. L'accordo viene notificato al contribuente a cura dell'autorità competente, con contestuale comunicazione all'Agenzia delle Entrate, che eventualmente fornisce le informazioni relative alla presentazione di istanza di rimborso o sgravio dell'imposta e relative sanzioni e interessi*"). The same Circular letter of the Italian Revenue Agency, however, expressly envisions the possibility for the taxpayers to accept the result of the MAP conducted under article 25 of the OECD MC (see par. 4.10: "*In caso di accordo tra le autorità competenti, generalmente l'autorità competente che ha ricevuto l'istanza di MAP comunica i contenuti dell'accordo al contribuente, mentre l'Agenzia delle Entrate ne dispone l'esecuzione, provvedendo - ove del caso - al rimborso o allo sgravio dell'imposta non dovuta e relative sanzioni e interessi.* […] *Qualora l'accordo amichevole sia intervenuto in pendenza di procedimento giurisdizionale, il contribuente può accettare la definizione raggiunta in ambito negoziale oppure rifiutarla, proseguendo il giudizio*").

[94] As to the existence of such a right see, *inter alia*, A. RUST, *How final are arbitration decisions?*, in M. LANG, J. OWENS, *International arbitration in tax matters*, IBFD, 2016, *Online Book*, par. 16.2.; see L. HINNEKENS, *Het EEG-verdrag betreffende fiscal arbitrage*, in Algemeen Fiscaal Tijdschrift, n. 11/1991, 303.

[95] As to the work conducted by the EU JTPF on this matter, see H.M. PIT, *op. cit*., 813 – 816.

An issue closely connected to the taxpayers' right of acceptance of the mutual agreement is whether taxpayers are entitled to end the procedure once it has already begun.

The Directive seems to grant such a right under article 3(6), according to which "*An affected person that wishes to withdraw a complaint shall simultaneously submit a written notification of withdrawal to each of the relevant authorities of the Member States concerned. Such notification shall terminate all the proceedings* […]".

By contrast, neither the "OECD Procedures", nor the EU Arbitration Convention, grant to taxpayers the right to terminate in advance the procedure.

This issue was discussed, with reference to the MAP "in the narrow sense" regulated by article 25(1),(2) and (4) of the OECD MC by an influential author[96], who, at this regard, envisioned the existence of three possible solutions.

The first solution is to consider that, once the taxpayers have presented the case, the procedure is no longer under their control and, therefore, the procedure can continue as long as relevant authorities consider it appropriate to do so.

The second solution is to consider that the taxpayers' situation is relevant during he "unilateral relief", while it is no longer relevant once the case has been referred to the MAP, so that the taxpayers have the right to end – at their own discretion – the MAP procedure only in the former case.

The third solution is to consider that the MAP is conducted on behalf of the taxpayers' and that, as a consequence, whenever the taxpayers have no longer an interest that the tax authorities pursue the negotiations, the procedure is deprived of its own function and should, therefore, terminate.

In the previous paragraphs it was argued that taxpayers are not parties of the MAP, since this is a "government-to-government" procedure; accordingly, it should be held that taxpayers are not entitled to end unilaterally – at their own discretion – the procedure. Nevertheless, the third solution seems the preferable one[97]. Indeed, if the

[96] P. PISTONE, *Settlement of Disputes in talian Tax Treaty*, in M. LANG, M. ZÜGER (edited by), *Settlement of Disputes in Tax Treaty Law*, Kluwer Law International, 2003, 320 – 321.

[97] This, precisely, is also the view of P. PISTONE, *op. ult. cit.*, 321, who, however, leaves open the possibility for the competent authorities to continue the procedure (only) if they deem it "important for the interpretation of the interpretation of the Convention".

tax authorities decide to carry on the negotiations even when the taxpayers wish to terminate the MAP, the final agreement would be useless from a practical point of view, since the taxpayers have (or, as far as the EU Arbitration Convention is concerned, should have), in any case, the right to accept or to reject the final agreement[98].

Furthermore, in light of the taxpayers' right to accept, or not, the outcome of the MAP, the decision of the tax authority to continue the MAP regardless the taxpayers' request to end such procedure could even be viewed as a waste of public resources and thus entail a violation of article 41 of the European charter of fundamental rights ("Right to good administration") and – as long as the Italian Revenue Agency may be concerned – of article 97 of the Italian Constitution.

4.4. The second condition for the implementation of the mutual agreement: the renounce to domestic remedies.

For the implementation of the agreement, article 4(2) of the Directive requires that the taxpayer, besides accepting the agreement, should also renounce to domestic remedies. This second requirement is – clearly – connected to the first one, *i.e.* to the mutual agreement's acceptance from the taxpayer. Indeed: on the one hand, it is logical that the acceptance of the mutual agreement has to be followed by the termination of the domestic remedies; on the other hand, if no right of acceptance of the agreement were granted to the taxpayers, the second requirement alone would deprive taxpayers of their right of defence, since they would ultimately be forced to abandon the domestic remedies even when they deem that the agreement hasn't adequately settled the case in dispute.

These two requirements, however, shouldn't be completely overlapped.

Indeed, it should be briefly pointed out (this issue will be further examined in chapter IV when dealing with the interactions between the Directive and the internal domestic remedies) that this second requirement, unlike the first one, seems to have a limited practical relevance. In requiring the termination of domestic remedies, article 4(2)

[98] This is also the view of H.M. PIT, *op. cit.*, 807, who notes that it "as a taxpayer has the possibility to accept or reject a mutual agreement reached, it appears useless to continue with negotiations if the taxpayer does not agree herewith".

implies that the dispute resolution procedure envisioned in the Directive can run in parallel with domestic – judicial or administrative – remedies. This circumstance, however, is unlikely to occur, since: *(i)* on the one hand, article 16(3) stipulates that until domestic remedies are finalized, terminated or suspended, the proceedings under the Directive remain blocked; and, *(ii)* on the other hand, article 16(4)(a) stipulates that the MAP terminates if, before an agreement is reached, the question in dispute is settled by the court (or other judicial body) of one of the Member States involved and if the national law of that Member State doesn't allow the tax authority to derogate from such decision (see, for further clarifications, chapter IV).
Hence, in light of the combination between paragraphs 3 and 4 of article 16, the Directive may proceed alongside with domestic remedies – and, therefore, this second requirement come into play – only when the taxpayer, after having triggered the Directive, is able to obtain the suspension of the domestic remedies. Otherwise, taxpayers would be inevitably forced to terminate the domestic proceedings in order to carry on the Directive's MAP.
This last circumstance will induce us to consider whether the mutual agreement reached by the relevant authority can be appealed before domestic Courts (see, infra, par. 5): indeed, if the taxpayers aren't able to obtain the suspension of domestic litigation, they are substantially forced to terminate the domestic judicial proceedings in order to carry on the Directive's procedure and, as a consequence, their right to accept, or not to accept, the agreement (first condition for the implementation of the agreement: see supra) wouldn't suffice, *per se*, to safeguard the taxpayers against agreements that, in their view, haven't adequately settled the case in dispute[99].

[99] Suppose, for example, that a primary adjustment is imposed upon an Italian enterprise and that this enterprise decides to both challenge the adjustment before national Courts and to initiate the Directive's procedure. If the Italian enterprise is not able to obtain the suspension of the domestic judicial proceeding, pursuant to article 16(3) and (4), it would have to terminate the judicial proceeding before the national Court in order to carry on the Directive's MAP. As a consequence, if the Italian enterprise decides to carry on the MAP, if the mutual agreement reached by the competent tax authorities confirms that the primary adjustment is well founded, the taxpayer would have no other available remedy in order to obtain a revision of such act.

4.5. (Follows). Focus on the "OECD Procedures" and on the EU Arbitration Convention as to the need to renounce to domestic remedies in order to implement the MAP.

Neither under the "OECD Procedures", nor under the EU Arbitration Convention there is an express provision dealing with the taxpayers' duty to renounce to domestic remedies in order to implement the mutual agreement.

The existence of such a duty, however, seems to be undisputed both with regard to the "OECD Procedures" and to the EU Arbitration Convention. As stated above, it is, indeed, logical that when the mutual agreement has to be implemented, the taxpayers should, accordingly, withdraw from pending domestic remedies concerning the same issues that are settled in the agreement.

More specifically, on the one hand, as to the "OECD Procedures", the Commentary to article 25 of the OECD MC confirms that the implementation of a mutual agreement should normally be made subject "*to the taxpayer's withdrawal of the suit at law concerning those points settled in the mutual agreement*"[100]. On the other hand, as to the EU Arbitration Convention, paragraph 7.7. of the Code of Conduct also confirms that, "*when domestic remedies are still pending*", the implementation of the mutual agreement "*should be subject to its acceptance by the enterprise* [although – as stated above – Member States haven't reached a common view on this point] *and the enterprise's withdrawal from domestic remedies such as appeals concerning the issues settled in a mutual agreement procedure*".

Moreover, it should be highlighted that – exactly as it occurs under the Directive – both under the "OECD Procedures", and under the EU Arbitration Convention taxpayers (unless they are able to obtain a suspension) need to terminate domestic judicial proceedings in order to carry on the MAP.

Indeed, although both the EU Arbitration Convention and the "OECD Procedures" allow to initiate the MAP in parallel with domestic remedies, under both these legal instruments: *(i)* on the one hand, the MAP remains blocked until domestic remedies

[100] See OECD, *Model Tax Convention on Income and on Capital*, *Commentary*, 2017, C(25), par. 45.

are finalized or suspended[101-102]; *(ii)* on the other hand, the MAP terminates if the question in dispute is settled by the court (or other judicial body) of one of the Member States involved and the relevant tax authorities cannot derogate national judicial decisions[103-104] (see, for further clarifications, chapter IV).

As stated above with respect to the Directive, this last circumstance will induce us to explore whether the mutual agreement reached by the relevant authorities can be appealed before domestic Courts.

4.6. Process and time limits for the implementation of the final decision.

All the existing dispute resolution mechanisms state that mutual agreements reached during a MAP have to be implemented irrespective of any time limits prescribed by national law. With specific regard to transfer pricing disputes, this substantially entails that domestic legislation – such as, for example, those rules that prescribe the loss of

[101] As to the "OECD Procedures", see: *(i)* article 19(2) of the MLI: "*Where a competent authority has suspended the mutual agreement procedure referred to in paragraph 1 because a case with respect to one or more of the same issues is pending before court or administrative tribunal, the period provided in subparagraph b) of paragraph 1 will stop running until either a final decision has been rendered by the court or administrative tribunal or the case has been suspended or withdrawn*"; (ii) OECD, *Model Tax Convention on Income and on Capital*, *Commentary*, 2017, C(25), par. 25: "Two approaches, each of which is consistent with Article 25 are, on one hand, requiring the taxpayer to initiate the mutual agreement procedure, with no suspension during domestic proceedings, but with the competent authorities not entering into talks in earnest until the domestic law action is finally determined, or else, on the other hand, having the competent authorities enter into talks, but without finally settling an agreement unless and until the taxpayer agrees to withdraw domestic law actions".

[102] As to the EU Arbitration Convention, see article 7(1): "*Enterprises may have recourse to the remedies available to them under the domestic law of the Contracting States concerned; however, where the case has so been submitted to a court or tribunal, the term of two years referred to in first subparagraph shall be computed from the date on which the judgment of the final court of appeal was given*".

[103] As to the "OECD Procedures", see OECD, *Model Tax Convention on Income and on Capital*, *Commentary*, 2017, C(25), par. 76, lett. b): "Where the mutual agreement procedure is first pursued and a mutual agreement has been reached, the taxpayer and other persons directly affected by the case are offered the possibility to reject the agreement and pursue the domestic remedies that had been suspended; conversely, if these persons prefer to have the agreement apply, they will have to renounce the exercise of domestic legal remedies as regards the issues covered by the agreement".

[104] As to the EU Arbitration Convention this conclusion can be inferred from article 7(3), according to which, if "*the domestic law of a Contracting State does not permit the competent authorities of that State to derogate from the decisions of their judicial bodies*", the arbitration stage cannot initiate unless the taxpayer "*has allowed the time provided for appeal to expire, or has withdrawn any such appeal before a decision has been delivered*". Indeed, although article 7(3) of the Convention seems only to refer to the beginning of the arbitration stage, it is submitted that such provision also affects the mutual agreement procedure in the sense described above in the text.

the right of reimbursement after a certain period of time – do not impede the making of corresponding adjustments[105].

It is striking to note that neither the Directive, nor the EU Arbitration Convention or the "OECD Procedures" set a strict timeline for the implementation of the mutual agreement. Moreover, none of the existing dispute resolution tools provides for a mechanism allowing taxpayers to enforce the compliance with the mutual agreement if one (or both) the relevant authorities involved do not comply with this agreement.

Although the doctrine has labeled the absence of similar provisions as the "Achilles heels" of international dispute settlement[106], it seems that such post-agreement-control mechanisms are not really needed.

Indeed, on the one hand, given that the "OECD Procedures" and the EU Arbitration Convention are instruments of public international law, and given that States are legally bound to comply with their provisions, the non-cooperation of tax authorities in implementing mutual agreements reached during the MAPs envisioned therein would result in a breach of the *pacta sunt servanda* rule laid down under article 26 of the Vienna Convention[107-108].

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[105] With specific regard to the "OECD Procedures", it seems interesting to note that some states (including Italy: see par. 98 of the OECD Commentary to article 25, version *ante* 2017) have made a reservation to article 25(2) of the OECD MC as they were unwilling (or unable) to override their domestic time limits for reimbursements. It should, however, be highlighted, on the one hand, that element 1.1. of the BEPS Action 14 prompts states to include paragraphs from 1 to 3 of article 25 of the OECD MC in their double tax conventions and, on the other hand, that article 16(5)(c)(ii) of the MLI expressly prevents the possibility not to comply with element 1.1. of the BEPS minimum standard. Therefore, it seems established that such reservations to article 25(2) of the OECD MC have to be considered withdrawn from those States that have signed the MLI. This conclusion seems confirmed in light of the fact that, following the BEPS, Italy has revoked the reservation previously made to article 25(2) of the OECD MC (see par. 98 of the 2017 version of the OECD Commentary to article 25).

[106] M. ZÜGER, *Arbitration under tax treaties: improving legal protection in international tax law*, IBFD, 2001, *Online Books*, par. 6.1.

[107] For a supporting view see H.M. PIT, *op. cit.*, 1104 – 1105 and, *ivi*, the reference made to: G. AIRS, *The EU Arbitration Convention*, in *The Tax Journal*, 23 February 1995, 4 – 6; A. LAHODNY-KARNER, *Transfer pricing, mutual agreement procedure and EU Arbitration Convention*, in W. GASSNER, M. LANG, E. LECHNER, *Tax Treaties and EC Law*, Kluwer Law International, 1997, 205; I. HOFBAUER, *Settlement of disputes in Austria tax treaty law*, in M. LANG, M. ZÜGER, *Settlement of disputes in tax treaty law*, Linde Verlag, 2003, 72; K. NILAUSEN, *Settlement of disputes in Danish tax treaty law*, *ivi*, 150 – 151; E. VELTHUIZEN, *Settlement of disputes in Dutch tax treaty law*, *ivi*, 170 – 173.

[108] From a different perspective see M. TRIVELLIN, op. cit., 87 – 88: "*si potrebbe sondare l'esperibilità di diversi rimedi per tentare di conseguire forzosamente l'esecuzione. Per es., valorizzando la struttura consensuale dell'istituto, si potrebbe invocare la tutela propria del contratto a favore di terzi (art.. 1411 c.c.), over, puntando sulla funzione giustiziale della procedura, si potrebbe proporre una (per vero non agevole) equiparazione ai lodi ai fini dell'attivazione del giudizio di ottemperanza. Da ultimo, si*

On the other hand, a similar conclusion can be reached if States do not cooperate in implementing a mutual agreement reached through the MAP envisioned under the Directive; in this situation, indeed, it seems established that taxpayers could enforce the implementation of the agreement before domestic courts by claiming an infringement of EU secondary law.

5. The possibility for taxpayers to appeal against the mutual agreement.

In the previous paragraph it was questioned whether mutual agreements can be appealed before the domestic Courts of the States involved in an international tax dispute (*rectius*, if taxpayers can appeal the administrative acts that implement mutual agreements in their domestic legal systems).

Precisely: *(i)* in paragraph 4.1. it was stated that if the possibility to challenge the mutual agreement before national Courts is excluded, or is very limited as to its possible grounds, the taxpayers' right of acceptance of the agreement (first condition for its implementation) would become of pivotal importance, since such a right would constitute the only available tool for taxpayers in order to react against undue agreements; moreover, *(ii)* in both paragraphs 4.4. and 4.5., it was stated that – notwithstanding the taxpayers' right of acceptance – if the possibility to challenge the mutual agreement before national Courts is excluded, taxpayers would have no remedy in order to obtain the revision of undue mutual agreements in all the cases in which taxpayers aren't able to obtain the suspension of the domestic judicial proceedings. Indeed, under all the existing legal instruments to settle international tax disputes, if taxpayers are not able to obtain the suspension of the domestic proceedings, they would be likely to need to terminate such proceedings in order to carry on the MAP.

The following sub-paragraph will explore whether taxpayers have the right to challenge mutual agreements before national Courts when they are not able to obtain the suspension of domestic judicial proceedings (if, indeed, as just stated above, taxpayers are able to obtain the suspension of domestic judicial remedies, once a MAP

potrebbe dedurre la violazione dei principi di buona amministrazione come fondamento di un'azione risarcitoria", who recalls J.F. AVERY JONES, *op. cit.*, 7, "In most countries, if a mutual agreement is broken by the tax administration, while it may not be binding as a matter of contract, the tax administration, as a matter of good administration, is bound to carry it out".

or an arbitration procedure comes to an end, it seems that they still have the possibility to seek protection if they believe that the mutual agreement is undue or unlawful, by continuing domestic judicial proceedings).

The issue concerning the taxpayers' right to challenge mutual agreements before national Courts is of great complexity, since none of the existing legal mechanisms to settle international tax disputes contains provisions that provide for the possibility to appeal at a national level mutual agreements.

Moreover, the (not many) authors who have addressed this matter have adopted divergent views.

More specifically, some authors draw the conclusion that mutual agreements – reached under both the "OECD Procedures" and the EU Arbitration Convention – can be appealed, with no limitations at all, before domestic Courts. The theoretical grounds of this conclusion, however, are not entirely clear, since the mentioned authors seem to argue only on the grounds that the "annulment" by domestic courts is not expressly excluded under neither of the existing dispute resolution mechanisms[109].

According to other authors, this possibility should be excluded because national Courts do not have jurisdiction over administrative acts adopted between tax authorities of different States[110].

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[109] See H. MOOIJ, *MAP Arbitration in Tax Treaty Disputes*, forthcoming, par. 765: "Arbitral decisions are vulnerable to claims for annulment by domestic courts if conditions of due process have not been properly met. This appears to hold for MAP arbitrations as well, since the possibility of annulment by domestic courts is not expressly excluded under neither the MLI, the European Arbitration Convention or the new EU Directive, nor, as I am aware, under any of the present bilateral tax treaties". A similar position has also been taken by P. PISTONE, *Arbitration Procedures in Tax Treaty and Community Law: a Study from an Italian Perspective*, in *Dir. prat. trib.. internaz.*, 2001, 629; F. ADAMI, F. LEITA, *La procedura amichevole per evitare le doppie imposizioni*, in *Riv. dir. trib.*, 1992, I, 405; O. REALE, *Le procedure amichevoli nelle convenzioni internazionali contro le doppie imposizioni*, in *Riv. dir. trib.*, 2003, I, 382.

[110] R. CORDEIRO GUERRA, *Diritto tributario internazionale*, Padova, 2012, 367: "*Poiché, peraltro, la procedura amichevole si dipana tra gli Stati, senza che il contribuente abbia un potere di intervento diretto, non è escluso che la soluzione raggiunta non sia da questi reputata soddisfacente* […]. *In tal caso* […] *l'individuo potrebbe in astratto impugnare glii atti impositivi interni che danno attuazione all'accordo intervenuto, ma, di fatto, ill giudice interno dovrà confermarli in quanto provvedimenti emanati in esecuzione di un accordo internazionale (c.d. accordo in forma semplificata) raggiunto tra le amministrazioni dei due Stati coinvolti al termine della procedura amichevole*". This seems also the conclusion reached by M. TRIVELLIN, *op. cit.*, 161: "*La MAP presuppone, infatti, un accordo delle amministrazioni competenti ed il Giudice nazionale non parrebbe poter assumere funzioni surrogatorie ed imporre una diversa (e non condivisa) sistemazione degli interessi, per di più anche ad un'Autorità straniera*".

Although this last argument seems hardly surmountable, there still could be some ways in order to conclude that taxpayers can seek protection before national Courts against undue mutual agreements.

Precisely, in light of article 344 of the TFUE, as recently interpreted by the ECJ in the *Achmea* judgment, it seems that taxpayers should always be able to obtain from national Courts the revision of mutual agreements that have been reached in breach of EU law. In this judgment, indeed, the ECJ emphasized that, pursuant to article 344 of the TFUE, Member States have to ensure the full effectiveness and consistency of EU law by ensuring that all the matters related to the interpretation or the application of EU law can be settled or directly by the Court of Justice, or through judicial remedies that enable a dialogue – pursuant to article 267 of the TFUE – between domestic courts and the Court of Justice[111].

Hence, given that: *(i)* transfer pricing disputes could be regarded as a matter of "Union law" in light of the EU Commission's orientation that envisions the arm's length principle under article 107 of the TFUE; *(ii)* tax authorities in the reaching of a MAP cannot – clearly – be considered "tribunals" within the meaning of Article 267 of the TFEU and, thus, refer a preliminary ruling to the ECJ; *(iii)* under all the existing dispute resolution mechanisms, if taxpayers (as hinted above) aren't able to obtain the suspension of the pending judicial remedies, they are substantially forced to withdraw from such remedies in order to terminate a MAP; it is established that if mutual agreements weren't to be submitted to judicial review, the contracting states would be entitled to remove from the jurisdiction of their courts disputes that could concern the application or interpretation of EU law.

Therefore, in light of these remarks, it doesn't seem impossible to conclude that taxpayers should be granted the right to appeal against mutual agreements reached in breach of EU law.

More specifically, one possible ground of appeal could relate the infringement of article 41 of the Charter Of Fundamental Rights of the European Union, according to which taxpayers should be, in any case, granted with the rights to: *(i)* participate to the

[111] ECJ, 6 March 2018, Case C-284/16, *Achmea*. This case was already discussed in chapter I: see, retro, chapter I, section II, last paragraph.

meetings between tax authorities; *(ii)* be heard and submit all documents and allegations that they may regard as useful in order to settle the case; *(iii)* have full access to the relevant documentation; *(iv)* receive a formal notice at the end of the procedure, indicating the different positions put forward by the parties involved in the proceeding, the reasons that have led to reach a specific solution to the case and – as the case might be – the reasons that have justified the rejection of the position put forward by the taxpayer. Indeed, as previously stated, it seems acceptable to conclude that article 41 of the Charter should apply with regard to the MAPs envisioned both under the Directive and under the other dispute resolution mechanisms of international public law.

Moreover, if it is accepted the current EU Commission's orientation, according to which article 107 of the TFUE envisions an "European arm's length principle", it could even be argued that taxpayers are entitled to challenge the merits of mutual agreements whenever the relevant tax authorities reached an agreement that isn't consistent with such principle, by claiming a violation of article 107 of the TFUE.

6. (Follows). Critical remarks as to the effectiveness of domestic appeals against undue mutual agreements: is there the need of judicial means to settle international tax disputes (referral to chapter III)?

The previous paragraph briefly recalled the ECJ's judgment in the *Achmea* case, in order to substantiate the conclusion that taxpayers should have the right to challenge before national Courts mutual agreements reached in breach of EU law.

It should, nevertheless, be highlighted that the possibility for taxpayers to appeal against undue mutual agreements before national Courts appears to be an ineffective remedy for two reasons.

The first reason is that decisions rendered by national courts cannot be binding upon tax authorities of another State. Therefore, this remedy could be effective *only* when the following two conditions are both met: *(i)* that taxpayers file the appeal before the domestic courts of all the states involved in the dispute; *(ii)* that all the judicial proceedings triggered at the national level lead to decisions favourable to the taxpayers.

The second reason is that taxpayers, by challenging a mutual agreement before national courts, would likely be able to obtain – whether all the domestic proceedings triggered by the taxpayer lead to a decision favorable for the taxpayer – only the dismissal of the agreement rather than a decision that forces the tax administrations involved in a dispute to start over a new MAP. An "annulment decision" alone, without the possibility to re-open a new MAP, indeed, would be of no practical use, since it wouldn't eliminate double taxation, but, rather, merely restore the *status quo ante* the submission of the MAP request[112].

In light of these remarks, whenever an agreement has been rendered in breach of EU Law, it appears – from a *de iure condendo* perspective – that the most effective remedy for taxpayers in order to obtain its revision would be to submit the dispute to the arbitration procedure[113].

Moreover, given that the possibility for taxpayers to appeal against undue mutual agreements before national Courts (who may eventually refer the question for a preliminary ruling to the Court of Justice pursuant to article 267 of the TFUE) appears to be an ineffective remedy for the resolution of international tax disputes consistently with the EU Law, this solution seems the most compatible with article 344 of the TFUE as recently interpreted by the ECJ in the Achmea decision[114]. Indeed, it seems established that the current structure of the MAPs envisioned under the international tax dispute resolution mechanisms doesn't ensure – neither via domestic judicial

[112] Moreover, such a remedy appears also to be cumbersome, since it entails the running of different judicial proceedings, in different States, and requires a considerable amount of time before a final decision is reached in each State, given that a decision by a first-tier court may be further appealed before a second-tier court and, ultimately, before a Supreme Court.

[113] It should be immediately highlighted that – as it will be further discussed in chapter III – such a possibility seems precluded under all the existing dispute resolution mechanisms. This conclusion, therefore, represents a mere hypothesis *de jure condendo*. See, among all, J.S. WILKIE, *Implementation of Arbitration Decisions in Domestic Law*, in M. LANG, J. OWENS (edited by), *International Arbitration in Tax Matters*, IBFD, 2015, 352: "taxpayers may not agree with a MAP determination. But arbitration may not be invoked for this reason; it is not an appeal device to challenge MAP decisions".

[114] Towards this conclusion see: A.P. DOURADO, P. PISTONE, *Arbitrating Tax Disputes in Line with EU Law*, in J. MONSENEGO, J. BJUVBERG (edited by), *International Taxation in a Changing Landscape*, Kluwer Law International, 2019, 57 – 67; J. MONSENEGO, *Does the Achmea Case Prevent the Resolution of Tax Treaty Disputes through Arbitration?*, in *Intertax*, 2019, issue n. 8-9, 725 ss.; K. PERROU, *Taxpayer Rights and Taxpayer Participation in Procedures Under the Dispute Resolution Directive*, in *Intertax*, 2019, issue n. 8-9, 715 ss.

systems – that a tax dispute falling within the scope of “Union Law” will always be settled consistently with the EU Law.

On a final note it should be highlighted that even if one admits that taxpayers are entitled to obtain the revision of undue mutual agreements through the arbitration procedure, the same issues discussed above would represent themselves, *mutatis mutandis*, at the end of the arbitral-stage, if the arbitral boards issue a final decision that is inconsistent with EU law, given that: *(i)* the arbitral tribunals envisioned under the existing dispute resolution mechanisms are not to be considered “tribunals” for the purpose of article 267 of the TFUE; *(ii)* if the arbitral panel doesn’t repeal the agreement accordingly to the “Union Law” the taxpayer would have no remedy other than to appeal the “arbitral award” before domestic courts; *(iii)* even assuming that taxpayers could effectively challenge before national courts the arbitral award, such a remedy would likely lead only to the annulment of the award and not to the re-opening of the arbitration.

All these remarks will be considered in greater depth in the following chapter, where the following question will be answered: is there the need of judicial means to settle international tax disputes?

CHAPTER III

THE ARBITRATION PROCEDURE:

A COMPARISON BETWEEN THE ARBITRATION PROCEDURE ENVISIONED IN THE DIRECTIVE AND THE ARBITRATION PROCEDURES ENVISIONED IN THE OTHER DISPUTE RESOLUTION MECHANISMS

taxpayers to appeal against the final decision: is there the need of judicial means to settle international tax disputes?

1. Preliminary remarks: the administrative nature of tax arbitration.

This chapter points out that arbitration procedures under the existing dispute resolution mechanisms differ in their specific characteristics. Nevertheless, as a general, preliminary consideration, it should be immediately brought forward that none of such procedures is to be viewed as a procedure to perform a judicial settlement of tax disputes between taxpayers and tax authorities, since none of the hallmarks of "judicial" arbitration can be inferred therein[1]. Indeed, this chapter will clarify that, neither pursuant to the Directive, nor to the EU Arbitration Convention or the "OECD Procedures", it is likely that *(i)* the final decision is rendered by a board that is impartial and independent with respect to both taxpayers and the relevant tax authorities, nor that *(ii)* such decision is binding for both tax authorities and taxpayers. More specifically, as to the lack of element *sub (i)*, it will be highlighted that, under all the existing mechanisms to settle international tax disputes, tax authorities have full and exclusive control over the appointment of arbitrators and the fees and expenses of the arbitration panel' members are paid only by the contracting jurisdiction. As to the lack of element *sub (ii)*, it will be highlighted that under all the existing mechanisms to settle international tax disputes, on the one hand, taxpayers are entitled whether or not to accept the final decision and, on the other hand, the relevant tax authorities (with a few exceptions, and only under the "OECD Procedures"[2]) keep the right to agree on a different settlement once the "arbitration" board/panel will have issued its decision[3]. Moreover, in this regard, it should also be kept in mind that, under all the

[1] For a different view see H.M. PIT, *Dispute Resolution in the EU*, IBFD, 2018, 939 – 940; 1382 and the authors *ivi* recalled.

[2] See *infra* par. 9.

[3] Accordingly, see K. PERROU, *Taxpayer Participation in Tax Treaty Dispute Resolution*, IBFD, 2014, *Online Books*, par. 7.4.1.2. ("the power of decision is inherent in the very notion of 'tribunal'. Bodies that tender only advice cannot be characterized as tribunals […]. Even if the advice given is followed in the great majority of cases and a practice has developed, which is, however, of no binding force, as the administration may decide differently at any time, this is not enough to give to the body rendering the advice the quality of a tribunal. The fact that the decision of the arbitration panel or the advisory commission becomes binding after a certain time limit if the tax authorities have not decided differently does not change the situation; the decision is made conditional upon the tax authorities' agreement. In these cases the OECD arbitration panel and the EU Arbitration Convention advisory commission do not qualify as "tribunals") and, if we are not mistaken, R. WOLFRUM, *Advisory opinions: alternative means*

dispute resolution mechanisms, tax authorities are the "gatekeepers" of the arbitral proceedings, since able to prevent, at their own discretion, the commencement of such proceedings. Indeed (regardless as to whether all the existing mechanisms to settle international tax disputes provide for mandatory arbitration procedures, since the starting of arbitration under all these mechanisms is not subject to a prior authorization by the relevant tax authorities[4]) under the "OECD Procedures", the EU Arbitration Convention and the Directive, the arbitration is construed as a mere extension of the MAP and not as an independent dispute resolution mechanism. As a consequence, should not the relevant authorities be willing to solve the case by arbitration, then the same could prevent the latter from starting by just refusing to initiate the MAP[5].

Having this briefly said, it should already be concluded that, under all the existing legal instruments to settle international tax disputes, arbitration shares the same nature of the MAP. Precisely, also arbitration is likely to be considered as a "government-to-government" procedure of an administrative nature[6].

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to avoid the development of legal conflicts?, in H. RUIZ FABRI (edited by), *International law and litigation*, Nomos, 2019, 99 ss. ("advisory opinions are not a means to 'settle' – at least non directly – disputes between States, but to offer legal advice to the organs or institutions requesting the opinion"). At this regard see also E. SNODGRASS, *Tax Controversies and Dispute Resolution under Tax Treaties: Insights from the Arbitration Sphere*, in *Derivaties and Financial Instruments*, 2017, 7 who highlights that "any process of 'tax arbitration' that lives the outcome open to being disavowed […] cannot properly be called arbitration".

[4] Precisely: *(i)* on the one hand, under both the Directive and the "OECD Procedures", the decision to submit the case to arbitration is subject only to a request of taxpayers and not to the consent of either (or both) of the authorities involved; *(ii)* on the other hand, under the EU Arbitration Convention, the arbitration procedure initiates automatically whenever the competent authorities aren't able to reach a mutual agreement during the MAP (see infra, paragraphs 9 and 10).

[5] See chapter II, which widely discussed in which cases, under the different mechanisms to settle tax disputes, tax authorities are enabled to unilaterally and (even) discretionary block the initiation of the MAP (so called "blocking method").

[6] As it will be further highlighted, this conclusion is contrary to the mainstream opinion. Nevertheless, S.M. RONCO, *Meccanismi arbitrali per la risoluzione delle dispute in materia fiscale e diritto dell'Unione europea: una complessa relazione. Spunti alla luce della Direttiva n. 2017/1852/UE"*, in *Dir. prat. trib. Internaz.*, forthcoming, has reached a similar conclusion by referring to the possibility for relevant tax authorities to reach a final decision by adopting the so called "last best offer approach". The Author, precisely, highlighted that "*In tale circostanza si assiste ad una modalità di deliberazione in cui la ponderazione delle argomentazioni giuridiche a fondamento delle pretese delle Autorità competenti appare pretermessa.* […] *Tale aspetto* […] *esonera le Autorità competenti dall'onere di giustificare le offerte finali rispettivamente formulate innanzi al panel. Meccanismo, quest'ultimo, che, in altre parole, manifesta la perdurante caratterizzazione dello strumento de quo in continuità con una logica di tipo non giurisdizionale e volto a tutelare la discrezionalità decisionale delle Autorità competenti*".

This preliminary remark allows a brief consideration as to the issues that have risen as to the admissibility of the use of arbitration in the field of taxation in light of the principles of legality and prohibition of waiver of tax revenues that can be found in many States' Constitutional Charts[7]. Particular attention should be paid to the assumption – brought forwards by some authors – according to which, in light of the above mentioned principles, tax authorities may not be able to dispose or relinquish their tax jurisdiction to an "arbitral" board[8].

Indeed, either as arbitration decisions are not binding upon the relevant tax authorities and as the same tax authorities maintain the right to substantially govern the functioning of the arbitral proceedings, seem to exclude that, through arbitration, the administrative tax authorities "give away", to a third body, their power to collect tax revenues provided by the law[9].

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[7] See, for a general overview, L.E. SCHOUERI, *Arbitration and Constitutional Issues*, in M. LANG, J. OWENS (edited by), *International Arbitration in Tax Matters*, IBFD, 2015, 187 – 208; A.P. DOURADO, P. PISTONE, *Some Critical Thoughts on the Introduction of Arbitration in Tax Treaties*, in *Intertax*, 2014, issue n. 3, 158 ss. and also G. PETRILLO, *New impetus from the OECD for resolving tax disputes through arbitration: an opportunity to reflect on the validity of domestic restraints to arbitration in tax matters*, in *Riv. dir. trib. internaz*., 2006, 171 ss.

[8] As far as it is known, such approach is common in Latin American countries: see, for instance, D.V. BELLAN, *Individuals' Income under Double Taxation Conventions: A Brazilian Approach*, Wolters Kluwer, 2010, 70 – 71, who points out that Brazilian States' representatives "may not be able to dispose or relinquish the tax jurisdiction while engaged in a negotiation process with another contracting state, even if this is due to problems related to the interpretation of the convention".

[9] See, at this regard, the remarks of D. DE CAROLIS, *A New Approach to International Taxation Dispute Resolution Process (ITDRP)*, in *Intertax*, n. 5/2017, 394 with regard to the EU Arbitration Convention (that, however, seem extendable, *mutatis mutandis*, to the other dispute resolution tools): "the resolution of fiscal disputes through arbitral procedure entails the waiver of the most fundamental and least renounceable aspect of State sovereignty, i.e. taxing power. Consequently, after a long negotiation, Member States accepted to bind themselves to the Convention's dispute resolution system for tax disputes only on condition that this system shall be subject to a series of limitations allowing them substantial control on all phases and salient aspects of the procedure". Precisely, the Author notes that: *(i)* States have conceived arbitration essentially "as an intergovernmental negotiation which does not provide the taxpayer's participation: the arbitral phase, at least in the States' original intention, shall represent a sort o 'parenthesis' within the negotiation phase, a pure eventual phase serving more the purpose of spurring States to find an agreement during negotiations than actually solving the dispute"; *(ii)* the "arbitral awards" are "not immediately binding upon the States, since they can reach an agreement on different terms from this decision and only if they fail to do so becomes the Advisory Commission's decision binding"; *(iii)* "States keep their control also on the phase of access to the Convention: the mutual agreement procedure is started by the taxpayer's request for the Convention's application; yet, competent authorities are entitled to […] deny access if they do not consider the request well-founded and/ or they consider themselves able to resolve unilaterally the complained double taxation".

Moreover, reasoning that arbitration clauses may constitute, *per se*, an undue waiver of the tax authorities' power to tax fails to properly address the fact that arbitration procedures (as also MAPs) do not concern the relation between the tax administration and the taxpayer, but rather the definition of the limits of the tax sovereignty of two or more states as agreed in the tax treaties and/or conventions entered into with each other[10]. Therefore, no loss of tax revenues arises directly from arbitration, since the outcome of the procedure is a mere application of the tax treaty or of the convention that is the object of arbitration.

The matter arises at a different level as to how the "arbitral" panels shall reach the final decision, *i.e.* if such decision has to be reached through a strict application of the rule of law or if, by contrast, it could also be based on equity and, therefore, be the result of a wider range of elements than the ones strictly related to the tax system[11].

As to transfer pricing disputes, the solution to this issue seems identical to the one reached in the previous chapters with regard to international APAs (see chapter I, section III) and to MAPs (see chapter II), however, this solution will need to be more extensively addressed in the following paragraphs[12]. Indeed, while none of the existing dispute resolution mechanisms, for APAs and MAPs, provide rules on how the relevant tax authorities shall reach an agreement; on the contrary, all the existing mechanisms, with regards to arbitration, specifically regulate two different ways for "arbitral" boards to reach the final decision. Precisely, all the existing mechanisms allow to conduct the arbitration procedure either through the so called "independent opinion approach", or through the "last best offer approach", so that the arbitrators can adopt the final decision indipendently, on the grounds of the facts and arguments

[10] Indeed, as pointed out by the doctrine, "if, due to a decision taken in the international sphere (arbitration), it is decided that the state has no jurisdiction, the state has no right to the revenue concerned. Thus, no tax waiver will be granted by the authority" (L.E. SCHOUERI, *op. cit.*, 206).

[11] Accordingly, see M. TRIVELLIN, *Studi sugli strumenti di soluzione delle controversie fiscali internazionali*, Torino, 2018, 139, who, with regard to the "*complessa questione dell'ammissibilità degli arbitrati alla luce dei principi costituzionali e fondamentali del nostro ordinamento ed in particolare dell'indisponibilità dell'obbligazione tributaria*", concludes that "*ci sembra comunque che la compatibilità sussista, perché i predetti istituti [...] si configurano quali meccanismi di risoluzione di una questione incerta (res dubia) o comunque hanno ad oggetto una res litigious, come l'accertamento con adesione, la mediazione, la conciliazione*" and that "*il problema attiene piuttosto alle regole da seguire ai fini della decisione*".

[12] See infra par. 8.

presented by the parties, or by choosing between the solutions to the case proposed by the tax authorities involved in the dispute, respectively.

2. The grounds for the initiation of arbitration: is there the possibility to trigger arbitration in order to challenge undue mutual agreements?

As seen in the previous chapter, under all the existing dispute resolution mechanisms the arbitration procedure may initiate if the relevant authorities fail to reach an agreement during the MAP on how to eliminate the double taxation that occurred for a specific case under review.

More specifically, as to the "OECD Procedures", both article 25(5) of the OECD MC and article 19(1) of the MLI state that "*Where* […] *the competent authorities are unable to reach an agreement to resolve that case* […] *any unresolved issues arising from the case shall be submitted to arbitration if the person so requests*".

As to the EU Arbitration Convention, article 7 states the arbitration proceeding may be established "*If the competent authorities concerned fail to reach an agreement that eliminates double taxation*".

As to the Directive, article 6(1)(b) states that that the arbitration proceeding may start where "*the competent authorities of the Member States concerned had accepted the complaint that was submitted by the affected person but failed to reach an agreement on how to resolve the question in dispute by mutual agreement within the time limit provided for in Article 4(1)*".

Therefore, *nulla quaestio* as to the possibility – under all the existing dispute resolution mechanisms – to trigger the arbitration procedure if the relevant authorities fail to reach an agreement within the given timelines.

Quid est, by contrast, if the relevant tax authorities reach an agreement that, in the taxpayers' view, is unlawful?

As stated in the previous chapter, in this case taxpayers could decide not to accept the MAP result and initiate or continue – as the case may be – litigation at the domestic level. However, domestic litigation triggered for the revision of the primary adjustment wouldn't *per se* solve the case of double taxation, since it wouldn't automatically enable the taxpayer to obtain a "correlative adjustment" in the other State. Moreover, it may well be that, once the MAP is concluded, the time limit to engage in the domestic litigation have already expired or that, in order to further the MAP, the taxpayers were forced to renounce to pending domestic remedies (see *supra*, chapter II).

In light of these circumstances, chapter II concluded that when taxpayers are forced to renounce to pending domestic remedies in order to further the MAP (i.e. when taxpayers are not able to obtain the suspension of judicial remedies), they should have the possibility to appeal before domestic courts against mutual agreements (*rectius*, against internal administrative acts that implement in the domestic system mutual agreements) if: *(i)* the MAP is conducted, or the mutual agreement is reached, in breach of article 41 of the Charter Of Fundamental Rights of the European Union[13]; and/or *(ii)* when relevant tax authorities reach an agreement not consistent with the arm's length principle[14].

This conclusion was reached in light of the ECJ's judgment in the *Achmea* case, where the Court emphasized that Member States have to ensure the full effectiveness and consistency of EU law by implementing a system of judicial remedies that enables a dialogue – by means of article 267 of the TFUE – between domestic courts and the Court of Justice on matters related to the interpretation or application of EU law.

Indeed, if in such a case mutual agreements weren't to be submitted to judicial review before domestic Courts, the resolution of transfer pricing disputes through the MAPs envisioned under the existing dispute resolution tools could possibly entail a breach of article 344 of the TFUE as recently interpreted by the ECJ in the *Achmea* judgment, given that, by submitting to a MAP such disputes, Member States would exempt the

[13] According to which taxpayers should be, in any case, granted with the rights to: *(i)* participate to the meetings between tax authorities; *(ii)* be heard and submit all documents and allegations that they may regard as useful in order to settle the case; *(iii)* have full access to the relevant documentation; *(iv)* receive a formal notice at the end of the procedure, indicating the different positions put forward by the parties involved in the proceeding, the reasons that have lead to reach a specific solution to the case and – as the case might be – the reasons that have justified the rejection of the position put forward by the taxpayer.

[14] This argument is relevant if one follows the line of reasoning of the European Commission in certain recent decisions relating to advance tax rulings, according to which the arm's length principle is a notion of EU Law under article 107 of the TFUE (see retro chapter I, section III).

jurisdiction of their national courts (and, as a consequence, of the ECJ by means of article 267 of the TFUE) from the application and/or interpretation of EU law[15].

In this respect, nevertheless, the possibility for taxpayers to appeal against undue mutual agreements before national Courts (which may refer the case to the Court of Justice for a preliminary ruling) is, it was pointed out, failing to provide an effective remedy for the resolution of international tax disputes consistently with the EU Law, mainly because such a remedy doesn't seem to ensure the re-opening of a new MAP[16].

Therefore, from a *de iure condendo* perspective, it was brought forward the conclusion that taxpayers should be entitled to obtain the revision of undue mutual agreements via arbitration.

As it will be further discussed, however, this possibility seems envisioned – although on limited grounds – only under the EU Arbitration Convention.

2.1. The grounds for initiating the arbitration procedure under the Directive.

As stated above, pursuant to article 6(1)(b) of the Directive, arbitration can start upon a request made by the affected person if "*the competent authorities of the Member States concerned … failed to reach an agreement on how to resolve the question in dispute by mutual agreement within the time limit provided for article 4(1)*".

In light of this provision, the arbitration procedure envisioned in the Directive can be triggered by the taxpayer only when the relevant tax authorities have failed to reach a mutual agreement during the MAP; as a consequence, taxpayers have no remedy –

[15] As hinted above, indeed, under all the existing dispute resolution mechanisms taxpayers are substantially forced to renounce to pending domestic remedies (unless they are able to obtain their suspension) in order to continue the MAP and/or it may well be that, once the MAP is concluded, the terms for the initiation of domestic litigation have already expired.

[16] As hinted in the last paragraph of chapter II, the possibility for taxpayers to appeal against undue mutual agreements before national Courts appears to be an ineffective remedy for two reasons.The first reason is that decisions rendered by national courts cannot be binding upon tax authorities of another State. Therefore, this remedy could be effective *only* when the following two conditions are both met: *(i)* that taxpayers file the appeal before the domestic courts of all the states involved in the dispute; *(ii)* that all the judicial proceedings triggered at the national level lead to decisions favourable to the taxpayers. The second reason is that taxpayers, by challenging a mutual agreement before national courts, would likely be able to obtain – whether all the domestic proceedings triggered by the taxpayer lead to a decision favorable for the taxpayer – the annulment of the agreement rather than a decision that forces the tax administrations involved in a dispute to start over a new MAP. An "annulment decision" alone, without the possibility to re-open a new MAP, indeed, would be of no practical use, since it wouldn't eliminate double taxation.

apart from the possibility to resort to domestic litigation (with all the complexities that such a remedy entails) – in the case where the relevant tax authorities actually reach an agreement deemed entirely satisfactory[17-18].

This conclusion is likely to be strengthened by the wording of article 4(2), according to which "*Once the competent authorities of the Member States have reached an agreement as to how to resolve the question in dispute ... the competent authority of each Member States concerned shall, without delay, notify this agreement to the affected person, as a decision that is binding on the authority and enforceable by the affected person accepting the decision and renouncing the right to any other remedy*". This provision, indeed, confirms that taxpayers are entitled to enforce a decision reached through the MAP, but not to force relevant authorities to reconsider a mutual agreement and look for a new one[19].

As a consequence, if the relevant tax authorities reach an agreement that, in the taxpayers view, is not correct and/or doesn't actually eliminate double taxation, the

[17] Accordingly, see S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, forthcoming who argues that when affected persons are "unsatisfied with the agreement reached by competent authorities at the MAP level" the only solution available for taxpayers would be to "disregard the MAP's decision and initiate or continue, as the case may be, litigation at domestic level".

[18] It should be recalled that, according to article 4(3) of the Directive, if "*the competent authorities of the Member States concerned have not reached an agreement on how to resolve the question in dispute within the period provided for in paragraph 1, the competent authority of each of the Member States concerned shall inform the affected person indicating the general reasons for the failure to reach agreement*". As it has been highlighted by S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, *forthcoming*, article 6(1)(b) of the Directive "should be deemed applicable irrespective of the fact that the competent authorities have managed to notify to the affected person the general reasons as to why they were unable to reach an agreement under the MAP within the time-frame set out in Article 4(1). That also because the wording of Article 6(1)(b) does not subject the request for setting up the Advisory Commission to any previous notification on the part of competent authorities involved, but merely dictates that such a request could be made by the affected person provided that competent authorities have failed to reach an agreement within the time limit set in Article 4(1)". *Contra* P. PISTONE, *The Settlement of Cross-border Tax Disputes in the European Union*, in J. WATTEL, O. MARRES, H. VERMEULEN (edited by), *Terra/Wattel European Tax Law*, Wolters Kluwer, 2018, 368, that stresses that "in such circumstances, the absence of a validly notified information notice to the affected persons should be a specific ground for appeal before domestic Courts of the States involved, in line with the general right of appeal against the outcome of mutual agreement procedure, established in Article 5(3) EU Arbitration Directive".

[19] P. PISTONE, *The Settlement of Cross-border Tax Disputes in the European Union*, in J. WATTEL, O. MARRES, H. VERMEULEN (edited by), *op. cit.*, 360.

only available remedy in the hands of taxpayers would be to challenge such agreement before domestic Courts, with all the complexities that such a remedy entails.

2.2. The grounds for initiating the arbitration procedure under the "OECD Procedures".

As to the "OECD Procedures", both article 25(1) of the OECD MC and article 19(1) of the MLI state that any "*unresolved issue*" shall be submitted to arbitration upon the request of taxpayers.

By submitting to taxpayers the choice on whether to start, or not to start, arbitration, these provisions could be interpreted to the extent that arbitration can be triggered not only *(i)* when the relevant tax authorities have failed to reach a mutual agreement during the MAP, but also *(ii)* when an agreement has been reached, but the taxpayers deem such an agreement not entirely satisfactory.

However, it is striking noting that, according to the OECD (which – it is worth noting – the MLI designates as the board entitled to appoint the arbitration panel whenever the relevant tax authorities fail to do so[20]) the arbitration can start only in the case *sub (i)*, *i.e.* when the relevant authorities fail to reach an agreement and not, by contrast, in the case *sub (ii)*, *i.e.* when the MAP terminates with an agreement between the tax authorities that, according to taxpayers, is not satisfactory.

The Commentary to article 25, indeed, states that "where the two competent authorities agree that taxation by both States has been in accordance with the Convention, there are no unresolved issues and the case may be considered to have been resolved even in the case where there might be double taxation that is not addressed by the provisions of the Convention"[21].

Therefore, under the OECD Procedures, the taxpayers seem highly unlikely to be able to trigger arbitration apart from the cases in which relevant authorities fail to reach a mutual agreement within the given timelines.

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[20] Article 20(3) and (4) of the MLI provide for a default rule which applies in the case that competent authorities fail to appoint the arbitration panel. These provisions, precisely, state that in such a case the appointment will be made by the highest ranking official of the Centre for Tax Policy and Administration of the OECD that is not a national of either Contracting Jurisdiction.

[21] OECD, Commentary to Article 25, par. 71.

Consequently – as it occurs under the Directive – if the relevant tax authorities reach a mutual agreement that, in the taxpayers' view, is not correct and/or doesn't actually eliminate double taxation, the only remedy available to taxpayers would be to challenge such agreement before domestic Courts, with all the complexities that such a remedy entails[22].

2.3. The grounds for initiating the arbitration procedure under the EU Arbitration Convention.

Unlike what occurs under the Directive and the "OECD Procedures" (where, as stated above, arbitration starts if the taxpayers so require) under the EU Arbitration Convention arbitration begins at the sole discretion of relevant tax authorities.

Indeed, according to article 7(1) of the Convention "*If the competent tax authorities concerned fail to reach an agreement that eliminates the double taxation in accordance with article 6(1)* […] they shall *set up an advisory commission charged with delivering its opinion on the elimination of double taxation in question*" (emphasis added).

Under the Convention, therefore, there shouldn't be doubts as to the fact that arbitration will not begin if the two (or more) relevant authorities involved in a dispute deem the agreement reached through a MAP as actually eliminating double taxation, regardless the taxpayers view on the matter.

However, as highlighted in the previous chapter, it should be recalled that the EU Arbitration Convention is the only dispute resolution mechanism that clearly indicates the principles that have to be followed during the MAP and that clearly requires that the mutual agreement reached through the MAP must always eliminate double taxation. All the other tools, indeed, remain silent on these aspects, thus giving relevant tax authorities full discretion over the content of mutual agreements.

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[22] See M. TRIVELLIN, *op. cit.*, 158: "*Un'ulteriore condizione preclusiva si ricava dall'art. 25, § 5, OECD* Model *e dall'art. 19, § 1, della* Multilateral Convention *e consiste nella circostanza che le Autorità competenti abbiano raggiunto un accordo che non lasci questioni irrisolte. In tali ipotesi, non vi sarebbe spazio per l'arbitrato anche qualora il contribuente ritenga che l'Agreement non abbia correttamente definito il suo caso. In questo modo, l'arbitrato permette sì di assicurare maggiore effettività alla procedura amichevole ma rimane ad essa sostanzialmente servente ed è esposto al rischio di abusi, potendo le amministrazioni interessate mirare a soluzioni di 'comodo' per evitare l'innesco della fase arbitrale*".

More specifically, it should be recalled that, on the one hand, article 4 of the Convention states that the legal basis of mutual agreements must be the ALP as advocated by the OECD and that, on the other hand, article 14 of the Convention expressly states that double taxation, in the field of transfer pricing, "*shall be regarded as eliminated*" only if the profits included in the computation of taxable base in one State are "*reduced by an amount equal to the tax chargeable on them in the other* [State]". Hence, the EU Arbitration Convention sufficiently clarifies that relevant authorities are not allowed to fix transfer prices other than at arm's length (and, thus, in violation of article 107 of the TFUE).

As a consequence, under the EU Arbitration Convention, any agreement that *(i)* is not based on the ALP (i.e. agreements based on equity that determine *ex aequo et bono* the transfer prices; "fifty/fifty" deals; agreements based in any other possible kind of negotiated base unrelated to the tax system) or that *(ii)* doesn't fully eliminate double taxation, should be considered suitable for the arbitration procedure pursuant to article 7(1). If this conclusion were accepted, taxpayers could thus challenge the validity of the agreement (*rectius*, the validity of the choice of the relevant tax authorities not to submit the case to arbitration) in front of domestic courts on the grounds that relevant authorities failed to comply with article 7(1) of the Convention (*alias* 107 of the TFUE) and, by doing so, eventually have the case referred to arbitration[23-24].

By contrast, the EU Arbitration Convention seems not to provide for the possibility to trigger the arbitration if there has been the breach of procedural rules, such as the ones envisioned in article 41 of the Charter on Fundamental Rights of the European Union.

[23] Accordingly, see H.M. PIT, *op. cit.*, 619: "Any mutual agreement reached that does not meet these requirements should be considered invalid and, consequently, the case under review should still be referred to the arbitration procedure. This also follows from the wording of article 7(1) of the EU Arbitration convention. Taxpayers could thus challenge the validity of the mutual agreement reached in front of a domestic court […] and, by doing so, having the case referred to the arbitration procedure".

[24] It is worth noting that M. TRIVELLIN, *op. cit.*, 150 has proposed a similar solution with regard to the "OECD Procedures": "*Si potrebbe immaginare … di contestare la correttezza della posizione assunta dall'Autorità competente nazionale a fronte della richiesta avanzata dal contribuente, posizione cui parrebbe possibile riconoscere autonomia (qualificandola come diniego di ammissione alla procedura arbitrale), nonostante la stessa confluisca in un 'accordo' transnazionale. Se così fosse, si potrebbe tentare di scardinare la convergente volontà degli Stati sul punto 'delegittimando' la risoluzione presa a riguardo dal singolo Paese*".

2.4. Are the MAPs envisioned under the existing dispute resolution mechanisms compatible with EU law?

The previous subparagraphs highlighted that, on the one hand, neither the Directive, neither the "OECD Procedures", seem to allow the possibility to have undue mutual agreements reviewed through arbitration and, on the other hand, that the EU Arbitration Convention seems to allow this possibility only when there has been a breach of the arm's length principle, but not when, during the MAP, there has been a breach of procedural rules such as the ones envisioned under article 41 of the Charter on Fundamental Rights of the European Union.

As hinted above, this aspect of the MAPs envisioned under the existing dispute resolution mechanisms could entail a breach of article 344 of the TFUE as recently interpreted by the ECJ in Achmea judgment, since these procedures do not seems to ensure – neither via domestic judicial systems – that a tax dispute will always be settled consistently with the EU Law.

This remark may justify the conclusion that the provisions of the Directive, of the "OECD Procedures" and of the EU Arbitration Convention dealing with the grounds to engage in arbitration could be extensively interpreted as to ensure that taxpayers can always request the starting of the arbitration procedure whenever they believe that the mutual agreement has been reached in violation of the EU Law.

3. Impeding causes for the initiation of arbitration: the on-going of domestic litigation (referral to chapter IV).

All the existing dispute resolution mechanisms include some impediments as to the possibility to carry out in parallel domestic remedies and arbitration whenever the national laws of the States involved in a dispute do not allow the tax authorities to derogate from national courts' decisions[25].

[25] This occurs in the vast majority of the EU Member States. H.M. PIT, *op. cit.*, 842, notes that in the annex to the EU Arbitration Convention 14 of the 28 EU Member States have declared that their competent tax authorities can't derogate from the decisions of their national judicial bodies. Precisely, these States are: Italy, Belgium, France, Czech Republic, Hungary, Latvia, Lithuania, Malta, Poland, Portugal, Slovakia, Slovenia, Spain and the United Kingdom.

More specifically: on the one hand, the Directive[26] and the "OECD Procedures"[27-28] prevent the initiation of arbitration if the question in dispute is decided before the taxpayers' request to begin the arbitration procedure, or the termination of arbitration if the national decision intervenes during such procedure. On the other hand, the EU Arbitration Convention even requires taxpayers to withdraw from the domestic proceedings in order to start the arbitration stage[29].

[26] See article 16(4) of the Directive: "*Where a decision on a question in dispute has been rendered by the relevant court or other judicial body of a Member State, and the national law of that Member State does not allow it to derogate from the decision, that Member State may provide that:* [lett. b] *before the affected person has made a request under Article 6(1), the provisions of Article 6(1) do not apply if the question in dispute had remained unresolved during the whole of the mutual agreement procedure under Article 4, in which case the competent authority of that Member State is to inform the other competent authorities of the Member States concerned of the effect of the decision of the relevant court or other judicial body;* [lett. c] *the dispute resolution process under Article 6 is to be terminated if the decision of the relevant court or other judicial body was rendered at any time after an affected person has made a request under Article 6(1) but before the Advisory Commission or the Alternative Dispute Resolution Commission has delivered its opinion to the competent authorities of the Member States concerned in accordance with Article 14, in which case the competent authority of the relevant Member State concerned is to inform the other competent authorities of the Member States concerned and the Advisory Commission or the Alternative Dispute Resolution Commission of the effect of the decision of the relevant court or other judicial body*".

[27] Whilst article 25 of the OECD MC doesn't expressly regulate this matter, article 19(12) of the MLI states that "*A Party may reserve the right for the following rules to apply with respect to its Covered Tax Agreements notwithstanding the other provisions of this Article: (a) any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for by this Convention shall not be submitted to arbitration, if a decision on this issue has already been rendered by a court or administrative tribunal of either Contracting Jurisdiction; (b) if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting Jurisdictions, a decision concerning the issue is rendered by a court or administrative tribunal of one of the Contracting Jurisdictions, the arbitration process shall terminate*".

[28] It is worth noting that the Directive precludes the initiation of arbitration if the question in dispute is decided before the taxpayers' request to begin the arbitration procedure, and provides for the termination of arbitration if the national decision intervenes during such procedure, only if the national laws of the States involved in a dispute do not allow the tax authorities to derogate from national courts' decisions. By contrast, the MLI makes the same rules subject to an express reservation pursuant to article 12 of the same MLI. Nevertheless, it should be highlighted that all the EU Member States whose legislation do not allow their tax authorities to derogate from the decisions of their national Courts (who have opted for Part VI of the MLI) have formulated the reservation envisioned under article 12 of the MLI. Italy, Belgium, France, Malta, Portugal, Slovenia, Spain and the United Kingdom, indeed, have all reserved the right to apply article 12 of the MLI (see OECD, *Signatories and parties to the multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting*, Status as of 8 August 2019, available at https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf).

[29] Article 7(3) of the EU Arbitration Convention reads: "*Where the domestic law of a Contracting State does not permit the competent authorities of that Stat to derogate from the decisions of their judicial bodies, paragraph 1 shall not apply unless the associated enterprise of that State has allowed the time provided for appeal to expire, or has withdrawn any such appeal before a decision has been delivered*" (for further insights on this provision see chapter IV).

Nevertheless, as it will be further discussed in chapter IV, these provisions have a limited practical relevance.

The Directive, the EU Arbitration Convention and the "OECD Procedures", indeed, all provide for the procedures laid down therein to be effectively begun only when, alternatively, the domestic judicial remedies come to an end or the taxpayers are able to obtain their suspension. In other words, given that arbitration may start only at the end of a MAP, where taxpayers request the lodging of an international procedure together with a domestic appeal, it is clear that there is room for overlap between both – and, thus, the above mentioned provisions come into play – only if the taxpayer is able to obtain the suspension of (or withdraws from) the domestic proceedings.

4. (Follows). Additional impeding causes for the initiation of arbitration under the MLI.

In chapter I it was highlighted that, among the possible reservations to Part VI of the MLI, States may reserve, pursuant to article 28(2)(a) of the same MLI, the right to choose which cases shall be eligible for arbitration. For example, pursuant to this provision, Italy has reserved the right to exclude from the scope of Part VI of its Covered Tax Agreements: *(i)* cases concerning items of income or capital that are not taxed by a Contracting Jurisdiction because they are not included in the taxable base in that Contracting Jurisdiction or because they are subject to an exemption or zero tax rate provided under the domestic tax law of that Contracting Jurisdiction; *(ii)* cases involving the application of an anti-abuse rule in a Covered Tax Agreement or in Italy's domestic legislation, namely article 10-bis of Law n. 212/2000; *(iii)* cases concerning dual resident persons; *(iv)* cases involving penalties related to tax fraud, wilful default and gross negligence[30-31].

[30] Italy's MLI position is available at the following link: http://www.oecd.org/tax/treaties/beps-mli-position-italy.pdf. See, at this regard, M. TRIVELLIN, *op. cit.*, 163 – 165; C. GARBARINO, *Diritto convenzionale tributario*, Milano, 2019, 54 – 55; C. GARBARINO, P. OCCHIUTO, *Lo strumento multilaterale per la modifica dei Trattati contro le doppie imposizioni*, in *Fiscaltà e commercio internazionale*, 2018, 47 – 53.

[31] Article 28(2)(a) of the MLI recalls, at some extent: *(i)* article 16, paragraphs 6 and 7, of the Directive, according to which the competent tax authorities of each state involved in a dispute may deny access to the Directive's dispute resolution procedure in cases where, respectively, "*penalties were imposed in that Member State*" for "*tax fraud, willful default and gross negligence*" and where "*a question in dispute does not involve double taxation*"; *(ii)* article 8 of the EU Arbitration Convention, according to

Moreover, it was highlighted that this type of reservation can turn to be particularly delicate for the flowing of the procedure. Indeed, according to art. 28(2)(b) of the MLI, such a reservation is subject to the acceptance of the other contracting State, meaning that if the other contracting State raises an objection to such reservation, the consequence is that the entirety of Part VI will no longer apply to the CTA entered into between the objecting and the reserving States.

Article 28(5) states that a reservation under paragraph 2(a) would generally be made at the time of signature or when depositing the instrument of ratification, acceptance or approval[32]. On a similar note, paragraph 2(b) specifies that a reservation made under paragraph 2(a) shall be considered accepted if the other State has not notified the Depositary that it objects to the reservation by the end of a period of twelve calendar months beginning from the date of the notification of the reservation, or by the date on which the Party deposits its instrument of ratification, acceptance, or approval, whichever is later[33].

This mechanism seems to prevent the possibility for States to invoke on a case-by-case basis article 28(2)(a) of the MLI, thus ensuring that taxpayers will be able to know in advance, when filing the request for a MAP, if a specific case is suitable – or is not suitable – to be referred to arbitration[34].

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which the competent tax authorities of each state involved in a dispute may deny access to the Convention's dispute resolution procedure in cases where the taxpayers are "*liable to a serious penalty*". These provisions have been already analyzed in the previous chapter (see retro chapter II, par. 1.4.), assuming that they prevent access to the whole procedures envisioned under the Directive and the EU Arbitration Convention, thus also to the MAP. Nevertheless, it should be recalled that the majority of the doctrine adopts the view that when a Member State decides to invoke article 16, paragraphs 6 and 7, of the Directive, the competent authorities would still have to take a decision on whether to accept the complaint under article 5(1) and – if this decision is positive – to initiate the MAP under article 4. More specifically, it has been argued that both paragraphs 6 and 7 of article 16 refer only to the procedure regulated under article 6 and, as a consequence, both articles 5(1) and 4 would be disregarded from the scope of application of these two provisions (see, inter alia, P. PISTONE, *The Settlement of Cross-border Tax Disputes in the European Union*, in J. WATTEL, O. MARRES, H. VERMEULEN (edited by), *Terra/Wattel European Tax Law*, Wolters Kluwer, 2018, 375 – 376). As to the reasons why the view adopted by the majority of the doctrine doesn't seem entirely sharable, see retro chapter II, par. 1.4.

[32] See, for further clarifications, OECD, *Explanatory statement to the multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting*, par. 266.

[33] See, for further clarifications, OECD, *Explanatory statement to the multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting*, par. 267.

[34] For a general overview of such reservations see H.M. PIT, *Arbitration under the OECD Multilateral Instrument: Reservations, Options and Choices*, in *Bulletin for International Taxation*, 2017, 568 ss.; G. GROEN, *The Nature and Scope of the Mandatory Arbitration Provision in the OECD Multilateral*

It should, nevertheless, be noted that some EU Member States, pursuant to article 28(2)(a) of the MLI, have decided to exclude from arbitration all those cases that the relevant authorities involved in a dispute may find – on a case-by-case basis – not suitable for arbitration[35].

For instance, Spain has formulated such a reservation as follows: "*The Kingdom of Spain reserves the right to exclude from the Scope of Part VI cases which the competent authorities of both Contracting Jurisdictions agree are not suitable for resolution through arbitration. Such agreement shall be reached before the date on which arbitration proceedings would otherwise have begun and shall be notified to the person who presented the case*".

Reservations drafted in such a manner seem to decrease greatly the legal protection of taxpayers, given that: on the one hand, they prevent taxpayers to know in advance, before the starting of the MAP, on whether the case in dispute is suitable to be submitted to arbitration and, on the other hand, they may be opportunistically invoked by tax authorities in order to stop the procedure whenever they are no longer willing to settle the case on an international stage.

These concerns seem even heightened as the MLI doesn't provide taxpayers with any sort of remedy in order to counteract against denials of access to the arbitration stage whenever the tax authorities claim that the case in dispute cannot be referred to arbitration in light of the reservations made by the contracting States pursuant to article 28(2)(a) of the MLI[36].

5. The composition of the "arbitration panels".

Convention (2016), in *Bulletin for International Taxation*, 2017, 611 – 613, who also notes that "The ability to make such reservations may be regarded as reducing the effectiveness of the dispute settlement procedure, but it should be remembered that without such reservations the competent authorities might not wish to initiate the international stage of the MAP at all and by doing so would forgo the chance to arrive at a bilateral solution, for fear of losing control over the process if they could not come to an agreement in a MAP".

[35] Ths is, precisely, the case of Spain, Sweden and France (see G. GROEN, *loc. ult. cit*. and M. TRIVELLIN, *loc. ult. cit*.).

[36] At this regard, see M. TRIVELLIN, *op. cit*., 165: "*In questi casi, le Autorità competenti sarebbero autorizzate a rifiutare l'arbitrato. Poiché, però, il diniego incide in modo rilevante sugli interessi del soggetto passivo, si dovrebbe immaginare una tutela affine a quella avverso il diniego di MAP, anche perché la decisione di rifiutare la nomina del Collegio parrebbe dover essere assunta dall'organo che esprime la posizione dell'Amministrazione nazionale*".

In the introduction of this chapter it has already been highlighted that, under all the existing dispute resolution mechanisms, tax authorities involved in a dispute (unlike taxpayers) have the power to appoint the members of the "arbitral" boards that shall, eventually, take the final decision on a case.

For this reason it was concluded that none of the arbitration procedures envisioned in the existing dispute resolution mechanisms – regardless the *nomen iuris* used – can be viewed as "proper" arbitrations procedures, *i.e.* as procedures that perform a judicial function. Nevertheless, it was also brought forward that all these mechanisms contain certain provisions that are aimed to ensure that the "arbitration panels" are not composed exclusively by the same tax authorities' representatives that have conducted the MAP.

The reason for the inclusion of such rules seems clear: to ensure the effectiveness of the arbitration by granting to taxpayers a final decision of the case. As stated above, arbitration starts only when the relevant tax authorities fail to reach an agreement during the MAP; therefore, the nature of arbitration entails that the persons that conducted the MAP should no longer be part of the decision making process. Indeed, given that Member State representatives would be likely to experience difficulties in altering the positions that they assumed during the MAP, the best possible solution in order to break the deadlock experienced during the MAP, and thus deliver a decision on the elimination of double taxation, would be to entrust independent experts with the resolution of the dispute and to prevent States' representatives from having "a seat" in the arbitration panel[37].

The question to be answered in this respect is whether the rules included in the Directive are an improvement if compared to the rules included in the "OECD Procedures" and in the EU Arbitration Convention.

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[37] See D.R. TILLINGHAST, *Issues in the Implementation of the Arbitration of Disputes Arising under Income Tax Treaties*, in *Bulletin for International Taxation*, n. 3/2002, 97: "The competent authorities are parties to the dispute, and they should actively participate in the arbitral proceedings in that capacity. But they are hardly the ones a person would pick to sit in judgement of the dispute, and their presence in the deliberations of the arbitral tribunal will complicate the process and may inhibit a candid discussion of the issues. If a case goes to arbitration, it will be because the competent authorities, having had the opportunity to resolve the case by agreement, have failed. The resolution of the dispute at that point should be entrusted to others".

5.1. The two different "arbitration panels" envisioned under the Directive: the Advisory Commission and the Alternative Dispute Resolution Commission.

When the relevant tax authorities involved in a dispute have not been able to reach an agreement during the MAP within the deadline of two (extendable to three) years, the Directive envisions the possibility to set up two different decision-making boards for the purpose of carrying out the arbitration stage, namely: the Advisory Commission and the Alternative Dispute Resolution Commission.

The Advisory Commission is, according to article 6(2)(b), the arbitration panel that shall be appointed "by default" in the cases where a MAP isn't successfully terminated.

The Alternative Dispute Resolution Commission, by contrast, is an arbitration panel that Member States can decide to appoint on an optional basis, in alternative to the Advisory Commission. The Alternative Dispute resolution Commission can be appointed or on a case-by-case basis, i.e. with regard to a specific dispute, or even as a permanent board for the resolution of all the disputes between such States (the so called "*Standing Committee*")[38]. The logic of setting up an Alternative Dispute Resolution Commission instead of the Advisory Commission should be attributed to the fact that the former board, in comparison with the Advisory Commission, allows Member States a significant degree of freedom as to the choice of the techniques to solve the question in dispute[39].

This paragraph will focus on the differences between these two boards as to their form and composition. The following paragraph (par. 6) will, instead, focus on the different rules that these three boards can follow during the decision-making process.

5.1.1. The Advisory Commission.

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[38] See S. PIOTROWSKI, R. ISMER, P. BAKER, J. MONSENEGO, K. PERROU, R. PETRUZZI, E. REIMER, F. SERRANO ANTÓN, L. STANKIEWICZ, E. TRAVERSA, J. VOJE, *Towards a Standing Committee Pursuant to Article 10 of the EU Tax Dispute Resolution Directive: A Proposal for Implementation*, in *Intertax*, 2019, issue 8/9, 678 ss.

[39] See S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, forthcoming.

The composition of the Advisory Commission is defined by article 8(1) of the Directive.

According to this provision, the Advisory Commission (in bilateral disputes) will standardly be composed of five members: one representative per Member State concerned; two independent persons appointed by each relevant authority of the Member States concerned; one chairman. Article 8(1), however, grants the possibility to alter the composition of the Advisory Commission by enabling each of the Member States concerned to appoint one additional representative of their tax administrations and/or one additional independent person. Consequently (in bilateral disputes) an Advisory Commission can, at a maximum, be composed of nine members.

In the introduction of this section, it was argued that arbitration panels should – ideally – be composed only of independent persons, since the presence in an arbitration panel of representatives of the Member States involved in the dispute could prevent an efficient and effective functioning of the panel; primarily, due to the fact that such representatives would likely advocate for the solution already defended during the MAP, thus impeding to break the *empasse* created by the relevant authorities during such procedure.

These concerns, however, do not seem to affect significantly the functioning of the Advisory Commission.

Although the majority of the Advisory Commission's members consists of Member States' representative, it seems that the real decision power relies, *de facto*, in the hands of the independent persons and of the chairman. Indeed, given that during the arbitration stage the representatives of the Member States will evidently continue to advocate the position assumed during the MAP, and given that each State has an equal number of its representatives, the independent persons' and the chairman's votes will, in the substance, always determine the majority[40] needed to deliver an opinion, thus

[40] See article 14(3) of the Directive: "*The Advisory Commission or Alternative Dispute Resolution Commission shall adopt its opinion by a simple majority of its members. Where a majority cannot be reached, the vote of the chair shall determine the final opinion*".

ensuring that the commission operates independently from the Member States involved[41-42].

5.1.2. The Alternative Dispute Resolution Commission.

As stated above, article 10(1) of the Directive allows Member States' relevant authorities to mutually agree to appoint as arbitration panel an Alternative Dispute Resolution Commission rather than an Advisory Commission. The Alternative Dispute Resolution Commission, precisely, can be appointed or on a case-by-case basis, with regard to a specific dispute, or even as a permanent board for the resolution of all the disputes between such States ("*Standing Committee*").

As to the composition of such board, the Directive leaves great flexibility to Member States. Indeed, article 10 doesn't require a minimum or a maximum number of members, nor that such members should consist of both Member States' representatives and independent person. Such flexibility bears the risk that Member States may agree on a commission that only consists of their own representatives. This would prevent the ADR Commission to function in an efficient manner and to provide for a breakthrough in the deadlock created by the relevant authorities during the MAP[43].

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[41] Accordingly, see A.N. IBARROLA, *Elimination of Double Taxation in the European Union: Former Article 293 TEEC, EU Competences and Controversial Aspects of the Arbitration Directive*, in J. M. ALMUDI CID, J. A. FERRERAS GUTIÉRREZ, P. A. HERNÁNDEZ GONZÁLEZ-BARREDA (edited by), *Combating Tax Avoidance in the EU*, Wolters Kluwer, 2019, 384.

[42] The Member States' representatives' role within the Advisory Commission, therefore, seems limited to audit the process and to present the case to the independent members. One may argue that the presence of States' representatives within the Advisory Commission could help to facilitate and expedite the whole arbitration procedure, since such representatives are already aware of the most delicate aspects of the case under review. See, however, the sharable, critical remarks of S. GOVIND, L. TURCAN, *The Changing Contours of Dispute Resolution in the International Tax World: Comparing the OECD Multilateral Instrument and the Proposed EU Arbitration Directive*, in *Bulletin for International Taxation*, 2017, par. 3.4.: "the advisory commission has many more members, at least five and up to nine members, compared to an arbitral panel under the OECD Model and the UN Model, which would consist of three members. This would make the appointment of the advisory commission more cumbersome and the procedures costlier. At the very least, the number of representatives of competent authorities should be reduced to a maximum of one from each Member State".

[43] See S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, *op. cit.*: "the core elements of the appointment procedure laid down in the Directive […] can be structurally derogated within the Alternative Dispute Resolution Commission setting. As to that, the most significant aspect is that, though not conflict of interest is allowed, no rule provides that at least some of the appointed members shall be neutral in respect to both Member States or, even more significantly, in respect to the affected

This risk, however, seems avoided by the fact that article 10(2)[44] expressly states that the members of the ADR Commission must comply with the independence requirements laid down under article 8(4)[45]. The reference to this provision, precisely, seems rather to imply that States will be able to appoint as members of the ADR Commission only independent persons rather than representatives of their own, thus increasing greatly the independence of the ADR Commission in comparison to the Advisory Commission.

5.1.3. (Follows) The possibility to appoint the European court of Justice as an Alternative Dispute Resolution Commission.

It is worth noting that the inclusion of article 10 ("*The Alternative Dispute Resolution Commission*") in the final text of the Directive followed the proposal of some Member States (Germany at first) to involve the ECJ to act as an arbitrator within the procedure envisioned in the Directive. More specifically, given that some Member States (particularly the United Kingdom) fiercely opposed to an active role of the ECJ in the field of tax litigation, Member States agreed to insert article 10 in order to find a compromise between these two positions. Although such provision doesn't make clear reference as to the possibility to appoint the ECJ as an ADR Commission, it was, nevertheless, agreed the wording of such provision so as to leave great flexibility to Member States as to the choice of the form of such arbitral board and, thus, even to

person. Indeed, Member States may well stipulate that no independent person of standing shall be appointed and, as a consequence, the dispute resolution body could be composed only of selected members of the competent authorities involved".

[44] Article 10(2) of the Directive states that "*Except for the rules regarding the independence of its members set out in Article 8(4) and 8(5), the Alternative Dispute Resolution Commission may differ regarding its composition and form from the Advisory Commission*".

[45] Article 8(4) of the Directive, precisely, envisions a mechanism that prevents that one competent authority may appoint as arbitrator a person who: (i) "*belongs to or is working on behalf of one of the tax administrations concerned or was in such a situation at any time during the previous 3 years*"; (ii) "*has, or has had, a material holding in or voting right in or is or has been an employee of or adviser, at any time during the last 5 years prior to the date of his appointment, to any affected person concerned*"; (iii) "*does not offer a sufficient guarantee of objectivity for the settlement of the dispute or disputes to be decided*"; (iv) "*is an employee with an enterprise that provides tax advice or otherwise gives tax advice on a professional basis, or was in such a situation at any time during a period of at least 3 years prior to the date of his appointment*".

appoint the ECJ as an arbitrator in the form of an ADR Commission (both on a case-by-case or on a permanent basis)[46].

Whether or not the Directive actually grants this possibility should, however, be closely examined.

Pursuant to article 273 of the TFUE, "*The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties*". This provision, precisely, poses that the ECJ has jurisdiction in any dispute between Member States if three conditions are satisfied: *(i)* the dispute is between Member States; *(ii)* the dispute relates to the subject matter of EU law; *(iii)* the dispute is submitted to the ECJ under a special agreement between the parties.

In order to assess whether the Directive, by means of article 10, actually allows the appointment of the ECJ as arbitrator, it should be recalled a recent judgment of the ECJ[47] that – for the first time – provided for the interpretation of these three elements with regard to the resolution of a tax dispute under the double tax convention between Austria and Germany[48].

Precisely, in this judgment, the ECJ confirmed its jurisdiction over the tax dispute between Austria and Germany by drawing the following considerations in relation to the three elements envisioned in article 273 of the TFUE.

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[46] See H.M. PIT, *op. cit.*, 386, who also refers to EUROPEAN COMMISSION, *Summary report on the 2016 Consultation on improving double taxation dispute resolution mechanisms*, sec. III.3., where is stated that "Because some members states did not want to have a specific reference to the ECJ, it was agreed that 'permanent structures' could involve the EU court".

[47] ECJ, 12 Sept. 2017, case C-648/15, *Austria v. Germany*. On this judgment see, inter alia, M. LANG, *Double Taxation Convention in the Case Law of the CJEU*, in *Intertax*, 2018, issue n. 3, 181 ss.; J. LUTS, C. KEMPENEERS, *Case C-648/15 Austria v. Germany: Jurisdiction and Powers of the CJ to Settle Tax Treaty Disputes Under Article 273 TFEU*, in *EC Tax Review*, n. 1/2018, 5 ss.; B. MICHEL, *Austria v. Germany (Case C-648/15): The ECJ and Its New Tax Treaty Arbitration Hat*, in *European Taxation*, 2018, 2 ss.

[48] Article 25(5) of this treaty (which, at the present moment, constitutes a *unicum* in the tax dispute resolution scenario), precisely, reads as follows: "*If any difficulty or doubt arising as to the interpretation or application of the Convention cannot be removed by the competent authorities by the use of the mutual agreement procedure as provided for by the foregoing paragraphs of this Article within a period of 3 years from the date of initiation of the procedure, the States upon application of a person covered by paragraph 1 shall be obliged to refer the case to arbitration proceedings before the European Court of Justice pursuant to Article 239 of the EC treaty* [now article 273 of the Treaty on the Functioning of the European Union]".

As to the first element, the Court outlined that there was undoubtedly a dispute between Austria and Germany, given that: (a) both countries claimed the exclusive right to tax certain income; (b) those concurrent claims led to double taxation of a taxpayer, which is contrary to the aims of the tax treaty; (c) the States weren't able to find a solution during the MAP. It is striking to note that the ECJ seems to have interpreted the sentence "*disputes between Member States*" laid down under article 273 of the TFUE in a rather flexible manner, given that it gave no relevance to the fact that the dispute concerned an administrative procedure and that the outcome of the dispute settlement through arbitration wouldn't have had a *res judicata* effect (i.e. it wouldn't have had binding effects upon the judiciary branches of the Member States involved).

As to the second element, the ECJ explained that the sentence "*relates to the subject matter of the Treaties*" laid down under article 273 of the TFUE has to be understood as an "objectively identifiable link with the subject matter of the Treaties" and concluded that a dispute concerning the interpretation of a tax treaty meets this criterion, given that the mitigation of double taxation has a beneficial effect on the functioning of the internal market. More specifically, at this regard the ECJ referred to the Commission's conclusions in its communication of 11 November 2011, where it was stated that the purpose (and effect) of the conclusion of a tax treaty between Member States is to "eliminate or mitigate certain consequences resulting from the uncoordinated exercise of heir power of taxation, which is, by nature, capable of restricting, discouraging or rendering less attractive the exercise of the freedoms of movement provided for in the TFEU".

As to the third and last element, the Court acknowledged that article 25(5) of the tax Convention between Austria and Germany did not entail an arbitration clause to resolve the specific question in dispute, but rather "a general term of the Austro-German convention" that was drafted "before that dispute arose". In other words, according to the ECJ, article 25(5) of this treaty cannot be defined, *strictu sensu*, as a "special agreement" between Austria and Germany to submit that specific dispute to the jurisdiction of the Court. Nevertheless, the ECJ – by recalling a previous case where the Court had the opportunity to interpret the scope of article 273 of the TFU and the general objective of this provision (which – according to the Court – "consists in affording the Member States a means of resolving those of their disputes which relate to the subject matter of the Treaties within the framework of the EU judicature") – also noted that "there is no reason for the parties not to acknowledge, before a dispute arises, an agreement on the referral to the Court of any potential dispute" and, therefore, considered that article 25(5) of the Austria-Germany convention is a "special agreement" in light of article 273 of the TFUE.

The conclusions reached by the ECJ as to the first and the second elements of article 273 of the TFUE with regard to article 25(5) of the Austria-Germany treaty, seem valid, *mutatis mutandis*, with regard to the Directive. The Directive, indeed, applies to disputes between Member States that arise in connection with the interpretation and the application of existing double tax treaties. Moreover, as to the third element, there seem to be no doubts as to the fact that the agreement between two (or more) Member States to appoint the ECJ as an ADR Commission on the basis of article 10(1) of the Directive could constitute a "special agreement" according to article 273 of the TFUE, both when such appointment is made on a case-by-case basis, i.e. for the resolution of a specific dispute, and when – as it occurs under article 25(5) of the Austria-Germany convention – such appointment is of a permanent nature, i.e. it is made in advance with regard to all the dispute that will rise between the two (or more) States entered into the agreement .

5.2. The "arbitration panel" envisioned under the EU Arbitration Convention: the Advisory Commission.

When the relevant tax authorities involved in a dispute have not been able to reach an agreement during the MAP within the deadline of two (extendable to three) years, article 7 of the EU Arbitration Convention envisions a mandatory arbitration procedure that has to be conducted by an "Advisory commission".

The composition of the Advisory Commission under the EU Arbitration Convention resembles, almost exactly, the composition of the Advisory Commission under the Directive (*rectius*, the composition of the Advisory Commission under the Directive substantially copies the composition of the Advisory Commission under the EU Arbitration Convention). The main differences between such boards lie in the number of the members. More specifically, if the Advisory Commission (in bilateral disputes) under the Directive will standardly be composed of five members; the Advisory Commission (in bilateral disputes) under the EU Arbitration Convention will standardly be composed of seven members. Pursuant to article 9 of the EU Arbitration Convention, indeed, the Advisory Commission generally consists of: (i) a chairman; (ii) two representatives from each Member States and (iii) an even number of independent persons.

Despite these differences, exactly as it was concluded above with regard to the Advisory Commission envisioned under the Directive (see par. 5.1.1.), it can be concluded that also within the Advisory Commission envisioned under the EU Arbitration Convention the real decision-making power lies in the hands of the chairman and of the independent persons. Indeed, also under the EU Arbitration Convention each State has an equal number of its representatives and, pursuant to article 11(2), "*The advisory commission shall adopt its opinion by a simple majority of its members*"[49].

In light of this circumstance, it can thus be concluded that also under the EU Arbitration Convention the Advisory Commission is able to function – not *de jure*, but *de facto* – independently from the Member States involved.

5.3. The "arbitration panel" envisioned under the "OECD Procedures".

Article 25(5) of the OECD MC remains silent as to the procedural rules that have to be followed during arbitration and states that all such rules have to be decided by relevant authorities through an *ad hoc* MAP.

Part VI of the MLI, however, signalled a change to this approach and included several, specific procedural rules as regards arbitration.

With specific regard to the composition of the arbitration panel, article 20 of the MLI expressly states that the arbitration panel shall consist of three members with expertise

[49] Accordingly, see L. HINNEKENS, *The European Tax Arbitration Convention and its Legal Framework – II*, in *British Tax Review*, n. 3/1996, 305: "The Convention system of commission make-up raises a first problem of numbers (Article 9). […] the revenue authorities' vote prevails on the independent vote. But this imbalance disregards the fact that the adversary parties in the arbitration are the tax authorities of the two Contracting States concerned. And that in arbitration proceedings the third arbitrator is the centre of gravity. This composition is satisfactory on this score of the numbers. The independent vote is determinant in case of a tie between the votes of the two adverse parties procedure (2 versus 2)".

in international tax matters. Precisely: *(i)* each relevant authority appoints one member of the panel and *(ii)* the two panel members so appointed have to appoint a third member, who shall serve as Chairman of the arbitration panel.

As to the rules governing the appointment of the arbitration panel's members, article 20(2)(c) of the MLI states that the arbitration panel must: *(i)* be "*impartial*" and "*independent*" of the relevant authorities, tax administrations, ministries of finance of the Contracting Jurisdictions and persons directly affected by the case (as well as their advisors); *(ii)* maintain its "*impartiality*" and "*independence*" throughout the proceedings; *(iii)* avoid any conduct for a reasonable period of time thereafter which may damage the appearance of "*impartiality*" and "*independence*" of the arbitrators with respect to the proceedings.

It is striking noting that under the "OECD Procedures" the Member States cannot appoint any of their representatives as arbitrators.

This aspect clearly distinguishes the arbitration panel envisioned under the "OECD Procedures" from the Advisory Commission envisioned under both the Directive and the EU Arbitration Convention. Although it is true that, in the current state of play, the Advisory Commission composition envisioned under both the Directive and the EU Arbitration Convention provides for a sufficiently independent character, the approach followed by the MLI (that is also shared by the Directive with regard to the ADR Commission) seems, nevertheless, preferable.

Indeed, the fact that relevant tax authorities have no seat in the arbitration panel seems to contribute to ensure an even more efficient functioning of the arbitration proceedings: it seems indeed established that the possibility to appoint as arbitrators persons working in Member States' tax assessment or audit departments who were previously involved in the case (and even, as the case may be, the same tax inspector who imposed the profit adjustment under review or the same tax inspector) doesn't facilitate or expedite the running of the arbitration procedure.

Moreover, the approach adopted under the "OECD Procedures" as to the composition of the arbitral panel seems preferable even because it considerably limits the number of arbitrators. Indeed, the choice to have (at least five) arbitrators under the Directive and (at least seven) arbitrators under the EU Arbitration Convention renders the whole procedure unnecessarily cumbersome and costly[50].

On a final note, it should be stressed that the reference made by the different provisions of the existing dispute resolution tools to the "impartiality" or to the "independence" of the arbitrators does not imply that such arbitral panels are "independent" and "impartial" with respect to both the relevant tax authorities and the taxpayers, nor – as a consequence – that arbitration in the tax field is a procedure that performs a judicial settlement of disputes between taxpayers and tax authorities.

Indeed: *(i)* on the one hand, it should be reminded that taxpayers – unlike tax authorities – have no control over the appointment of their members; *(ii)* on the other hand, its should also be pointed out that under all the existing dispute resolution mechanisms the fees and the expenses of the arbitration panels are paid only by the contracting jurisdictions[51].

As a consequence, the reference made by such provisions to the "impartiality" and the "independence" of arbitrators seems to be purely aimed to ensure the effectiveness of the procedure and, precisely, to avoid that the same persons that have conducted the MAP may inhibit debates on how to solve the case under review.

6. Procedural rules governing the establishment of the "arbitral panels".

The previous paragraph analysed the composition of the arbitration panels envisioned in the existing dispute resolution tools and concluded that both the Directive and the EU Arbitration Convention, in comparison with the "OECD Procedures", offer less guarantees as to the independence of the arbitral panels' members with respect to the tax authorities involved in a dispute.

This paragraph will briefly examine the procedural rules governing the establishment of such "arbitral panels", given that such rules are of a pivotal importance for the functioning of arbitration. Indeed, it is established that if a dispute resolution mechanism doesn't provide for rules that contain strict deadlines for the setting up of

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[50] S. GOVIND, L. TURCAN, *loc. ult. cit*.

[51] See article 12 of the directive, article 11(3) of the EU Arbitration Convention and article 25 of the MLI.

the arbitration panels and/or for mechanisms that ensure the establishment of such panels when the relevant authorities fail to do so, tax authorities could eventually be able to block, at their own discretion, the beginning of the arbitration procedure, thus preventing the conclusion of the whole procedure and the reaching of a final decision that eliminates double taxation.

This concern – as it will be further highlighted – affects, *prima facie*, only the EU Arbitration Convention, given that this is the only dispute resolution tool that doesn't provide for a default mechanism that ensures the establishment of an advisory commission and the appointment of its members if the relevant authorities fail to fulfil such obligation. Nevertheless, also the rules envisioned in the Directive as to the establishment of the arbitration panels seem to suffer some loopholes.

In light of this circumstances, at the end of this paragraph, it will be concluded that, at the current stage of the international tax dispute resolution scenario, the arbitration envisioned in the MLI is the one that grants to taxpayers the greatest legal protection, since it is the only arbitration procedure that actually grants to taxpayers, in any possible case, the establishment of the arbitral panels and, thus, the reaching of a final decision[52].

6.1. The main weakness of the EU Arbitration Convention: the lack of an obligation upon the tax authorities to appoint the Advisory Commission.

As stated above, article 7(1) of the EU Arbitration Convention stipulates that if Member States fail to reach a mutual agreement, the case is mandatorily referred to arbitration. Unlike what occurs under the Directive and the "OECD Procedures" – where the arbitration starts only if the taxpayers so require –, under the EU Arbitration Convention arbitration is directly and automatically triggered by the relevant tax authorities.

It is, however, striking to note – as hinted above – that the EU Arbitration Convention doesn't set any deadline for the relevant tax authorities to appoint the Advisory

[52] *Contra* S. GOVIND, *The New Face of International Tax Dispute Resolution: Comparing the OECD Multilateral Instrument with the EU Dispute Resolution Directive*, in *EC Tax Review*, n. 6/2018, 317: "As opposed to the MLI and tax treaties, the appointment mechanism under the Directive is thorough and allows the taxpayer more protection at every level".

Commission, nor it provides for a default mechanism that ensures such appointment when tax authorities fail to establish the Commission. Article 9 (7) of the Convention, indeed, only provides that "*The Contracting States shall take all necessary steps to ensure that the advisory commission meets without delay once cases are referred to it*".

The lack of such rules is a serious shortcoming, as to the risk for the advisory commission not being established at all[53].

It is, therefore, not surprising to discover that the available statistics show that the EU Arbitration Convention is not functioning properly, given that – up to the 31 December 2017 – of 80 cases eligible for arbitration, only 2 have been reported as actually being refereed to that procedure[54].

6.2. The establishment of the arbitral panels under the Directive: the Directive seems subject – at some extent – to the same weakness of the EU Arbitration Convention.

The Directive provides for a strict deadline within which the Advisory Commission needs to be established and a default mechanism that ensures such appointment when the relevant authorities fail to do so.

Precisely, on the one hand, article 6(1)(b), last sentence, of the Directive, states that "*The Advisory Commission shall be set up no later than 120 days*" from the taxpayer's request to start arbitration. On the other hand, article 7 of the Directive ("*Appointments by relevant courts or national appointing*") assigns to domestic courts competence to appoint the Advisory Commission's members (*rectius*, the independent members of the Commission) when the relevant tax authorities fail to do so[55].

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[53] See, accordingly, H.M. PIT, *op. cit.*, 641 – 643.

[54] EU JOINT TRANSFER PRICING FORUM, *Overview of numbers submitted for Statistics on Pending Mutual Agreement Procedures (MAPs) under the Arbitration Convention (AC) at the End of 2017*, Meeting of 24 October 2018. See, for similar considerations with regard to the EU Arbitration Convention's statistics updated to the 31 December 2009, K. PERROU, *Taxpayer Participation in Tax Treaty Dispute Resolution*, IBFD, 2014, *Online Books*, par. 1.3.2.

[55] In this respect two situations are possible: *(i)* the first situation is that only one competent authority fails to nominate its own independent member(s) of the Commission; *(ii)* the second situation is that all the competent authorities involved in the dispute fail to appoint the independent persons of the Commission. In the first scenario, article 7(1) of the Directive grants to the affected persons the right to request the domestic courts of that competent authority to appoint the independent person instead. In the second scenario, the same article 7(1) of the Directive grants to the affected persons the right to

According to many authors – by providing for a strict deadline within which the Advisory Commission needs to be established and for a default mechanism that ensures such appointment when the relevant authorities fail to do so – the appointment mechanism envisioned under the Directive allows the taxpayer to be more protected[56] and, thus, has solved the main bottleneck of the EU Arbitration Convention.
This conclusion, however, doesn't seem entirely sharable.
The first consideration to be made at this regard is that both the deadline of 120 days for the establishment of the arbitral panel and the default mechanism that ensures its establishment by domestic courts when the relevant authorities fail to do so, seem to apply only with respect to the Advisory Commission and not with respect to the ADR Commission[57]. Indeed, on the one hand, article 10 of the Directive ("*The Alternative Dispute Resolution Commission*") doesn't pose any time limit for the establishment of such board, nor it provides for a rule that deals with the case in which the relevant authorities fail to establish it at all. On the other hand, the same article 10 makes no reference nor to article 6(1)(b), last sentence (which – as stated above – states that the Advisory Commission shall be set up no later than 120 days from the taxpayer's request to start arbitration), nor to the enforcement mechanism laid down under article 7.
As a result, the relevant tax authorities involved in a dispute may well be able to block, at their own discretion, the flowing of the whole procedure by just agreeing to conduct arbitration through an ADR Commission (instead then through an Advisory Commission) and then remaining passive as to the appointment of such board.
The second consideration to be made is that the enforcement mechanisms envisioned in article 7 for requesting the domestic courts the appointment of the members of the Advisory Commission only relates to the case in which the relevant authorities have not appointed the independent members of such Commission. No Directive's

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request before the domestic courts of each of the Member States involved in the dispute to appoint the independent persons instead.

[56] See, for instance, S. GOVIND, *loc. ult. cit*.

[57] As stated above in paragraph 5.1., the Directive envisions the possibility to set up two different decision-making bodies for the purpose of carrying out the arbitration stage, namely: the Advisory Commission and the Alternative Dispute Resolution Commission.

provision puts in place a similar mechanism when relevant authorities fail to appoint their own representatives as members of the Advisory Commission (as seen above, the Advisory Commission consists of both independent persons and tax authorities' representatives)[58].

As a result, the relevant tax authorities may even block the flowing of the procedure by just refusing to appoint their representatives as members of the Advisory Commission.

6.3. The establishment of the arbitral panels under the "OECD Procedures".

Similarly to the Directive, article 20 of the MLI provides for both a strict deadline within which the Advisory Commission needs to be established and a default mechanism that ensures such appointment when the relevant authorities fail to do so.

Precisely, on the one hand, article 20(2)(b) states that "*Each competent authority shall appoint one panel member within 60 days of the date of the request for arbitration*"; on the other hand, article 20(3) and (4) state that if one or both of the relevant tax authorities fail to appoint a member of the arbitration panel in the manner and timeframe specified by the MLI, the appointment of such member(s) shall be made by the highest ranking official of the Centre for Tax Policy and Administration of the OECD (hereinafter "CTPA").

As it is evident, the enforcement mechanism envisioned under article 20 of the MLI – unlike the one envisioned under the Directive – renders truly impossible for relevant tax authorities to block the initiation of the arbitration procedure by just refusing not

[58] Accordingly, see S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, *op. cit.*: "no provision is directed at countering competent authorities' lax attitude in appointing their own representatives as members of the Advisory Commission pursuant to Article 8(1)(b). One may argue that the lack of a specific rules in connection thereto is based on the principle that Member States should cooperate in good will in ensuring the application of the rights and remedies laid down in the Directive and, therefore, they should not obstruct the appointment of their own representative within the dispute resolution body. In any event, it is undisputable that failure to provide a specific time-limit or any other remedy as to the compulsory appointment of competent authorities' own representatives in the Advisory Commission setting could significantly lengthens the whole process. That drawback may prove to be particularly severe considering that mere lax attitude by just one competent authority in appointing its own representatives could basically trump the smooth functioning of the phase in question in respect to all other Member States and affected persons involved within".

to appoint a member of the arbitration panel, thus ensuring that, once a case has moved to the arbitration stage, it will always be resolved.

This conclusion may be challenged on the grounds that the relevant tax authorities, in order to block the procedure, could just refuse to notify the CTPA of their failure to appoint the arbitration panel; however, it should be highlighted that article 20(3) and (4) of the MLI do not specify how (and by whom) the CTPA should be notified of such failure. In light of this circumstance, it seems arguable that taxpayers can directly and independently notify the CTPA of the fact that the arbitration process has been improperly stalled by the relevant authorities and that, if taxpayers undertake such an action, the CTPA will always be forced to appoint the panel[59].

Therefore, in light of these remarks, it seems possible to conclude that the arbitration procedure envisioned in the MLI offers to taxpayers greater protection as compared to the arbitration procedures envisioned under the Directive and the EU Arbitration Convention, given that it is the legal instrument that actually grants to taxpayers, in any possible case, the reaching of a final decision.

7. Different techniques and types of dispute resolution processes during the arbitration stage.

As it was described in the first chapter (see chapter I, section I), arbitration procedures can be distinguished depending on the way in which the arbitration panel reaches the final decision. Precisely: on the one hand, if the arbitrators have the power to reach the final decision independently, on the grounds of the facts and arguments presented by the parties, it is said that the arbitration is conducted through the "independent opinion approach". On the other hand, if each of the relevant tax authorities have the power to

[59] Accordingly, see G. GROEN, *The Nature and Scope of the Mandatory Arbitration Provision in the OECD Multilateral Convention (2016)*, in *Bulletin for International Taxation*, 2017, 611: "The only substantial improvement over the mandatory arbitration procedure of article 25(5) of the OECD Model is that, if one or both of the competent authorities fail to appoint a member of the arbitration panel in the manner and timeframe specified in article 19(2) of the MLI, a member is appointed by the highest ranking official of the Centre for Tax Policy and Administration (CTPA) of the OECD. Article 19(2) of the MLI does not specify how and by whom the CTPA should be notified of such failure, but the author assumes that, if the affected taxpayer notifies the CTPA of the fact that the arbitration process has been improperly stalled by the competent authorities, the CTPA must take appropriate action and appoint a member. This enforcement mechanism ensures that, once a case has moved to the international stage of a specific case MAP, the case is resolved at the request of the taxpayer".

submit a proposal to the arbitration panel, which then has to adopt one of these proposals as a final decision, it is said that the arbitration is conducted through the "last best offer approach". In other words, the difference between these two approaches lies in the fact that, under the "independent opinion" approach, arbitrators can produce a solution of their own, while, under the "last best offer" approach, arbitrators are restricted to a choice between the solutions proposed by the relevant tax authorities.
Under the Directive and the "OECD Procedures" both these approaches for the conducting of arbitration are possible.
The Directive sets, as a standard, the "independent opinion approach". Indeed, according to article 10(2), the arbitration procedure before the Advisory Commission has to be conducted through the "*independent opinion process*". Nevertheless, when parties agree to refer the arbitration to an ADR Commission, the same provision of the Directive allows Member States to agree on a different type of arbitration procedure and, precisely, on the "last better offer" approach. Article 10(2), indeed, expressly states that "*any other type of dispute resolution process, including the 'final offer' arbitration (otherwise known as 'last best offer' arbitration), can be agreed by the competent authorities* […] *and applied by the Alternative Dispute resolution Commission*"
The "OECD Procedures" follow an opposite approach. Indeed – whilst article 25 of the OECD MC doesn't expressly regulate this matter – article 23 of the MLI sets, as a standard, the "last best offer" approach and admits the "independent opinion approach" only when the parties of a tax treaty covered by the MLI reserve the right not to apply the previous mode of arbitration[60]. It should be immediately recalled (since this seems one of the main weaknesses of the arbitration procedure envisioned in the MLI: see infra) that if a State reserves the right to have arbitration conducted through the "independent opinion" approach, the other State, pursuant to article 23(3), may reserve the right not to apply this approach: in this case, the two States involved in a dispute will have to reach an *ad hoc* agreement on the type of approach to be adopted in that specific case, otherwise the whole procedure will end into a deadlock[61].

[60] See the combination between article 28(1) and article 23(2) of the MLI..

[61] As it will be further discussed, the risk of such a deadlock affects especially Italy. Currently, indeed, various States that have opted for arbitration under the MLI have also reserved the right to apply the

Unlike the Directive and the MLI, the EU Arbitration Convention doesn't expressly mention if the arbitration procedure envisioned therein shall be conducted through the "independent opinion" or through the "last best offer approach"[62].

Nevertheless, it seems established that the only mode of arbitration under this legal instrument is the "independent opinion" approach. Indeed, article 11(1) of the EU Arbitration Convention requires that the final opinion of the Advisory commission is based on the tax principles (i.e. the arm's length principle) laid down under article 4 (see infra for further clarifications). Therefore, it seems that the opinion of the Advisory Commission should reflect what the Advisory Commission itself deems – on the basis of the information provided, of the arguments presented and of the positions assumed by each of the parties involved – to be the correct arm's length price for the transactions under review[63].

8. (Follows). Possible limitations in the reaching of arbitral opinions: the grounds of the agreements.

On a different level from the modes to conduct arbitration, there is the issue concerning whether arbitral opinions can be based on equity and Solomon's judgements (i.e. agreements that determine *ex aequo et bono* the transfer prices; "fifty-fifty" deals; agreements based in other kinds of negotiated base that is unrelated to the tax system), or if, by contrast, such opinions have to be reached through a strict application of the rule of law.

With respect to the reaching of mutual agreements, in the previous chapter it was highlighted that none of the existing dispute resolution mechanisms – apart from the EU Arbitration Convention – clearly set which grounds relevant tax authorities shall

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"independent opinion" approach. Therefore, given that Italy has formulated the reservation of article 23(3), it is likely that in many of the tax disputes where Italy will be involved, the Italian Revenue Agency will necessarily need to reach with its counter-party an ad hoc agreement as to the mode of arbitration to follow in order to end the procedure.

[62] P. PISTONE, *The Settlement of Cross-border Tax Disputes in the European Union*, in J. WATTEL, O. MARRES, H. VERMEULEN (edited by), *Terra/Wattel European Tax Law*, Wolters Kluwer, 2018, 369.

[63] Accordingly, see H.M. PIT, *op. cit.*, 739: "the opinion should reflect what the advisory commission deems to be the correct arm's lenght price for dealings between associated enterprises […]. The advisory commission therby has to deliver this opinion on the information provided, the arguments presented and the positions of each involved party".

reach such agreements on, thus leaving open – in the abstract – the possibility for relevant tax authorities to reach agreements based on equity. This issue was therefore examined both from an Italian perspective, in light of the legality principle, and from an European perspective, in light of the EU's State Aid law, and it was concluded that – from both these perspectives – mutual agreements cannot be based on equity solutions, but must be based on the arm's length principle as advocated by the OECD. This conclusion also applies to arbitration.

However, with respect to arbitration, this conclusion can be reached directly from the wording of the provisions contained in the existing dispute resolution mechanisms. Indeed, unlike what occurs with respect to mutual agreements, all the existing dispute resolution mechanisms clearly lay down which should be the legal grounds of the arbitral opinions.

As to the Directive, article 14 of the Directive states that "*the Advisory Commission or Alternative Dispute Resolution Commission shall base its opinion on the provisions of the applicable agreement or convention* […] *as well as on any applicable national rules*". Therefore, there seem to be no doubts as to the fact that, under the Directive, the arbitrators – in both cases in which the arbitration is conducted through an Advisory Commission (under the "independent opinion approach") or through an

ADR Commission (under the "last best offer approach")[64-65] – are subject to the rule of law and, thus, cannot base the final opinion on equity[66].

As to the EU Arbitration Convention – similarly to the provision laid down under article 14 of the Directive – article 11(1) of the Convention requires that the opinion must be based on the arm's length principle laid down under article 4 of the same Convention (i.e. – as stated under paragraph 6(a) of the Code of Conduct – on the basis of the arm's length principle "*as advocated by the OECD*")[67].

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[64] For a different point of view see S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, *op. cit.*, who argues that if a ADR Commission is set "no specific rule in Article 10 mandates that the dispute resolution body should deliver its opinion according to 'provisions of the applicable agreement or convention referred to in Article 1 as well as on any applicable national rules'. On the contrary, it appears that one of the most distinctive feature of the said dispute resolution tool when compared to the Advisory Commission's setting is exactly the fact that the former may decide disregarding ordinary principles of legal reasoning, in a way to find an acceptable compromise among competent authorities with a view to overcoming the impasse that took place among competent authorities during the course of the MAP phase". On a similar note, see also M. TRIVELLIN, *op. cit.*, 139.

[65] Although the authors quoted in the previous footnote make a fair point as to the *ratio* of the "last best offer" arbitration approach, it seems that the reference in article 14 of the Directive to both the Advisory Commission and the ADR Commission leaves no doubts as to the fact that also the latter dispute resolution body cannot base its opinions on equity, but rather "*on the provisions of the applicable agreement or convention* […] *as well as on any applicable national rules*". Moreover, if it is accepted the conclusion (reached in the previous chapter) according to which, during the MAP, tax authorities cannot reach agreements on the base of equity, then, accordingly, the solutions proposed by the relevant tax authorities involved in a dispute – among which, under the "last best offer" approach, the arbitrators have to choose in order to render the final offer – should always strictly apply the rule of law (*rectius*, with respect to transfer pricing disputes, the OECD's methods of calculation of the transfer prices). *Quid est* if this doesn't occur and both (in bilateral disputes) the proposals submitted to the arbitral panel are based on equity? As it will be further highlighted, it seems that the arbitral panel should have the power to reject the proposals and submit to the competent tax authorities involved the invitation to reformulate new proposals.

[66] With specific regard to transfer pricing disputes, this entails that arbitrators must apply the arm's length principle as advocated by the OECD, in compliance with: (i) the tax treaty's provision (if there is any) equivalent to article 9 of the OECD MC whose interpretation is disputed and/or (ii) the EU State Aid Law and/or (iii) (as far as Italy may be concerned in a dispute) with article 110, comma 7, of the Italian Income Code.

[67] Also the majority of the doctrine has interpreted this provision as an obligatory provision, which prevents other grounds for the opinion such as equity. See, *inter alia*: L. HINNEKENS, *European Arbitration Convention: Thoughts on Its Principles, Procedures and First Experience*, in *EC Tax Review*, n. 3/2010, 110 – 112: "Article 11(1) AC means that the advisory commission is prohibited by that legal basis from applying other principles or criteria. AC thus prohibits alternative principles such as equity (no *ex aequo et bono* determination), 50–50 deal (no 'half baby' or 'Solomonic judgments'), or any kind of reasoning or negotiated base, as long as a consensus is obtained between the competent authorities (no 'horse trading' or 'pack- age deals')" (page 110); "According to a strict reading of Article 4 *juncto* Article 11 AC, the legal basis for the opinion of the advisory commission is Article 4 AC. It means that the commission verifies whether the adjustment and the reasoning for it are or are not correct, that is, constitute a compatible or incompatible application of the ALP principles" (page 111); M. ZÜGER, *Settlement of Disputes in Tax Treaty Law – General Report*, in M. LANG, M. ZÜGER (edited

As to the "OECD Procedures" [*rectius*, the arbitration procedure envisioned in the MLI, since article 25(5) of the OECD MC doesn't provide for a set of procedural rules], article 23(2) of the MLI states that the arbitral panel shall decide the issues submitted to arbitration "*in accordance with the applicable provisions of the Covered Tax Agreement*" and "*of those of the domestic laws of the Contracting Jurisdictions*", and that the panel members "*shall also consider any other* [legal] *sources which the competent authorities of the Contracting Jurisdictions may by mutual agreement expressly identify*". Therefore, there seem to be no doubts as to the fact that, also under the MLI, the arbitrators are subject to the rule of law and, thus, cannot base the final opinion on equity.

Nevertheless, it should be noted that article 23(2) of the MLI only applies when arbitration follows the "independent opinion" approach and that, if arbitration is conducted through the "last best offer approach", article 23(1) of the MLI makes no reference nor to the "*applicable provisions of the Covered Tax Agreement*" nor to "*those of the domestic laws of the Contracting Jurisdictions*", but rather states that *(i)* each relevant tax authority has to submit a proposal of resolution that "*shall be limited to a disposition*" or to a "*maximum rate of tax charged*" and that *(ii)* the "*arbitration panel shall select as its decision one of the proposed resolutions" without "rationale or any other explanation of the decision*".

This circumstance has lead some authors to assume that if arbitration is conducted through the "last best offer" approach, then the final opinion can be based on equity[68].

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by), *Settlements of Disputes in Tax Treaty Law*, Kluwer Law International, 2003, 29: "Article 11(1) of the Convention explicitly provides that the advisory commission has to base its opinion on the principles of Art. 4. Decisions based on equity are therefore not allowed"; P. PISTONE, *Settlement of Disputes in Italian Tax Treaty Law*, in M. LANG, M. ZÜGER (edited by), *Settlements of Disputes in Tax Treaty Law*, *cit.*, 333: "The arbitration procedure should, insofar as this is possible, integrate with the mutual agreement procedure, so as to deviate from its rules only when this is specified by the EU Arbitration Convention, or is otherwise needed. One could therefore conclude that, in the case of Italy, opinions of the arbitration board may not be based on equity"; P. ADONNINO, *Some Thoughts on the EC Arbitration Convention*, in *European Taxation*, 2003, 403 ss.: "Many arbitration procedures provide that the decision must be taken on the basis of equity. In principle, this is not permitted in the application of the Arbitration Convention" (page 404); "Art. 11(1), second sentence, provides that 'the advisory commission must base its opinion on Article 4'. Thus, the Arbitration Convention provides a legal basis for the opinion of the advisory commission" (page 405); ID., *La Convenzione europea 90/436 sulla cosidetta procedura arbitrale. Limiti e problemi*, in *Riv. dir. trib*., 2002, I, 1211 ss.

[68] See M. TRIVELLIN, *op. cit*., 139: "*Se si ritiene insuperabile il vincolo dell'indisponibilità, ci si orienterà plausibilmente a ritenere che l'arbitrato debba essere fondato su norme di diritto (come di regola avviene seguendo gli schemi dell'* 'indipendent opinion approach'*) e non consenta statuizioni a*

This objection is not entirely convincing.

Indeed, if it is accepted the conclusion (reached in the previous chapter) according to which, during the MAP, tax authorities cannot reach agreements on the base of equity, then, accordingly, the solutions proposed by the relevant tax authorities involved in a dispute – among which the arbitrators have to choose in order to render the final offer – should always strictly apply the rule of law (*rectius*, with respect to transfer pricing disputes, the OECD's methods of calculation of the transfer prices).

This conclusion seems reinforced in light of the fact that, according to article 23(2)(b) of the MLI, *(i)* relevant tax authorities are entitled to submit their proposals to the arbitration panel together with "position papers" that support such proposals; *(ii)* such "position papers" should describe the process that has been followed by the relevant tax authorities when drafting the proposal; *(iii)* each relevant authority may also submit a reply submission with respect to the proposed resolution and supporting position paper submitted by the other relevant authority[69-70].

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*contenuto transattivo (come invece si può riscontrare nel c.d. '*last best offer approach*')*", who recalls Y. HADARI, *Compulsory Arbitration in International Transfer Pricing and other Double Taxation Disputes*, in Y. EDREY, M. GREGGI (edited by), *Tax law and the Mediterranean Area*, Itax Papers on Taxation, vol. I, 2012, 83 ss. This argument doesn't seem far from the one employed by S.M. RONCO S.M., *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, op. cit., with regard to the use of the "last best offer" approach under the Directive (see supra footnote 64).

[69] See OECD, *Explanatory statement to the multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting*, par. 243 "The proposed resolutions submitted by the competent authorities of each Contracting Jurisdiction may be supported by a position paper. Each competent authority may also submit a reply submission with respect to the proposed resolution and supporting position paper submitted by the other competent authority. The reply submission and its supporting paper are meant to address only the positions and arguments of the other competent authority, and are not intended as an opportunity for a competent authority to advance additional arguments in favour of its own position".

[70] It neither seems entirely convincing the remark according to which States (as Italy) that opted for the "last best offer" approach under the MLI and, simultaneously, formulated the reservation set forth under article 23(3) of the MLI (i.e. the right to not apply the "independent opinion" approach if the other contracting State makes such an option and to mutually agree with such State on a different the type of arbitration process) have given priority to speed up the resolution of cross border tax disputes, rather than to the reaching of solutions strictly compliant with the rule of law. Precisely one may argue that the aim of the States that made the reservation laid down under article 23(3) of the MLI is to tacitly (and, as one may believe, even cleverly) render more difficult the resolution of disputes during the arbitration stage if the other disputing State has opted for the "independent opinion approach". Indeed, when this circumstance occurs, tax authorities will need to reach an *ad hoc* agreement as to the mode of arbitration and, where/when such agreement will be impossible to reach, the whole procedure will end into a deadlock. *Contra* M. TRIVELLIN, *op. cit*., 141: "*nella prospettiva internazionale, il nostro Paese considera prioritaria la più immediata soluzione del problema della doppia imposizione piuttosto*

Quid est if this doesn't occur and both (in bilateral disputes) the proposals submitted to the arbitral panel are based on equity? In this case – from a *de jure condendo* perspective – it seems that the arbitral panel should have the power to reject both the proposals and submit to the competent tax authorities involved an invitation to reformulate new proposals; otherwise, as it will be further highlighted, there is the risk that taxpayers may challenge the arbitral award, by claiming that the final decision has been rendered in breach of article 107 of the TFUE.

9. From the arbitral opinion to the final decision of the competent tax authorities: the final decision as a follow-up to the outcome of the arbitration procedure.

As it has already been briefly described in the introduction of this chapter (see, *retro*, paragraph 1), the general rule, under all the existing dispute resolution mechanisms, is that the arbitral "award" is not directly binding upon the tax authorities involved in the dispute, since tax authorities maintain, for a certain period of time (which varies under the different tools), the right to agree on a different resolution of the case. Only if the relevant tax authorities fail to reach such agreement within the given deadlines, the arbitral "award" becomes binding[71].

A brief clarification in this respect, however, should be made with regard to the "OECD Procedures".

Article 25(5) of the OECD MC, indeed, states that the arbitral panel's decision "*shall be binding on both Contracting States and shall be implemented notwithstanding any time limits in the domestic laws of these States*" and leaves the possibility for relevant

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che la rigorosa ricostruzione della fattispecie secondo diritto, il che potrebbe confermare gli spunti teorici che propendono per ammettere anche decisioni a struttura transattiva della vertenza".

[71] This additional phase has been widely criticized by the doctrine, mainly on the grounds that it leaves in the hands of tax authorities the resolution of the case, thus "depowering" the arbitration stage. See, inter alia, L. HINNEKENS, *The Tax Arbitration Convention*, *cit*., 104; D.R. TILLINGHAST, *Issues in the Implementation of the arbitration of disputes arising under income tax treaties*, in *Bulletin for International Fiscal Documentation*, n. 3/2002, 93; M. ZÜGER, *Mutual agreement and arbitration procedure in a multilateral treaty*, in M. LANG, H. LOUKOTA, A.J. RÄDLER, J. SCHUCH, G. TOIFL, C. URTZ, F. WASSERMEYER, M. ZÜGER (edted by), *Multilateral tax treaties: new developments in international tax law*, Kluwer Law International, 1998, 166; and, more recently, S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, *op. cit*. Although these authors all have a fair point, it must not be forgotten that this additional phase seems consistent with the administrative nature of arbitration: only a judicial procedure, indeed, could enable a third body to issue a binding decision that affects States' sovereignity and power to tax.

tax authorities to deviate from such decision if they not agree with the outcome of the arbitration procedure as a mere option[72].

The same occurs under the MLI: the default rule under the MLI, indeed, is that the arbitral panel's decision is directly binding upon the tax authorities [see article 19(4) of the MLI], while the possibility for relevant tax authorities to agree on a different resolution of the case is left as on an option under article 24(2) of the same MLI.

Nevertheless, it is striking to note that 14 (out of 16) of the EU Member States (including Italy) that have opted for the arbitration incorporated in Part VI of the MLI have chosen to apply in their Covered Tax Agreements the alternative provision laid down under article 24(2) of the MLI: only Finland and the Netherlands, indeed, did not opt to have included in their Covered Tax Agreements the possibility for the relevant tax authorities to autonomously reach a final decision after that the arbitration panel has rendered its opinion[73]. Therefore, in a post BEPS scenario, it seems fair to assume that the trend, under all the existing dispute resolution mechanisms (including the "OECD Procedures"), is to leave to relevant tax authorities the power to agree on a different solution of the case after that the arbitral "award" has been delivered to them.

Having this briefly clarified, we shall examine more in detail the content of the rules envisioned under the existing dispute resolution mechanisms as to the reaching of the final decision in both the cases *(i)* in which the relevant tax authorities agree with the opinion of the arbitral panel and *(ii)* in which they disagree with that opinion and agree on a deviating solution. Pursuant to articles 15 of the Directive, 12 of the EU Arbitration Convention and 24(2) of the MLI, indeed, the relevant tax authorities have two options once the arbitration panel has delivered its opinion: agree or disagree with such opinion.

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[72] See OECD Commentary to article 25, par. 84: "Some States may wish to allow the competent authorities to depart from the arbitration decision, provided that they can agree on a different solution that would settle all outstanding issues that prevented the resolution of the mutual agreement procedure case (this, for example, is allowed under Article 12 of the EU Arbitration Convention)". As far as it is known, this option has been exercised in a very few double tax conventions that incorporate an arbitration clauses (15 out of 223: see the statistics mentioned by H.M. PIT, *op. cit*., 1503).

[73] See OECD, *Signatories and parties to the multilateral convention to implement tax treaty related measures to prevent base erosion and profit shifting*, Status as of 8 August 2019, available at https://www.oecd.org/tax/treaties/beps-mli-signatories-and-parties.pdf.

If the relevant tax authorities agree with the arbitration panel's opinion, they have to take the final decision accordingly, by adopting an *ad hoc* mutual agreement[74] that reflects the content of the arbitral opinion (see infra par. 10).
When, by contrast, the relevant tax authorities disagree with the arbitral opinion there are two further possible options.
The first option is that the relevant tax authorities are able to reach an *ad hoc* mutual agreement for the resolution of the case[75].
The second option is that the relevant tax authorities fail to agree – within the deadlines provided for under the different dispute resolution procedures – on an alternative decision to the case. When this situation occurs, as hinted above, all the existing dispute resolution mechanisms state that the arbitral panel's opinion becomes binding on the competent tax authorities and mandatorily constitutes the basis of the final decision (*i.e.* of the "final" mutual agreement that implements the arbitral panel's opinion)[76]. In other words, the failure by the tax authorities involved in a dispute to take an alternative decision to the case turns the arbitral opinion from a non-binding

[74] More specifically: *(i)* article 15(1) of the Directive states that "*The competent authorities concerned shall agree on how to resolve the question in dispute within 6 months of the notification of the opinion of the Advisory Commission or Alternative Dispute Resolution Commission*"; *(ii)* article 12(1) of the EU Arbitration Convention states that "*The competent authorities party to the procedure referred to in Article 7 shall, acting by common consent on the basis of Article 4, take a decision which will eliminate the double taxation within six months of the date on which the advisory commission delivered its opinion*"; *(iii)* article 19(4)(a) of the MLI states that "*The arbitration decision with respect to the issues submitted to arbitration shall be implemented through the mutual agreement concerning the case referred to in paragraph 1*".

[75] It is submitted that in this final stage the competent tax authorities must comply with the same principles that govern the reaching of mutual agreements during the first-stage MAP and, as a consequence, that such an agreement cannot be based on equity. The implementation phase – as the arbitration stage –, indeed, has to be viewed as a continuation of the MAP; therefore the same rules must apply in these two stages. Accordingly, see H.M. PIT, *op. cit.*, 758: "it would be odd if competent authorities would be bound to view the OECD for the mutual agreement procedure, but not for the implementation phase".

[76] More specifically: *(i)* article 15(2) of the Directive states that "*The competent authorities may take a decision which deviates from the opinion of the Advisory Commission or Alternative Dispute Resolution Commission. However, if they fail to reach an agreement as to how to resolve the question in dispute, they shall be bound by that opinion*"; *(ii)* article 12(1)(last sentence) of the EU Arbitration Convention states that "*The competent authorities may take a decision which deviates from the advisory commission's opinion. If they fail to reach an agreement, they shall be obliged to act in accordance with that opinion*"; *(iii)* article 24(2) of the MLI states that "*an arbitration decision pursuant to this Part shall not be binding on the Contracting Jurisdictions to a Covered Tax Agreement and shall not be implemented if the competent authorities of the Contracting Jurisdictions agree on a different resolution of all unresolved issues within three calendar months after the arbitration decision has been delivered to them*".

opinion into a binding arbitral award. *Ça vans sans dire* that this default mechanisms doesn't change the (administrative) legal nature of arbitration, since it is purely aimed to prevent deadlocks of the procedure and, thus, the reaching of a decision that eliminates double taxation when the tax authorities involved in a dispute fail to provide for such elimination themselves[77].

10. (Follows). The implementation of the final decision.

As stated in the previous chapter (see, *retro*, chapter II, par. 4), the implementation of the mutual agreement reached during the MAP is subject – under all the existing dispute resolution mechanism (although, the EU Arbitration Convention's provisions are not entirely clear on this matter) – to two conditions: *(i)* the first condition is that taxpayers accept the final decision[78]; *(ii)* the second condition is that taxpayers either renounce to pursue domestic litigation on the same matters covered by the final decision or end the domestic remedies that are already pending if these were suspended[79].

The second condition *sub (ii)* applies, under all the existing dispute resolution mechanisms, also for the implementation of arbitral awards. However – as stated above with regard to the MAPs' implementation, and as it will be further clarified infra in chapter IV – this second requirement seems to have a limited practical relevance. The cases in which arbitration procedures can be conducted simultaneously with domestic remedies, indeed, seem quite rare. First of all, because the Directive, the EU Arbitration Convention and the "OECD Procedures" all stipulate that the procedures envisioned therein can effectively begin only when, alternatively, the domestic judicial remedies come to an end or the taxpayers are able to obtain their suspension[80].

[77] *Contra*, L. HINNEKENS, *The Tax Arbitration Convention*, *cit*., 99: "This (potential or effective) binding effect of a decision by a truly third instance changes the nature of the mechanism […] from a mere diplomatic negotiation between States to a truly supranational arbitration".

[78] For further considerations on this requirement see *retro* chapter II, par. 4.1.

[79] For further considerations on this requirement see *retro* chapter II, par. 4.4.

[80] More specifically, article 16(3) of the Directive states that "*Affected persons may have recourse to the remedies available to them under national law* […]. *However, where the affected person has commenced to seek such a remedy, the terms of periods referred to in Article 5(5) ad 4(1) respectively shall commence from the date on which a judgment delivered in those proceedings has become final or on which those proceedings have otherwise been definitively concluded or where the proceedings have been suspended*". Article 7(1) of the EU Arbitration Convention states that "*Enterprises may have*

Therefore, given that arbitration may start only at the end of a MAP, it seems clear that when taxpayers simultaneously request the initiation of an international procedure and initiate a domestic appeal, arbitration and domestic remedies can overlap only if the taxpayer is able to obtain the suspension of domestic litigation.

Secondly, because all the existing dispute resolution mechanisms add further impediments as to the possibility to carry out in parallel domestic remedies and the arbitration procedure whenever the national laws of the States involved in a dispute do not allow the tax authorities to derogate from national courts' decisions. More specifically: on the one hand, the Directive[81] and the "OECD Procedures"[82] prevent

recourse to the remedies available to them under domestic law [...]; however, where the case has so been submitted to a court or tribunal, the term of two years [n.d.a. for the completion of the MAP] *shall be computed from the date on which the judgment of the final court of appeal was given*". Article 19(2) of the MLI provides for the suspension of the "*the mutual agreement procedure referred to in paragraph 1* [if] *a case with respect to one or more of the same issues is pending before court or administrative tribunal*" and states that, in such a case, "*the period provided in subparagraph b) of paragraph 1 will stop running until either a final decision has been rendered by the court or administrative tribunal or the case has been suspended or withdrawn*". Accordingly, see OECD, Commentary to article 25 of the OECD MC, par. 25, which envisions the possibility to follow two different approaches when a taxpayer initiates, simultaneously, a MAP and domestic judicial proceedings: (i) the first approach is to have "the competent authorities not entering into talks in earnest until the domestic law action is finally determined"; (ii) the second approach is to have "the competent authorities enter into talks, but without finally settling an agreement unless and until the taxpayer agrees to withdraw domestic law actions".

[81] See article 16(4) of the Directive: "*Where a decision on a question in dispute has been rendered by the relevant court or other judicial body of a Member State, and the national law of that Member State does not allow it to derogate from the decision, that Member State may provide that:* [lett. b] *before the affected person has made a request under Article 6(1), the provisions of Article 6(1) do not apply if the question in dispute had remained unresolved during the whole of the mutual agreement procedure under Article 4, in which case the competent authority of that Member State is to inform the other competent authorities of the Member States concerned of the effect of the decision of the relevant court or other judicial body;* [lett. c] *the dispute resolution process under Article 6 is to be terminated if the decision of the relevant court or other judicial body was rendered at any time after an affected person has made a request under Article 6(1) but before the Advisory Commission or the Alternative Dispute Resolution Commission has delivered its opinion to the competent authorities of the Member States concerned in accordance with Article 14, in which case the competent authority of the relevant Member State concerned is to inform the other competent authorities of the Member States concerned and the Advisory Commission or the Alternative Dispute Resolution Commission of the effect of the decision of the relevant court or other judicial body*".

[82] Whilst article 25 of the OECD MC doesn't expressly regulate this matter, article 19(12) of the MLI states that "*A Party may reserve the right for the following rules to apply with respect to its Covered Tax Agreements notwithstanding the other provisions of this Article: (a) any unresolved issue arising from a mutual agreement procedure case otherwise within the scope of the arbitration process provided for by this Convention shall not be submitted to arbitration, if a decision on this issue has already been rendered by a court or administrative tribunal of either Contracting Jurisdiction; (b) if, at any time after a request for arbitration has been made and before the arbitration panel has delivered its decision to the competent authorities of the Contracting Jurisdictions, a decision concerning the issue is rendered by a court or administrative tribunal of one of the Contracting Jurisdictions, the arbitration process shall terminate*". It is worth noting that the Directive (as also the EU Arbitration Convention)

the initiation of arbitration if the question in dispute is decided before the taxpayers' request to begin the arbitration procedure, or the termination of arbitration if the national decision intervenes during such procedure; on the other hand, the EU Arbitration Convention even requires taxpayers to withdraw from the domestic proceedings in order to start the arbitration stage[83].

The first condition *sub (i)* – *i.e.* the taxpayers' acceptance of the arbitral award – seems to undoubtedly apply for the implementation of arbitral awards reached under the "OECD Procedures.

Article 19(4)(b) of the MLI, indeed, states that the arbitration decision is not binding on the Contracting Jurisdictions except if: (a) "*a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision. In such a case, the case shall not be eligible for any further consideration by the competent authorities*"; and (b) "*a person directly affected by the case pursues litigation on the issues which were resolved in the mutual agreement implementing the arbitration decision in any court or administrative tribunal*". Accordingly, on a similar note, article 25(5) of the OECD MC states that taxpayers, in order to implement the final decision, taxpayers need to "*accept the mutual agreement that implements the arbitration decision*" and waive domestic legal remedies.

By contrast, it is not entirely clear if this same condition needs to be always fulfilled for the implementation of arbitral awards reached under the Directive or the EU Arbitration Convention.

More precisely, the existence of the taxpayers' right of acceptance is considered established when the competent tax authorities reach a "final" mutual agreement after

prevents the initiation of arbitration if the question in dispute is decided before the taxpayers' request to begin the arbitration procedure and/or provides for the termination of arbitration if the national decision intervenes during such procedure only if the national laws of the States involved in a dispute do not allow the tax authorities to derogate from national courts' decisions. By contrast, the MLI makes the same rules subject to an express reservation pursuant to article 12 of the same MLI. At this regard, it should be immediately brought forward that all the EU Member States whose legislation do not allow their tax authorities to derogate from the decisions of their national Courts have formulated the reservation envisioned under article 12 of the MLI (see, for further insights, chapter IV).

[83] Article 7(3) of the EU Arbitration Convention reads: "*Where the domestic law of a Contracting State does not permit the competent authorities of that Stat to derogate from the decisions of their judicial bodies, paragraph 1 shall not apply unless the associated enterprise of that State has allowed the time provided for appeal to expire, or has withdrawn any such appeal before a decision has been delivered*" (for further insights on this provision see chapter III).

that the arbitral panel arbitral has rendered an opinion (both in the cases in which they agree and disagree with such opinion). With respect to these cases, indeed, on the one hand, article 15(4) of the Directive states that "*The final decision shall be implemented subject to the affected person(s) accepting the final decision* […]" and, on the other hand, paragraph 7.7. of the Code of Conduct states that "*the implementation of this agreement should be subject to* [the taxpayers'] *acceptance*"[84].

By contrast, some doubts surround the existence of such a right in the case in which the competent tax authorities fail to agree on a final decision of the case.

Some authors, precisely, highlighted that nor article 12(1) of the EU Arbitration Convention[85], nor article 15(2) of the Directive[86] specify whether taxpayers hold a right of acceptance and thus concluded that, in such situation, taxpayers should be considered directly bound by the arbitral panel's opinion exactly as the competent tax authorities[87].

The conclusion reached by the above mentioned authors, however, doesn't seem entirely sharable for the two following reasons.

The first reason is that, although article 12(1) of the Convention and article 15(2) of the Directive don't expressly provide for the taxpayers' right of acceptance, they only

[84] Although paragraph 7.7. of the Code of Conduct refers to the implementation of the mutual agreement reached during he MAP, it is established that – in the absence of an *ad hoc* provision on this matter – the implementation of the arbitration decision should be subject to the same rules that govern the implementation of mutual agreements. Indeed, the final decision (either if it is based on the opinion of the advisory commission or on the deviating final decision of the competent tax authorities involved) is always rendered by a mutual agreement between the Member States involved. Accordingly, see: M. ZÜGER, *Arbitration under tax treaties: improving legal protection in international tax law*, IBFD, 2001, *Online Books*, par. 3.4.1.; M. MARKHAM, *The transfer pricing of intangibles*, Kluwer Law International, 2005, 222.

[85] Article 12(1) of the EU Arbitration Convention states that "*The competent tax authorities may take a decision which deviates from the advisory commission's opinion. If they fail to reach an agreement, they shall be obliged to act in accordance with that opinion*".

[86] Article 15(2) of the Directive states that if the competent tax authorities fail to "*reach an agreement as to how to resolve the question in dispute, they shall be bound by that opinion*".

[87] See J.M. O'BRIEN, M.A. OATES, *Arbitrating competent authorities disputes?*, in *Journal of taxation of Global Transactions,* n. 3/2006, 34 and S. GOVIND, L. TURCAN, *loc. ult. cit*., who even conclude that competent tax authorities are not bound by a arbitral panel's opinion, while taxpayers are. Moreover, according to L. HINNEKENS, *The Tax Arbitration Convention*, *cit*., 99, in such situations the arbitral opinion bounds also taxpayers because "This (potential or effective) binding effect of a decision by a truly third instance changes the nature of the mechanism […] from a mere diplomatic negotiation between States to a truly supranational arbitration".

stipulate that the competent tax authorities are obliged to act in accordance with the arbitral opinion, but not that taxpayers are bound by it in a similar fashion.
The second reason is that taxpayers are not party to the arbitration procedure and, thereby, they can't be bound – unless they accept it – by a decision reached between unrelated parties[88].

10.1. Process for the implementation of the final decision (brief remarks).
As to the process of implementation of the final decision, the third sentence of article 15(4) of the Directive stipulates that the final decision shall be implemented "*irrespective of any time limits prescribed by the national law*".
A similar provision is envisioned under article 25(5) of the OECD MC and can be inferred from the combination between articles 19(4)(a) (according to which "*The arbitration decision with respect to the issues submitted to arbitration shall be implemented through the mutual agreement*") and article 16(2) of the MLI (according to which "*Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting Jurisdictions*")[89].
The EU Arbitration Convention is the only dispute resolution mechanism that doesn't expressly regulate the implementation process of the final decision. The absence of such a rule, however, doesn't raise many concerns.
Indeed, given that the final decision is – *de facto*, as seen above – a mutual agreement that follows-up the outcome of the arbitration procedure (*rectius*, of the arbitral panels' opinion), it seems established that the final decision has to be implemented exactly as a mutual agreement reached during the MAP, accordingly to article 6(2) of the EU Arbitration Convention[90].
In conclusion, it is worth noting that – unlike what occurs for the implementation of the mutual agreement reached during the MAP – the Directive envisions a post-award control mechanism that allows taxpayers to enforce compliance with the binding arbitral decision if one (or both) competent tax authorities involved in a dispute fail to

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[88] Accordingly, see S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, op. cit.

[89] See, for further remarks, M. TRIVELLIN, op. cit., 231 – 232.

[90] Accordingly, see H.M. PIT, *op. cit*., 766.

implement at a domestic level such decision. Precisely, article 15(4) of the Directive states that "*the affected person may apply to the competent court of the Member State that failed to implement the final decision in order to enforce the implementation thereof*".

The inclusion of such a mechanism constitutes a *unicuum* in the tax dispute resolution scenario, given that neither the "OECD Procedures" nor the EU Arbitration Convention contain a provision equivalent to article 15(4) of the Directive. With regard to these dispute resolution tools, however, a similar rule could be indirectly inferred (as seen in the previous chapter with regard to the implementation of mutual agreements reached during a MAP) from article 26 of the Vienna Convention, given that the non cooperation of States in implementing a final decision could be viewed as a breach of the *pacta sunt servanda* rule.

11. The taxpayers' involvement in the arbitration procedure.

In the previous chapter (see chapter II, par. 3.2.) it was highlighted that all the existing mechanisms to settle international tax disputes are based on the "Diplomatic Protection Theory", *i.e.* on the assumption that, on the international level, individuals have no international personality and, therefore, only States may act on behalf of their nationals ("diplomatic protection"). Hence, where a State takes up the individual's dispute through diplomatic protection, this dispute becomes a pure interstate dispute with no enforceable right of involvement of the individuals who suffered the breach of international law.

Nevertheless, it was concluded that MAPs should comply with article 41 of the Charter of Fundamental Rights of the European Union ("Right to good administration") and, as a consequence, taxpayers should be, in any case, granted with minimum rights. Namely, the rights to: *(i)* participate to the meetings between tax authorities; *(ii)* be heard and submit all documents and allegations that they may regard as useful in order to settle the case; *(iii)* have full access to the relevant documentation; *(iv)* receive a formal notice at the end of the procedure, indicating the different positions put forward by the parties involved in the proceeding, the reasons that have lead to reach a specific solution to the case and – as the case might be – the reasons that have justified the rejection of the position put forward by the taxpayer.

Given that – as extensively demonstrated in this chapter – arbitration is a mere extension of the MAP and, as a consequence, has its same legal nature, also the arbitration procedures envisioned in the existing dispute resolution mechanisms should always comply, *mutatis mutandis*, with article 41 of the Charter of Fundamental Rights of the European Union and, accordingly, taxpayers should be entitled to challenge before domestic courts the administrative acts that implement arbitration "awards" that aren't reached accordingly with article 41 of the Charter (for further remarks see infra par. 12).

Precisely, with respect of arbitration, the minimum rights that shall be granted to taxpayers in light of article 41 of the Charter seem to be the following: *(i)* the right to appear before the arbitration panel and to submit all the documents and allegations that taxpayers (or arbitrators) may regard as useful in order to settle the case; *(ii)* the right to have access to all the relevant documentation and to be informed on the progress of the proceedings; *(iii)* the right to obtain a reasoned final decision, *i.e.* a decision that indicates (at least) the different positions put forward by the parties involved in the proceeding, the reasons that have lead to reach a specific solution to the case and – as the case might be – the reasons that have justified the rejection of the position put forward by the taxpayer.

The next sub-paragraphs will examine at what extent the existing dispute resolution mechanisms comply with article 41 of the Charter.

11.1. Provisions of the "OECD Procedures".

The arbitration procedures envisioned under both the OECD MC and the MLI provide for no involvement of taxpayers. As stated by an influential author, under these procedures taxpayers are treated "as mere object of a dispute on tax sovereignty without an international remedy that effectively protects their rights"[91].

As far as it is known, indeed, neither article 25(5) of the OECD MC, nor article 19 of the MLI grant to taxpayers the rights to *(i)* appear before the arbitration panel or to *(ii)*

[91] P. PISTONE, *The Settlement of Cross-border Tax Disputes in the European Union*, in J. WATTEL, O. MARRES, H. VERMEULEN (edited by), *Terra/Wattel European Tax Law*, Wolters Kluwer, 2018, 369.

have access to all the relevant documentation and be informed on the progress of the proceedings.

As to the right to *(iii)* obtain a reasoned final decision (*i.e.* a decision that at least indicates the different positions put forward by the parties involved in the proceeding, the reasons that have lead to reach a specific solution to the case and – as the case might be – the reasons that have justified the rejection of the position put forward by the taxpayer) it is worth noting that article 23(1)(c) of the MLI states that "*The arbitration panel* […] *shall not include a rationale or any other explanation of the decision*", thus expressly excluding such a right when arbitration is conducted through the "last best offer" approach (which – as stated above – is the default option under the MLI). Given that, when adopting the final decision (*i.e.* the mutual agreement that implements the arbitral opinion), competent tax authorities are merely requested to transpose the content of the arbitral opinion, such a provision of the MLI seems to be in blatant contrast with article 41 of the Charter, which, indeed, expressly provides "*the obligation of the administration to give reasons for its decisions*". Therefore, it should be concluded that article 23(1)(c) of the MLI is inapplicable (and shouldn't, in the practice, be applied by competent tax authorities) with regard to tax disputes involving two (or more) EU Member States, given that taxpayers (as hinted above, and as it will be further discussed) are, in any case, entitled to challenge before domestic courts the administrative acts that implement tax treaty arbitration "awards" that aren't reasoned in accordance with article 41 of the Charter.

11.2. Provisions of the EU Arbitration Convention and of the Directive.

Both the EU Arbitration Convention and the Directive seem to ensure to taxpayers both the right to submit their views/appear before the arbitral panel and to obtain a reasoned final decision. By contrast, neither of these two procedures seem to adequately ensure the right of taxpayers to have access to all the relevant documentation and to be informed on the progress of the arbitral proceedings.

11.2.1. The taxpayers' right to submit their views and to appear before the arbitral panel.

Article 10 of the EU arbitration Convention and article 13 of the Directive grant to taxpayers both the right to submit information and the right to appear before the arbitral panel.

Precisely, on the one hand, both article 10(1) of the EU arbitration Convention and article 13(1) of the Directive grant to taxpayers the right to submit any information, evidence or documentation that they deem relevant for the arbitral panel to deliver its opinion. These provisions, therefore, seem to safeguard the taxpayers' right to present their view on the case and, by doing so, even to rebut and challenge the arguments put forward by the competent tax authorities. Moreover, given that neither of these two provisions seem to include any restriction on the volume of information, nor on the frequency of providing such information, such provisions seem also to allow taxpayers to provide the arbitral panel with their own viewpoints on the case, as well as their proposal for its resolution[92].

On the other hand, both article 10(2) of the Convention and article 13(2) of the Directive further grant to taxpayers the right to appear before the arbitration panel. Therefore, also these provisions enable taxpayers to *(a)* (orally) share their viewpoints on the case and, eventually, to *(b)* answer to the questions of the arbitrators.

Having this said, it should be highlighted that even if articles 10 of the Convention and 13 of the Directive share many similarities, there is one important difference between these two provisions.

Indeed, unlike article 10 of the EU Arbitration Convention, article 13 of the Directive makes the rights to provide information and to request an appearance before the arbitral panel subject to the consent of the competent tax authorities.

This requirement could be seen as a step backwards of the Directive, that decreases the taxpayers' involvement in the arbitration[93]. However – in light of the stand of the Directive as a piece of secondary legislation of the European Union and in light of its recital n. 9, which expressly refers to the "*principles recognized* […] *by the Charter of Fundamental Rights*" – it seems more reasonable to conclude that this provision must be interpreted in a way that doesn't generate clashes with relevant primary law

[92] H.M. PIT, *op. cit.*, 811.

[93] H.M. PIT, *op. cit.*, 1545.

of the European Union as reflected in the EU Charter of fundamental Rights[94]. In other words, it seems that this provision should be interpreted in a way that limits – as much as possible – the right of competent authorities to object the submission of documents or the appearance of taxpayers.

Precisely, it seems that such a right should be limited only to the cases listed under article 13(1)(last sentence) in respect to which the Directive expressly allows such a limitation. Namely when: *(i)* the submission of information requires carrying out administrative measures that are against national law; *(ii)* the information cannot be obtained under the national law of the Member States concerned; *(iii)* the information concerns trade/business/industrial/professional/trade secrets; *(iv)* the disclosure of information is contrary to public policy.

11.2.2. The taxpayers' right to obtain a reasoned final decision.

As it was highlighted in the previous paragraphs, the award rendered by the arbitration panel must be converted through a mutual agreement entered into between the competent authorities, which may, alternatively, reflect or deviate from the outcome of the arbitral panels' decision.

It is therefore submitted that: *(i)* on the one hand, if the final decision (i.e. the "final" mutual agreement entered into between the competent authorities) reflects the arbitral opinion, the competent tax authorities will need to transpose in such a decision the content of the arbitral opinion; *(ii)* on the other hand, if the final decision (*i.e.* the "final" mutual agreement) doesn't reflect the arbitral opinion – because the competent tax authorities disagree with the solution reached by the arbitrators –, the competent tax authorities, in such a decision, will need to both transpose the content of the arbitral opinion and illustrate the reasons that lead to a different resolution of the case.

In light of the above, it seems that the taxpayers' right to obtain – accordingly with article 41 of the Charter – a reasoned final decision largely depends on whether there are provisions that define the content of the arbitral panel's opinion.

[94] P. PISTONE, *The Settlement of Cross-border Tax Disputes in the European Union*, in J. WATTEL, O. MARRES, H. VERMEULEN (edited by), *Terra/Wattel European Tax Law*, Wolters Kluwer, 2018, 371.

Although none of the EU Arbitration Convention's and Directive's provisions expressly define which information should be included in the arbitral panel's opinion, it doesn't seem unreasonable to conclude that a useful guidance for the drafting of the final opinion could be detected under paragraph 9.4. of the Code of Conduct, according to which "*Member States would expect the opinion to contain*" (*inter alia*): *(i)* the names of the members of the arbitral panel; *(ii)* the names of the taxpayers and the data of the competent tax authorities involved in the dispute; *(iii)* a description of the facts and circumstances of the dispute; *(iv)* a short summary of the proceedings; *(v)* the arguments and the methods on which the decision in the opinion is based.
Indeed, where (at least) all these information are not reflected in the final decision notified to the taxpayers, it seems that there could be the grounds to challenge before domestic courts – for infringement of article 41 of the Charter – the administrative act that implements such a decision.

11.2.3. The taxpayers' right to have access to all the relevant documentation and to be informed on the progress of the arbitral proceedings.

The Directive, unlike the EU Arbitration Convention, partially ensures the taxpayers' right to have access to all the relevant documentation and to be informed on the progress of the arbitral proceedings. More specifically, it seems to ensure such a right when providing, under article 11, that competent tax authorities have to communicate to the taxpayer, within a strict deadline, the rules of functioning of the arbitral panel[95]. However, such a right doesn't seem fully granted in light of the fact that, as it also occurs under the EU Arbitration Convention, the Directive doesn't require the communication to taxpayers of the arbitral panel opinion. Indeed, article 14(3)(last sentence) of the Directive stipulates that "*The chair shall communicate the opinion of the Advisory Commission or Alternative Dispute Resolution Commission* [only] *to*

[95] The rules of functioning of the arbitral panels envisioned under the Directive are laid down under article 11. Such rules of functioning are currently absent under both the EU Arbitration Convention and the "OECD Procedures" (although the "Sample Mutual Agreement on Arbitration" envisioned in the OECD Commentary to article 25 includes the option for competent tax authorities to agree on the termes of reference for an arbitration procedure). For an overview of the specific features of article 11 allow us to refer to S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, *op. cit.*

competent authorities" and – as to the EU Arbitration Convention – paragraph 9(iii) of the Code of Conduct states that the arbitral panel's opinion should be drafted in "*three original copies*" (or more in the case of triangular cases), of which "*one to be sent to each competent authorities of the Member States involved*" and "*one to be transmitted to the Secretary-General of the council for archiving*".

One may argue that this circumstance is logical and doesn't harm the legal protection of taxpayers, given that, under both the Directive and the EU Arbitration Convention, competent tax authorities have the possibility to reach a deviating mutual agreement after the advisory commission (or the ADR Commission) has delivered its opinion[96].

Nevertheless, it seems that the communication to taxpayers of the arbitral panel's opinion is of great importance, given that: *(i)* in the case in which the competent tax authorities agree with the arbitral panel's opinion, it enables taxpayers to better understand the final decision (i.e. the mutual agreement) that implements such opinion and to verify whether the arbitral opinion has been faithfully transposed into the final decision; *(ii)* in the case in which the competent tax authorities disagree with the arbitral panel's opinion, it enables taxpayers to confront such opinion with the final decision and, thus, to evaluate whether the competent tax authorities have correctly disregarded the arbitral opinion's or if, by contrast, the divergent decision that they have reached is unlawful and should, therefore, be appealed.

On another note, independently from article 41 of the Charter, it is worth noting that the communication of such opinion to taxpayers is of great importance under the Directive also because, pursuant to article 15(3) of the Directive, taxpayers are granted the right to initiate domestic proceedings if the competent tax authorities fail to communicate the final decision within 6 months after the date in which the arbitral panel has rendered its opinion, in order to enforce such communication. Therefore, it is submitted that taxpayers would necessarily need to be aware of when such opinion is rendered – and thus be notified of the arbitral panel's opinion – in order to be able to assess when this period expires and to trigger domestic remedies.

[96] This is the opinion of H.M. Pit, op. cit., 742.

11.3. Critical remarks on the legal theory's majority opinion according to which – at the current stage of the international tax dispute resolution scenario – arbitration procedures are subject to article 47 of the Charter of Fundamental Rights of the European Union.

It should be briefly highlighted that the the legal theory's majority opinion argues that arbitration procedures are subject to article 47 ("*Right to an effective remedy and to a fair trial*"), rather than – as argued in this research – to article 41 ("*Right to good administration*") of the Charter of Fundamental Rights of the European Union[97].

Article 47 of the Charter provides for many more safeguards[98] as compared to article 41 and, unlike this latter provision, applies to proceedings "*before a tribunal*", *i.e.* to proceedings that are of a judicial nature.

As it has been widely presented in this chapter, however, arbitration procedures in the field of taxation seem to have an administrative – rather than a judicial – nature. This remark alone could, therefore, warrant the conclusion that article 47 of the Charter is not applicable to arbitration; nevertheless, such a conclusion needs to be further substantiated in light of the notion of "tribunal" envisioned under the ECJ's case law for the purposes of article 267 of the TFUE. The ECJ, indeed, has not confined the concept of "court" or "tribunal" to those boards belonging to the Member States' judiciary system, but, rather, has devised an autonomous notion of "tribunal" based on

[97] See, *ex multis*, D. DE CAROLIS, *The EU Dispute Resolution Directive (2017/1852) and Fair Trial Protection under Article 47 of the EU Charter of Fundamental Rights*, in *European Taxation*, 2018, 495 ss.; K. PERROU, *Taxpayer Rights and Taxpayer Participation in Procedures Under the Dispute Resolution Directive*, in *Intertax*, 2019, issue n. 8-9, 715 ss.; and – if we are not mistaken – M. TRIVELLIN, *op. cit*., 169: "*Se l'arbitrato rimane l'unica sede in cui si discute dei diritti del contribuente alla corretta imposizione* […] *in esso dovrebbero essere salvaguardati i connotati del gusto processo*". Similarly, see the Authors who extend to arbitration article 6 of the ECHR: 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 G.W. KOFLER, M. POIARES MADURO, P. PISTONE (edited by), *Human Rights and Taxation in Europe and the World*, IBFD, 2011, *Online Books*, par. 21; J. HERDIN-WINTER, *Exchange of Information and Legal Protection: DTCs and EC Law*, M. LANG, J. SCHUCH, C. STARINGER (edited by), *Tax Treaty Law and EC Law*, Kluwer Law International, 2007, 262 – 263; K. PERROU, *Tax Treaty Dispute Resolution*, IBFD, 2014, Online Books, chapter 5.

[98] Article 47 of the Charter of Fundamental Rights of the European Union states that "*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union*" and that this right includes: *(i)* "*the right of every person to be heard, before any individual measure which would affect him or her adversely is taken*"; (ii) "*the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy*"; *(iii)* "*the obligation of the administration to give reasons for its decisions*".

several criteria laid down – for the first time – in the *Vaassen-Göbbels* decision[99]. Precisely, according to this ECJ's judgment, when a domestic board refers to the ECJ for a preliminary ruling pursuant to article 267 of the TFUE, the ECJ has to establish whether such board: *(i)* is established by law; *(ii)* is permanent; *(iii)* applies rules of law; *(iv)* has a compulsory jurisdiction; *(v)* is independent[100]; *(vi)* renders a decision of a judicial nature; *(vi)* envisions an *inter partes* procedure.

Preliminary, it has to be highlighted that – despite the *Vaassen-Göbbels* criteria – the final outcomes of the (many) decisions rendered by the ECJ as to the notion of "tribunal" for the purposes of article 267 of the TFUE are far from compelling or rigorous, since they often seem in contradiction with each other[101]: thus, the concept of "tribunal" is, at the current stage, an extremely vague and elastic concept.

In light of this premise, the analysis at stake will be conducted by taking as a landmark the notion of "tribunal" envisioned in the *Ascendi* judgment[102], provided that this is the most recent judgment in which the ECJ addressed such a notion with respect to an arbitral board in the field of taxation (namely, the Portuguese Tax Arbitral Courts). More specifically, given that in this case the ECJ confirmed that Portuguese Tax Arbitral Courts meet all the requirements in order to be qualified as "tribunals", it has to be established whether the arbitral panels envisioned under the existing dispute resolution mechanisms meet the same requirements that, according to the ECJ, allow to qualify as "tribunals" the Portuguese Tax Arbitral Courts.

The first requirement that, according to the ECJ, allows to qualify as "tribunals" the Portuguese Tax Arbitral Courts is that these Arbitral Courts are established by law, given that they are included in the list of national courts in Article 209 of the

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[99] See ECJ, 30 June 1966, Case 61/65, *Vaassen-Göbbels*.

[100] This requirement was introduced, after 20 years after the *Vaassen-Göbbels* decision, by ECJ, 11 June 1987, Case 14/86, *Pretore di Salò*, par. 7.

[101] To support this conclusion allow us to refer to the convincing remarks of R.G. ANTÓN, *"Ceci n'est pas une Pipe": The Notion of Tax Court under Article 267 of the TFEU*, in *European Taxation*, 2015, 515 ss. For further remarks on this case law orientation see also K. LENAERTS, I. MASELIS, K. GUTMAN, *EU procedural law,* Oxford University Press, 2014, 52 ss.; M. SZPUNAR, *Referrals of preliminary questions by arbitral tribunals to the CJEU,* in F. FERRARI (edited by). *The impact of EU law on international commercial arbitration*, JurisNET, 2017, 87 ss.

[102] ECJ, 12 June 2014, Case C-377/13, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta, S.A. v. Autoridade Tribu- tária e Aduaneira*.

Constitution of the Portuguese Republic and, moreover, that article 1 of Decree-Law n. 10/2011 provides that tax arbitration constitutes an alternative means of judicial resolution of tax disputes[103].

This first requirement seems to be met under all the existing dispute resolution mechanisms: indeed, the fact that the arbitral boards are expressly foreseen and regulated by instruments of international public law (the "OECD Procedures" and the EU Arbitration Convention) and of "Union secondary Law" (the Directive) seems to allow the conclusion that they are "established by law"[104-105].

The second requirement that, according to the ECJ, allows to qualify as "tribunals" the Portuguese Tax Arbitral Courts is that these Arbitral Courts are of a "permanent" nature, since they are "an element of the system of judicial resolution of tax disputes"[106] (even though "the composition of the trial formations of the Tribunal Arbitral Tributário is ephemeral and their activity ends once they have made their ruling"[107]).

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[103] ECJ, 12 June 2014, Case C-377/13, *Ascendi*, cit., par. 24: "In the main proceedings, it appears from the information provided in the order for reference that the arbitration tribunals dealing with taxation have been established by law. The arbitration tribunals are included in the list of national courts in Article 209 of the Constitution of the Portuguese Republic. Moreover, Article 1 of Decree-Law No 10/2011, of 20 January 2011, on the legal rules governing tax arbitration, provides that tax arbitration constitutes an alternative means of judicial resolution of tax disputes and Article 2 of the same decree-law confers general jurisdiction on arbitration tribunals dealing with taxation for assessing the legality of the payment of any tax".

[104] This conclusion is supported by A.P. DOURADO, P. PISTONE, *Arbitrating Tax Disputes in Line with EU Law*, in J. MONSENEGO, J. BJUVBERG (edited by), *International Taxation in a Changing Landscape*, Kluwer Law International, 2019, 64 – 65.

[105] Some doubts, however, may rise in respect to the arbitration procedure envisioned under article 25(5) of the OECD MC, given that if, on the one hand, an arbitration provision drafted along the lines of Article 25(5) of the OECD MC implies a choice for this dispute resolution mechanism, and this choice is formalized in a legally binding document, namely the treaty; on the other hand, it is only the principle of arbitration that is decided in the treaty, not its details or procedural aspects. As discussed above, indeed, article 25(5) of the OECD MC does not set all details on the functioningof arbitration, leaving the mode of application to the contracting states (accordingly, see J. MONSENEGO, *Does the Achmea Case Prevent the Resolution of Tax Treaty Disputes through Arbitration?*, in *Intertax*, 2019, issue n. 8-9, 730; *contra* A.P. DOURADO, P. PISTONE, *loc. ult. cit.*).

[106] ECJ, 12 June 2014, Case C-377/13, *Ascendi*, cit., par. 25.

[107] ECJ, 12 June 2014, Case C-377/13, *Ascendi*, cit., par. 26. It is worth noting that also arbitration in the field of international taxation disputes is – following the wording of the ECJ in the *Ascendi* decision – "ephemeral", given that: *(i)* it may be initiated only at the request of the taxpayer; *(ii)* when such a request is made, the arbitration panel is constituted on that occasion and on an ad hoc basis, i.e. solely for the purpose of resolving the dispute at hand; *(iii)* once the arbitration panel has resolved the dispute, it ceases to exist (except the case, envisioned only under the Directive, in which States appoint an ADR Commission of a "permanent nature" – so called "Standing Committee": see supra par. 5.1.2.).

If broadly interpreted, also this second requirement seems to be met under all the existing dispute resolution mechanisms. Indeed, given that the arbitration panels set up on the basis of tax treaties, of the EU Arbitration Convention and of the Directive are foreseen in legal instruments that bind the jurisdiction that approved them, they could be held – following the wording of the ECJ – as "an element of the system of judicial resolution of tax disputes"[108]. However, from a more close analysis of the arbitration procedures envisioned in the different dispute resolution mechanisms, this conclusion doesn't seem entirely acceptable; mainly in light of the fact that that competent tax authorities have – under all the existing dispute resolution mechanisms – a wide margin of discretion in governing the arbitration procedures and, in some cases, even the power to block the flowing of the proceedings. In other words, the arbitral panels envisioned under the existing dispute resolution mechanisms do not seem to constitute elements "of the system of judicial resolution of tax disputes" for the reason that taxpayers are not always granted with the right to access – at their own discretion – the arbitration procedure[109-110].

The third requirement that, according to the ECJ, allows to qualify as "tribunals" the Portuguese Tax Arbitral Courts is that these Arbitral Courts – although they not meet the requirement of having compulsory jurisdiction, given that the parties (as it occurs under the existing international tax dispute resolution mechanisms) are under no obligation, in law or in fact, to refer their disputes to arbitration – are empowered to

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[108] This conclusion is supported by A.P. DOURADO, P. PISTONE, *Arbitrating Tax Disputes in Line with EU Law*, in J. MONSENEGO, J. BJUVBERG (edited by), *International Taxation in a Changing Landscape*, Kluwer Law International, 2019, 65.

[109] See the sharable remarks of V. CAPASSO, *Oltre la «degiurisdizionalizzazione»: il Tribunal Arbitral Tributário portoghese*, forthcoming: "*appare più verosimile, infatti, intendere il riferimento alla «natura permanente» del Tribunal Arbitral Tributário come alla (mera) stabile possibilità per il cittadino di adire il giudice privato*".

[110] One may wonder if the "Standing Committee" envisioned under article 10 of the Directive could be of a permanent nature in the sense of the case law of the Court of Justice. The Dispute Resolution Directive, indeed, expressly mentions that the standing committee is "of a permanent nature". However, it seems that the use of the word "permanent" does not automatically make the "Standing Committee" a "tribunal" for the purposes of Article 267 of the TFEU. The actual permanency of the "Standing Committee", indeed, is not established by the Directive, but is up to the Member States through an agreement between their competent authorities. Therefore, if the standing committee is to be permanent, such a permanency does not come from its statutory origin, but from the agreement between the competent authorities of the Member States (accordingly, see J. MONSENEGO, *Does the Achmea Case Prevent the Resolution of Tax Treaty Disputes through Arbitration?*, in *Intertax*, 2019, issue n. 8-9, 735).

issue "binding decisions upon the parties"[111]. This requirement isn't met by the arbitration procedures envisioned in the existing dispute resolution mechanisms, given that tax authorities have the power to disagree with the arbitral panels' opinion and to agree on a different solution of the case in dispute. In addition, taxpayers have always the right on whether to accept, or not to accept, the final decision rendered by the competent tax authorities[112]. Therefore, it doesn't seem acceptable to conclude that the arbitral panels envisioned under the existing dispute resolution mechanisms to settle international tax disputes deliver binding decisions.

The last requirement[113] that, according to the ECJ, allows to qualify as "tribunals" the Portuguese Tax Arbitral Courts is that the members of these Arbitral Courts are "subject to the principles of impartiality and independence", given that the provisions of the Decree Law n. 10/2011 "ensure that the relevant arbitration tribunal acts as a third party in relation to the authority which adopted the impugned decision"[114]. *Prima facie*, this requirement seems to be met by all the arbitration procedures envisioned in the existing dispute resolution mechanisms. Indeed, also the existing dispute resolution mechanisms seem (*de facto*, although not *de jure*) to sufficiently safeguard the independence and the impartiality of arbitrators with respect to tax authorities (see supra par. 5). Moreover, as it occurs under the Portuguese Decree Law n. 10/2011 (see art. 6), also under the existing dispute resolution mechanisms the arbitrators are usually chosen from a "list" of independent persons.

[111] ECJ, 12 June 2014, Case C-377/13, *Ascendi*, cit., par. 29.

[112] C*ontra* A.P. DOURADO, P. PISTONE, *Arbitrating Tax Disputes in Line with EU Law*, in J. MONSENEGO, J. BJUVBERG (edited by), *International Taxation in a Changing Landscape*, Kluwer Law International, 2019, 65.

[113] *Rectius*, according to the ECJ, the Portuguese Tax Arbitral Courts can be qualified as "tribunals" also *(i)* because articles 16 and 28 of Decree-Law n. 10/2011 envision an *inter partes* procedure (*i.e.* a procedure between tax authorities and taxpayers) before the arbitration tribunals (see par. 30 of the *Ascendi* judgment): as it was discussed in this chapter, this is not the case of the arbitration procedures envisioned under the existing dispute resolution mechanisms, given that these are administrative procedures between tax authorities only. And *(ii)* because these Courts "are to adjudicate on the basis of statutory law and recourse to equity is prohibited" (see, again, par. 30 of the *Ascendi* judgment): as it was previously discussed, also to the arbitration panels dealing with international tax disputes should be prevented the possibility issue opinions based on equity, therefore this requirements seems to be met by the arbitration procedures envisioned for the settlement of international tax disputes.

[114] ECJ, 12 June 2014, Case C-377/13, *Ascendi*, cit., par. 32.

However, it is striking to note that under article 6, comma 3, of the Portuguese Decree Law n. 10/2011 – which the ECJ expressly recalls in the *Ascendi* case – taxpayers have the possibility to appoint their own arbitrators[115]. By contrast, under all the existing dispute resolution tools, tax authorities have full control over the appointment of arbitrators. For this reason, it seems established that neither this requirement is fulfilled by the arbitration procedures envisioned under the Directive, the EU Arbitration Procedure and the "OECD Procedures".

In conclusion, it seems that the arbitral panels envisioned in the existing dispute resolution mechanisms cannot be qualified as "tribunals" for the purpose of article 267 of the TFUE and, thus, of article 47 of the Charter, given that: *(a)* they are not of a "permanent nature"; *(b)* they are not empowered to issue "binding decisions upon the parties"; *(c)* they are not independent and impartial with respect to both taxpayers and the relevant tax authorities.

12. The possibility for taxpayers to appeal against the final decision: is there the need of judicial means to settle international tax disputes?

The existence of the taxpayers' right to appeal undue "arbitral awards" before domestic courts seems undisputed[116].

Indeed: *(i)* article 15(4) of the Directive allows domestic Courts to invalidate (following the request of taxpayers, but even, it seems, of competent tax authorities) the final decision if "*there was a lack of independence*" according to the criteria laid down under article 8; *(ii)* similarly, article 19(4)(b)(ii) of the MLI expressly allows domestic Courts to invalidate "arbitral awards" by stating that such decisions shall not be binding "*if a final decision of the courts of one of the Contracting Jurisdictions*

[115] See V. CAPASSO, *Oltre la «degiurisdizionalizzazione»: il Tribunal Arbitral Tributário portoghese*, in corso di pubblicazione.

[116] On this complex issue, see: M. TRIVELLIN, *op. cit.*, 158 – 163; H. ABEDIAN, *Judicial Review of Arbitral Awards in International Arbitration. A Case for an Efficient System of Judicial Review*, in *Journal of International Arbitration*, 2011, 553 ss.; D. RAMOS MUNOZ, *A Game of Snakes and Ladders – Tax Arbitration in an International and EU Setting*, in D. SARMIENTO, D. JIMÉNEZ-VALLADOLID DE L'HOTELLERIE-FALLOIS (edited by), *Litigating EU Tax Law in International, National and Non-EU National Courts*, IBFD, 2014, *Online Books*, par. 7.4.3.2. and par. 7.5.3.; J.S. WILKIE, *Implementation of Arbitration Decisions in Domestic Law*, in M. LANG, J. OWENS (edited by), in *International Arbitration in Tax Matters*, IBFD, 2015, 352 – 353; A RUST, *How Final are Arbitration Decisions?*, *ivi*, 382.

holds that the arbitration decision is invalid"; *(iii)* finally, the OECD Commentary to article 25 (when stating that "if an arbitration decision is found to be unenforceable by the courts of one of the Contracting States because of a violation of paragraph 5 of Article 25 or of any procedural rule, that arbitration decision will not be binding on either State") finds it obvious that taxpayers are entitled to submit to judicial review arbitration decisions whenever there is a violation of the procedural rules[117].

Moreover, with specific regard to transfer pricing disputes (if one follows the line of reasoning of the EU Commission, according to which the arm's length principle falls under the "umbrella" of article 107 of the TFUE.), it seems acceptable to conclude that when taxpayers are not able to obtain the suspension of domestic judicial proceedings, they should always be entitled to appeal against "arbitral awards" that have been issued in breach EU law (for instance, of article 41 of the Charter of Fundamental Rights of the European Union and/or of article 107 of the TFUE if the final decision is not consistent with the arm's length principle envisioned therein).

As it was previously discussed in this research, indeed, the ECJ, in the *Achmea* judgment, emphasized the need for Member States to ensure the full effectiveness and consistency of EU law, by implementing a system of judicial remedies that enables a dialogue – by means of article 267 of the TFUE – between domestic courts and the Court of Justice on matters related to the interpretation or the application of EU law.

Hence, if "arbitral awards" weren't to be submitted to judicial review before domestic Courts when taxpayers are not able to obtain the suspension of domestic judicial proceedings, Member States could substantially remove from the jurisdiction of their national courts (and, as a consequence, of the ECJ by means of article 267 of the TFUE) the application and/or the interpretation of EU law, given that, on the one hand, the arbitral panels envisioned under the existing dispute resolution mechanisms cannot be deemed to be "tribunals" for the purposes of article 267 of the TFUE (see supra par. 10.3.), and, on the other hand, under all the existing legal instruments to settle international tax disputes, if taxpayers are not able to obtain the suspension of the

[117] As to the existence, under the EU Arbitration Convention, of the right to appeal before domestic courts undue "arbitral awards", see L. HINNEKENS, *European Arbitration Convention: Thoughts on Its Principles, Procedures and First Experience*, in *EC Tax Review*, n.3/2010, 109 ss.; H.M. PIT, *op. cit.*, 1506.

domestic proceedings they are required to terminate such proceedings in order to carry on the MAP and, eventually, begin the arbitration stage.
Having this briefly said it should, however, be highlighted that the possibility for taxpayers to appeal against undue arbitration decisions before national Courts seems to be an ineffective remedy for the elimination of double taxation and, thus, for the resolution of international tax disputes consistently with the EU Law.
The first reason is that decisions rendered by national courts cannot be binding upon tax authorities of another State. Therefore, this remedy could be effective only when the following two conditions are both met: *(i)* that taxpayers file the appeal before the domestic courts of all the states involved in the dispute; *(ii)* that all the judicial proceedings triggered at the national level lead to decisions favorable to the taxpayers.
The second reason is that, by challenging an "arbitral award" before national courts, taxpayers would likely be able to obtain the dismissal of the agreement (for further remarks on this aspect see chapter IV) and not a decision that forces the tax administrations involved in a dispute to start over a new arbitration procedure[118]. An "annulment decision" alone, without the possibility to re-open a new MAP/arbitration procedure, indeed, is of no practical use for taxpayers, since it wouldn't eliminate double taxation, but, rather, merely restore the *status quo ante* the submission of the MAP request[119].

[118] It is worth noting that, under the MLI, the possibility to re-open a new arbitration procedure after the revision of the final decision by domestic courts can be even prevented at the discretion of the competent tax authorities. Article 19(4)(b)(ii) of the MLI, indeed, reads that "*In such a case, a new request for arbitration may be made unless the competent authorities agree that such a new request should not be permitted*". As to this provision, see the critical remarks of M. TRIVELLIN, *op. cit*., 161: "*Non sembra ragionevole che gli Stati possano negare il diritto di ricominciare dall'inizio perché questo rischia di svuotare di efficacia la pronuncia di invalidità. Il contribuente potrebbe, infatti, non avere più strumenti per assicurarsi una decisione sul caso (quelli interni potrebbero essere ormai estinti e quelli internazionali sarebbero paralizzati proprio dalla decisione della Autorità competenti di non dar corso ad una nuova fase arbitrale). Non resterebbe che un'azione di danno per far valere gli eventuali illeciti*". Moreover, see the critical remarks of H.M. PIT, *op. cit*., 1519 and of J. LUTS, F. DEBELVA, *op. cit*., par. III.B.4 as to the fact that article 15(4) of the Directive doesn't set in place any procedures that forces the competent tax authorities to re-open a new arbitration procedure if domestic courts assess that there was a lack of independence during the arbitration, thus leaving, in this situation, the taxpayers with an unresolved dispute.

[119] Moreover, such a remedy appears also to be cumbersome, since it entails the running of different judicial proceedings, in different States, and requires a considerable amount of time before a final decision is reached in each State, given that a decision by a first-tier court may be further appealed before a second-tier court and, ultimately, before a Supreme Court.

This final remark may, therefore, allow to reach the conclusion that the current structure of the international tax dispute resolution mechanisms doesn't ensure – neither via domestic judicial systems – that a tax dispute falling within the scope of "Union Law" will always be effectively settled consistently with the EU Law and, thus, that the use of arbitration in order to settle international tax disputes could be incompatible with article 344 of the TFUE as recently interpreted by the ECJ in the Achmea decision[120].

Taking into account this conclusion, we would like to bring towards two possible solutions in order to preserve the compatibility of cross-border tax arbitration with EU Law.

A first solution (which is probably the preferable one) could be to turn the arbitration procedures envisioned under the existing dispute resolution mechanisms into procedures of a judicial nature. By doing so, indeed, "arbitral panels" would be given the possibility to directly and autonomously refer a case for a preliminary ruling to the Court of Justice in order to resolve questions involving the interpretation of EU law[121].

A second solution could be to ensure the effectiveness of domestic remedies against undue arbitration decisions, by inserting in the existing dispute resolution mechanisms rules that *jointly*: *(i)* grant to taxpayers the right to appeal against undue mutual agreements/arbitration decisions; *(ii)* attribute to one of the States involved in an international tax dispute (exclusive) jurisdiction over the appeal *sub (i)* (this, for instance, could be the State in which is resident the taxpayer that triggered the

[120] Towards this conclusion see: A.P. DOURADO, P. PISTONE, *Arbitrating Tax Disputes in Line with EU Law*, in J. MONSENEGO, J. BJUVBERG (edited by), *International Taxation in a Changing Landscape*, Kluwer Law International, 2019, 57 – 67; J. MONSENEGO, *Does the Achmea Case Prevent the Resolution of Tax Treaty Disputes through Arbitration?*, in *Intertax*, 2019, issue n. 8-9, 725 ss.; K. PERROU, *Taxpayer Rights and Taxpayer Participation in Procedures Under the Dispute Resolution Directive*, in *Intertax*, 2019, issue n. 8-9, 715 ss.

[121] Towards this solution seem to point K. PERROU, *Taxpayer Rights and Taxpayer Participation in Procedures Under the Dispute Resolution Directive*, in *Intertax*, 2019, issue n. 8-9, 723-724 ("The EU law environment leads to the conclusion that the […] arbitration phase should be designed as real arbitration that ensures (1) the participation of the taxpayer and (2) the effective supervision of its decisions by the CJEU") and J. MONSENEGO, *Does the Achmea Case Prevent the Resolution of Tax Treaty Disputes through Arbitration?*, in *Intertax*, 2019, issue n. 8-9, 736.

MAP[122]); *(iii)* force all the tax administrations involved in a dispute to re-open[123] a new MAP or arbitration procedure if the domestic appeal triggered in the State *sub (ii)* ends with a decision that assesses (possibly following the submission of a preliminary before the ECJ) the unlawfulness of the appealed mutual agreements/arbitration decisions[124].

[122] Since in transfer pricing disputes more than one taxpayer is affected by double taxation, a possible solution could be to attribute the jurisdiction to the State where is resident the taxpayer that triggered the MAP: i.e., as the case may be, to the State that imposed the primary adjustment or to the State that would have to issue the correlative adjustment.

[123] As to the importance to re-open the MAP, see: J. MONSENEGO, *Does the Achmea Case Prevent the Resolution of Tax Treaty Disputes through Arbitration?*, in *Intertax*, 2019, issue n. 8-9, 733: "the Achmea case points to a need to reform Article 25(5) of the OECD Model (2017), in order to give the taxpayer a possibility to request the opening of a new arbitration procedure within a certain time period after the Court or the domestic court has ruled on the issue".

[124] A third solution could be to appoint the ECJ itself as arbitrator (as stated above, at the current stage, this possibility seems granted only under the Directive and under article 25(5) of the tax treaty between Austria and Germany). Nevertheless, this solution – as seen above – seems hardly viable, since it would excessively burden the ECJ. Accordingly, see, recently, A.P. DOURADO, P. PISTONE, *Arbitrating Tax Disputes in Line with EU Law*, in J. MONSENEGO, J. BJUVBERG (edited by), *International Taxation in a Changing Landscape*, Kluwer Law International, 2019, 66.

CHAPTER IV

INTERACTIONS BETWEEN THE EXISTING MECHANISMS TO SETTLE INTERNATIONAL TAX DISPUTES AND THE ITALIAN TAX LEGAL SYSTEM (SELECTED ISSUES)

administrative acts implementing mutual agreements or arbitrations decisions that entail the revision downwards or the confirmation of primary adjustments imposed in Italy. – 3.2. Critical remarks as to the possibility to challenge, before Italian Courts, administrative acts implementing mutual agreements or arbitrations decisions that grant to Italian taxpayers a "correlative adjustment". – 4. The suspension of tax collection during the period of application of the existing dispute resolution mechanisms. – 4.1. The suspension of tax collection during the period of application of the EU Arbitration Convention: analysis of article 3, comma 2, Law n. 99/1993. – 4.2. The suspension of tax collection during the period of application of the "OECD Procedures". – 4.3. The suspension of tax collection during the period of application of the Directive.

1. Insights on the legal nature of Italian administrative acts implementing mutual agreements and arbitration decisions.

Chapters II and III highlighted, respectively, that the MAPs and the arbitration procedures envisioned under all the existing dispute resolution mechanisms should be viewed as procedures of an administrative nature, through which the tax administrations exercise their power to tax.

Precisely, at this regard, it was highlighted, in general, that all the existing dispute resolution mechanisms are based on the "Diplomatic Protection Theory", *i.e.* on the assumption that, on the international level, individuals have no international personality and, therefore, only States may act at on an international level on behalf of their nationals ("diplomatic protection"). Hence, where a State takes up the individual dispute through diplomatic protection, this dispute becomes a pure interstate dispute with no enforceable right of involvement of the individuals who suffered the breach of international law.

Moreover, with specific regard to the arbitration stage, this same conclusion has been further substantiated by highlighting that – contrary to the international legal theory majority opinion – none of the arbitration procedures envisioned under the existing dispute resolution mechanisms should be viewed as procedures that perform a judicial settlement of tax disputes between taxpayers and tax authorities, given that none of the typical features of "judicial" arbitration can be inferred therein. Precisely, neither the Directive, nor the EU Arbitration Convention or the "OECD Procedures", have given evidence to suggest that *(i)* the "arbitration panels" are impartial and independent *vis-*

à-vis both taxpayers and relevant tax authorities, nor that *(ii)* the arbitration decisions are binding on both the tax authorities and the taxpayers.
This paragraph is going to provide for some insights as to the legal nature of the Italian Revenue Agency administrative measures that implement in the Italian legal systems mutual agreements and arbitration decisions[1].
To this end, a distinction should be made between *(a)* administrative measures that implement mutual agreements, or arbitrations decisions, that entail a revision downwards of primary adjustments imposed in Italy and *(b)* administrative measures that implement mutual agreements, or arbitrations decisions, that grant to Italian taxpayers a "correlative adjustment".

1.1. Insights on the legal nature of administrative acts implementing mutual agreements or arbitrations decisions that entail the revision downwards or the confirmation of primary adjustments imposed in Italy.

When a primary adjustment is imposed in Italy, a taxpayer may choose to trigger one of the procedures envisioned under the international tax dispute resolution mechanisms in order to obtain a mutual agreement or an arbitration decision that entails, alternatively: *(i)* the annulment of the primary adjustment; *(ii)* a revision downwards of the primary adjustment and the issuing of a correlative adjustment; *(iii)* the confirmation of the primary adjustment and the issuing of a correlative adjustment that completely offsets the primary adjustment.
From an Italian perspective, the legal nature of the administrative measures that implement a mutual agreement or an arbitration decision triggered after the imposition in Italy of a primary adjustment seem to vary depending on the outcome of such procedures. Precisely, it appears that the outcomes *sub (i)* and *sub (ii)* should be distinguished from the outcome *sub (iii)*.
As to the outcomes *sub (i)* and *sub (ii)*, the administrative measures implemented by the Revenue Agency in the domestic system to enforce mutual agreements or arbitration decisions entailing the repeal or downward revision of a primary adjustment

[1] The previous chapters have already brought forward that both mutual agreements (see chapter II, par. 4) and arbitration decisions (see chapter II, par. 10) have to be implemented in the domestic legal systems thorough administrative acts of the tax administrations that are involved in the procedures.

ordered in Italy can be regarded (in a broader sense) as measures granting the Revenue Agency its right to carry out its applications for internal review ("*provvedimenti in autotutela*"). More specifically, when a mutual agreement or an arbitration decision entails the integral annulment of an Italian primary adjustment, the administrative measure that implements such an agreement or arbitration decision could be *assimilated* to a "total application for internal review " ("*provvedimento di autotutela totale*"). When, by contrast, a mutual agreement or an arbitration decision entails a downward revision of an Italian primary adjustment, the administrative measure that implements such an agreement or arbitration decision could be *assimilated* a "partial application for internal review " ("*provvedimento di autotutela parziale*").

As to the outcome *sub (iii)*, the administrative measures implemented by the Revenue Agency in the domestic system to enforce mutual agreements or arbitration decisions entailing the confirmation of a primary adjustment issued in Italy can be regarded (in a broader sense) as denials of the Italian Revenue Agency to exercise application for internal review ("*diniego di autotutela*"), *rectius* as "confirmatory measures" of the primary adjustment ("*provvedimenti confermativi*")[2].

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[2] Usually, when an administrative measure "confirms" a previous administrative measure, it should be distinguished if the former is a "confirmatory measure" ("*provvedimento confermativo*") or a "merely confirmatory measure" ("*atto meramente confermativo*"): the difference between these two measures is that only when issuing a "confirmatory measure" the tax administration carries out a new administrative proceeding. "Merely confirmatory measures", by contrast, are interim acts, with which the tax administration merely recognize the accuracy of a previous administrative measure, without carrying out a new administrative proceeding in order to undertake such assessment. This distinction is relevant, since only the formers can be appealed before a Court [this distinction derives from administrative law; see, *inter alia*: E. CANNADA BARTOLI, *Conferma (dir. amm.)*, in *Enc. dir.*, VIII, 1961, 856 ss., spec. par. 5; M.S. GIANNINI, *Diritto amministrativo*, Milano, 1993, 562 – 563; R. VILLATA, M. RAMAJOLI, *Il provvedimento amministrativo*, Torino, 2006, 621; R. CHIEPPA, *Provvedimenti di secondo grado (dir. amm.*), in *Enc. Dir.,* Annali, II, Milano, 2008, par. 19; B.G. MATTARELLA, *Il provvedimento*, in S. CASSESE (edited by), *Istituzioni di diritto amministrativo*, Milano, 2012, 348; as to the administrative case law, see: Cons. di Stato, sez. IV, 14 aprile 2014, n. 1805; Id, sez. IV, 12 febbraio 2015, n. 758; Id., sez. IV, 29 febbraio 2016, n. 812; Id., sez. III, 30 maggio 2017, n. 2564]. As to the necessity to apply this distinction with regard to denials of the Italian Revenue Agency to exercise its power of self protection ("*dinieghi di autotutela*"), see F. TESAURO, *Manuale del processo tributario*, Torino, 2017, 82: "*Occorre* […] *distinguere il caso in cui il diniego di autotutela costituisce mera conferma del precedente provvedimento dal caso in cui il diniego costituisce un nuovo atto impositivo, diverso da quello precedente, conseguente ad una nuova istruttoria*"; in the Italian Supreme's case law, see, *inter alia*: Cass., 15 october 2007, n. 21530. Slightly different appears the view of M. BASILAVECCHIA, *Funzione impositiva e forme di tutela*, 2013, Torino, 2013, 373, according to which: "*anche se il diniego si limiti a ribadire la correttezza dell'atto contestato, esso non è mai atto di pura conferma, perché alla revisione dell'atto l'amministrazione ha comunque dovuto affiancare una valutazione sulle circostanze di fatto [...] rappresentate nell'istanza d autotutela o comunque emerse, per qualsiasi ragione, nell'ambito delle attività interne di revisione degli atti emanati*". There seem to be no doubts as to the fact that administrative acts implemening mutual agreements or arbitration decisions that entail the

The elements that could enable to trace administrative deeds that implement in the Italian legal system mutual agreements and arbitration decisions back to the Italian Revenue Agency power of application for internal review seem essentially two.

The first element is that the procedures envisioned under the Directive, the EU Arbitration Convention and the "OECD Procedures" are aimed to settle international tax disputes involving double taxation. Indeed, pursuant to article 2, comma 1, lett. d), of the Ministerial Decree 11 February 1997, n. 37, one of the grounds for the exercise of the power of application for internal review by the Italian Revenue Agency is, precisely, the elimination of double taxation (both economic and juridical).

The second element is that, in order to obtain the annulment or a revision downwards of a primary adjustment by means of the procedures envisioned under the existing international tax disputes resolution mechanisms, taxpayers have to submit a request to the same Italian Revenue Agency, *i.e.* to the same administrative body that has issued the primary adjustment. Similarly, pursuant to the combination between article 1 and article 5 of the Ministerial Decree 11 February 1997, n. 37, the taxpayers, in order to obtain an "application for internal review" that annuls – entirely or partially – a tax assessment (or other equivalent act), have to make a request to the Italian

confirmation of a primary adjustment issued in Italy are "confirmatory deeds", since MAPs and arbitration procedures are – by definition – new administrative proceedings.

Revenue Agency, *i.e.* to the same administrative body that has issued such tax assessment (or other equivalent act)[3-4].

Having this briefly said, it should, nevertheless, be highlighted that some differences between the Italian Revenue Agency power of application for internal review and mutual agreements/arbitral decisions that entail the annulment or the revision downwards of an Italian primary adjustment could still be detected.

Firstly, it could be argued – although this issue is still widely debated – that the exercise of the power of application for internal review is not compulsory upon the Revenue Agency[5], while, by contrast, the Italian Revenue Agency has a legal duty to

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[3] Accordingly, see G. GALIZIA, *Questioni scelte in tema di autotutel dell'amminisrazione finanziaria*, in *Dir. prat. trib.*, 2009, I, 1015 – 1019, 1020 ("*Sulla base delle illustrate analogie esistenti tra i due istituti, si può agevolmente concludere che, nella prima fase, l'art. 25 del modello di convenzione OCSE contempli una specifica applicazione dell'istituto interno dell'autotutela diretta alla correzione di un ato viziato, in punto di diritto, dalla non corretta applicazione del trattato e che la vera e propria procedura amichevole si configuri come una sorta di autotutela internazionale attraverso cui, a voler utilizzare una locuzione di kelseniana memoria, gli Stati si fanno giustizia da sé*"); M. TRIVELLIN, *Studi sugli strumenti di soluzione delle controversie fiscali internazionali*, Torino, 2018, 82 ("*La struttura della procedura amichevole, pur comportando un accordo con l'altro Paese contraente, implica, almeno per taluni aspetti, un coinvolgimento diretto nella vertenza dell'Autorità nazionale che non ci appare qualitativamente differente rispetto a un riesame*"), 85 ("*Si è detto ... che l'attuazione dell'accordo sarebbe espressione del potere di autotutela*") , 90-91 ("*la MAP ... rivela alcuni tratti di assimibilità ad un'istanza di riesame*"); P. PISTONE, *Arbitration procedures in Tax Treaty and Community Law: a Study from an Italian Perspective*, in *Dir. prat. trib. int.*, 2001, 622 ("*Should Italian tax authorities not invoke the procedure, the taxpayer may claim his right to the initiation before domestic administrative courts, enjoying the same degree of legal protection applicable to the denial of* autotutela"). This conclusion seems also reached by C. CONSOLO, *Sospensione del processo*, in C. GLENDI, C. CONSOLO, A. CONTRINO (a cura di), Abuso del diritto e novità sul processo tributario, Milano, 2016, 192 ("*Si badi, tuttavia, che un epilogo della procedura amichevole tra Stati che comporti la rinunzia dell'autorità fiscale italiana ad elevare pretese impositive su una determinata capacità contributiva ben potrebbe qualificarsi come circostanza sopravvenuta, idonea a consentire alla p.a. di esercitare il proprio potere di autotutela*").

[4] Moreover, on a final note, it is worth noting that the Italian Revenue Agency, in the Circular letter n. 21/E of 2012, seems to confirm this solution, when stating that mutual agreements or arbitration decisions that entail the annulment or the revision downwards of a tax assessment are implemented through the issuing of a "relief deed" in relation to the taxes not due ("*provvedimento di sgravio*"). See Circ. Ag. Entr., 5 giugno 2012, n. 21/E, par. 4.2.10 ("*In caso di accordo tra le autorità competenti, generalmente l'autorità competente che ha ricevuto l'istanza di MAP comunica i contenuti dell'accordo al contribuente, mentre l'Agenzia delle Entrate ne dispone l'esecuzione, provvedendo - ove del caso - al rimborso o allo sgravio dell'imposta non dovuta e relative sanzioni e interessi*") and, *mutatis mutandis*, par. 5.10 ("*L'accordo viene notificato al contribuente a cura dell'autorità competente, con contestuale comunicazione all'Agenzia delle Entrate, che eventualmente fornisce le informazioni relative alla presentazione di istanza di rimborso o sgravio dell'imposta e relative sanzioni e interessi*").

[5] See Corte Cost., 13 luglio 2017, n. 181: "*l'annullamento d'ufficio non ha funzione giustiziale, costituisce espressione di amministrazione attiva e comporta di regola valutazioni discrezionali, non esaurendosi il potere dell'autorità che lo adotta unicamente nella verifica della legittimità dell'atto e nel suo doveroso annullamento se ne riscontra l'illegittimità"*. Accordingly, if we are not mistaken, D. STEVANATO, *Autotutela (Diritto tributario)*, in *Enc. dir.*, *Aggiornamento*, Milano, 1999, 303 ss. and R.

conclude the procedures envisioned under the existing dispute resolution mechanisms to settle international tax disputes (as stated above, indeed, all the existing dispute resolution mechanisms – a part, at some extent, from the "OECD Procedures" – provide for mandatory arbitration procedures that ensure the reaching of a final solution of the disputes)[6]. Secondly, it could be argued that the rationale of the existing dispute resolution mechanisms (*i.e.* the duty to perform the obligations arising from a double tax treaty or from a convention) slightly differs from the rationale of the Italian Revenue Agency power of application for internal review (*i.e.* articles 3, 53 and 97 of the Italian Constitution)[7].

1.2. Insights on the legal nature of administrative acts implementing mutual agreements or arbitrations decisions that grant to Italian taxpayers a "correlative adjustment".

When the existing dispute resolution mechanisms are triggered following an upward adjustment carried out by a foreign tax administration and the procedures envisioned therein terminate with a mutual agreement or an arbitration decision that grant to an Italian taxpayer a "correlative adjustment", the administrative act that implements such

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LUPI, *Diritto tributario. Parte generale*, Milano, 2000, 90 ss.: "*Il potere di annullare atti illegittimi o infondati deve considerarsi come uno degli aspetti generali del potere amministrativo in materia tributaria e deve considerarsi ammesso in base ai principi propri del diritto amministrativo, che sull'argomento non trovano alcuna deroga nelle esigenze specifiche del diritto tributario*. […] *Da quanto sopra discende che il la decisione se esercitare o meno l'autotutela ha contenuto eminentemente discrezionale*". *Contra*, if we are not mistaken, F. TESAURO, *Riesame degli atti impositivi a tutela del contribuente*, in *Giust. trib*., 2008, 20 – 21: "*Per il diritto amministrativo generale, è opinione condivisa che l'annullamento in autotutela di un precedente atto illegittimo non è un atto vincolato. Le pubbliche amministrazioni sono libere di riesaminare o non riesaminare i loro atti. [Nel diritto tributario, invece, va] riconosciuto al privato un interesse legittimo di tipo c.d. pretensivo, e a contenuto procedimentale, a che l'istanza venga esaminata e decisa alla luce della sussistenza di quei presupposti che il legislatore, sia pure non tassativamente, ha elencato nella norma regolamentare (art. 2, D.M. 37/97)*". A similar view, always if we are not mistaken, has been adopted also by F. MOSCHETTI, *Profili generali*, in F. MOSCHETTI (a cura di), *La capacità contributiva*, Padova, 1993, 13 ss.; E. DE MITA, *Principi di diritto tributario*, Milano, 2007, 40; F. GALLO, *Discrezionalità (diritto tributario)*, in *Enc. dir*., Aggiornamento, III, Milano, 1999, 536 ss.; G. TREMONTI, *Imposizione e definitività nel diritto tributario*, Milano, 1977, 430.

[6] Accordingly, if we are not mistaken, M. TRIVELLIN, *op. cit*., 91: "*Gli elementi comuni non devono, tuttavia, condurre a una piena identificazione […] il fine è quello di dar corso ad un'autonoma procedura internazionale […] e non sembra, dunque, coinvolgere i profili di discrezionalità attribuiti dalla Corte Costituzionale all'autotutela, considerata come espressione di amministrazione attiva e non di funzioni giustiziali e di protezione del contribuente*".

[7] Both these issues, due to their complexity, necessarily fall outside the scope of this research.

mutual agreement or arbitral decision in Italy cannot be traced back to the Italian Revenue Agency power of application for internal review.

The exercise of the power of application for internal review, indeed, implies, necessarily, the existence of a previous tax assessment to revoke or annul.

In order to offer some insights on the legal nature of administrative measures that implement mutual agreements or arbitrations decisions granting to Italian taxpayers a "correlative adjustment", it seems appropriate to briefly address the functioning of the said correlative adjustments.

As repeatedly highlighted in this research, corresponding adjustments are aimed to eliminate international double taxation in cases where the tax administration of one State (State A) increases the taxable profits of a company (i.e. makes a primary adjustment) as a result of applying the arm's length principle to transactions involving an associated enterprise resident in a second tax jurisdiction (State B). Precisely, in such a case, the corresponding adjustment is a downward adjustment to the tax liability of the latter associated enterprise (i.e. of the associated enterprise resident in State B) that is aimed to allocate the profits between the two jurisdictions (State A and State B) consistently with the primary adjustment.

A corresponding adjustment can be achieved in different ways.

A State may make a correlative adjustment either by: *(a)* recalculating the profits subject to tax of an associated enterprise in accordance to the arm's length prices determined in a primary adjustment ("decrease tax adjustment*"),* or by *(b)* letting such calculation stand and giving the associated enterprise a tax refund for the additional tax charged imposed upon its associated enterprise by the adjusting State (hereinafter, "refund method").

Moreover, once a tax administration has agreed to make a correlative adjustment, a corresponding adjustment could be attributed either to *(c)* the year in which the controlled transactions giving rise to the adjustment took place, or to *(d)* an alternative year, such as the year in which the primary adjustment is imposed[8].

[8] According to the OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, July 2017, par. C.2. ("Corresponding Adjustments"), indeed, all these possibilities are – in the abstract – viable.

Starting from this last issue, it should be highlighted that neither the Italian Law (under article 31-quater, comma 1, of the Decree n. 600/1973[9]) nor the Italian Revenue Agency have offered useful guidelines as to the fiscal year to which the correlative adjustment should be attributed. Nevertheless, at this regard, it could be concluded that the most appropriate solution is the one *sub (c)* (*i.e.* to attribute correlative adjustments to the fiscal year in which the controlled transactions giving rise to the primary adjustment took place), since only this solution enables to achieve a perfect matching of income and expenses, and since this is the solution that better reflects the economic situation that would have occurred if the controlled transactions had been *ab initio* at arm's length[10].

As to the first issue, the Italian Law, under article 31-quater, didn't provide for useful guidelines neither with regard to the method for the making of a corresponding adjustment. The Italian Revenue Agency, in the Circular letter 21/E of 2012, however, seems to refer to the method *sub (b)* (*i.e.* the refund method) as to the best method to make a corresponding adjustment. This Circular letter, indeed, states that, as a result of a MAP/arbitration procedure that entails the issuing of a "correlative adjustment"

[9] Article 31-quater of the Decree n. 600/1973, sets the conditions under which the Italian Revenue Agency is entitled to issue corresponding adjustments. This provision will be extensively examined infra in par. 3.

[10] Accordingly, see OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, July 2017, par. 4.36: "Once a tax administration has agreed to make a corresponding adjustment it is necessary to establish whether the adjustment is to be attributed to the year in which the controlled transactions giving rise to the adjustment took place or to an alternative year, such as the year in which the primary adjustment is determined. This issue also often raises the question of a taxpayer's entitlement to interest on the overpayment of tax in the jurisdiction which has agreed to make the corresponding adjustment (discussed in paragraphs 4.65-4.67). The first approach is more appropriate because it achieves a matching of income and expenses and better reflects the economic situation as it would have been if the controlled transactions had been at arm's length". However, the same OECD seems also to leave open other solutions, when stating that "in cases involving lengthy delays between the year covered by the adjustment and the year of its acceptance by the taxpayer or a final court decision, the tax administration should have the flexibility to agree to make corresponding adjustments for the year of acceptance of or decision on the primary adjustment". At this regard see A. VICINI RONCHETTI, *I prezzi di trasferimento*, in C. SACCHETTO, *Principi di diritto tributario europeo e internazionale*, 2011, 298-299: "*con riferimento al periodo di imposta al quale imputare l'aggiustamento corrispondente si poneva il dubbio se esso avrebbe dovuto essere imputato nell'esercizio in cui è avvenuta la transazione ovvero nell'esercizio in cui è avvenuta la rettifica del reddito da parte dell'amministrazione finanziaria. L'OCSE propende per la prima soluzione in quanto garantirebbe di ristabilire perfettamente le condizioni economiche che avrebbero dovuto verificarsi se la transazione fosse avvenuta* at arm's lenght".

to an Italian enterprise, the Italian Revenue Agency is always required to issue a tax refund[11].

The method for the issuing of corresponding adjustments indicated by the Italian Revenue Agency in the Circular letter 21/E of 2012, however, doesn't seem applicable if the Italian enterprise, in the fiscal year in which the controlled transactions giving rise to the adjustment took place, suffered a loss. For this reason, contrary to the solution reached by the Italian Revenue Agency in the above mentioned Circular letter, the most appropriate method for making a correlative adjustment seems to be the one referred to in *sub (a)*, *i.e.* to recalculate the Italian enterprises' profits subject to tax in accordance to the arm's length prices determined in the primary adjustment ("decrease tax adjustment"). This conclusion, moreover, seems also the most consistent with the wording of both article 110, comma 7, of the Italian Income Code (which defines correlative adjustments as measures that entail "*una diminuzione del reddito*") and of article 31-quarter of the Decree n. 600/1973 (which refers to "*La rettifica in diminuzione del reddito di cui all'articolo 110, comma 7, secondo periodo*")[12-13].

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[11] See Circ. Ag. Entr., 5 giugno 2012, n. 21/E, par. 4.2.10 and par. 5.10 (see *supra*).

[12] Accordingly, see ASSONIME, *Risposta alla consultazione pubblica in materia di prezzi di trasferimento, relatvamente all'atuazione delle disposizioni previste dall'art. 110, comma 7, TUIR e dall'art. 31-quter del D.P.R. n. 600 del 1973*, 2018, par. 3: "*nell'ottica di fornire maggiore chiarezza ai contribuenti e, nel contempo, di semplificare e rendere maggiormente efficiente l'azione dell'attività amministrativa, riterremmo altresì opportuno intervenire anche sul dato testuale del successivo punto 4.4., ove è ulteriormente specificato che in caso di "accoglimento", l'ufficio "comunica all'Autorità fiscale dello Stato estero la rettifica in diminuzione riconosciuta" e che "la procedura si perfeziona con un provvedimento del Direttore dell'Agenzia che dispone il rimborso dell'imposta calcolata sull'imponibile corrispondente alla rettifica effettuata a titolo definitivo nell'altro Stato […]". Il punto 4.4., infatti, se abbiamo ben compreso, è volto unicamente a regolare le vicende successive al riconoscimento, da parte dell'ufficio, della rettifica in diminuzione del reddito, ma si tratta di vicende che possono essere anche molto diverse tra loro e che dovrebbero essere risolte caso per caso. A nostro avviso, occorre valutare bene l'opportunità di fornire agli uffici un'unica vincolante soluzione procedimentale: in alcuni casi, ad esempio, il suddetto riconoscimento potrebbe comportare – in luogo di un vero e proprio rimborso – la mera conferma di una maggiore perdita rispetto a quella originariamente dichiarata e che, forse, meriterebbe di essere regolarizzata mediante presentazione da parte del contribuente di una dichiarazione rettificativa a favore. In altri casi, invece, si potrebbe configurare in capo al contribuente un vero e proprio diritto al rimborso*".

[13] This conclusion seems strengthened from a comparison between the final version of the Italian Revenue Agency's Regulation regarding the implementation of article 31-*quater*, comma 1, lett. c), of the Decree n. 600/1973 and the initial draft of this Regulation (this regulation will be analyzed more in detail *infra*). Paragraph 4.4. of the initial draft of Regulation, indeed, stated that the correlative adjustment had to be issued through a reimboursment relief ("*In caso di riconoscimento* […] *la procedura si perfeziona con un provvedimento del Direttore dell'Agenzia che dispone il rimborso dell'imposta calcolata sull'imponibile corrispondente alla rettifica effettuata a titolo definitivo nell'altro Stato*"). Pargraph 4.3. of the final version of the Regulation, by contrast, makes no reference

In light of these remarks, in order to implement a mutual agreement or an arbitration decision that grants to an Italian taxpayer a "correlative adjustment", the Italian Revenue Agency seems required just to notify the taxpayer a document providing new transfer prices and allowing the taxpayer to amend its tax return for the period when the controlled transactions were carried out (and – if the Italian enterprise suffered a loss in such fiscal year – its tax returns for the following fiscal years), so as to obtain a reimbursement, make a compensation or increase a loss[14], as the case may be.
It is understood that such administrative deeds constitute a *unicuum* in the Italian tax legal system and, thus, cannot be included in any "typical" category of administrative deeds[15].

1.3. (Follows). Analysis of the "new" Italian provision concerning unilateral corresponding adjustments (article 31-quater of the Decree n. 600/1973).

The previous chapters have already brought forward that the Decree n. 50/2017 has amended the text of article 110, paragraph 7, of the Italian Income Tax Code in order to incorporate into the Italian legislation the arm's length principle set forth by both the OECD Model and the OECD Transfer Pricing Guidelines. The same Decree, however, has also modified article 110(7) in order to broaden the conditions under which the Italian Revenue Agency can recognize corresponding adjustments.
In particular, the mentioned Decree has: *(i)* eliminated the sentence of article 110(7) according to which Italian taxpayers could obtain corresponding adjustments only in

to a reimbursement relief, but states, more in general, that if the procedure ends with a recognition of the correlative adjustment, the Revenue Agency orders the revision downwards of the income ("*In caso di riconoscimento* […] *la procedura* […] *si perfeziona con un provvedimento del Direttore dell'Agenzia che dispone la variazione in diminuzione del reddito corrispondente alla rettifica effettuata a titolo definitivo nell'altro Stato e ne dà comunicazione al competente ufficio dell'Agenzia delle entrate che espleta tutte le formalità necessarie*").

[14] More specifically: *(a)* if the Italian enterprises, in the fiscal year in which the controlled transactions took place, paid an amount of taxes that is higher than the amount of taxes that it would have paid as a result of the "correlative adjustment", the enterprise will be entitled to amend its tax return and benefit of a tax credit (that will, subsequently, enable he taxpayer to obtain or a compensation or a reimbursement); *(b)* if, by contrast, the Italian enterprises, in the fiscal year in which the controlled transactions took place, generated a loss, the enterprise will be entitled to amend its tax return in order to increase such a loss.

[15] This circumstance poses the question on whether taxpayers may challenge before domestic courts the result of mutual agreements or arbitration decisions that entail the issuing of a corresponding adjustment. Paragraph 3.2. of this chapter will attempt to address extensively this issue.

execution of a MAP or of an arbitration procedure; *(ii)* introduced a new provision, namely article 31-quater of the Decree n. 600/1973, which sets new conditions under which corresponding adjustments can be recognized; *(iii)* inserted in article 110(7) an express reference to article 31-*quater* of the Decree n. 600/1973 as to the cases in which the Italian Revenue Agency may issue correlative adjustments.

Pursuant to the combination between article 110 of the Italian Income Tax Code and article 31-*quater* of the Decree n. 600/1973, a corresponding adjustment in Italy is now allowed *(i)* as a result of a procedure for the resolution of international tax disputes [see article 31-*quater*, comma 1, lett. a)] or *(ii)* as a result of a domestic administrative proceeding, that can be triggered by Italian taxpayers whenever a primary adjustment imposed by a foreign State becomes final [see article 31-*quater*, comma 1, lett. c)][16].

More specifically, pursuant to article 31-*quater* of the Decree n. 600/1973, in the case in which a primary adjustment is imposed in a foreign country, there are two ways in order to obtain a correlative adjustment in Italy.

The first option – that was discussed in the previous chapters and in the previous subparagraph of this chapter – is to initiate an international procedure for the resolution of international tax disputes, *i.e.* or the mutual agreement procedure provided for by the Conventions to avoid double taxation (the "OECD Procedures"), or the mutual agreement procedure provided for by the EU Arbitration Convention, or the mutual agreement procedure provided for the Directive [see article 31-*quater*, comma 1, lett. a)].

The second option – that will be further discussed in this paragraph – is to trigger the procedure envisioned under article 31-*quater*, comma 1, lett. c).

This provision lays down two conditions (a part from the one that the primary adjustment has to be issued by a State with which Italy has concluded a double tax treaty) in order to obtain a correlative adjustment: *(a)* that the primary adjustment is final in the foreign State and *(b)* that this same adjustment – according to the Italian Revenue Agency – is consistent with the arm's length principle.

[16] It should be mentioned that, pursuant to article 31-*quater*, comma 1, lett. b), of the Decree n. 600/1973, the Italian Revenue Agency is entitled to issue a corresponding adjustment also in a third hypothesis, *i.e. (iii)* as a result of transfer pricing adjustments deriving from activities of international cooperation. This provision, however, falls outside the scope of this research.

The Italian Revenue Agency, on 30 May 2018, has issued a Regulation (hereinafter, "the Regulation") [17], that provides for some clarifications as to the application of the procedure envisioned under article 31-*quater*, comma 1, lett. c), of the Decree n. 600/1973.

In particular, as to the condition *sub (a)* – according to which the primary adjustment has to be final – the Revenue Agency has clarified that such requirement should be fulfilled at the end of the procedure and not at the time in which the taxpayer submits the request pursuant to article 31-quater[18]. This seems an important clarification, since the possibility to file a request for a correlative adjustment only when the primary adjustment is final in a foreign State could jeopardize the elimination of double taxation in the cases in which: *(i)* the Italian Revenue Agency deems that such adjustment is not at arm's length and, therefore, refuses to grant a correlative adjustment [second condition envisioned under article 31-quarter, lett. c)] and *(ii)* the domestic legislation of the State that has imposed the primary adjustment does not allow the opening of a MAP in the cases in which such adjustment has become definitive. If, indeed, the Italian Revenue Agency denies the issuing of a corresponding adjustment on the grounds, for instance, that the primary adjustment is not at arm's length, the only remedy in the hands of taxpayers in order to eliminate the occurred double taxation would be to initiate a "normal" MAP that also involves the tax authority that has issued the primary adjustment.

At this regard, it is worth noting that the Regulation has clarified that if the procedure envisioned under article 31-*quater*, comma 1, lett. c), of the Decree n. 600/1973 ends with a denial to issue a corresponding adjustment, the Italian Revenue Agency will

[17] Provv. Dir. Ag. Entr., 30 May 2018, "*Disposizioni per l'attuazione della disciplina di cui all'art. 31 quater, comma 1, lettera c) del decreto del Presidente della Repubblica 29 settembre 1973, n. 600, introdotto dall'art. 59 del Decreto Legge 24 aprile 2017, n. 50, convertito dalla legge 21 giugno 2017, n. 96*".

[18] The initial draft of Regulation provided that the adjustment had to be final when the taxpayer submitted the application. Indeed, according to the draft of Regulation, the taxpayer had to attach to the application the certificate, issued by the foreign authority imposing the primary adjustment, showing the definitiveness of such adjustment. This orientation has been revised in the final text of the Regulation, which now states that the primary adjustment should be final at the end of the procedure. More precisely, on the basis of this new interpretation, the certificate showing the definitiveness of the primary adjustment must be submitted only if the Italian Revenue Agency recognizes the issuing of a unilateral adjustment.

automatically convert this "national" procedure into a "normal" MAP with the tax authority of the foreign State that has imposed the primary adjustment. The Regulation, indeed, expressly requires that, when filing the application to start the procedure envisioned under article 31-quater, lett. c), taxpayers need to indicate the legal instrument for the resolution of international disputes which they intend to trigger in the case in which this procedure ends with a non-recognition of the correlative adjustment[19]. Hence, article 31-quater, lett. c), seems, in the substance, to provide for an alternative way to initiate a MAP.

Having this briefly said, a first question to be answered is whether the procedure laid down under article 31-*quater* of the Decree n. 600/1973 substitutes the procedures envisioned under the existing disputes resolution mechanisms or if, by contrast, such a procedure applies alongside with them. In other words, it has to be established whether Italian taxpayers, in order to obtain a correlative adjustment in Italy, are forced to apply article 31-*quater* of the Decree n. 600/1973 or if, by contrast, they can freely choose to resort to the procedures envisioned under the "OECD Procedures", the Directive, and the EU Arbitration Convention.

Paragraph 6 of the "Regulation" seems to provide for an answer to this question, when stating that if a taxpayer does not intend to request the unilateral downward adjustment referred to in article 31-*quater*, there remains, in any case, his right to trigger the other procedures for the resolution of international disputes provided for by the existing dispute resolution mechanism[20]. The Italian Revenue Agency "Regulation", therefore,

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[19] See the combination between paragraphs 2.2. and 6.1. of the Regulation according to which, respectively: (i) "*the application, besides containing the elements referred in point 2.4., must indicate, for the purpose of paragraph 6.1., the legal instrument for the resolution of international disputes of which it is requested the application*"; (ii) "*the application referred to in this regulation determines the activation of the procedure for the resolution of international disputes provided for by the legal instrument indicated in the application referred to in point 2.2., if the procedure ends with the non-recognition of the downward adjustment*" (the translation in English of the Regulation can be found in A. MASSIMIANO, M. SEVERI, *The New Italian Transfer Princing Provision Concerning Unilateral Corresponding Adjustments*, in *International Transfer Pricing Journal*, 2019, 75 – 77).

[20] See, precisely, paragraph 6.1., according to which "*L'istanza di cui al presente provvedimento determina l'attivazione della procedura per la risoluzione delle controversie internazionali prevista dallo strumento giuridico indicato nell'istanza di cui al punto 2.2. Qualora il procedimento di cui al punto 4 si concluda con il mancato riconoscimento della variazione in diminuzione del reddito di cui al punto 4.2, la variazione in diminuzione o comunque l'eliminazione della doppia imposizione potrà essere ottenuta attraverso l'esecuzione degli accordi conclusi con le autorità competenti degli Stati esteri all'interno della relativa procedura per la risoluzione delle controversie internazionali, come stabilito dall'art. 31-quater comma 1, lettera a)*".

seems sufficiently clear as to the fact that the unilateral corresponding adjustment procedure envisioned under article 31-*quater* is optional, meaning that taxpayers may always request the immediate activation of a MAP under the relevant tax treaty ("OECD Procedures"), under the EU Arbitration Convention, or under the Directive.

The second question to be answered is why taxpayers should choose to resort to the procedure envisioned under article 31-*quater* rather than to the procedures set forth under the existing dispute resolution mechanisms. A possible reason could be that the procedure envisioned under article 31-*quater* seems to provide for a fastest tool in order to obtain the issuing of a correlative adjustment in those cases in which a foreign primary adjustment is manifestly in line with the ALP, since this procedure has to necessarily end within 180 days from the submission of the taxpayers' request and only involves the Italian Revenue Agency[21].

A final question to be answered is whether taxpayers are entitled to challenge before Italian tax Courts the deeds of the Italian Revenue Agency that deny a correlative adjustment.

The answer to this question seems negative.

Indeed, the administrative measures adopted by the Italian Revenue Agency to prevent the issue of a correlative adjustment cannot be regarded as authoritative measures (*i.e.* measures which become final unless challenged before a tax court within a 60-day period), but rather *interim* opinions of the Italian Revenue Agency that entail the conclusion of such a "special" domestic procedure and the beginning of a mutual agreement procedure (precisely, the MAP envisioned under the dispute resolution tool chosen by the taxpayer in his initial request) with the tax authority that has imposed the primary adjustment[22].

[21] For the procedural aspects of this procedure see, more in detail, M. ANTONINI, R.A. PAPOTTI, *La nuova procedura di eliminazione delle doppie imposizioni da rettifiche transfer pricing in uno Stato estero*, in *Corr. trib*., 2018, 2089 ss.; D. LIBURDI, M. SIRONI, *Rettifiche in diminuzione derivanti dal transfer pricing*, in *Il fisco*, 2018, 1414 ss.

[22] Accordingly, if we are not mistaken, see ASSONIME, *Risposta alla consultazione pubblica in materia di prezzi di trasferimento, relatvamente all'atuazione delle disposizioni previste dall'art. 110, comma 7, TUIR e dall'art. 31-quter del D.P.R. n. 600 del 1973*, 2018, par. 3: "*sembrerebbe più logico riconoscere alla risposta dell'ufficio natura "endoprocedimentale" e, quindi, come atto "intermedio" di un procedimento più complesso volto a consentire all'amministrazione finanziaria di riconsiderare nel merito l'intera fattispecie nell'ambito dell'eventuale e successiva procedura amichevole avviata dal contribuente. In quest'ottica la risposta dell'ufficio potrebbe non essere considerata immediatamente lesiva della sfera giuridica soggettiva del contribuente. Infatti, l'avvio della MAP è contemplato in*

This conclusion seems strengthened in light of the fact that neither article 31-quater, nor the Italian Revenue Agency Regulation, seem to contemplate the possibility for the Italian Revenue Agency to partially accept the taxpayers' requests, but – rather – seem to contemplate only the two following scenarios: *(i)* the issuing of a correlative adjustment, within 180 days from the taxpayers' request, that completely offsets the primary adjustment imposed in a foreign State, or *(ii)* the refusal to issue such a correlative adjustment and the beginning of a MAP between the Italian Revenue Agency and the tax authority that imposed the primary adjustment[23].

2. Interactions between the existing mechanisms to settle international tax disputes and Italian domestic judicial.

The previous chapters have already described – at some extent – the rules envisioned under the existing mechanisms to settle international tax disputes that govern the interactions with domestic judicial remedies.

This paragraph will analyse more in detail such rules and how they apply in all the different stages of the international procedures, by taking into account both the relevant provisions of the Italian tax procedural code (*rectius*, of the Decree n. 546/1992) and the guidelines of the Italian Revenue Agency on this matter.

It is understood that this analysis only regards the case in which the existing mechanisms to settle international tax disputes are triggered following the imposition of a primary adjustment in Italy, since only in this case such procedures may interact with Italian judicial proceedings.

2.1. Interactions between the existing mechanisms to settle international tax disputes and Italian judicial remedies at the time of the submitting of the complaint.

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modo espresso dalla norma primaria proprio con la finalità di permettere all'ufficio una nuova e diversa valutazione del caso, con eventuale superamento definitivo delle originarie perplessità in ordine al riconoscimento della posizione creditoria vantata dal contribuente".

[23] It is worth noting that the Italian Revenue Agency's failure to take action within the deadline of 180 days from the submission of the taxpayers' request seems indeed equivalent to an express denial to issue a correlative adjustment. More precisely, it seems that the 180 days deadline should be viewed as a peremptory term, so that the Italian Revenue Agency should be "forced" to initiate the MAP with the foreign tax authority (also) in the case in which it fails to take action within such timeline of 180 days.

Under all the existing dispute resolution mechanisms it is submitted that taxpayers are allowed to submit a complaint or request irrespective of whether they also trigger the available domestic remedies.

Indeed: *(i)* article 3(1) of the Directive stipulates that "*Any affected person shall be entitled to submit a complaint on a question in dispute* […] *regardless of whether the affected person has recourse to the remedies available under the national law of any of the Member States concerned*"; *(ii)* article 6(1) of the EU Arbitration Convention states that "*an enterprise* […] *may, irrespective of the remedies provided by the domestic law of the Contracting States concerned, present its case*"; *(iii)* article 25(1) of the OECD MLI (and – almost identically – article 16 of the MLI) states that "*a person* […] *may, irrespective of the remedies provided by the domestic law of those States, present his case*".

The allowance of the simultaneous running of domestic remedies and of the mechanisms envisioned under the existing tools to settle international tax disputes is of pivotal importance for the taxpayers' safeguard. If, indeed, taxpayers were forced to choose between these two options they could incur in a lack of protection, given that tax authorities have many possibilities to block (even arbitrarily, if they are not willing to settle the case on an international level) the whole course of the international procedures. For instance, such a lack of protection could occur, *inter alia*: *(a)* if the relevant tax authority(ies) to which the complaint or request was submitted deem(s) – as the case may be even discretionary – that such complaint or request is not well-founded (so called "*Blocking Method*"); *(b)* if the relevant tax authority(ies) to which the complaint or request was submitted deem(s) that the taxpayer is subject to "serious penalties" and thus prevents access to the procedure; *(c)* if – as it may occur under the Directive – the tax authority of a Member State decides to unilaterally deny access to the procedure assuming that the question in dispute does not involve double taxation (etc.).

From an Italian perspective, it is worth noting that, from the sentence "*irrespective of the remedies provided by the domestic law*" laid down under article 25(1) of the OECD MC [and, *mutatis mutandis*, under article 6(1) of the EU Arbitration Convention, article 3(1) of the Directive and article 16 of the MLI], the Italian Revenue Agency infers the conclusion that, if the primary adjustment has been issued in Italy, taxpayers are (not only allowed, but actually) forced to challenge before domestic Courts such assessment act in order to trigger the MAP[24].

In other words, according to the Italian Revenue Agency, the initiation of domestic remedies is a prerequisite for the initiation of the international procedures.

Although, as hinted above, taxpayers should be able to conduct "in parallel" domestic proceedings and the procedures envisioned under the existing international tax dispute resolution mechanisms, making the access to these latter procedures subject to the initiation of domestic remedies could undermine the taxpayers' safeguard in all those cases in which, for whatever reason, the primary adjustment imposed in Italy becomes definitive (for instance, because the Italian taxpayer is unable or unwilling to "go to Court").

Moreover, this orientation of the Italian Revenue Agency seems questionable for several other reasons.

The first reason is that administrative measures implementing in the Italian legal system mutual agreements or "arbitral awards" that entail the – entire or partial – annulment of a primary adjustment could be seen as measures through which the Italian Revenue Agency exercises its power of application for internal review ("*provvedimenti in autotutela*": see *supra* par. 1). It is established, indeed, that the Italian Revenue Agency is allowed to exercise such a power irrespective of whether taxpayers fail to challenge a tax assessment before domestic Courts (*i.e.* irrespective of whether a tax assessment becomes definitive)[25].

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[24] See Circ. Ag. Entr., par. 4.2.5.: "*L'articolo 25, paragrafo 1, del Modello OCSE prevede che l'apertura della procedura amichevole possa essere richiesta dal contribuente "indipendentemente dai ricorsi previsti dalla legislazione nazionale". A tale riguardo, la maggior parte delle Convenzioni stipulate dall'Italia contengono, nel relativo Protocollo di accompagnamento, una disposizione interpretativa dell'articolo sulle MAP in forza della quale la locuzione "indipendentemente dai ricorsi previsti dalla legislazione nazionale" va intesa nel senso che "l'attivazione della procedura amichevole non è in alternativa con la procedura contenziosa nazionale che va, in ogni caso, preventivamente instaurata laddove la controversia concerne un'applicazione delle imposte non conforme alla Convenzione" (o equivalente).* […] *L'opportunità di adire il giudice tributario corrisponde alla necessità di evitare che, in pendenza di procedura amichevole, l'imposta accertata in Italia diventi definitiva e, pertanto, non modificabile ai sensi dell'eventuale accordo raggiunto fra le autorità competenti*".

[25] See article 2, comma 1, Ministerial Decree n. 37/1997: "*L'amministrazione può procedere, in tutto o in parte, all'annullamento o alla rinuncia all'imposizione in caso di autoaccertamento, senza necessità di istanza di parte, anche in pendenza di giudizio o in caso di non impugnabilità*". Accordingly, see F. TESAURO, *Istituzioni di diritto tributario. Parte generale*, Milano, 2016, 180: "*L'autotutela può avere per oggetto anche un atto divenuto definitivo (perché non impugnato o impugnato senza successo)*".

The second reason is that domestic remedies and international tax dispute resolution mechanisms have entirely different goals. Indeed, on the one hand, domestic remedies are merely aimed to obtain the annulment of tax assessments (i.e. of primary adjustments). On the other hand, international tax dispute resolution mechanisms are aimed to eliminate double taxation, by enabling taxpayers to either: *(i)* obtain the annulment of primary adjustments; *(ii)* obtain correlative adjustments that match – and, thus, offset – primary adjustments; *(iii)* obtain a revision downwards of primary adjustments up to a given amount and, simultaneously, a corresponding adjustment of the same amount.

The third reason is that a similar orientation seems to unduly prevent to associated enterprises resident in other countries – that would be entitled to obtain a correlative adjustment as a result of a primary adjustment issued in Italy – to trigger a MAP whenever the Italian company is not willing or is unable (for example, because it has ceased to exist) to challenge the primary adjustment before domestic courts.

2.2. Interactions between the existing mechanisms to settle international tax disputes and Italian judicial remedies during the mutual agreement and the arbitration stages: the pivotal importance of the domestic rules that govern the suspension of domestic judicial proceedings.

As discussed in the previous subparagraph, all the existing dispute resolution mechanisms stipulate that taxpayers can (and, as far as the dispute involves an Italian taxpayer, "have to") simultaneously submit the request for a MAP and initiate domestic judicial proceedings.

Therefore, it could appear that the existing dispute resolution mechanisms allow to simultaneously carry out international procedures and domestic remedies.

Such a conclusion, however, is premature and has to be clarified in the following terms.

Firstly, it has to be highlighted that the Directive, the EU Arbitration Convention and the "OECD Procedures" all stipulate that the procedures envisioned therein can effectively begin only when, alternatively, the domestic judicial remedies come to an end or the taxpayers are able to obtain their suspension[26].

Secondly, it has to be highlighted that all the existing dispute resolution mechanisms add further impediments as to the possibility to carry out in parallel domestic and international remedies whenever the national laws of the States involved in a dispute do not allow the tax authorities to derogate from national courts' decisions.

More specifically, in such cases, all the dispute resolution mechanisms provide for the termination of both the MAP and of the arbitration if a national Court decision is issued, respectively, before the reaching of a mutual agreement or before the issue of an arbitral award. Moreover: on the one hand, the Directive and the "OECD Procedures" prevent the initiation of arbitration if the question in dispute is decided before the taxpayers' request to begin the arbitration procedure; on the other hand, article 7(3) of the EU Arbitration Convention even requires taxpayers to withdraw from the domestic proceedings in order to start the arbitration stage[27].

[26] More specifically, article 16(3) of the Directive states that "*Affected persons may have recourse to the remedies available to them under national law* […]. *However, where the affected person has commenced to seek such a remedy, the terms of periods referred to in Article 5(5) ad 4(1) respectively shall commence from the date on which a judgment delivered in those proceedings has become final or on which those proceedings have otherwise been definitively concluded or where the proceedings have been suspended*".

Article 7(1) of the EU Arbitration Convention states that "*Enterprises may have recourse to the remedies available to them under domestic law […]; however, where the case has so been submitted to a court or tribunal, the term of two years* [n.d.a. for the completion of the MAP] *shall be computed from the date on which the judgment of the final court of appeal was given*".

Article 19(2) of the MLI provides for the suspension of the "*the mutual agreement procedure referred to in paragraph 1* [if] *a case with respect to one or more of the same issues is pending before court or administrative tribunal*" and states that, in such a case, "*the period provided in subparagraph b) of paragraph 1 will stop running until either a final decision has been rendered by the court or administrative tribunal or the case has been suspended or withdrawn*". Accordingly, see OECD, Commentary to article 25 of the OECD MC, par. 25, which envisions the possibility to follow two different approaches when a taxpayer initiates, simultaneously, a MAP and domestic judicial proceedings: (i) the first approach is to have "the competent authorities not entering into talks in earnest until the domestic law action is finally determined"; (ii) the second approach is to have "the competent authorities enter into talks, but without finally settling an agreement unless and until the taxpayer agrees to withdraw domestic law actions".

[27] It is worth noting that article 7(3) of the EU Arbitration Convention raises, from an Italian perspective, some concerns. Assuming that the Italian Revenue Agency – as stated in the circular letter n. 21/E of 2012 – can't derogate from national courts' decisions (for critical remarks on this orientation see *infra*) and being understood that, in light of article 7(1) of the same Convention, domestic remedies can still be available, before the starting of arbitration, only if taxpayers are able to obtain the suspension of the domestic remedies; it is not entirely clear how the termination of such remedies pursuant to article 7(3) can be combined with the orientation of the Italian Revenue Agency according to which the international procedures cannot be carried out if the tax assessment becomes definitive. Indeed, if a domestic judicial proceeding is pending before a tax Court, the taxpayers' duty to renounce to domestic remedies would inevitably cause the definitiveness of the tax assessment and, therefore, according to

In light of these two groups of provisions, if relevant authorities can't derogate from national Courts' decisions (this occurs in almost all the EU Member States, including Italy: see *infra*), the interactions between the procedures to settle international tax disputes and the pending Italian judicial proceedings seems as being a result of the possibility for taxpayers to obtain the suspension of the latters. Indeed, once taxpayers trigger domestic judicial remedies, they only have two alternative options in order to carry on the procedures envisioned under the existing dispute resolution mechanisms.
The first option is to request the suspension of the domestic proceedings until the end of the MAP or of the arbitration. In this case, and only in this case, the two types of remedies can proceed in parallel.
The second option – which becomes unavoidable if taxpayers fail to request or to obtain the suspension of domestic proceedings – is to terminate the domestic proceedings.
The national rules governing the suspension of domestic judicial proceedings are, therefore, of pivotal importance for the taxpayers' safeguard.
Indeed, as it was hinted above, the termination of domestic judicial proceedings before the reaching of a mutual agreement or of an arbitral award could have ruinous consequences on taxpayers, essentially for two reasons.
The first reason is that tax authorities have many possibilities to block (even arbitrarily, if they are not willing to settle the case on an international level) the whole course of the international procedures. If this occurs, by abandoning in advance judicial domestic remedies, there is the risk that taxpayers could be deprived of every possible tool in order to settle a case in dispute.
The second reason is that even if the MAP or the arbitration is successfully concluded, taxpayers would have no available remedies in order to counteract against mutual

the Revenue Agency, the termination of the whole procedure envisioned under the EU Arbitration Convention. A possible solution in order to supersede this deadlock could be to consider: *(i)* that the orientation of the Italian Revenue Agency according to which the international procedures cannot be carried out if the tax assessment becomes definitive does not apply with respect to the EU Arbitration Convention (see M. TRIVELLIN, *op. cit*., 203 – 204, footnote 48); and *(ii)* that, in any case, article 7(3) of the convention should be inapplicable if the taxpayer obtains the suspension of domestic proceedings. Indeed, given that the *ratio* of this provision is to avoid conflicting outcomes between the procedures of the EU Arbitration Convention and domestic Courts' judgments, if domestic remedies are suspended this risk doesn't occur.

agreements or arbitral awards that they may deem undue or unsatisfactory. Indeed, although – as it was stated in the previous chapters – the taxpayers could, in the abstract, appeal against a mutual agreement or an arbitral award before domestic Courts, such a remedy would be of no effect if the national laws of the States of appeal do not grant the possibility to force all the relevant tax authorities involved in an international tax dispute to re-open a new MAP/arbitration, given that the mere annulment of a mutual agreement or of an arbitral award would merely have the effect to re-establish the *status quo ante* the submission of the MAP request.

*2.3. (Follows). Analysis of article 39, comma 1-*ter*, of the Decree n. 546/1992.*

According to the circular letter n. 21/E of 2012, the Italian Revenue Agency is not allowed to derogate from the decisions of Italian judicial bodies when conducting an international procedure[28].

This orientation entails that disputes involving Italy are subject to all those provisions of the existing dispute resolution mechanisms according to which (see supra) the MAPs and the arbitration procedures envisioned therein have to terminate (or cannot initiate) if a national Court decision is issued before their conclusion. In other terms, according to this orientation, Italian taxpayers are allowed to simultaneously carry out domestic remedies and the MAPs/arbitration procedures envisioned under the existing dispute resolution mechanisms only if they are able to obtain the suspension of the formers.

This orientation of the Italian Revenue Agency, however, doesn't seem entirely sharable for similar reasons to the ones that lead us to critically address the orientation of the same Italian Revenue Agency according to which the initiation of domestic remedies is a prerequisite for the initiation of the procedures to settle international tax disputes.

Precisely, this orientation doesn't seem entirely acceptable because it doesn't take into duly consideration both the facts that: *(i)* administrative measures implementing in the Italian legal system mutual agreements or "arbitral awards" that entail the annulment

[28] See Circ. Ag. Entr., 5 giugno 2012, n. 21/E, par. 5.6: "*l'Italia rientra fra le giurisdizioni che non consentono all'autorità amministrativa di derogare a una sentenza*".

of a primary adjustment imposed in Italy could be seen as measures through which the Italian Revenue Agency exercises its power of application for internal review ("*provvedimenti in autotutela*"); *(ii)* article 2, comma 2, of the Ministerial Decree n. 37/1997 expressly allows the Italian Revenue Agency to exercise its power of application for internal review when a tax Court has already issued a final decision (and even to derogate to a tax Court decision that is favourable for the tax administration if the Italian Revenue Agency – as it is likely to occur during a MAP or an arbitration procedure – discovers facts that were unknown at the time of the issuing of the tax assessment to revoke or annul)[29].

Having this said, we can now move to analyse article 39, comma 1-ter, of the Decree n. 546/1992, *i.e.* the provision that governs the suspension of Italian judicial remedies in the cases in which a taxpayer triggers one of the procedures envisioned under the existing international tax disputes resolution mechanisms[30].

According to this provision, if a taxpayer triggers one of these disputes resolution mechanisms[31], the suspension of judicial proceedings is subject to the consent of both the taxpayers and the Italian Revenue Agency, meaning that only if such a consent is reached the tax Court can grant the suspension.

This provision doesn't seem entirely sharable, since an objection of the Italian Revenue Agency to suspend judicial remedies – which seems, in the abstract, possible according to this provision[32] – could expose to detrimental consequences a taxpayer

[29] See F. TESAURO, *Istituzioni di diritto tributario. Parte generale*, Milano, 2016, 180: "*Neppure il giudicato impedisce in assoluto l'autotutela, purché il ritiro dell'atto venga fatto per motivi che non contraddicono il contenuto della sentenza passata in giudicato: ciò discende dai principi ed, inoltre, è deducibile con argomentazione a contrario dal regolamento, ove è previsto che l'ufficio non può annullare il suo atto <<per motivi sui quali sia intervenuta sentenza passata in giudicato favorevole all'Amministrazione finanziaria>>*".

[30] On this provision see, *inter alia*, A. GUIDARA, *Art. 39, D.Lgs. n. 546/1992*, in C. GLENDI, C. CONSOLO (edited by), *Commentario breve alle leggi del processo tributario*, Milano, 2017, 560 ss.

[31] Article 39, comma 1-ter, provides for the suspension of judicial remedies only with respect to the procedures envisioned in double tax treaties ("OECD Procedures") and in the EU Arbitration Convention. It seems established that this provision should be extensively interpreted in order to comprehend under its scope of application also the cases in which taxpayers resort to the procedure envisioned under the Directive.

[32] See F. MATTARELLI, *La sospensione del processo tributario: influenza del nuovo art. 39, D.Lgs. n. 546/1992 sulle procedure amichevoli internazionali in materia di transfer pricing*, in *Rass. trib.*, 2017, 132 ss., who notes that "*le eventuali contestazioni IRES di transfer pricing [sono solitamente] contenute in un accertamento con il quale vengono avanzate le pretese per altri e diversi rilievi ai fini del medesimo tributo. È altresì possibile - ma non necessario - che l'accertamento contenga anche*

willing to prosecute a MAP or an arbitration procedure (see *supra*). It would have, therefore, been preferable if the Italian Law, under article 39, comma 1-*ter*, introduced an automatic suspension mechanisms of judicial proceedings whenever taxpayers choose to resort to the existing international dispute resolution mechanisms in order to settle a dispute that is *sub iudice* before an Italian tax Court.

The highlighted concerns, however, could be somewhat mitigated by interpreting article 39, comma 1-ter, in light of the Italian Constitution and of the principles, envisioned under the Italian Charter of Taxpayers' Rights ("*Statuto dei diritti del contribuente*"; Law n. 212/2000) that should govern the Italian tax administration action.

More specifically, given that the Italian Revenue Agency denial to suspend domestic remedies pursuant to article 39, comma 1-ter could – in the abstract – deprive taxpayers of every mean of defence against a transfer pricing claim (see supra), it could be argued that such a refusal could entail a breach of the taxpayers' right of defence envisioned under article 24 and 113 of the Italian Constitution.

Moreover, the Italian Revenue Agency does not seem to be entitled to oppose taxpayers' requests to suspend judicial remedies pursuant to article 39, comma 1-ter, even in light of article 10 of the Charter of Taxpayers' Rights ("*Tutela dell'affidamento e della buona fede*")[33] and of the principle of good administration envisioned under

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contestazioni in materia di IRAP ed IVA. Può quindi ben accadere che una delle parti abbia interesse ad una sollecita decisione in relazione ad una delle questioni oggetto di lite sì che l'interesse per la sospensione del processo in relazione alla pendenza di una procedura convenzionale può scontrarsi con la contrapposta esigenza di una delle parti di vedere decisa la parte della controversia che non ha nulla a che vedere con la rettifica in materia di transfer pricing. Ebbene, in tal caso le norme del processo tributario non soccorrono e trovano, anzi, un ostacolo insormontabile nell'art. 35, comma 3, il quale proibisce al giudice di decidere solo parzialmente la lite". Accordingly, see F. MORRA, M. SEVERI, *I rapporti tra contenzioso interno e procedura arbitrale con riferimento alle rettifiche sui prezzi di trasferimento*, in *Riv. dir. trib.*, *Supplemento Online*, 18 aprile 2018, who note that "*in fattispecie* […] *in cui la controversia riguarda più rilievi [è] difficile per il giudice congelare per anni l'intero giudizio*".

[33] As to the pivotal importance of this principle in the Italian tax legal system, see, even before the entry into force of the Charter of Taxpayers' Rights, M.C. FREGNI, *Obbligazione tributaria e codice civile*, Torino, 1998, spec. 230 ss., and, subsequently, among all the Scholars, E. DELLA VALLE, *L'affidamento nella certezza del diritto tributario*, Milano, 2001; M. LOGOZZO, *La tutela dell'affidamento e della buona fede del contribbuente tra prospettiva comunitaria e "nuova" codificazione*, in *Boll. trib.*, 2003, 1125 ss.; G. MARONGIU, *Lo Statuto dei diritti del contribuente*, Torino, 2008, 102 ss.; M. TRIVELLIN, *Il principio di buona fede nel rapporto tributario*, Padova, 2009, 71 ss.; ID., *Art. 10, L. 27 luglio 2000, n. 212*, in G. FALSITTA, A. FANTOZZI, G. MARONGIU, F. MOSCHETTI, *Commentario breve alle leggi*

article 97 of the Constitution[34]. An hypothetical objection of the Italian Revenue Agency to suspend judicial remedies, indeed, would be in open contradiction with the duty of the same Italian Revenue Agency to settle the case on an international stage, given that the procedures to settle international tax disputes are incompatible with domestic proceedings, unless the latter are suspended. Indeed, as widely highlighted in the previous subparagraphs, under all the existing dispute resolution mechanisms there are provisions according to which the reaching of a domestic tax Court final decision entails the automatic termination of the MAPs or of the arbitration procedures envisioned therein.

2.4. (Follows). Analysis of the Italian procedural rules that shall govern the termination of domestic judicial proceedings in the cases in which taxpayers are not able to obtain the suspension pursuant to article 39, comma 1-ter, Decree n. 546/1992.

As stated in the previous paragraph, taxpayers should always have the right to obtain the suspension of domestic judicial proceedings pursuant to article 39, comma 1-ter, meaning that the Italian Revenue Agency shouldn't be entitled to rise any objection to such a suspension. This conclusion was reached in light of articles 24, 97, 113 of the Italian Constitution and of the good faith principle envisioned under the Charter of Taxpayers' Rights ("*Statuto dei diritti del contribuente*"; Law n. 212/2000).

In the practice, however, it may well occur that the Italian Revenue Agency objects to the suspension requested by the taxpayer. If this occurs (and if a tax Court doesn't interpret article 39, comma 1-ter, in light of the Italian Constitution and of the good faith principle, and, accordingly, grant the suspension regardless of the objection of the Italian Revenue Agency), the taxpayer is substantially forced to renounce to judicial remedies in order to continue a MAP or to start an arbitration procedure.

Under the Italian "tax procedural code" (Decree n. 546/1992), the renounce to judicial proceedings is governed under article 44. The renounce made pursuant to this

tributarie, Padova, 2011, vol. I, 524 ss.; N. SARTORI, *Il principio di buona fede e collaborazione nello Statuto dei diritti del contribuente*, in *Giur. it.*, 2018, 763 ss.

[34] On the link between the principle envisioned under the Charter of Taxpayers' Rights and the principles envisioned under the Italian Constitution see, among all, F. PAPARELLA, *Brevi note sulla "forza costituzionale" delle norme dello Statuto dei diritti del contribuente*, in *Le corti pugliesi*, n. 3/2006, 727 ss.

provision (during the first-tier trial[35]) entails the definitiveness of the tax assessment *sub iudice*. In light of this circumstance and in light of the Inland Revenue guideline whereby taxpayers cannot begin or continue an international tax dispute resolution procedure if the tax assessment becomes definitive in Italy (see supra), whenever taxpayers terminate the domestic remedies pursuant to article 44 of the Decree n. 546/1992, the Italian Revenue Agency could, theoretically, raise an objection as to the implementation of the mutual agreement or the arbitral award, on account of the final nature of the primary adjustment.

Being understood that such a conduct of the Italian Revenue Agency would openly entail a breach of the good faith principle envisioned under article 10 of the Italian Charter of Taxpayers' Rights (and, possibly, even of article 97 of the Italian Constitution), this last remark seems to confirm – *a contrario* – the conclusions reached in the previous subparagraphs; precisely: *(i)* on the one hand, the inconsistency

[35] It is worth noting that article 44 of the Decree n. 546/1992 envisions a type of renounce, similar to the one envisioned under article 306 of the civil procedural code, usually addressed as "waiver of domestic remedies" ("*rinuncia agli atti*"; see, *ex multis*, E. DELLA VALLE, *Sospensione, interruzione ed estinzione del processo*, in AA.VV., *Il processo tributario*, in F. TESAURO (directed by), *Giurisprudenza sistematica di diritto tributario*, Torino, 1997, 625). This entails that if the Italian judicial proceeding is at the second-tier stage, the renounce pursuant to article 44 of the Decree n. 546/1992 has the effect to consolidate the first-tier tax Court's decision. In this case, indeed, article 338 of the civil procedural code should apply ("*L'estinzione del procedimento di appello o di revocazione nei casi previsti nei numeri 4 e 5 dell'articolo 395 fa passare in giudicato la sentenza impugnata, salvo che ne siano stati modificati gli effetti con provvedimenti pronunciati nel procedimento estinto*"; accordingly, even if not expressly referring to article 338 c.p.c., see P. RUSSO, *Manuale di diritto tributario. Il processo tributario*, Milano, 2013, 257). In light of this circumstance – and, precisely, in light of the fact that during a second-tier judgment the appellant (entitled to make the renounce ex article 44) could be the tax administration and not the taxpayer –, differently to what is stated above in the text, it is preferable to conclude that the most appropriate way for taxpayers to terminate judicial proceedings when triggering a MAP would be to make, rather than a waiver to judicial remedies strictly pursuant to article 44 ("*rinuncia agli atti*"), a waiver to the judicial action in its entirety ("*rinuncia all'azione*"). This last type of waiver, indeed, is the only one that can be made by taxpayers in every stage of a judgment (also in the second-tier stage, if the appellant is the tax administration), since, unlike the waiver pursuant to article 44, it always entails the definitiveness of the tax assessment (*i.e.* "*la definitiva abdicazione del diritto ad invocare la tutela giurisdizionale per la propria situazione soggettiva*": R. VACCARELLA, *Rinuncia agli atti del giudizio*, in *Enc. dir.*, XL, Milano, 1989, 968; the waver pursuant to article 44, by contrast, "*non comporta la rinuncia all'azione ed al diritto sostanziale che con quest'ultima si intende far valere* [sicché] *dopo la rinuncia al ricorso* [è] *consentito all'interessato adire nuovamente il giudice speciale tributario*": see P. RUSSO, *Manuale*, *op. cit.*, 258 and, accordingly, G.A. MICHELI, *Sospensione, interruzione ed estinzione del processo*, in *Opere minori di diritto processuale civile*, I, Milano, 1982, 555: "[la rinuncia agli atti] *tocca il diritto di chiedere al giudice il riconoscimento del diritto, cioè l'azione in senso processuale* […] *in quanto in quel processo il giudice non può più provvedere sulle domande delle parti, mentre queste ultime conservano il potere per far valere il proprio diritto*"). For further remarks on this distinction see P. RUSSO, *L'estinzione del processo. II) Diritto tributario*, in *Enc. giur.*, XIII, 1989; ID., *L'estinzione del processo tributario*, in *Dir. prat. trib.*, 1994, 433 ss.).

and the contradictory of the Italian Revenue Agency orientation according to which the definitiveness of an Italian tax assessment precludes the initiation of MAPs and arbitration procedures; *(ii)* on the other hand, that the Italian Revenue Agency should have a "legal duty" to accept the taxpayers' request to suspend judicial proceedings pursuant to article 39, comma 1-ter.

2.5. Interactions between the existing mechanisms to settle international tax disputes and the Italian judicial remedies at the time of implementation of a mutual agreement or of an arbitration decision.

In subparagraphs 2.1. and 2.2. it was stated that taxpayers are prevented from running simultaneously domestic judicial remedies and the procedures envisioned under the existing international tax dispute resolution mechanisms, unless taxpayers are able to obtain the suspension of the formers.

Accordingly, all the existing dispute resolution mechanisms make the implementation of mutual agreements/arbitral awards subject to both the acceptance of the taxpayers and to the renounce/termination of the domestic judicial remedies (see, supra, chaper II, par. 4 and chaper III, par. 10).

From an Italian perspective, it seems interesting to discuss how taxpayers should renounce to pending domestic remedies in order to allow the implementation of mutual agreements and of arbitral awards.

The Italian Revenue Agency, in the Circular letter n. 21/E of 2012 merely requires taxpayers to waive domestic remedies ("*rinuncia al ricorso giurisdizionale*")[36], with no further specification as to which provision should apply in these cases.

The reference made by the Italian Revenue Agency to the "waive" of domestic remedies ("*rinuncia al ricorso giurisdizionale*"), however, seems improper, since, in this case – rather than article 44 – article 46 of the Decree n. 546/1992 ("*Cessazione della materia del contendere ed estinzione del giudizio*") should come into play. According to this provision, Italian judicial proceedings terminate if the subject-matter of the litigation ceases to exist. This, typically, occurs when the Italian Revenue Agency exercises its power of application for internal review ("*autotutela*") and,

[36] See Circ. Ag. Entr., 5 June 2012, par. 4.2.5.

consequently, annuls a tax assessment (or other equivalent act) that the taxpayer has challenged before a tax Court. Hence, given that administrative measures that implement mutual agreements or arbitral awards that entail the revision of primary adjustments imposed in Italy (and *ivi* challenged before domestic Courts) could be deemed, in a broad sense, to operate as measures through which the Italian Revenue Agency exercises its power of application for internal review ("*autotutela*"), it seems acceptable to conclude that taxpayers should invoke this provision (rather than article 44) in order to obtain the implementation of mutual agreements or "arbitral awards"[37]. This conclusion, however, needs to be further substantiated.

If, on the one hand, the subject matter of the Italian proceedings seems to discontinue when mutual agreements/arbitral awards entail the integral annulment of the primary adjustment *sub iudice*, on the other hand this conclusion could be challenged when mutual agreements/arbitral awards only entail a partial revision of the primary adjustment.

In this case, indeed, similarly to what occurs if the Italian Revenue Agency issues an act of "partial application for internal review", the primary adjustment imposed in Italy would not be completely neutralized and, as a consequence, the taxpayer could – in the abstract – be entitled to continue the judicial proceeding in order to obtain the annulment of such assessment with respect to the amount of taxes that hasn't been lifted by the Italian Revenue Agency. At this regard, it should be immediately highlighted that when a tax assessment (or other equivalent act) is *sub iudice*, the Italian Revenue Agency may proceed in two alternative ways in order to partially annul such tax assessment (or other equivalent act): *(i)* the first "way" is to issue a "partial application for internal review" that entails the termination of the judicial proceedings only with respect to the parts (or for the amount) of the tax assessment that have been annulled; *(ii)* the second "way" is to issue an administrative deed that

[37] See M. TRIVELLIN, *op. cit.*, 84: "*La soluzione non andrebbe, dunque, ricercata nella rinuncia unilaterale ma, ci sembra, nell'art. 46, D.Lgs. n. 546/1992, disciplinante la cessazione della materia del contendere. Il contribuente non dovrebbe, cioè, rinunciare ad alcunché, ma dovrebbe, se lo ritiene, far valere l'intervenuta soluzione amichevole nel processo tributario come presupposto per un'estinzione del giudizio ricollegabile ad un caso di definizione delle pendenze tributarie*".

revokes the tax assessment *sub iudice* and, subsequently, to issue a new tax assessment in substitution of the one previously revoked[38].

In paragraph 3.1. – when addressing the possibility to appeal before domestic Courts undue mutual agreements or arbitral decisions – it will be argued that this last option seems the preferable one with respect to the implementation of mutual agreements/arbitral decisions that entail the revision downwards of a primary adjustment imposed in Italy. Hence, if this conclusion is accepted – i.e. if is accepted that, in order to implement mutual agreements/arbitral awards that entail a partial revision of the primary adjustment, the Italian Revenue Agency has to revoke the primary adjustment *sub iudice* – there seem to be no doubts as to the applicability, also in this case, of article 46 – rather than article 44 – of the Decree n. 546/1992 in order to allow thw implementation of mutual agreements and of arbtral awards.

3. (Follows). Further remarks as to the possibility to challenge before domestic Courts internal administrative acts that implement undue mutual agreements or arbitration decisions: an Italian perspective.

In the previous chapters of this research it was discussed whether mutual agreements or arbitration decisions (*rectius*, domestic administrative measures that implement a mutual agreement or an arbitration decision) can be appealed before domestic Courts. The premise of our analysis was that the need to challenge before domestic Courts domestic administrative measures that implement a mutual agreement or an arbitration decision rises only when taxpayers are not able to obtain the suspension of domestic judicial proceedings.

If, indeed, taxpayers are able to obtain the suspension of domestic judicial remedies, once a MAP or an arbitration procedure comes to an end, they still have the possibility to continue domestic judicial proceedings if they believe that the mutual agreement or

[38] On this complex issue, that will be only marginally addressed in the next paragraph, see, among all: P. RUSSO, *Cessazione della materia del contendere. III) Diritto tributario*, in *Enc. giur.*, VI, Roma, 1988, 1 ss.; M. BASILAVECCHIA, *Gli effetti processuali della reiterazione dell'accertamento*, in *Riv. dir. trib.*, 1995, I, 172 ss.; V. FICARI, *Avviso di accertamento "sostitutivo" in sede di autotutela fra sistema normativo e diritto giurisprudenziale*, in *Dir. prat. trib.*, 1995, I, 1831 ss.; A. MARCHESELLI, *Art. 46, D.Lgs. n. 546/1992*, in C. GLENDI, C. CONSOLO (edited by), *Commentario breve alle leggi del processo tributario*, Milano, 2017, 582 ss.; A. GAFFURI, *Art. 46, D.Lgs. n. 546/1992*, in F. TESAURO (edited by), *Codice commentato del processo tributario*, Torino, 2011, 488 ss.

the arbitration decision is undue or unlawful. By contrast – notwithstanding the existence of the taxpayers' right to accept, or not accept, the result of a MAP or of an arbitration procedure – if taxpayers aren't able to obtain the suspension of domestic judicial proceedings, the only remedy in their hands in order to obtain the revision of mutual agreements or of arbitration decisions that they may believe to be undue or unlawful would be to challenge the administrative measures implementing such agreements or arbitration decisions before national Courts. Indeed, as stated above, under all the existing legal instruments to settle international tax disputes, if domestic proceedings are not suspended, taxpayers are forced to terminate such proceedings in order to carry on a MAP or an arbitration procedure.

In the previous chapters it was highlighted that, in such cases, the possibility for taxpayers to challenge before domestic Courts administrative measures implementing a mutual agreement or an arbitration decision could be validly excluded on the grounds that national Courts do not seem to have jurisdiction over administrative measures adopted by tax authorities of different States[39].

Nevertheless, and although this argument was deemed hardly surmountable, it was highlighted that there could still be some grounds in order to admit the possibility for taxpayers to seek protection before national Courts. Precisely, it was argued that such a possibility could be granted whenever a mutual agreement or an arbitration decision is reached in breach of EU law and, precisely, in breach of article 41 of the Charter of Fundamental Rights of the European Union and/or of article 107 of the TFUE (i.e. in breach of the arm's length principle).

After having posed the existence – in the abstract – of the taxpayers' right to appeal before domestic courts undue mutual agreements or "arbitral awards", the previous chapters highlighted that such remedies are, in any case, ineffective for the taxpayers' safeguard.

[39] See, accordingly, R. CORDEIRO GUERRA, *Diritto tributario internazionale*, Padova, 2012, 367: "*Poiché, peraltro, la procedura amichevole si dipana tra gli Stati, senza che il contribuente abbia un potere di intervento diretto, non è escluso che la soluzione raggiunta non sia da questi reputata soddisfacente* […]. *In tal caso* […] *l'individuo potrebbe in astratto impugnare gli atti impositivi interni che danno attuazione all'accordo intervenuto, ma, di fatto, il giudice interno dovrà confermarli in quanto provvedimenti emanati in esecuzione di un accordo internazionale (c.d. accordo in forma semplificata) raggiunto tra le amministrazioni dei due Stati coinvolti al termine della procedura amichevole*".

This conclusion, precisely, was reached for two reasons.

The first reason is that decisions rendered by national courts cannot be binding upon tax authorities of another State, so that, in order to be effective, domestic appeals against administrative deeds implementing mutual agreements or arbitration decisions *(i)* should always be brought before the domestic courts of all the states involved in a dispute, and *(ii)* should all end with decisions favourable to the taxpayers.

The second reason is that taxpayers, by challenging a mutual agreements or arbitration decisions before national courts, are likely to obtain (whether all the domestic proceedings triggered by the taxpayer lead to a decision favorable for the taxpayer) only the annulment of the agreement/arbitration decision, rather than a decision that forces the tax administrations involved in a dispute to start over a new MAP/arbitration procedure. An "annulment decision" alone, without the possibility to re-open a new MAP/arbitration procedure, indeed, is of no practical use for taxpayers, since it doesn't eliminate double taxation[40].

Therefore, in order to guarantee the effectiveness of domestic remedies against undue mutual agreements/arbitration decisions, the previous chapters brought forward the suggestion to insert, under all the existing dispute resolution mechanisms, rules that *jointly*: *(i)* grant to taxpayers the right to appeal against undue mutual agreements/arbitration decisions; *(ii)* attribute (only) to one of the States involved in an international tax dispute exclusive jurisdiction over the appeal *sub (i)*; *(iii)* force all the tax administrations involved in a dispute to re-open a new MAP or arbitration procedure if the domestic appeal triggered in the State *sub (ii)* ends with a decision that assesses the unlawfulness of the appealed mutual agreements/arbitration decisions.

The next subparagraphs are aimed to demonstrate that the conclusion reached (as to ineffectiveness of domestic appeals) and the suggestions brought forward (as to the remedies that could be brought to the existing dispute resolution mechanisms in order

[40] Moreover, such a remedy appears also to be cumbersome, since it entails the running of different judicial proceedings, in different States, and requires a considerable amount of time before a final decision is reached in each State, given that a decision by a first-tier court may be further appealed before a second-tier court and, ultimately, before a Supreme Court.

to enhance the effectiveness of domestic remedies) in the previous chapters hold equal relevance also from an Italian perspective.

To this end, once again, it will be distinguished between appeals brought forward against *(a)* administrative measures implementing mutual agreements or arbitrations decisions that entail a revision downwards of primary adjustments imposed in Italy and *(b)* administrative measures implementing mutual agreements or arbitrations decisions that grant to Italian taxpayers a “correlative adjustment”.

3.1. Critical remarks as to the possibility to challenge before domestic Courts administrative acts implementing mutual agreements or arbitrations decisions that entail the revision downwards or the confirmation of primary adjustments imposed in Italy.

In paragraph 1 it was highlighted that when a primary adjustment is imposed in Italy, a taxpayer may choose to trigger one of the procedures envisioned under the international tax dispute resolution mechanisms in order to obtain a mutual agreement or an arbitration decision that entails, alternatively: *(i)* the annulment of the primary adjustment, *(ii)* a revision downwards of the primary adjustment and the issuing of a correlative adjustment, or *(iii)* the confirmation of the primary adjustment and the issuing of a correlative adjustment that completely offsets the primary adjustment.

Moreover, it was highlighted that, from an Italian perspective, the legal nature of administrative measures that implement a mutual agreements or an arbitration decision triggered after the imposition in Italy of a primary adjustment seems to vary depending on the outcome of such procedures. Precisely, it was highlighted that: *(i)* if a mutual agreement or an arbitration decision entails the integral annulment of a primary adjustment imposed in Italy, the administrative act through which the Italian Revenue Agency implements in the domestic system such agreement or final decision could be viewed as a “total application for internal review” (“*provvedimento di autotutela totale*”); *(ii)* if a mutual agreement or an arbitration decision entails a revision downwards of an Italian primary adjustment, the administrative act through which the Italian Revenue Agency implements in the domestic system such agreement or final decision could be viewed as a “partial application for internal review” (“*provvedimento di autotutela parziale*”); *(iii)* if a mutual agreement or an arbitration decision entails the confirmation of the primary adjustment issued in Italy, the administrative act through which the Italian Revenue Agency implements in the domestic system such agreement or final decision could be viewed as denial of the Italian Revenue Agency to exercise its power of application for internal review ("*diniego di autotutela*"), *i.e.* as a "confirmatory measures" of the primary adjustment ("*provvedimenti confermativi*").

In order to assess whether it is possible to challenge before Italian tax Courts administrative measures implementing such mutual agreements or arbitrations decisions, the two following premises should be made.

The first premise is that taxpayers do not seem to have any interest (pursuant to article 100 of the Italian civil procedural code) to bring an action against administrative deeds that entail the integral annulment of a tax assessment. Therefore, it doesn't seem possible to conclude that taxpayers have the right to challenge before Italian tax Courts administrative deeds that implement in the domestic system mutual agreements or arbitration decisions that entail the integral annulment of a primary adjustment imposed in Italy. In this case, indeed, the Italian taxpayers that triggered the MAP/arbitration (and, as a consequence, the associated enterprise with whom occurred the controlled transactions) would have no other solution than to accept the mutual agreement/arbitration decision.

The second premise is that, at the time of implementation of mutual agreements or arbitration decisions triggered after the imposition in Italy of a primary adjustment, domestic remedies against such an adjustment could still be pending. This, precisely, occurs when Italian taxpayers request (and are able to obtain) the suspension of domestic judicial proceedings pursuant to article 39, comma 1-ter, of the Decree n. 546/1992 (see supra par. 2.3.).

As to this second premise, it should be recalled that, as it was concluded in the previous chapters, taxpayers may have the right to challenge undue mutual agreements or arbitration decisions only when they are not able to obtain such suspension. If, indeed, taxpayers are able to obtain the suspension of domestic judicial remedies, once a MAP or an arbitration procedure comes to an end, they still have the possibility to continue domestic judicial proceedings if they believe that the mutual agreement or the arbitration decision is undue or unlawful. The following subparagraphs aim to foster this conclusion from an Italian perspective, by making some considerations as to: *(i)* the impossibility for taxpayers to appeal against administrative measures implementing mutual agreements or arbitrations decisions that entail the revision downwards or the confirmation of primary adjustments imposed in Italy when, at the time of their implementation, domestic remedies against such adjustments are still pending; *(ii)* the possibility – in the abstract – for taxpayers to challenge before Italian tax Courts administrative measures implementing mutual agreements or arbitrations decisions that entail either the revision downwards or the confirmation of a primary adjustment imposed in Italy when, at the time of their implementation, domestic remedies against such adjustment are not pending because the taxpayer didn't obtain their suspension and, therefore, was forced to abandon them in order to conclude the MAP or the arbitration procedure.

3.1.1. Remarks as to the (im)possibility to appeal against administrative acts implementing mutual agreements or arbitrations decisions that entail the revision downwards of primary adjustments imposed in Italy when domestic remedies against such adjustment are still pending.

In order to assess whether taxpayers have the right to challenge before domestic Courts administrative measures implementing mutual agreements or arbitrations decisions that entail the revision downwards of primary adjustments imposed in Italy when domestic remedies against such adjustments are still pending, some brief clarifications should be made as to the means of implementation of such mutual agreements/arbitration decisions.

As repeatedly stated in this chapter, administrative measures that implement agreements or arbitration decisions that entail the revision downwards of primary adjustments imposed in Italy should be viewed (in a broad sense) as "partial application for internal review deeds" ("*provvedimenti di autotutela parziale*").

When a tax assessment (or other equivalent act) is *sub iudice*, the Italian Revenue Agency may proceed in two alternative ways in order to partially annul such tax assessment (or other equivalent act): *(i)* issue a "partial application for internal review" that entails the termination of the judicial proceedings only with respect to the parts of the tax assessment that have be annulled ("*autotutela negativa*"); or *(ii)* revoke the tax assessment *sub iudice* – thus causing the termination of the judicial proceedings ex article 46 of the Decree n. 546/1992 – and substitute such tax assessment with a new one (so called "*autotutela positiva-sostitutiva*")[41].

As hinted above, this last option seems the preferable one with respect to administrative measures that implement mutual agreements/arbitration decisions, since during the MAP/arbitration procedure the Italian Revenue Agency may endorse arguments or discover facts that are new or incompatible from the arguments or the facts that it has endorsed or discovered at the time of the issuing of the primary adjustment, so that the prosecution of domestic proceedings with regard to the parts of the tax assessment that haven't be annulled could undermine the taxpayers' right of defence[42-43].

According to this solution, taxpayers could be entitled to challenge the tax assessment issued in *lieu* of the primary adjustment partially waived further to the MAP/arbitration procedure.

Nevertheless, as stated *supra*, such possibility seems precluded in light of the fact that, in order to obtain the implementation of mutual agreements and arbitration decisions

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[41] M. BASILAVECCHIA, *Funzione impositiva e forme di tutela*, *op. cit.*, 369 – 370: "*se il ritiro è parziale, il processo potrebbe chiudersi con una sentenza di annullamento o di rigetto riferita alle parti dell'atto confermate, mentre sulle altre sarebbe dichiarata la cessazione della materia del contendere; altra ipotesi, che appare meglio utilizzabile* […] *è quella in cui l'atto impugnato venga completamente ritirato, con la emanazione di un nuovo avviso*"; P. PIANTAVIGNA, *L'esercizio del potere di autotutela dell'Amministrazione finanziaria in pendenza di giudizio*, in *Riv. dir. fin. sc. fin.*, 2012, 35: "*Al riguardo, giova la distinzione tra autotutela "negativa" e "positiva". Con l'esercizio della prima, l'atto precedente viene annullato, totalmente o parzialmente. Diversamene, l'autotutela "positiva" identifica le ipotesi di riesame in senso stretto* […] *di un atto precedente: alla prima fase di rivalutazione degli elementi già conosciuti (o dei nuovi elementi forniti dal contribuente in sede d'istanza), segue un secondo momento, in cui l'Amministrazione procede all'eliminazione del primo atto e all'emanazione di un atto sostitutivo di secondo grado*".

[42] P. PIANTAVIGNA, *L'esercizio*, *op. cit.*, 38: "*l'esercizio del potere di sostituzione, configurando un'ipotesi di mutamento nel corso del processo della motivazione dell'atto impugnato, non può che tradursi nell'estinzione del giudizio già instaurato*".

[43] When exercising its power of "*autotutela sostitutiva-positiva*", the Italian Revenue Agency has to issue the tax assessment that substitutes the one (partially) annulled within the deadline provided for under article 43 of the Decree n. 600/1973 (see, for all, F. TESAURO, *Istituzioni di diritto tributario. Parte generale*, *op. cit.*, 178: "*Fino a che non spira il termine di decadenza, l'Amministrazione, dopo aver emesso un avviso di accertamento, può provvedere nuovamente*"). It is worth noting that this condition does not apply when the Italian Revenue Agency implements a mutual agreement or an arbitration decision, given that (as highlighted in the previous chapters), under all the existing dispute resolution mechanisms, the implementation of mutual agreements and of arbitration decisions has to be made irrespective of any time limits prescribed by national law.

that entail the revision downwards of primary adjustments imposed in Italy (*i.e.* in order to obtain the revocation of the primary adjustment and the substitution of such tax assessment with a new one) taxpayers need to accept the result of the MAP or of the arbitration. Such an acceptance, indeed, seems equivalent – and should be viewed as – a preventative acquiescence to the tax assessment that the Italian Revenue Agency has to issue in substitution of the tax assessment partially annulled by the mutual agreement/arbitration decision.

3.1.2. (Follows). Remarks as to the (im)possibility to appeal against administrative acts implementing mutual agreements or arbitrations decisions that entail the confirmation of primary adjustments imposed in Italy when domestic remedies against such adjustment are still pending.

As stated above in paragraph 1, administrative measures that implement agreements or arbitration decisions that entail the confirmation of primary adjustments imposed in Italy should be viewed – in a broad sense – as denials of the Italian Revenue Agency to exercise its power of application for internal review ("*dinieghi di autotutela*").

When a tax assessment (or other equivalent act) is *sub iudice* and the Italian Revenue Agency issues a denial to exercise its power of application for internal review, there isn't (usually) the need to revoke the tax assessment *sub iudice* and to substitute such tax assessment with a new one. Indeed, in such cases, the Italian Revenue Agency denial to exercise its power of application for internal review, is likely to reflect, *mutatis mutandis*, the content of the tax assessment that has been confirmed with the denial.

The same seems likely to occur with regard to administrative measures implementing mutual agreements/arbitration decisions that entail the confirmation of a primary adjustment.

Therefore, in the case in which a mutual agreement or an arbitration decision entails the confirmation of a primary adjustment *sub iudice*, if the taxpayer is frustrated with the outcome of the MAP/arbitration procedure, the only solution available to that taxpayer seems a refusal to accept the outcome of that MAP/arbitration procedure and a re-opening of the judicial proceedings against the primary adjustment confirmed by the mutual agreement/arbitration decision.

In other words – as it was concluded in the previous chapters – also from an Italian point of view it seems established that if taxpayers are able to obtain the suspension of domestic judicial proceedings, they have no right to autonomously challenge the administrative deed that implements the mutual agreement/arbitration decision, since they can still seek protection by resuming the judicial remedies that were kept "on hold" during the running of the MAP and/or of the arbitration procedure[44].

3.1.3. Remarks as to the possibility – in the abstract – to challenge before domestic Courts administrative acts implementing mutual agreements or arbitrations decisions that entail the revision downwards or the confirmation of primary adjustments imposed in Italy when there are no pending domestic remedies against such adjustments.

As it was highlighted in the introduction of this paragraph, if taxpayers are not able to obtain the suspension of domestic judicial proceedings, they should always be entitled – at least in the abstract – to challenge before national Courts the administrative measures that implement in the domestic legal systems mutual agreements or arbitration decisions.

In order to assess whether taxpayers have the right to challenge before domestic Courts administrative measures implementing mutual agreements or arbitration decisions that entail the revision downwards or the confirmation of primary adjustments imposed in Italy when, at the time of their implementation, there are no pending domestic

[44] It is understood that domestic remedies, unlike the procedures envisioned under the existing international dispute resolution tools, are not effective for the elimination of international double taxation. The elimination of international double taxation through domestic remedies, indeed, could be achieved only by obtaining from an Italian tax Court the integral annulment of the primary adjustment, given that a judgment that entails only the partial annulment – or the confirmation – of the primary adjustment doesn't give the right to obtain (or, at least, to obtain automatically) a correlative adjustment in a foreign State. In light of this argument, it could be – in the abstract – possible to reach a different conclusion from the one reached above in the text. More specifically, in light of the fact that the taxpayers' legal protection could be impaired by resuming judicial remedies (since they would hardly obtain the elimination of double taxation), it could be reached the conclusion that, in such cases, Italian taxpayers could be entitled to keep "on hold" the judicial proceedings and autonomously challenge the administrative deed that implements the mutual agreement/arbitration decision in order to force the Italian Revenue Agency to re-open a new MAP. If this, different view were accepted, a similar conclusion would also apply with respect to the case discussed supra in par. 3.1.1., *i.e.* it could be concluded that taxpayers are entitled to challenge the administrative acts implementing a mutual agreement or arbitration decision that entails the revision downwards of a primary adjustment imposed in Italy.

remedies against such adjustments, it should be established whether the Italian Revenue Agency denials to totally ("*provvedimenti di diniego di autotutela*") or partially ("*provvedimenti di autotutela parziali*") exercise its power of application for internal review are challengeable before Italian tax Courts. Indeed, as repeatedly hinted in the previous subparagraphs, mutual agreements or arbitration decisions that entail the revision downwards or the confirmation of primary adjustments could be assimilated, respectively, to "partial application for internal review deed" ("*provvedimenti di autotutela parziali*") or to "confirmatory deed" ("*dinieghi di autotutela*").

The issue concerning the possibility to challenge Italian Revenue Agency denials to exercise its power of application for internal review, due to its complexity, falls outside of the scope of this research. Therefore, it seems sufficient to note that an affirmative answer to the question at stake could be inferred in light of the majority orientation of the Italian Supreme Court case-law, according to which the Italian Revenue Agency denials to (totally[45] or partially[46-47]) exercise its power of application for internal review are challengeable (even if not expressly listed under article 19 of the Decree n.

[45] See, *ex multis*, Cass., SS.UU., 23 aprile 2009, n. 9669; Cass., SS.UU., 9 luglio 2009, n. 16097; Cass., 12 maggio 2010, n. 11457; Cass., (ord.) 3 luglio 2014, n. 15194; Cass., (ord.) 2 dicembre 2014, n. 25524; Cass., 3 dicembre 2014, n. 25563; Cass., 20 febbraio 2015, n. 3442; Cass., 30 ottobre 2015, n. 22253 ("*contro il diniego dell'Amministrazione di procedere all'esercizio del potere di autotutela può essere proposta impugnazione soltanto per dedurre eventuali profili di illegittimità del rifiuto e non per contestare la fondatezza della pretesa tributaria* […] *diversamente attraverso la impugnazione del diniego di esercizio di autotutela si consentirebbe l'aggiramento del termine di decadenza previsto, a garanzia del principio di certezza del diritto e di tendenziale stabilità dei rapporti giuridici, per la impugnazione degli atti impositivi che rimarrebbero quindi esposti a riesame a tempo indeterminato tutte le volte che il contribuente, pur divenuto definitivo l'avviso di accertamento o rettifica, presenti istanza di revisione in autotutela e ritenga di impugnare il provvedimento espresso o tacito non satisfattivo del proprio interesse rivolto alla rimozione dell'atto impositivo definitivo*"). For a general overview of this complex issue – among the many contributions of the Italian doctrine (that can't be here entirely quoted) – see, in a chronological order: D. STEVANATO, *L'autotutela dell'amministrazione finanziaria. L'annullamento d'ufficio a favore del contribuente*, Padova, 1996; S. LA ROSA, *Autotutela e annullamento d'ufficio degli accertamenti tributari*, in *Riv. dir. trib*., 1998, I, 1133 ss.; F. TESAURO, *Riesame degli atti impositivi a tutela del contribuente*, in *Giust. trib*., 2008, 17 ss.; M. BASILAVECCHIA, *Torna l'incertezza sul diniego di autotutela*, in *Dial. trib*., 2009, 154 ss.; M. CANTILLO, *Il controllo giudiziale del provvedimento di diniego dell'autotutela*, in *Rass. trib*., 2008, 303 ss.; C. GLENDI, *Impugnazione del diniego di autotutela e oggetto del processo tributario*, in *GT – Riv. giur. dir. trib*., 2012, 29 ss.; S. MUSCARÀ, *La cassazione chiude (apparentemente) le porte alla tutela giurisizionale in tema di diniego di autotutela*, in *Boll. trib*., 2009, 501 ss.; ID. *Le Sezioni Unite scrivono un ulteriore capitole in tema di impugnabilità del diniego di autotutela*, *ivi*, 2009, 837 ss.; M. PROCOPIO, *L'impugnabilità del diniego di autotutela sulle sentenza passate in giudicato: l'attuale incertezza giurisprudenziale*, in *Dir. prat. trib*., 2009, 973 ss.; S.F. COCIANI, *Il riesame della pretesa tributaria su atti impositivi già oggetto di giudicato. Spunti ricostruttivi in tema di tutela giurisdizionale del contribuente*, in *Riv. dir. trib*., 2011, I, 619 ss.; V. FICARI, *Impugnabilità del silenzio avverso l'istanza di autotutela e interesse pubblico all'annullamento*, in *Boll. trib*., 2014, 968 ss.; G. GLENDI, *Questioni aperte sull'impugnabilità del diniego di autotutela. Incertezze sui rimedi esperibili avverso il diniego parziale e tacito di autotutela*, in *GT – Riv. giur. trib*., 2017, 48 ss.

[46] See Cass., 8 luglio 2015, n. 1423 and Cass., 14 ottobre 2016, n. 20798 ("*ai sensi del D.Lgs. 31 dicembre 1992, n. 546, art. 19, è impugnabile l'annullamento parziale, adottato nell'esercizio del potere di autotutela, di un avviso impositivo già definitivo, trattandosi di un atto contenente la manifestazione di una compiuta e definitiva pretesa tributaria, rispetto a cui, pur se riduttivo dell'originaria pretesa, non può privarsi il contribuente della possibilità di difesa*"). *Contra*, Cass., 15 aprile 2016, n. 7511, (critically) commented by P. PIANTAVIGNA, *Riflessioni sull'autotutela parziale alla luce dell'ondivaga nomofilassi della cassazione*, in *Riv. dir. fin. sc. fin*., 2016, 77 ss.

[47] It is worth noting that the possibility to challenge the "*provvedimenti di autotutela parziale*" could be questioned in light of article 2-quater, comma 1-octies, of the Decree n. 564/1994 (recently added by the Italian legislator by means of article 11, comma 1, lett. a), of the Decree n. 159/2015) according to which "*L'annullamento o la revoca parziali non sono impugnabili autonomamente*". This provision, however, should be confined only to the cases in which the "*provvedimento di autotutela parziale*" is a (partial) "merely confirmatory measure" ("*atto meramente confermativo*") and not a "confirmatory measure" ("*provvedimento confermativo*"; as to this distinction, see supra footnote 1). This conclusion can be inferred from the explanatory statement of the Decree n. 159/2015, where it is stated that "*si prevede che l'atto di autotutela parziale non è autonomamente impugnabile, poiché trattasi di una rettifica dell'originaria pretesa impositiva e non di un nuovo atto, sostitutivo del precedente annullato*". Accordingly, see F. TESAURO, *Manuale*, op. cit., 84 and G. GLENDI, *Questioni aperte sull'impugnabilità del diniego di autotutela*, *loc. ult. cit*. As already hinted above, there seem to be no doubts as to the fact that administrative measures implementing mutual agreements or arbitration decisions that entail the confirmation or the revision downwards of a primary adjustment issued in Italy are "confirmatory

546/1992) before Italian tax Courts, and that such appeals enable taxpayers to obtain, rather than the mere annulment of the denials, a judgment that "forces" the Italian Revenue Agency to perform a new evaluation as to the opportunity to revoke or annul a tax assessment (or other equivalent act)[48].

Hence, *mutatis mutandis*, it could be concluded that taxpayers have the right to challenge before Italian tax Courts administrative measures implementing mutual agreements or arbitrations decisions that entail the revision downwards or the confirmation of primary adjustments imposed in Italy that are no longer *sub iudice*, in order to force the Italian Revenue Agency to re-open a new MAP.

3.1.4. (Follows). The ineffectiveness of domestic appeals against administrative acts implementing mutual agreements or arbitrations decisions that entail the revision downwards or the confirmation of primary adjustments imposed in Italy.

The considerations made above were aimed to demonstrate that taxpayers seem to have – in the abstract – the right to challenge before Italian tax Courts administrative measures implementing mutual agreements or arbitrations decisions that entail the revision downwards or the confirmation of primary adjustments imposed in Italy that are no longer *sub iudice*, in order to force the Italian Revenue Agency to re-open a new MAP.

In the abstract, this could be an effective remedy, since the reopening of a new MAP could ensure both the issuing of a new mutual agreement/arbitration decision that entails the integral annulment (or a revision downward for an higher amount) of the

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deeds" and not "merely confirmatory acts", since MAPs and arbitration procedures are – by definition – new administrative proceedings. Hence, article 2-quater, comma 1-octies, of the Decree n. 564/1994, doesn't seem applicable.

[48] See Cass., Sez. Un., 27 marzo 2007, n. 7388: "*nel giudizio instaurato contro il mero, ed esplicito, rifiuto di esercizio dell'autotutela può esercitarsi un sindacato - nelle forme ammesse sugli atti discrezionali - soltanto sulla legittimità del rifiuto, e non sulla fondatezza delle pretesa tributaria, sindacato che costituirebbe un'indebita sostituzione dal giudice nell'attività amministrativa. Ove l'atto di rifiuto dell'annullamento d'ufficio contenga una conferma della fondatezza della pretesa tributaria, e tale fondatezza sia esclusa dal giudice, l'Amministrazione finanziaria dovrà adeguarsi a tale pronuncia. In difetto potrà essere esperito il rimedio del ricorso in ottemperanza di cui all'art. 70 del D.Lgs. n. 546 del 1992, con l'avvertenza che tale norma, a differenza di quanto previsto per l'analogo rimedio dinanzi al giudice amministrativo ex art. 27, n. 4), del testo unico sul Consiglio di Stato (R.D. 26 giugno 1924, n. 1054), non attribuisce alle Commissioni tributarie una giurisdizione estesa al merito*". See, however, the slightly different orientation of C. GLENDI, *Impugnazione del diniego di autotutela e oggetto del processo tributario*, *loc. ult. cit.*

primary adjustment and the issuing of a (higher) "correlative adjustment". Nevertheless, such a remedy could also be of no effect, given that the judgments of Italian tax Courts are not enforceable in foreign States. More specifically, it may well be that the tax authority of a foreign State refuses to re-open a new MAP on the grounds that it isn't bound by Italian tax courts' decisions that order to the Italian Revenue Agency to do so.

This remark seems to strengthen the conclusion reached in the previous chapters as to the ineffectiveness of domestic judicial remedies in order to challenge undue mutual agreements/arbitration decisions, and also strengthens the conclusion that, in order to enhance such effectiveness, there is the need to insert under the existing dispute resolution mechanisms rules that, *jointly*: *(i)* grant to taxpayers the right to appeal against undue mutual agreements/arbitration decisions; *(ii)* attribute to one of the States involved in an international tax dispute (exclusive) jurisdiction over the appeal *sub (i)*; *(iii)* force all the tax administrations involved in a dispute to re-open a new MAP or arbitration procedure if the domestic appeal triggered in the State *sub (ii)* ends with a decision that assesses the unlawfulness of the appealed mutual agreements/arbitration decisions[49].

[49] It is worth noting that this same conclusion stands, *mutatis mutandis*, even if one deems that taxpayers should be entitled to challenge before Italian tax Courts administrative acts implementing mutual agreements or arbitration decisions that entail *(a)* the *confirmation* or *(b)* the *revision downward* of primary adjustments imposed in Italy when, at the time of their implementation, domestic remedies are *still pending* (as to the arguments according to which it may be possible to reach such a conclusion, see supra footnote 43). Indeed, as to the case *sub (a)*, even if one poses that Italian taxpayers could challenge the administrative deeds that implement mutual agreements/arbitration that entail the *confirmation* of a primary adjustment as if they were denials of the Italian Revenue Agency to exercise its power to tax ("*dinieghi di autotutela*"), in order to obtain a judgment that forces the Italian Revenue Agency to re-open a new MAP, this remedy could be ineffective. Indeed, although the reopening of a new MAP could ensure both the issuing of a new mutual agreement/arbitration decision that entails the integral annulment (or a revision downwards) of the primary adjustment and the issuing of a "correlative adjustment"; nevertheless, it may well be that the tax authority of the other State involved in the dispute refuses to re-open a new MAP on the grounds that it isn't bound by the Italian tax court decision to do so. As to the case *sub (b)*, if one deems that taxpayers are entitled to challenge before Italian tax Courts administrative acts implementing mutual agreements or arbitration decisions that entail the revision downwards of a primary adjustment imposed in Italy, Italian taxpayers would need – in the abstract – to challenge the tax assessment issued in substitution of the primary adjustment that has been partially annulled as a result of the MAP/arbitration procedure. Such a remedy, however, would be of no effect for the elimination of international double taxation: even if the Italian tax Court assesses that the Italian taxpayer has the right to obtain the revision downward for an higher amount of the primary adjustment, such a decision would not be enforceable in the other disputing State in order to force the tax authority of that State to issue an higher correlative adjustment. Hence, also these remarks emphasise the need to insert under the existing dispute resolution mechanisms rules that, *jointly*: *(i)* attribute to one of the States involved in an international tax dispute exclusive jurisdiction over the appeal of mutual

3.2. Critical remarks as to the possibility to challenge, before Italian Courts, administrative acts implementing mutual agreements or arbitrations decisions that grant to Italian taxpayers a "correlative adjustment".

In paragraph 1.2., it was concluded that, when implementing mutual agreements or arbitrations decisions that grant to Italian taxpayers a "correlative adjustment", the Italian Revenue Agency has to issue an administrative act indicating the new transfer prices, that subsequently enables the taxpayer to amend its tax return for the fiscal year in which the controlled transactions occurred (and, possibly, its tax returns for the following fiscal years).

In light of this remark, it was concluded that such administrative measures can't be traced to a "typical" category of administrative deeds.

As to the possibility to challenge before Italian tax Courts such administrative deeds, it should be recalled that the Italian tax litigation should be viewed as an "appeal-trial"[50], designed for the appeal of the administrative deeds expressly listed under article 19 of the Decree n. 546/1992 (or, if not expressly listed, that are of an authoritative nature[51]). The structure of the Italian tax litigation, consequently, implies

agreements/arbitration decisions; *(ii)* force all the tax administrations involved in a dispute to re-open a new MAP or arbitration procedure if the domestic appeal triggered in the State *sub (i)* ends with a decision that assesses the unlawfulness of the appealed mutual agreements/arbitration decisions.

[50] See, among all, E. ALLORIO, *Diritto processuale tributario*, Torino, 1969, 80 ss.; F. TESAURO, *Imposizione e processo tributario nel pensiero di Enrico Allorio*, in *Rass. trib*., 2016, 17 ss.; ID., *Processo tributario*, in *Dig. disc. priv., sez. comm*., Aggiornamento, vol. III, Torino, 2007, 703; C. GLENDI, *L'oggetto del processo tributario*, Padova, 1984, 31 ss. *Contra*, among all, see E. CAPACCIOLI, *La nuova disciplina del contenzioso tributario: le fasi dinanzi le Commissioni di primo e di secondo grado*, in *Diritto e processo*, Scritti vari di diritto pubblico, Padova, 1978, 751 ss.; P. RUSSO, *Contenzioso tributario*, in *Dig. disc. priv*., *sez. comm*., vol. III, Torino, 1988, 489 ss.

[51] See, among all, R. SCHIAVOLIN, *Art. 19*, in C. GLENDI, C. CONSOLO (a cura di), *Commentario breve alle leggi del processo tributario*, Padova, 2012, 257 ss. and, specifically, 270: "*La nostra opinione è che dall'art. 19* […] *risulti una chiara scelta legislativa di tipicità degli atti autonomamente impugnabili, individuati però tramite modelli astratti, in quanto in essi si esprime l'esito di un certo tipo di attività amministrativa. Pertanto, la qualificazione di un concreto atto come impugnabile va fatta utilizzando l'interpretazione estensiva, dunque guardando non al* nomen iuris*, ma alla corrispondenza della funzione e degli effetti di esso con i tipi normativamente previsti nell'art. 19: vale a dire considerando se l'atto costituisca espressione compiuta delle funzioni svolte mediante tali atti* […]. *L'utilizzo dell'integrazione analogica pare invece contrario al disposto dell'art. 19 se con essa si intende la possibilità di considerare impugnabili* […] *atti con funzione e effetti diversi*"; F. TESAURO, *Manuale del processo tributario*, Torino, 2017, 58: "*Nell'interpretazione dell'art. 19 sono ammesse letture estensive, ma non integrazioni analogiche. Si può, con interpretazione estensiva, ampliare la*

that the administrative deeds (containing a tax claim) that aren't expressly listed under article 19 of the Decree n. 546/1992 (or that are not of an authoritative nature) can only be challenged together with the administrative measures, expressly listed under article 19 of the Decree n. 546/1992, that the Italian Revenue Agency needs to issue in order to enforce the former measures (so called "*impugnazione differita*")[52].

Administrative measures implementing mutual agreements or arbitrations decisions that grant to Italian taxpayers a "correlative adjustment" do not seem to fall under any of the administrative measures listed under article 19 of the Decree n. 546/1992. In light of this circumstance, the structure of the Italian tax litigation entails that taxpayers are not entitled to autonomously challenge before Italian tax Courts administrative measures implementing mutual agreements or arbitrations decisions that grant to them a "correlative adjustment" (i.e. that grant to them the right to amend their tax returns in accordance to the arm's length prices determined in the mutual agreement/arbitration decision: "decrease tax adjustment") [53]. As a consequence, since

classe degli atti impugnabili autonomamente, ma rispettando il sistema, che limita la tutela alla impugnazione di atti autoritativi".

[52] It is worth mentioning that the traditional structure of the Italian tax trial has been recently "plunged into crisis" in light of the Italian Supreme Court's orientation according to which taxpayers are entitled to challenge administrative deeds regardless of their inclusion under article 19 of the Decree n. 546/1992 and/or of their authoritative nature, as long as they are "*idonei a portare a conoscenza i presupposti di fatto e le ragioni in diritto della pretesa impositiva o del diniego del diritto vantato dal contribuente e siano quindi astrattamente suscettibili di a fondare l'interesse alla impugnazione ex art. 100 c.p.c.*" (so called "*impugnazione falcoltativa*": see, *inter alia*, Cass., 6 November 2013, n. 24916; Id., 28 November 2014, n. 25297; Id., 28 July, n. 15957). If one agrees with this orientation, it could be argued that taxpayers always have the right to directly challenge mutual agreements or arbitration decisions. This solution, however, even if possible in the abstract, seems in blandant contrast with article 19 of the Decree n. 546/1992 and, more in general, with the Italian tax litigation's structure (see F. TESAURO, *Manuale del processo tributario*, Torino, 2017, 63). On this case law orientation, see, *inter alia*, N. SARTORI, *Processo tributario*, in *Giur. it*., 2015, 1731 ss.; A. KOSTNER, *Gli atti autonomamente impugnabili nel processo tributario: crisi del principio di tassatività?*, in *Riv. trim. dir. trib*., 2016, 865 ss.; G. TABET, *Verso la fine del principio di tipicità degli atti impugnabili?*, in *GT – Riv. giur. trib.,* 2008, 506 ss.; ID. *La lunga metamorfosi della giurisdizione tributaria*, 2014, 465 ss.; G.M. CIPOLLA, *Processo tributario e modelli di riferimento: dall'onere di impugnazione all'impugnazione facoltativa*, in *Riv. dir. trib*., 2012 I, 957 ss.; G. INGRAO, *Prime riflessioni sull'impugnazione facoltativa nel processo tributario (a proposito dell'impugnabilità di avvisi di pagamento, comunicazioni, irregolarità, preavvisi di fermo di beni mobili e fatture)*, in *Riv. dir. trib*., 2007, I, 1075 ss.; G. GLENDI, *Note critiche alla teorica giurisprudenziale degli atti facoltativamente impugnabili nel processo tributario*, in *Dir. prat. trib*., 2018, 2528 ss.

[53] Alternatively, if one holds the view that administrative deeds implementing mutual agreements or arbitrations decisions that grant to Italian taxpayers a "correlative adjustment" are authoritative deeds ("*provvedimenti autoritativi*"), meaning that they become definitive if not challenged within the prescribed deadline, it could be argued that taxpayers should have the right to challenge directly such deeds before tax Courts regardless the fact that they are not expressly listed under article 19 of the

(as stated *supra*) correlative adjustments may grant to taxpayers or a tax credit, or an increase of losses already suffered, it could be argued that taxpayers, in order to seek protection against a mutual agreement/arbitration decision that they may deem undue, could, as the case may be: *(a)* request the reimbursement of an higher tax credit than the one resulting from the agreement/arbitration decision and, ultimately, challenge the administrative act that implements the agreement/arbitration decision together with the denial (express or tacit) of reimbursement; or *(b)* in the case in which, as a result of a "corresponding adjustment", the Italian enterprise is entitled to increase a loss for an amount lower than the one expected, increase such a loss for an higher amount and, ultimately, challenge the administrative act that implements the agreement/arbitration decision together with the tax assessment that re-adjusts such a loss[54].

The above considerations were aimed to demonstrate how taxpayers could – in the abstract – challenge before Italian tax Courts administrative measures implementing mutual agreements or arbitrations decisions that grant to Italian taxpayers a "correlative adjustment".

Nevertheless, an Italian court is unlikely to "nullify" the outcome of a mutual agreement or arbitration procedure which grants a taxpayer a correlative adjustment and, consequently, to recognize the right of the taxpayer to obtain a higher tax credit or a higher loss, without increasing at the same time the taxable profits of the associated company resident where the primary adjustment applies.

This remark, therefore, seems to strengthen the doubts, raised in the previous chapters, as to the absence of jurisdiction of Italian tax Courts over administrative measures adopted by tax authorities of different States and, thus, the conclusion as to the need

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Decree n. 546/1992 (see F. TESAURO, *Manuale del processo, op. cit.*, 58: "*Nell'interpretazione dell'art. 19 sono ammesse letture estensive, ma non integrazioni analogiche. Si può, con interpretazione estensiva, ampliare la classe degli atti impugnabili autonomamente, ma rispettando il sistema, che limita la tutela alla impugnazione di atti autoritativi*").

[54] In the absence, under the existing dispute resolution mechanisms, of provisions that expressly provide for the taxpayers' right to challenge undue mutual agreements/arbitration decisions and that attribute to one of the States involved in an international tax dispute exclusive jurisdiction over the appeal of mutual agreements/arbitration decisions, it seems established that such a possibility could be recognized only if the MAP is triggered by the Italian associated enterprise in order to obtain a correlative adjustment. Indeed, it seems that when the MAP is triggered by the associated enterprise resident in a (foreign) State that imposed the primary adjustment (in order to obtain its revision downwards or its annulment), only such enterprise should have the right on whether to accept or not to accept the result of the MAP.

to insert under all the existing dispute resolution mechanisms rules that, *jointly*: *(i)* attribute to one of the States involved in an international tax dispute exclusive jurisdiction over the appeal of mutual agreements/arbitration decisions; *(ii)* force all the tax administrations involved in a dispute to re-open a new MAP or arbitration procedure if the domestic appeal triggered in the State *sub (i)* ends with a decision that assesses the unlawfulness of the appealed mutual agreements/arbitration decisions.

4. The suspension of tax collection during the period of application of the existing dispute resolution mechanisms.

The last issue that needs to be addressed in this research regards the suspension of tax collection during the period of application of the existing dispute resolution mechanisms, since none of these mechanisms include a provision regarding the suspension of tax collection when the procedures envisioned therein are applied.

According to the legal theory that has faced this issue, the absence of binding rules as to the regulation of payment and collection of the tax amount connected to a "question in dispute" represents a significant drawback as to the effectiveness of these procedures[55].

In particular, given that international tax disputes generally involve huge amount of money, and given that the time for the completion of the procedures envisioned under the legal mechanisms to settle such disputes could be rather long, some authors pointed out that the immediate collection of the additional taxes due could induce taxpayers to pursue a purely domestic route (for which the suspension of tax collection is generally available) instead of bearing additional costs and the risk of unsecure outcomes of these procedures[56]. Precisely, it has been argued that, from the perspective of taxpayers, the suspension of tax collection is of pivotal importance because only such suspension prevents the so called "financing of double taxation"; indeed, if no suspension is granted, taxpayers are obliged to pay the additional tax immediately, but

[55] See, *inter alia*, R. ISMER, *Article 25*, in REIMER, RUST (edited by), *Klaus Vogel on Double Taxation Conventions*, Kluwer Law International, II, 2015, 1794-1795; M. TRIVELLIN, *op. cit*., 124 – 126.

[56] See G. RICHARDS, *An internal market without tax obstacles – snapshot or blueprint?*, in *The EC Tax Journal*, n. 3/2001, 183; J. SCHWARZ, *The European Union Arbitration Convention: perspective on an alternative for double taxation relief*, in *Tax Management Transfer Pricing Report*, n. 9/2002, 412.

the double taxation will only be eliminated years later (if at all), after the completion of the international procedure[57].

On a final note, some authors highlighted that the payment of the additional tax due before the termination of the international procedures places an additional financial burden on taxpayers, causing them significant cash-flow disadvantages and even – as the case may be – the loss of potential profits, given that the funds used to pay the tax twice are (temporarily) not available to the taxpayer[58].

All these concerns have been expressly addressed by both the EU JTPF and the OECD. Precisely: on the one hand, the EU JTPF examined whether taxpayers should be granted the suspension of tax collection when applying to the procedure envisioned under the EU Arbitration Convention and, eventually, inserted an express provision on this matter in the Code of Conduct[59]. On the other hand, the OECD – in the

[57] See H.M. PIT, *op. cit.*, 554.

[58] S.M. RONCO, *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, forthcoming. "no rule entitles affected taxpayers to claim any compensation to the loss of the time value of the money that they may be required to pay up to the final outcome of the process".

[59] Precisely, paragraph 8(a) of the Code of Conduct states that "*Member States are recommended to take all necessary measures to ensure that the suspension of tax collection during cross-border dispute resolution procedures under the Arbitration Convention can be obtained by enterprises engaged in such procedures under the same conditions as those engaged in a domestic appeals or litigation procedure although these measures may imply legislative changes in some Member States*" and specifies that "*It would be appropriate for Member States to extend these measures to the cross-border dispute resolution procedures under double taxation treaties between Member States" as well*".

Commentary to article 25 of the OECD MC[60], in the Transfer Pricing Guidelines[61], and in the MEMAP[62] – has recognized that States, when applying the "OECD

[60] OECD, *Model Tax Convention on Income and on Capital*, *Commentary*, 2017, C(25), par. 47.1: "Unlike disputes that involve solely the application of a Contracting State's domestic law, the disputes that are addressed through the mutual agreement procedure will in most cases involve double taxation. States therefore should as far as possible take into account cash flow issues in requiring advance payment of an amount that the taxpayer contends was at least in part levied contrary to the terms of the relevant Convention. Even if a mutual agreement procedure ultimately eliminates any double taxation or other taxation not in accordance with the Convention, the requirement to pay tax prior to the conclusion of the mutual agreement procedure may permanently cost the taxpayer the time value of the money represented by the amount inappropriately imposed for the period prior to the mutual agreement procedure resolution, at least in the fairly common case where the respective interest policies of the relevant Contracting States do not fully compensate the taxpayer for that cost. Thus, this means that in such cases the mutual agreement procedure would not achieve the goal of fully eliminating, as an economic matter, the burden of the double taxation or other taxation not in accordance with the Convention. Moreover, even if that economic burden is ultimately removed, a requirement that the taxpayer pay taxes on the same income to two Contracting States can impose cash flow burdens that are inconsistent with the Convention's goals of eliminating barriers to cross border trade and investment. As a minimum, payment of outstanding tax should not be a requirement to initiate the mutual agreement procedure if it is not a requirement before initiating domestic law review".

[61] OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*, par. par. 4.65: "The process of obtaining relief from double taxation through a corresponding adjustment can be complicated by issues relating to the collection of tax deficiencies and the assessment of interest on those deficiencies or overpayment. A first problem is that the assessed deficiency may be collected before the corresponding adjustment proceeding is completed, because of a lack of domestic procedures allowing the collection to be suspended. This may cause the MNE group to pay the same tax twice until the issues can be resolved. This problem arises not only in the context of the mutual agreement procedure but also for internal appeals. The work on Action 14 of the BEPS Action Plan recognised that the collection of tax by both Contracting States pending the resolution of a case through the mutual agreement procedure may have a significant impact on a taxpayer's business (for example, as a result of cash flow problems). Such collection of tax may also make it more difficult for a competent authority to engage in good faith mutual agreement procedure discussions when it considers that it may likely have to refund taxes already collected. The Report on BEPS Action 14 accordingly includes as best practice 6 a recommendation that countries should take appropriate measures to provide for a suspension of collection procedures during the period in which a mutual agreement procedure case is pending; such a suspension of collections should be available, at a minimum, under the same conditions as apply to a person pursuing a domestic administrative or judicial remedy".

[62] OECD, *Manual on effective mutual agreement procedures (MEMAP)*, par. 4.5.3: "There are several reasons why suspension of the collection of tax pending resolution of MAP can be a desirable policy. Any requirement to pay a tax assessment specifically as a condition of obtaining access to MAP in order to get relief from that very tax would generally be inconsistent with the policy of making MAP broadly available to resolve such disputes. Even if a MAP agreement ultimately eliminates any double taxation or other taxation not in accordance with the Convention, the requirement to pay tax prior to the conclusion of the MAP may permanently cost the taxpayer the time value of the money represented by the amount inappropriately imposed for the period prior to the MAP resolution, at least in the fairly common case where the respective interest policies of the relevant Contracting States do not fully compensate the taxpayer for that cost. Thus, this means that in such cases the MAP would not achieve the goal of fully eliminating, as an economic matter, the burden of the double taxation or other taxation not in accordance with the Convention. Moreover, even if that economic burden is ultimately removed, a requirement on the taxpayer to pay taxes on the same income to two Contracting States can impose cash flow burdens that are inconsistent with the Convention's goals of eliminating barriers to cross-border trade and investment. Finally, another unfortunate complication may be delays in the resolution

Procedures", should always allow the suspension of tax collection under the same conditions that apply for domestic (administrative or judicial) remedies.

In particular, the OECD highlighted that the requirement to pay the additional taxes due prior to the conclusion of a MAP or of an arbitration procedure may: *(i)* impose cash flow burdens that are inconsistent with the Convention goals of eliminating barriers to cross border trade and investment; *(ii)* permanently cost the taxpayer the time value of the money represented by the amount inappropriately imposed for the period prior to the mutual agreement procedure resolution, thus impeding the full elimination of the double taxation, even if double taxation is ultimately removed through the MAP/arbitration.

Given the absence, under the existing dispute resolution tools, of provisions dealing with the suspension of tax collection, at the current state of play of the international tax dispute resolution scenario the suspension of tax collection should be viewed as a purely domestic matter.

In the abstract, the approaches that can be followed at a domestic level seem to be essentially two: *(i)* provide for an automatic suspension of tax collection in the moment in which taxpayers submit a request for a MAP; or *(ii)* provide for the suspension of tax collection at the same conditions applicable for domestic (administrative or judicial) proceedings.

The following subparagraphs will describe how Italian taxpayers may obtain the suspension of tax collection during the period of application of the existing international tax disputes resolution tools.

4.1. The suspension of tax collection during the period of application of the EU Arbitration Convention: analysis of article 3, comma 2, Law n. 99/1993.

As to the suspension of tax collection during the period of application of the EU Arbitration Convention, paragraph 8(a) of the Code of Conduct recommends that contracting States implement all the necessary measures to ensure the suspension of

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of cases if a country is less willing to enter into good faith MAP discussions when a probable result could be the refunding of taxes already collected."

tax collection at "*the same conditions as those engaged in a domestic appeals/litigation procedure*".

The Italian Law has dealt with this issue by means of article 3, comma 2, of the Law n. 99/1993, which states – very generally – that, upon an express request of the taxpayer, the Italian Revenue Agency *may* authorize the suspension of tax collection up until the end of the procedures set forth under the Arbitration Convention (possibly, by requiring that the taxpayers provides for an *ad hoc* bank guarantee) [63].

Prima facie, it should be immediately highlighted that article 3, comma 2, of the Law n. 99/1993, as compared to the recommendation of paragraph 8(a) of the Code of Conduct, is more flexible in granting the suspension of tax collection, given that this provision doesn't subject such a suspension to – following the wording of the Code of Conduct – "*the same conditions as those engaged in a domestic appeals/litigation procedure*". Indeed, if, on the one hand, article 47 of the Decree n. 546/1992, states that taxpayers may obtain a tax-payment-suspension to a first-tier tax Court only by demonstrating that: *(i)* the merits of their appeal have – *prima facie* – a likelihood of success (so-called *fumus bonis iuris*); and *(ii)* the payment of the additional taxes due could cause to them serious and irreparable damages (so-called *periculum in mora*). On the other hand, article 3, comma 2, of the Law n. 99/1993, does not require neither the demonstration of the the *fumus boni iuris*, nor of the *periculum in mora*.

Nevertheless, by means of interpretation of article 3, comma 2, Law n. 99/1993, the Italian Revenue Agency has added a relevant condition (that cannot be found in the text of this provision) in order to obtain such a suspension. Precisely, in the Circular letter n. 21/E of 2012, the Italian Revenue Agency has stated that the suspension envisioned under article 3, comma 2, Law n. 99/1993, can be granted only if taxpayers withdraw from domestic judicial proceedings[64].

This last condition doesn't seem sharable for the following reasons.

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[63] At this regard, see A. MASSIMIANO, *Guidelines from Italian Tax Authorities on the Arbitration Convention: An Analysis in Light of the EU Code of Conduct*, in *International transfer pricing journal*, Jenuray/February 2014, 50 ss. and, specifically, 53 – 54.

[64] Circ. Ag. Entr., 5 June 2012, par. 5.7.

The first reason is that – as just hinted above – the Italian Law didn't establish such a condition under article 3, comma 2, Law n. 99/1993 (*ubi lex voluit dixit, ubi noluit tacuit*).
The second reason is that such an orientation is contrary to article 7(3) of the same EU Arbitration Convention, according to which the withdrawal of domestic remedies is a mandatory requirement only for the beginning of the arbitration stage and not at the initial stage of the MAP[65].
The third reason is that – as it was highlighted in the previous paragraphs of this chapter – taxpayers should never be forced to abandon domestic remedies before the conclusion of an international procedure, due to the ruinous consequences that could arise from such a waiver[66].
The last reason is that, once taxpayers have submitted a request for a MAP and the "requested" tax authority has accepted such a request, the suspension relief shouldn't be made subject to any condition, but, rather, should always be granted by the Italian Revenue Agency in light of the principles of fairness, diligence, loyalty and good faith.
As stated above, the suspension of tax collection is of pivotal importance in order to grant the effective application of the EU Arbitration Convention (as of the other dispute resolution mechanisms) and in order to ensure the full elimination of double taxation; therefore, the failure of the Revenue Agency to grant such a suspension relief (if, for instance, the taxpayer does not comply with the requirement to waive domestic remedies) could be deemed inconsistent with the adoption by the Italian Revenue Agency of a MAP/arbitration procedure and, more generally, inconsistent with the aims of the EU Arbitration Convention.

[65] See, nevertheless, the doubts raised *supra* as to whether this provision should apply also when taxpayers are able to obtain the suspension of domestic remedies and as to the fact that the waiver of domestic remedies before the termination of the procedure may cause the definitiveness of the tax assessment, which, according to the same Italian Revenue Agency, could preclude the continuation of the procedure envisioned under the EU Arbitration Convention.

[66] Indeed, it may well be that the tax authorities involved in the dispute may – even discretionary – block the flowing of the procedure after the acceptance of the taxpayer's claim. Suppose, for instance, with specific regard to the EU Arbitration Convention, the case in which the competent tax authorities fail to reach a mutual agreement within the given timelines and, subsequently, fail to appoint an Advisory Commission: as stated in chapter III, par. 6.1., one of the main deficiencies of the EU Arbitration Convention is, precisely, the absence of a deadline within which the competent tax authorities must appoint the Advisory Commission and/or of a default mechanism that ensures such appointment when tax authorities fail to establish the Commission.

4.2. The suspension of tax collection during the period of application of the "OECD Procedures".

If taxpayers resort to one of the "OECD Procedures", according to the Italian Revenue Agency Circular letter n. 21/E of 2012 the taxpayer may request (a part from the "judicial" suspension laid down under article 47 of the Decree n. 546/1992, which should always be available for taxpayers when triggering a procedure to settle international tax disputes in parallel with domestic remedies) the "administrative" suspension laid down under article 39, comma 1, of the Decree n. 602/1973.

Article 39, comma 1, of the Decree n. 602/1973 does not pose any condition for the suspension envisioned therein. Hence, one may argue that the Italian Revenue Agency may discretionary decide whether or not to grant such suspension. Nevertheless, as stated in the previous paragraph, once taxpayers have submitted a request for a mutual agreement procedure, and once the "required" tax authority has accepted such a request, the Revenue Agency should always grant such relief according to the principles of fairness, diligence, loyalty and good faith.

The Italian Revenue Agency failure to grant a suspension relief, indeed, would be inconsistent with the same Italian Revenue Agency acceptance of the request for a MAP and, more generally, run counter to the goals of the "OECD Procedures", given that the suspension of tax collection is of pivotal importance in order to ensure the full elimination of double taxation[67].

4.3. The suspension of tax collection during the period of application of the Directive.

At the stake, under the Directive, there is no guidance on how taxpayers should proceed in order to obtain the suspension of tax collection when resorting to the procedure envisioned therein.

Understood that article 3, comma 2, of the Law n. 99/1993 seems applicable only when taxpayers resort to the EU Arbitration Convention, the only possible solution for

[67] This seems also the conlcusion of M. TRIVELLIN, *op. cit*., 125, fotnote 238: "*il principio di correttezza potrebbe mostrarsi idoneo a fondare l'obbligo di rendere effettiva la sospensione amministrativa dei provvedimenti impositivi, almeno tutte le volte in cui la tutela cautelare processuale, per i tempi o lo stato del rito, non possa essere utilmente conseguita*".

taxpayers in order to obtain the suspension of tax collection when resorting to the Directive would be – as stated supra with respect to the "OECD Procedures" – to request the suspension pursuant to article 39, comma 2, of the Decree n. 602/1973.
Nevertheless, given that, as stated above, such a provision doesn't expressly "force" the Italian Revenue Agency to grant a suspension relief after that it accepts the taxpayer complaint, it seems that the Italian Law, when transposing the Directive into the Italian legal system, should include an *ad hoc* provision that – in accordance to the principles of fairness, diligence, loyalty and good faith – enables taxpayers to obtain the "automatic" suspension of tax collection from the moment in which taxpayers submit a complaint, up until the end of the procedures envisioned therein.
Indeed, as recently stated by an influential author, the Member States' failure to grant a suspension relief with regard to the taxation in question not only could appear inconsistent with competent authorities' own conduct, but even run counter to the "long term" goal of the Directive to make no longer necessary for taxpayers to trigger, simultaneously, the international procedures to settle international tax disputes and domestic judicial remedies. Such a failure, precisely, could have the effect to discourage taxpayers to set into motion the dispute resolution process in question, as they would end up in being treated worse than it would have been the case had they decided to pursue a purely domestic route instead[68].

[68] See S.M. RONCO *The EU Directive on tax dispute resolution mechanisms in the European Union: a flexible but still perfectible tool for solving international tax disputes*, op. cit.

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