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Chapter 2

Flexible Multi-Tier Dispute Resolution: The German Experience

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2.1. Introduction[1]

Within this extensive collaborative research outline, this research block aims at providing an impression of the most important existing procedures in order to deal with international tax controversies. This research solely focuses on the existing procedures dealing with tax controversies between taxpayers and tax authorities to avoid future appeals on a domestic level and on procedures between states besides mutual agreement procedures (MAPs) in tax treaties to deal with international tax disputes. With respect to the domestic and international procedures this research block solely focusses on procedures without the involvement of a third person.

With respect to the existent dispute solution procedures within different states, the branch reports of the IFA research project prepared in 2016 on dispute resolutions were used to obtain an impression of the applied legislations within the 39 participating states.[2] The fulfilment of the tax authorities' enforcement task depends on the cooperation of taxpayers. Therefore, tax procedures generally are or should be designed based on a mutual cooperative relationship in which the tax authorities as fiduciary of the public interest own the ultimate responsibility.[3] Within this cooperative framework, advance dispute resolutions have to be further developed and amended in order to serve the requirements of resolving possible future disputes at an early stage.

1. Cut-off date domestic framework: August 2016; cut-off date for international framework: July 2019.
2. *Dispute resolution procedures in international tax matters* (IFA Cahiers vol. 101A, 2016), Books IBFD. The reporting countries are Argentina, Australia, Austria, Belgium, Brazil, Canada, Chinese Taipei, Denmark, Finland, France, Germany, Greece, India, Italy, Japan, Korea, Liechtenstein, Luxembourg, Malaysia, Malta, Mexico, the Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Russia, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, Uruguay and Venezuela.
3. This was explicitly stated by the German Federal Constitutional Court on 9 March 2004, 2 BvL 17/02, German federal Tax Gazette, II 2005, 56.

2.2. Unilateral procedures dealing with international tax disputes between taxpayers and tax authorities within a state

2.2.1. ‚Rulings regarding future transactions

2.2.1.1. Advance rulings

Tax authorities and courts generally limit their actions to examining transactions ex post whereas taxpayers have a desire to evaluate the economic, legal and especially tax consequences of planned/expected transactions ex ante. Taxpayers who are obliged to calculate taxes by themselves (in a self-assessment system) or have to file tax returns and have to decide which information has to be included in the return regularly face questions regarding the accurate treatment of (often complex) tax issues. They are in need of a tool that provides legal certainty in order to avoid the regular enforcement tools of the state's authority such as administrative surcharges and penalties.

Tax laws all over the world contain numerous undetermined legal and value terms which need to be clarified. As tax authorities provide their decision ex post, after the respective transactions have already been conducted, the taxpayer bears the interpretation and valuation risk unilaterally as the initial decision-maker. The more uncertain the application of law, the more urgent is the need of an effective protection of tax planning. If the legal provision cannot provide a sufficient determination of the tax event, protection through an early inclusion of the taxpayer in the proceedings and the provision of an advance ruling are necessary. Herewith, taxpayers may secure their disposition in a way that does not solely minimize the respective tax burden, but mainly causing it to be a *predictable calculation*. It also ensures taxpayer's freedom of action that requires a planning and decision-making certainty. Calculations and investment decisions of taxpayers are significantly depending on tax parameters due to their high level of the tax burden. Therefore, the taxpayer has a significant interest that the tax authority approves the legal position on which his transactions were based. If neither the law nor court rulings are able to provide a secured basis of trust, the taxpayer's relevant dispositions are in need of advance protective/securing measures. Advance rulings serve such a protection of disposals. As an *administrative self-commitment*, the advance ruling compensates the tax law deficit of ex ante approval elements by already providing certainty regarding future administrative decisions to the taxpayer when tax-relevant decisions are made. It can be seen that the majority of the reviewed countries allow

advance rulings with respect to transactions which are not yet conducted. However, Denmark, for example, also allows taxpayers to obtain advance rulings that bind the tax administration for transactions which have already been carried out.[4] Also, the UK HMRC provides for a new non-statutory clearance procedure that allows for rulings regarding past transactions under certain circumstances where the tax authority considers itself bound in the event of case concordance.[5] These *post-transaction rulings* could be considered to belong to the category of contracts under public law regarding past transactions described below in section 2.2.1.2. Besides the fact that both kinds of rulings refer to transactions in the past, the understandings described in section 2.2.1.2. are designed to bind both parties whereas the mentioned rulings of Denmark and the United Kingdom are only binding for the tax administration.

Some countries allow rulings for all types of taxes and cases (e.g. Luxembourg, Germany) and may only restrict the provision to the prerequisite that the ruling must be of particular interest to the applicant due to the existence of significant tax implications (Germany). However, several states limit the provision of rulings to certain taxes and cases or to certain taxpayers.[6] Austria, for example, restricts rulings to cases of restructurings, group company regimes or transfer pricing.[7] Denmark excludes customs[8] and Switzerland provides legal provisions for VAT issues whereas rulings with respect to other issues are only provided based on the authorities' discretion.[9]

As advance rulings are generally providing guidance on the treatment of a specific case of a taxpayer, the case has to be explained extensively in a way that the tax authority does not have to conduct own investigations.[10] The nature of rulings in general requires for a special disposal interest of the applicant which is expressed by the extensive tax consequences of the

4. J. Breau & K. Slov Nilausen, *Denmark*, in *Dispute resolution procedures in international tax matters* (IFA Cahiers vol. 101A, 2016), p. 212, Books IBFD.
5. P. Nias, *United Kingdom*, in *Dispute resolution procedures in international tax matters* (IFA Cahiers vol. 101A, 2016), p. 746, Books IBFD.
6. E. Van de Velde, *Tax Rulings in the EU Member States*, Study for the ECON Committee, p. 28.
7. J. Herdin-Winter, F.A.M. Koppensteiner & S. Schmidjell Dommes, *Austria*, in *Dispute resolution procedures in international tax matters* (IFA Cahiers vol. 101A, 2016), p. 101, Books IBFD.
8. Breau & Slov Nilausen, *supra* n. 4.
9. R. Stocker, *Switzerland*, in *Dispute resolution procedures in international tax matters* (IFA Cahiers vol. 101A, 2016), p. 685, Books IBFD.
10. DE: German decree for the application of the Federal Fiscal Code of 31.1.2014, German Federal Tax Gazette I, 2014, 290, § 89 AO, sec. 3.5.1; Van de Velde, *supra* n. 6.

respective case.[11] In cases where the issue in question is insignificant, no advance ruling procedure is usually granted as tax authorities would otherwise be flooded with requests. The decision of the tax authority, whether or not to grant an advance ruling is often based on the discretionary power of the authority. If the taxpayer expressed his interest on the disposal (i.e. an interest on a respective commitment) through a proper application and if there are no indications that he will not pay the respective fee (if applicable), the administrative discretion should be reduced to zero in the sense of a legal claim to the issuance a ruling.[12]

Generally, advance rulings are binding, if the respective transaction is actually conducted in the way it was described in the case provided by the taxpayer when applying for such ruling.[13] The binding effect only applies to the tax authority itself, but not for the addressee of the ruling as it is generally considered to be self-binding without binding the other party.[14] Advance rulings contain favouring arrangements that exclusively concern the addressee and provide him with a suspensory conditional claim for performance.[15] The Japanese authorities offer advice to taxpayers, but as the procedure is not legally established, this is rather considered a voluntary service of the tax administration. However, the taxpayer can claim damages based on violation of the principle of good faith.[16] Some countries (e.g. Italy) also publish rulings in anonymized form via resolution or circular letter in cases where several taxpayers filed separate ruling requests in similar cases (whereas rulings for taxpayers in singular cases are not available to the public).[17] Furthermore, it can be seen that several countries publish certain anonymized information of the provided rulings (e.g. Australia, Canada, Belgium, Spain). Although published, as explained above, other taxpayers may not rely on these published rulings. Countries such as Germany, Liechtenstein and Finland do not publish their provided rulings.

The new EU Customs Code of 9 October 2013, Regulation (EU) No 952/2013, provides for an advance ruling that binds the authority *and* the taxpayer equally. With a view to the interest of the tax authority to be able

11. *See*, for example, Sec. 89(2) 1 German Fiscal Code.
12. R. Seer, *Verbindliche Auskunft*, FR 2017, p. 161 (165).
13. Van der Velde, *supra* n. 6, at p. 29.
14. R. Seer, *Verständigung in Steuerverfahren*, Habilitation, 1996, p. 310.
15. L. Horst, *Die verbindliche Auskunft nach § 89 AO*, Dissertation, 2010, p. 110 et seq.
16. S. Minami, *Japan*, in *Dispute resolution procedures in international tax matters* (IFA Cahiers vol. 101A, 2016), p. 343, Books IBFD.
17. M. Gianfrate, *Italy*, in *Dispute resolution procedures in international tax matters* (IFA Cahiers vol. 101A, 2016), p. 321, Books IBFD.

to rely on the respective provided treatment of the respective tax case within the ruling, the binding effect of a ruling on the taxpayer should also be considered for advance rulings in tax law.

As mentioned before, the advance ruling only provides the recipient of the ruling with a claim on fulfilment against the authority. Due to the generally favouring character of an advance ruling, this should result in the binding effect being denied if the ruling would contradict the existing law to the detriment of the taxpayer.[18] Furthermore, the binding effect should be denied automatically from the time the legal provision underlying the ruling is repealed or amended. However, as a measure of protection of taxpayers' disposal on their decisions, it is the function of advance rulings that the tax authorities bear the *risk of legal errors*.[19] This means that the change of court rulings or administrative provisions should not influence the binding effect of the advance ruling. According to German law, advance rulings may be repealed or amended *pro futuro*, if the respective transactions have not yet been conducted and it turns out that the provided rulings were incorrect.[20] This may include deviations of the binding commitment from later court rulings or administrative provisions. The German tax authority restricts the future amendment to such cases where the taxpayer had not yet executed its disposal and realized the underlying case.[21]

Several states require the payment of a fee with regard to the advance ruling application.[22] The fee is a tool to ensure that only serious questions are filed by the taxpayer and may also provide for a monetary compensation for the additional efforts. Advance rulings provide the taxpayer with a favourable anticipated future commitment of the tax authority being an individual attributable and chargeable advantage in the sense of tax planning security. The fee depends, for example, on the type of issue the application refers to (Finland),[23] on the hours spent on the ruling by the authority (Canada)[24] or

18. For example, DE: Sec. 2 (1) 2 German Tax information Regulation (StAuskV).
19. J. Hey, *Steuerplanungssicherheit als Rechtsproblem*, Habilitation, 2002, 728 et seq.; Horst, *supra* n. 15, at p. 129.
20. Sec. 2(3) StAuskV.
21. DE: German decree for the application of the Federal Fiscal Code of 31.1.2014 as amended on 24.1.2018, German Federal Tax Gazette I, 2014, 290, § 89 AO, sec. 3.6.8.
22. Germany, Canada, New Zealand, Denmark, Sweden, Finland; *see* respective country reports in *Dispute resolution procedures in international tax matters* (IFA Cahiers vol. 101A, 2016), Books IBFD.
23. L. Aine, *Finland*, in *Dispute resolution procedures in international tax matters* (IFA Cahiers vol. 101A, 2016), p. 227, Books IBFD.
24. D. Hill & M. Nixon, *Canada*, in *Dispute resolution procedures in international tax matters* (IFA Cahiers vol. 101A, 2016), p. 179, Books IBFD.

on the value of the respective transaction (Germany).[25] Some countries also determine a *time period* within which a ruling shall be provided. Canada, for example, wants to provide a ruling within 90 business days after the application was filed by the taxpayer,[26] whereas Mexico asks for the provision of a ruling within 3 months[27] and 6 months in Spain[28] or Germany. The United Kingdom even provides a 30-day period for their rulings (statutory clearances).[29] Other countries do not provide a certain time period in which a ruling has to be issued, this is rather subject to the discretionary power of the tax authority.

With respect to the legal protection of taxpayers it has to be distinguished between the possibility to take legal measures regarding the provision of an advance ruling in cases where none is granted by the authorities and between the concrete content of the ruling once the ruling is issued.

2.2.1.2. Unilateral APA

Advance pricing agreements (APAs) shall provide certainty with respect to transfer pricing issues before such transactions take place in order to avoid possible future conflicts regarding transfer pricing transactions. Taxpayers may gain unilateral legal certainty through an APA[30] from their competent authority, but as transfer pricing issues only occur within cross-border transactions, unilateral APAs do not provide full legal certainty because the foreign authority has not been involved in the APA process. Therefore, unilateral APAs are considered inefficient because they are not able to eliminate the risks of double taxation. Bi- and multilateral APAs are more efficient tools to deal with uncertainty in the field of transfer pricing as they include each relevant authority in the negotiation procedure (*see* below).

25. S. Greil & S. Rasch, *Germany*, in *Dispute resolution procedures in international tax matters* (IFA Cahiers vol. 101A, 2016), p. 266, Books IBFD.
26. Hill & Nixon, *supra* n. 24.
27. S.L. Pérez Cruz & A.T. Tiburcio, *Mexico*, in Dispute *resolution procedures in international tax matters* (IFA Cahiers vol. 101A, 2016), p. 447, Books IBFD.
28. F. Serrano Antòn, *Spain*, in *Dispute resolution procedures in international tax matters* (IFA Cahiers vol. 101A, 2016), p. 637, Books IBFD.
29. Nias, *supra* n. 5, at p. 745.
30. Countries such as Australia, Belgium, Canada, Denmark, France, and the Netherlands provide unilateral APAs; *see* respective country reports in *Dispute resolution procedures in international tax matters* (IFA Cahiers vol. 101A, 2016), Books IBFD.

2.2.1.3. Enhanced relationships

The idea of cooperative compliance was initially included under the title "enhanced relationship" with the OECD report "Study into the Role of Tax Intermediaries" of the Forum on Tax Administration in 2008.[31] Herewith, a special cooperation between the taxpayer and the tax administration was meant which goes beyond the basic relationship of both parties simply fulfilling their legal obligations.[32] In order to avoid connotations of inequality in tax treatment the term "enhanced relationship" was replaced by "cooperative compliance".[33] The identified pillars for a successful cooperative relationship are understanding based on commercial awareness, impartiality, proportionality, openness through disclosure and transparency.[34] Besides this, the establishment of an internal control system by the taxpayer formed a further pillar of cooperative compliance which ensures that the taxpayer provides accurate information and in return receives a better service from the fiscal authorities.[35] Intrinsic motivated compliant behaviour of taxpayers, which is also referred to as voluntarily compliant behaviour, is usually achieved when taxpayers fear sovereign repressive measures (e.g. via interest charges, tax penalties or audits) or if they are rewarded for acting "voluntarily" compliant.[36]

The Netherlands provides such enhanced relationship programmes for enterprises independent from their business' size.[37] Within a compliance agreement the enterprise agrees to discuss arising tax issues with the authorities by the time they become relevant and, in return, the taxpayer receives legal certainty from the authorities at that time.[38] This avoids time- and effort-consuming audits and disputes at a later stage. The United Kingdom also provides a "Customer Compliance Management Model" for large businesses. This programme consists of a Customer Compliance Manager (CCM) who shall manage the relationship between the businesses and HMRC in order to discuss and resolve tax issues before tax returns are

31. OECD, Study into the role of tax intermediaries, 2008.
32. OECD, Co-operative Compliance: A Framework. From Enhanced Relationship to Cooperative Compliance, 2013, p. 31.
33. Id., p. 16.
34. Id., p. 19.
35. Id., p. 21.
36. R. Seer, *Voluntary Compliance*, 67 Bull. Intl. Taxn. 11 (2013), sec. 6., Journal Articles & Papers IBFD; H. Gribnau, *Cooperative compliance: some procedural tax law issues*, in *Tax Assurance* p. 187 (R. Russo ed., Wolters Kluwer 2015).
37. OECD, *supra* n. 32, at p. 32.
38. J. Arendse & G. Groen, *Netherlands*, in *Dispute resolution procedures in international tax matters* (IFA Cahiers vol. 101A, 2016), p. 479, Books IBFD.

filed.[39] The Australian Tax Office provides for a pre-lodgement compliance review for large businesses and provides relationship managers.[40] It can be seen that most countries provide such relationship programmes with large businesses as they have high complexity and high possible tax effects (e.g. also Finland, Singapore, Denmark).

However, small and medium-sized businesses also have a need for legal certainty and also if their tax liabilities are not as high individually, together, they accumulate to an amount not irrelevant to state's revenues. In this regard, large companies often have better resources to establish own control systems within the company in order to comply with the authorities' cooperation requirements. This may be too expensive for small or medium-sized businesses and such businesses may also simply not be able to establish such systems as they do not have the necessary tax department to fulfil such a task. Small and medium-sized companies should be able to apply for a system comparable to the Dutch compliance framework, where tax advisors ensure and guarantee the accuracy of tax returns. In the Netherlands, the Dutch tax authorities review tax service providers in cooperation with the SRA (*Samenwerkende Registeraccountants en Accountants-administratieconsulenten*, "A cooperation of firms of chartered accountants and accounting and tax consultants") and NOAB (*Nederlandse Orde van Administratie- en Belastingdeskundigen*, "Netherlands Association of Accounting and Tax Experts") in order to examine whether these service providers provide for a sufficient quality assurance system securing the accuracy of the prepared tax returns. In case a service provider provides for such a control system, the Dutch authority concludes covenants with such tax service providers whose "covenant tax returns" are perceived to be reliable and therefore allow for a reduction of the supervisory activities of the Dutch tax authority.[41] This means that tax advisors can apply for such a certificate if they provide, for example,. for a sufficient control system that ensures the necessary quality and a perfect tax life in the past. These service providers are required to submit applications of their clients (businesses, entrepreneurs) to participate in horizontal monitoring. The Dutch authority may decline such application if the service provider does not have a sufficiently long history of cooperation with the entrepreneur, especially in

39. Available at https://www.gov.uk/guidance/hm-revenue-and-customs-large-business (last retrieved 24 September 2020).
40. M. Markham & J. Spencer, *Australia*, in *Dispute resolution procedures in international tax matters* (IFA Cahiers vol. 101A, 2016), p. 90, Books IBFD.
41. Guide Horizontal Monitoring Tax Service Providers, 2016, pp. 6 f., 14 f., available at (https://download.belastingdienst.nl/belastingdienst/docs/guide-horizon-monitoring-service-providers-dv4071z3pl.pdf, last retrieved on 24 September 2020).

preparing the tax returns, if the accounts of such entrepreneur are considered to be insufficient or it belongs to a sector which is generally not allowed to participate in horizontal monitoring (e.g. coffee shops, prostitution sector or mobile home sites).[42] Besides this the entrepreneur has to provide a tax control framework which assures the provided information is trustworthy.[43] The inclusion of such tax advisors within an enhanced relationship requires that tax advisors are subject to a legal regulatory framework which ensures their qualification (as it is also the case, for example, in Germany). These appointed trustworthy service providers will consult with the Dutch tax administration on relevant tax issues before tax returns are filed within so-called *preliminary consultations*.[44] A request for such a preliminary consultation is eligible within the Dutch horizontal monitoring system if the service provider expects the tax administration to adopt an opposing position on a relevant specified tax issue or if such a tax issue is of high importance for the taxpayer.[45] With respect to such consultations and further inquiries that may arise on the side of the tax service provider, the Dutch horizontal monitoring system provides for a relationship manager who serves as a constant contact person between the authority and service provider.[46] Small tax offices that do not have the facilities to provide for a sufficient control system in order to conclude the aforementioned covenants with the Dutch authority and participate in the horizontal monitoring programme are not left out by the Dutch authority. Such small service providers may participate in the horizontal monitoring procedure if they are tax members of an umbrella organization which has a sufficient control and quality assurance systems and concluded a respective compliance agreement with the Dutch authorities.[47] Equal treatment of covenant and non-covenant partners has to be ensured because enhanced relationship procedures cannot lead to a different tax assessment than assessing taxes via the regular procedure. Enhanced relationships may only affect the procedure of tax assessment by creating a different form of cooperation between taxpayers and the authorities.

It can be seen that the system of enhanced relationship/horizontal monitoring depends on building a trustful relationship between tax authorities, tax service providers and taxpayers which rewards voluntary compliant taxpayers with legal certainty and less administrative interference (like tax audits). However, for non-compliant taxpayers, the respective full force of

42. Id., at p. 14f
43. Gribnau *supra* n. 36, at p. 191.
44. Guide Horizontal Monitoring Tax Service Providers, 2016, *supra* n. 41, at p. 20 f.
45. Id., at p. 20.
46. Id., at p. 10.
47. Id., at p. 8.

enforcement measures is applicable in order to ensure at least enforced compliance and thus those taxpayers do not benefit from the obtaining legal certainty upfront or from being excluded from tax audits.[48] This way of promoting a compliant and cooperative relationship based on trust and effective communication is an effective tool to prevent disputes in tax law. The effectiveness and efficiency may be measured on the binding effect of the agreements (covenants) that are concluded between the authorities and taxpayers/service providers. Gribnau states that expressions of the parties' intentions to cooperate are viewed as "soft obligations" with an informal character that tend to not be legally binding but may have indirect legal effects. "Hard obligations" like the taxpayer being obliged to provide for a sufficient tax control framework and proactively informing the authority about occurring issues bearing tax risks are legally enforceable.[49] It can be agreed that the expression of the participating parties to be willing to cooperate in enhanced relationships or so-called horizontal monitoring structures via the mentioned covenants or agreements should not be accompanied by a detailed system of obligations and sanctions as this would be contrary to establishing an approach that aims at enhancing communication and cooperation by reducing regulatory limitations and intensifying parity between the taxpayers and authorities.[50]

Creating a relationship between taxpayers and tax authorities that is built on trust and communication and provides early discussions on critical tax issues is an effective tool for providing a system where possible future disputes may be avoided at an early stage within the tax procedure. Such voluntary compliance incentives may even make the taxpayer provide information which goes beyond the information he would be legally obliged to provide as he may be certain to receive legal certainty in return.

2.2.2. Contracts under public law regarding past transactions

Due to its complexity and the existence of numerous undefined legal and value terms, tax law generally provides room for interpretation and clarification which may be filled with understandings between tax authorities and the taxpayer. Besides this, room for interpretation is also existent with a view to the clarification of case facts. In Germany, understandings concerning the tax claim should not be allowed. Under German case law, the

48. Gribnau, *supra* n. 36, at p. 193.
49. Id., at p. 195 f.
50. *See also* id., at p. 190, who refers to a de-juridification of the relationship between taxpayers and tax authorities.

so-called "factual agreement" is binding for the tax authority as well as for the taxpayer if no questions regarding the applicable law, but only the treatment of cases of complicated fact finding are agreed upon.[51] These may be especially cases regarding estimations, valuation and future-oriented forecasts. Difficult fact finding is generally affirmed if facts can only be provided with unreasonable work and time efforts. It should be noted that a binding agreement on facts is often a mixture of legal questions and questions regarding the aforementioned case facts as these questions are usually closely entwined and therefore understandings on legal questions are tolerated in such cases in Germany.[52] German courts decline the binding effect of "factual agreements" if their content provides for an obvious incorrect taxation of the respective case as the taxation result may not deviate only because the respective facts were consensually agreed upon.[53] The German tool of "factual agreements" is applicable during each state of the assessment procedure, i.e. during tax audits, pending litigation or tax prosecution procedures.[54]

With a view to international dispute solution procedures the tool of ex post agreements on past issues during tax audits by coming to an understanding on facts of the respective audited case in advance is of high importance in order to avoid future appeals. Generally, such agreements of already conducted transactions are no unilateral rulings as taxpayers and tax authorities are ought to accept such rulings in order to ensure final legal certainty. Such binding agreements with a view of past transactions can be considered to be contracts under public law which already bind both parties by themselves.[55] Agreements on past transactions that are non-binding rather have an administrative psychological effect.

With respect to audits, several procedures are suitable to avoid legal disputes between taxpayers and tax authorities and there are several possibilities to address possible controversies with respect to audit procedures. Generally, cooperation between the taxpayer and the authority is possible at several stages of the audit. Pre-consultations are available, for example,

51. *See*, for example, DE: German Federal Financial Court, Decision of 31.7.1996 XI R 78/95, German Federal Tax Gazette II, 1996, 625.
52. Buciek, *Bindende Erklärungen der Finanzverwaltung*, Deutsche Steuerzeitung (DStZ) 1999, p. 396; Seer, Tipke/Kruse, Commentary on the German Fiscal Code, Vor § 118 AO, no. 11 citing further literature (Oct. 2015).
53. Seer, Tipke/Kruse, id., at § 118 AO, no. 29 f. citing further literature.
54. German Federal Ministry of Finance of 30.7.2008, German Federal Tax Gazette I 2008, p. 831, no. 1.
55. Seer, Tipke/Kruse, *supra* n. 53, at § 118 AO, no. 15 citing further literature.

in the United Kingdom[56] and some countries provide for final meetings (Finland,[57] Germany[58]).

The Australian tax law provides for an effective settlement policy which puts the decision of settlements regarding disputes during audits rather in the discretionary power of the administration. Australian tax authorities are allowed to settle disputed cases after considering the relative weight of the parties' positions, the costs versus the benefits of continuing the dispute, the impact on future compliance for the taxpayer and the broader community. This procedure results in settlements of disputed matters within tax audits being reached early during the audit period which makes the audit procedure more effective as disputes are resolved at an early state.[59]

2.3. Bi- or multilateral procedures dealing with international tax disputes between states

2.3.1. Bi- or multilateral APA

Bi- and multilateral APAs aim at avoiding transfer pricing conflicts and most countries provide such regulations within their national law.[60] There exists a desire in dealing with cross-border questions in this field before they result in mutual agreement procedures according to article 25 of the OECD Model, which may only resolve double taxation *after* the dispute already occurred. An APA shall provide a prospective protection of the taxpayer's disposal.[61] The content of APAs is mainly abstract general cases (price influencing factors, profit allocation).[62] Several countries provide a pre-filing meeting with the respective competent authority in order to determine the scope of the desired APA and which document(s) the taxpayer has to provide.[63] Australia even requires a triage process within the early engagement

56. Nias, *supra* n. 5, at p. 761.
57. Aine, *supra* n. 23, at p. 230.
58. Sec. 201 German Federal Fiscal Code.
59. Herdin-Winter, Koppensteiner & Schmidjell Dommes, *supra* n. 7, at p. 84.
60. Out of the 39 reviewed countries within the research of the IFA Cahiers vol. 101A, 2016, only three countries do not provide APA provisions or did not make respective statement (Argentina, Brazil, South Africa).
61. R. Seer, *Deutsche Steuerjuristische Gesellschaft* (German Association of Tax Lawyers) vol. 36, 2013, p. 351.
62. Directive EU/2015/2376 (DAC3) Art. 3 no. 15 Directive EU/2015/2376 (DAC3), OJ L 332 of 18 December 2015, 1; DE: Decree of the Federal Ministry of Finance of 5.10.2006, German Federal Gazette I 2006, p. 594.
63. E.g. Germany, Australia, Canada (*see* IFA Cahiers vol. 101A, 2016, country reports).

procedure which includes, for example, a preliminary research examining the tax and compliance history of the taxpayer, the current interactions with the tax authority, the taxpayer's behaviour/results under prior APA(s) and the value of cross-border dealings.[64]

In general, APAs shall provide/include information regarding:[65]
- the participating parties (being the competent authorities);
- the affected affiliated companies;
- the respective business transactions;
- the transfer pricing methods;
- application period of the APA:
- roll-back period for application of the transfer pricing method;
- critical assumptions for validity of the APA (e.g. consistent share participation, consistent business relation, consistent relations of market conditions, market share, sale volume, sale prices); and
- provision of annual reports proving that the business transactions have been carried out accordingly and that the validity assumptions have been fulfilled (e.g. annual financial statement, pricing calculations).

In order to compensate the valuation risk of the taxpayer effectively, he has to be able to rely on the APA in front of tax authorities. As described above, a unilateral APA that a company conducts with "its" tax authority does not provide such certainty in cross-border transfer pricing cases as the foreign authorities are not involved in such a procedure. For German tax purposes, bi- or multilateral APAs generally consist of two elements: the involved states conclude an administrative agreement under international law which binds them bi- or multilaterally (e.g. based on article 25(1) and (3) of the OECD Model) and as the binding effect between the tax authorities and the respective taxpayer cannot be derived from such an administrative agreement according to the German provisions, it has to be established additionally within the individual tax relationship between the tax authority and taxpayer. The German Tax Administration derives this binding effect via an advanced commitment of the authority to the taxpayer (company) based on the aforementioned administrative agreement. The above-described advance ruling provides a legal opinion on a provided future case and is only binding for the tax authority.[66] According to the OECD, APAs do not mainly resolve legal problems, but focus on the necessary factual assumptions required

64. Markham & Spencer, *supra* n. 40, at p. 88.
65. DE: German Federal Ministry of Finance of 5.10.2006, German Federal Tax Gazette I 2006, p. 594.
66. Id., at p. 594, no. 1.2.

for the determination of the accurate arm's length range.[67] The German tax authority only grants the ruling if the taxpayer gives his approval towards the administrative agreement in advance and additionally declares a limited waiver of appeal.[68] Under German law, APAs include a mutual future binding commitment of tax authorities and taxpayers.[69] As mentioned before, such agreements are viewed as contracts under public law. Tax authority and taxpayer have a desire that the respective opposite party complies with the content of the APA for the applicable period.

The taxpayer is a participant within the application process and the pre-filing procedure, but no formal participation is granted to him within the actual APA negotiation procedure. He rather is sitting in a "back room" while the tax authorities negotiate the terms of the APA. Thus, even though the taxpayer often pays a fee upon applying for an APA, no formal participation rights are granted.[70]

2.3.2. Cross-border rulings, cooperation and information exchange

It can be seen that advance rulings (*see* section 2.2.1.1.) are an effective tool to provide taxpayers with legal certainty and avoid future disputes which is applied by most jurisdictions. The complexity of tax laws requires such a tool to ensure taxpayers' freedom of disposal. APAs ensure effective legal certainty as they involve the relevant authorities within the affected jurisdictions. With respect to the numerous conflict potential of cross-border disputes in international tax law matters, a necessity exists to provide a tool that ensures legal certainty in advance outside the field of transfer pricing issues of affiliated companies. Potential cross-border rulings could provide for a procedure where the foreign state accepts (unilateral) rulings as described above. This could be achieved by extending bi-/multilateral APAs to cover further tax issues and not only transfer pricing transactions.

Besides the possibility of extending cross-border rulings on broader tax matters, information exchange is also a tool to avoid future disputes in cross-border cases as it enhances the cooperation of involved state's authorities. In this regard, the automatic exchange of issued cross-border rulings or APAs

67. OECD Transfer Pricing Guidelines, 2017, no. 4.143.
68. DE: Decree of the Federal Ministry of Finance of 5.10.2006, German Federal Gazette I 2006, p. 594, no. 4.6.
69. Id., at p. 594, no. 6.3, 6.4.
70. Id., at p. 594, no. 4.2.

by the European Union with Directive EU/2015/2376 (DAC3)[71] is mentionable. DAC3 requires to exchange summarized information of cross-border rulings or APAs to all Member States including a description of the relevant business activities or transactions (article 8a(1) and (2) in connection with paragraph 6(b) of DAC3). Generally, the provision of such information to other states who are affected by cross-border transactions may be a tool to avoid future disputes, if the provided information helps the involved states to examine the cross-border transaction in question properly. However, it is questionable if such summarized information as required by DAC3 provides for such comprehensive information which allows the examining authority to fully understand the background of a complex cross-border tax event. The preamble of DAC3 even states that *basic* sets of information should be exchanged.[72] Therefore, the automatic exchange of compressed information of the content of cross-border rulings and APAs is not sufficient in order to provide the necessary information to be able to discuss the respective issue in question and to prevent future disputes. The affected Member States can rather request further information if the automatically forwarded summarized information gives reason to do so. Additionally, article 8a(4) of DAC3 limits the provision of information regarding advance cross-border rulings to cases where no natural persons are concerned or involved. With respect to the aforementioned, the information exchange on cross-border rulings may be a helpful tool to enhance communication and cooperation of the respective parties (involved authorities and taxpayers), but its effectiveness is restricted as the provided information is limited to compressed information excluding transactions with natural persons.

Cross-border cases are of course also an issue with regard to tax audits, as the examining authorities have to be able to examine the relevant tax issues comprehensively with sufficient provided information. This topic has also been picked up by the OECD Forum on Tax Administration in a published report in 2019 examining the challenges and opportunities of enhanced cooperation within the area of joint cross-border tax audits.[73] With a view to cross-border cases, *simultaneous examinations* allow tax authorities of different states to align the time period when an audit is conducted and its scope. The actual audit is carried out autonomously according to the legal provisions set out by the national law of the respective involved tax authority.[74] Compared to this, *joint audits* shall allow cross-border cooperative

71. OJ L 332 of 18 December 2015, 1.
72. Id., preamble no. 12 and 14.
73. OECD, Joint Audit 2019 – Enhancing Tax Co-operation and Improving Tax Certainty, 2019.
74. Id., at no. 27 f.

(joint) audits which are conducted together by tax authorities of different states.[75] This results in at least one of the involved tax authorities to execute an audit measure outside of their sovereign territory which requires an explicit legal provision enabling authorities to conduct such sovereign action in a foreign state.[76] Within the European Union, the Directive on Administrative Cooperation in tax law provides such a legal basis. Outside the European Union bi- or multilateral agreements would provide such legal basis. Especially with a view to multinational entities (MNEs) who have to align with several tax administrations in several jurisdictions, such joint audits may be preferable in order to avoid having to investigate and discuss such cross-border cases separately with the respective involved jurisdictions. In this regard, it is worth mentioning, that the OECD ICAP Project (International Compliance Assurance Programme), which was launched in the beginning of 2018, entered its second phase in March 2019 with 17 jurisdictions participating.[77] The ICAP Project aims at providing an additional measure that enhances compliance and cooperation of multinational taxpayers on a voluntary basis and in turn provides respective certainty to such participating MNEs.[78] Within the ICAP, the respective involved tax authorities work together with the respective MNE in order to thoroughly asses potential tax risks of the MNE (e.g. in the area of profit allocation) based on information provided by the MNE (e.g. CbC reports and other relevant tax information). In case the tax risk is confirmed by the authorities to be low, these respective areas should not be subject to further investigation by the tax authorities in a specified future time period.[79]

Joint audits and simultaneous examinations are cooperations that enable cross-border APAs between tax authorities as problems may arise where only one state conducts an audit where possible disputable issues arise and the other involved state already assessed the transaction in question and does not conduct a parallel audit. This may also result in a MAP procedure. It is, however, of course preferable to avoid such an agreement procedure via an early cross-border cooperation before and during tax audits.

75. Id., at no. 38.
76. Id., at no. 26.
77. *See* OECD press release, available at http://www.oecd.org/tax/administration/leading-global-tax-administrations-agree-collective-actions-on-tax-certainty-co-operation-and-digital-transformation.htm (last retrieved on 24 September 2020); participating countries are Australia, Austria, Belgium, Canada, Denmark, Finland, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Poland, Spain, the United Kingdom and the United States.
78. OECD, International Compliance Assurance Programme - Pilot Handbook 2.0, no. 1.
79. Id., at no. 76ff.

2.4. Summary

(1) Tax procedure relies on a mutual cooperative relationship between the taxpayer and the tax authority. In order to ensure the lawful enforcement of the tax assessment procedure by tax authorities, the authorities are relying on the taxpayers to provide sufficient information regarding the tax issue in question. Enforcing such cooperation by law via legally binding obligations of taxpayers to provide tax-relevant information is one tool within tax procedure law. The introduction of procedures that build on a cooperative and communicative relationship between taxpayers and tax authorities can reduce legal disputes by providing the possibility of addressing and discussing critical tax issues at an early stage within the tax procedure.

(2) A functioning cooperative relationship between tax authorities and taxpayers has to be built on trust. The tax authorities have to be able to rely on the accuracy of the provided information and the taxpayers have to be able to obtain legal certainty from such open cooperation.

(3) Dispute resolution tools can provide certainty for both participating sides at an early stage and may avoid future disputes as possible risky tax issues can be addressed at an early stage of the tax procedure.

(4) Advance rulings are an effective tool to address possible disputable tax issues to tax authorities and obtain legal certainty for the taxpayer before the transaction takes place. Advance rulings should be limited to cases that are of particular interest and have certain importance in order to avoid the authorities being flooded with minor requests.

(5) Contracts under public law are tools to clarify complex case facts of already conducted transactions and to provide certainty with a view to ex post examination of such tax issues.

(6) Within the different tools for avoiding future disputes, enhanced relationships between taxpayers and tax authorities are a crucial system in order to create a trustworthy cooperative relationship that enhances tax assessment procedures by providing room for open discussions on critical tax issues at an early state. The fundamental idea of creating a cooperative trustworthy relationship where taxpayers and authorities can communicate on equal terms is an effective tool in order to avoid disputes at an early stage of the tax procedure.

(7) With international tax disputes, bi- and multilateral APAs may avoid future disputes with respect to cross-border transfer pricing issues. This cooperation between authorities of different states enhances the communication regarding complex cross-border cases within the field of transfer pricing and profit allocation.

(8) An extension of the applicable scope of cross-border rulings could be an opportunity to avoid future disputes without the interference of a third party. In connection with joint tax audits, this would be an effective tool to enhance cross-border cooperation and prevent future disputes.

(10) All in all, it can be seen that several legal tools are capable to prevent future disputes in tax matters and that these tools are based on a close cooperation between the taxpayer and the tax authorities. Such close cooperation and open communication are only possible within a trustworthy relationship between the cooperating parties. This requires that the communication can be held on equal levels and that legal certainty can be achieved for both parties. The latter implies that such tools should not only be binding for one, but for both parties equally.

The Use of Independent Non-Judicial Bodies in the Settlement of Tax Disputes: Selected National Experiences