New exchange of information versus tax solutions of equivalent effect

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ITALY National Report

Prof. AGOSTINO ENNIO LA SCALA[*]
Dr. PIETRO MASTELLONE, LL.M.[**]

1. The sources of the exchange of information system in Italian tax legislation.

1.1. Overview.

Italy, as an OECD member, has developed a wide and effective exchange of information system fully following the international standards of transparency in tax matters, building an extensive network of relationships with other States, members of the European Union and third countries.

Italy is also member of the *Global Forum on Transparency and Exchange of Information for Tax purposes* and member of the *Peer Review Group of the Global Forum*.

Transparency and exchange of information have become a new important global milestone in the international relationships between the States in the fiscal field. The fight against tax evasion, tax avoidance, fraud and harmful tax competition plays a strategic role[1] in the political manifesto of all developed countries, especially during the current deep economic crisis, where is stronger the need to find new sources of revenue for public expenditure and, at the same time, to fairly distribute the fiscal burden.

The competent authority's ability to exchange information (collect data and offer partners timely access to that information) has been improved during the last years, also through the introduction of new and strong assessment's powers, anti-money laundering legislation and several compulsory registration, accounting and identification customer record requirements on professionals and economic entities of any kind, including the financial institutions.

The legal and regulatory Italian framework for transparency and exchange of information includes the large network of bilateral double taxation conventions (DTCs), as well as seven tax information exchange Agreements (TIEAs), based on the TIEA Model.

Italy, as a party to the *Council of Europe and OECD Convention on Mutual Administrative Assistance in Tax Matters* (which is the only multilateral instrument on exchange of information in force), has ratified by the Law of 10 February 2005, No. 19, as well as the recent protocol amending this convention which entered into force on 1st June 2011. This protocol, which aim to adapt the Convention to international standards, in particular with regard to bank secrecy, has been ratified by the Law 27 October 2011, No. 193.

Italy has ratified the *European Convention on Mutual Assistance in Criminal Matters*, including the fiscal protocol.

As a member of the European Union moreover, Italy apply the provisions of the EU directives, exchanging all types of information, bank information included, without any reference to a domestic tax interest.[2] On 1st January 2013 entered into force the new Mutual assistance Directive No. 2011/16/EU, adopted by the European

[*] Associate Professor of Tax Law, University of Palermo. Prof. La Scala has written paragraphs 1, 2, 3 and 4. Paragraph 9 was written jointly with Dr. Mastellone.

[**] LL.M., Universiteit van Amsterdam; Ph.D. in "Public and Tax Law in the European Dimension", University of Bergamo; Lecturer of International Tax Law, University of Florence; Tax lawyer in Florence and Milan. Dr. Mastellone has written paragraphs 5, 6, 7 and 8. Paragraph 9 was written jointly with Prof. La Scala.

[1] *See* G-20, *Leaders' Declaration*, Russia, September 2013 and the document *A step change in tax transparency OECD Report for the G8 Summit*, Lough Erne, Enniskillen, June 2013.

[2] On this issue, *see* SEER, R. – GABERT, I., *European and international tax cooperation: legal basis, practice, burden of proof, legal protection and requirements*, in *Bulletin for International Taxation*, Vol. 65, No. 2/2011, p. 88 et seq.

Council on 15 February 2011.[3] In the field of indirect taxation (VAT, in particular) are in force regulations concerning mutual assistance and administrative cooperation.

Italy has also implemented the exchange of information system regulated by Directive No. 2003/48/EC about taxation of savings income in the form of interest payments by natural persons.

1.2. The Italian competent authorities.

The *Dipartimento delle Finanze* (hereinafter DF), a Directorate of the Italian Ministry of Economy and Finance, is the competent authority of exchange information for Italy, including negotiation and interpretation of double taxation conventions and tax information exchange agreements (TIEAs). The DF plays a role of general co-ordination of administrative cooperation and represents the country in the OECD and EU, as well as in Global Forum.

The Revenue Agency (*Agenzia delle Entrate*, hereinafter AE) and the Tax Police (*Guardia di Finanza*, hereinafter GdF)[4] are both authorized and operative competent authorities, allowed to receive and process incoming request from requesting jurisdictions and to send requests to all international counterparts, under the supervision of the DF. The two last mentioned authorities, by a dedicated international cooperation office, staffed with highly skilled officials, have the same compulsory powers regarding the gathering and collecting information and they share the same tools to manage the fight against tax avoidance, evasion and fraud. Italian fiscal system actually imposes on all bank institutions and financial intermediaries to communicate automatically to tax authorities all kind of data regarding open positions (customer accounts, reception of orders, etc.) and related transactions.

1.3. The relevant treaty provisions.

Actually, Italy has signed 103 double taxation conventions with countries all over the world, including developing countries and countries with economies "in transition", some of which are not yet in force (*e.g.* Cuba, Gabon, Iran, Kenya, Libya, Mongolia and Panama).

Italy's bilateral information exchange agreements cover all the main economic partners, all EU and OECD member jurisdictions, with the exception of Chile. Even if only a few of the DTCs contain an extensive information clause, such as Art. 26, paras. 4-5, OECD MTC, similar provisions have been introduced in many agreements (see, for example, those established in DTCs protocols with Bermuda, Mauritius, Mexico, Libya and Panama).

The majority of the treaties signed by Italy meet international standards. To the date, only nine treaties do not follow these standards. Even in these cases, the Italian authorities are ready to guarantee the application of the standard upon condition of reciprocity. Ongoing negotiations, particularly with Hong Kong and China, to bring treaties to the standards. Similar efforts are currently made in the direction to sign protocols amending treaties with Austria, Luxemburg and Singapore.

The relationships with some *neighbouring* third Countries, traditionally qualified as uncooperative ones, assume relevant importance, considering the evolution into domestic law of the so called "white list" (which replaced the old "black list"), including, *inter alia*, all Countries providing a sufficient level of fiscal cooperation with Italy, in order to not apply the special provisions against the so called "tax havens".

It's the case of Switzerland,[5] with which the negotiation is in progress, San Marino (see the recent double tax convention entered into force on October 2013, including an exchange information clause, but anyway not in accordance with the consolidated version of Art. 26 OECD MTC) and Monaco (any DTC at present signed;

[3] *See* GABERT, I., *Council Directive 2011/16/EU on administrative cooperation in the field of taxation*, in *European Taxation*, Vol. 51, No. 8/2011, p. 342 et seq.

[4] While the assessment of taxes is the exclusive competence of the *AE*, the investigation, audit and control of tax compliance is shared between this agency and the fiscal police.

[5] *See* PISTONE, P., *Exchange of information and Rubik Agreements: the perspective of an EU academic*, in *Bulletin for International Taxation*, Vol. 67, No. 4-5/2013, p. 216 et seq., where the conclusion of these kind of agreements (for example, between Switzerland and United Kingdom, Switzerland and Austria) is considerable «*undesirable from a policy perspective in the era of global fiscal transparency*».

anyway considering the absence of taxation in this country, Italian authorities believe it would be more appropriate the instrument of a TIEA).

Many DTCs signed by Italy, including those with Cyprus and Malta, meet the OECD standards.

The standards provide for international exchange on request of "foreseeably relevant" information for the administration or enforcement of the domestic tax laws of a requesting jurisdiction. The procedure also includes bank information and information held by fiduciaries, regardless of the existence of a domestic tax interest, but not apply to the so-called *fishing expeditions*.[6]

Since Italy has endorsed in 2004 the latest version of Art. 26 OECD MTC,[7] the full text of its provisions make generally part of the new conventions negotiated and signed. Italian policy support the conclusion of new treaties or the renegotiation of the text of current DTCs, in order to align it to international consolidated standards, including the latest version of Art. 26 OECD MTC and its Commentary. This is the case of recent protocols signed with some EU member States (see, for example, the new DTC Protocol with Luxembourg, in force from 21 June 2012) and with Singapore, from 19 October 2012.

In order to apply the provisions of mutual cooperation contained in the DTCs, Italy has signed administrative agreements for the exchange of information and the undertaking of simultaneous tax examinations with 12 States, member of EU and not, such as the US and Australia. The examinations are undertaken by virtue of arrangement between the two tax administrations to examine simultaneously and independently, each on its own territory, the taxation affairs of taxpayers in which they have a common or related interest, with a view to exchanging any relevant information which they so obtain. The legal basis is represented by Art. 26 (for example, agreements with Australia and Poland) and Art. 27 (see agreement with Denmark) of the OECD MTC. The Agreements signed with EU member States usually refer also to Council Directive No. 77/799/EEC on mutual cooperation in the field of direct taxation, of 19 December 1977.

Italy is involved in the peer review process,[8] aiming at the developing of the agreed tax standard of transparency and exchange of information set by the Global Forum and at the monitoring that they are fully implemented by its members in their tax systems, both at a national and international level.

Currently, Italy has also signed four Tax information Exchange Agreements (TIEAs), not yet in force, based on the TIEA model, with the Cook Islands, Bermuda, Cayman Islands, Gibraltar, Guernsey, Isle of Man and Jersey, containing extensive information clauses to assure an effective exchange of information, which lack is one of the key criteria in determining harmful tax practices. All these agreements follow the international standard.

2. The administrative cooperation in tax matters under EU law and its domestic implementation in Italy: for good and evil.

2.1. The Italian implementation of EU tax administrative cooperation instruments.

The EU Directive of 15 February 2011, No. 16, on administrative cooperation in the field of direct taxation has replaced the previous Directive No. 77/799/EEC. An effective mutual assistance system is considered, in the context of the current progress of European integration, a fundamental requirement ensuring the functioning of the internal market.

Exchange of tax relevant information has become the main instrument of coordination between the various fiscal legal systems of Member States, leaving the *status quo* of a not harmonized direct taxation across the EU and maintaining full national sovereignty over the types and level of taxes.

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[6] In this respect, a reference should be made to para. 5 of the Commentary to Art. 26 OECD MTC, in OECD, *Model Tax Convention on Income and on Capital (updated 2010)*, Paris, 2012, p. C(26)-2, where it is remarked that «*the standard "foreseeable relevance" is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer*».

[7] It's interesting the analysis of the proposal to update Art. 26 (*Exchange of information*) of the United Nations Model double taxation Convention between "developed" and "developing" Countries and its Commentary by the Committee of Experts on International Co-operation in Tax Matters, ninth session, Geneva, 21-25 October 2013.

[8] See OECD, Global Forum on Transparency and Exchange of Information for Tax Purposes, *Peer review report – Combined: Phase 1 + Phase 2. Italy*, Paris, 2011.

The new Directive ensures that the EU standards for transparency and exchange of information on request are aligned to international standards. In particular, matching with Art. 26 OECD MTC, it provides that Member States can no longer refuse to supply information *solely because* this information is held by a bank or other type of financial institution.

Unlike the previous legislation, the information exchange is no longer solely applicable for the correct assessment of taxes on income and capital. Art. 2 of the new Directive states it shall apply to «*all taxes of any kind*» levied by Member States (or by their territorial or administrative subdivisions, including the local authorities) with the exception of VAT, customs duties, excise duties and compulsory social contributions, already covered by different European Union legislation on administrative cooperation.

The Directive also provides for the exchange of information that is of "foreseeable relevance" to the administration and the enforcement of Member States' tax laws. The exchanges can relate to natural and legal persons, to associations of persons and to any other legal arrangement.

The Directive introduces automatic exchange of information from 1st January 2014 on five categories of income and capital based on available information (income from employment, director's fees, life insurance products not covered by other Directives, pensions, ownership of and income from immovable property). Following a Commission report to be submitted before 1st July 2017 and on the basis of a new proposal by the Commission, this list might be extended to dividends, capital gains and royalties. In addition, the Council may also decide to introduce unconditional automatic exchange of information in respect of at least three of the five aforementioned categories.

EU administrative cooperation provisions are implemented in Italian tax system by Art. 31-*bis* of Presidential Decree No. 600/1973, introduced by Art. 1 of the Legislative Decree No. 215/2005.

Revenue authorities to perform their duties coming from the cooperation within EU borders, as well as those from international exchange information procedures, apply the ordinary powers (with the related limits) granted for domestic assessments of taxes (see Art. 32 and Art. 33 of the abovementioned Presidential Decree for income taxes and Art. 51 and Art. 52 of Presidential Decree No. 633/1972 for VAT). Information could be already available in databases handled by tax authorities, they can also be collected from third parties, public and private, by requesting all bodies and governmental departments, non-commercial public bodies, insurance companies and institutions, business companies and organizations engaged in the collection of credits and in payments on behalf of third parties to communicate any information relating to a specific person or a group of persons, as well as professionals (*e.g.* lawyers, public notaries, trustees, etc.), except in the case of professional privilege. According to the recent developments of domestic law, banks, other financial institutions and intermediaries are oblige to provide any information required on the relations maintained with their clients, and to communicate periodically to the *Anagrafe Tributaria* (the main electronic tax database in force for tax assessment) all financial transactions made by all taxpayers.

The collection of information and documents can be done by requesting taxpayers' collaboration, also sending specific written questionnaires, or directly visiting their business premises during tax examinations and even at their own private premises (in this case an authorization from a judge is required).

The abovementioned Art. 31-*bis* constitutes also the legal basis for simultaneous tax examinations.

The Italian lawmaker has not yet implemented Directive No. 2011/16/EU. Taking into account the deep changes introduced at the EU level, it will be necessary to integrate properly the Italian legislation, in particular with respect to the automatic exchange of information by Art. 8 (*Mandatory automatic exchange of information*). This type of information exchange has recently gained much political support, both at the EU and OECD level,[9] focusing on the possible benefits, such as the capacity to let tax authorities aware of non-compliance behaviors and, at the same time, to have a deterrent effect, increasing voluntary compliance and encourage taxpayers to fulfill their fiscal obligations in the right way at the right time.

To the taxable periods as from 1st January 2014, automatic exchange of information procedure (which will take place regularly, namely at least once a year) applies, apart from and without prejudice of the "Savings

[9] *See* the Note on automatic exchange of information elaborated by *Committee of experts on international cooperation in tax matter*, ninth session, Geneva, 21-25 October 2013, where automatic exchange information procedures are clearly considered as one of the most important emerging issues in international tax and a fundamental step in tax transparency, «*comparable e.g. to the adoption of exchange on request as the international standard a few years ago*».

Directive" No. 2003/48/EC, to the following categories of income and capital: income from employment, director's fees, life insurance products not covered by other EU legal instruments on exchange on information and other similar measures, pensions and ownership of an income from immovable property. This list can be extend by Member States to additional categories of income and capital by bilateral or multilateral agreements signed with other Member States.

2.2. The Asset Recovery Office (ARO).

A particular cooperation procedure within EU borders in the field of tracing and identification of proceeds from, or other property related to, crime, is provided by the designation by each Member State of an "*Asset Recovery Office*".[10] The aim is to create an efficient centralized financial information data bank (including bank accounts, real estates, cars, yachts and other high value items) to facilitate the tracing and identification of crime related property which may become the object of a freezing, seizure or confiscation order made by a competent judicial authority, through the exchange of information on request ad spontaneous between Asset recovery offices. The International Police Co-operation Service within the Criminal Police Central Directorate plays the main role in investigative assistance, ensuring information exchanges through Interpol, Europol and S.I.Re.N.E. channels.

From the Italian prospective we believe it will be a very useful instrument in the struggle against cross-border organized crime's financial gains and profits, put under the responsibility of the Ministry of interior, applied without any prejudice to the obligations resulting from European Union instruments on mutual legal assistance.

Italian Authorities – Ministry of Justice, International Police Cooperation Service, Financial Information Unit (*Unità di Informazione Finanziaria*, hereinafter UIF) within the Bank of Italy and GdF – may provide judicial assistance both on the basis of bilateral on mutual legal assistance (MLA) Treaties (*i.e.* with Algeria, Lebanon, Morocco and Tunisia) or multilateral conventions, and in the absence of conventions, on the basis of international courtesy and reciprocity. Foreign Partners are able to obtain assistance such as financial information, production of financial or third party records and authentication of records, using routine investigative measures such as witness interviews, visual surveillance and public record searches.

3. The collection and exchange of information under anti-money laundering legislation: a real solution or just a new threat?

As we have seen, domestic legislation does not contemplate a general regulation concerning the exchange of information, with the exception of the administrative cooperation within the EU Member States regulated by the already mentioned Art. 31-*bis*. Competent authorities have full access to all kind of relevant data in tax matters, not only from the exercise of the investigation powers and assessment powers, but also from monitoring data system, such as that one concerning the anti-money laundering legislation.

Italy had a comprehensive and refined anti-money laundering/counter terrorist financing (AML/CFT) system, supported by multiple sources of information (including Chambers of Commerce and the Revenue Agency), involving a large number of entities and professionals,[11] as result of implementation of a series of European directives.[12] Anti-money laundering legislation, in addition to administrative sanctions (fines), provides, with respect to the most severe offences, also criminal sanctions (fines and imprisonment).

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[10] *See* Council Decision No. 2007/845/JHA of 6 December 2007, concerning cooperation between Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from, or other property related to, crime, in *Official Journal of the European Union*, No. L 332 of 18.12.2008, p. 103 et seq.

[11] *Customer due diligence* (CDD) perform applies (obligation to identify and verify their customers and clients as "beneficial owners" or real holders of the shares and to storage of all documents for no less than ten years), *ex plurimis*, on credit and financial institutions, investment companies, partnerships, lawyers, legal advisers, patent lawyers, notaries, auditors, accountants, tax advisers and tax agents, trust or company service providers when providing certain services to third parties.

[12] The legislative core of the updated AML system is Legislative Decree No. 231/2007 that implemented Directive No. 2005/60/EC and came into force on 1st January 2008. The Decree was updated by Legislative Decree No.151/2009 and Law Decree No. 78/2010 converted into Law No. 122/2010.

As we have already underlined, bank secrecy does not represent a legitimate justification to decline a request or to restrict effective exchange of information. The lack of similar provisions to paragraphs 4 and 5 of Art. 26 OECD MTC in DTCs, following a consolidated international tax policy, doesn't prevent the competent Italian authorities to exchange all types of information, even if the requested information is held by a bank or other financial institution.

In our opinion, fiscal authorities can also receive tax relevant information from the anti-money laundering system of other countries and use them for administrative and criminal tax assessment on the natural persons where identified as "beneficial owners". No doubt about the lawfulness of the exchanged data, because they would be acquired through official channels from the competent authority of another State. Completely different are the cases of the "stolen lists" by disloyal employees of bank clients, located in countries having strict bank secrecy and then sold to tax authorities of the states of their residence.[13]

As a fiscal police, the GdF, is also involved in the fight against money laundering, in collaboration with the UIF of the Bank of Italy.

The taxpayers moreover before to be defined as "beneficial owner" should be controlled under the domestic anti-money laundering legislation.

For these reasons, we do not believe such an exchange of information have a negative impact on the free movement of capital[14] nor on individual's right to privacy, as also stated in Art. 8 of the European Convention of Human Rights (ECHR).

Art. 63 of the Treaty on the Functioning of the European Union (hereinafter TFEU) prohibits any restrictions on the movement of capital and payments between Member States and between Member States and third countries, but Art. 65 TFEU provides, under the condition that national measures not constitute an instrument of arbitrary discrimination or a disguised restriction on the free movement of capital and payments, that Member States are allowed to take «*all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative […] information, or to take measures which are justified on grounds of public policy or public security*».

The States and the international and European institutions feel the need to fight against the harmful tax competition. The "Savings Directive" No. 2003/48/EC, as known, bases on information exchange system extended to the large range of capital income gained by individuals.

A very important issue is represented in general by the effective protection of taxpayer's rights during the exchange of information procedures. The need for effective cooperation between tax authorities cannot prevail anyway over the safeguard of taxpayers' fundamental guarantees stated in the Constitution (for example, protection of domicile and correspondence) and in the "Taxpayer Bill of Rights" (Law No. 212/2000) that establishes, *inter alia*, a list of rights to be respected by the tax office and exercised by the taxpayer during tax examination procedures (Art. 12).

De iure condito, the competent authorities do not have to inform the taxpayer about the request of information coming from other States and the entire exchange of information procedure, both founded on European law and on international DTCs, are handled by tax offices *inaudita altera parte*, without the taxpayer's involvement. Procedures governed by Art. 22, Directive No. 2011/16/EU are covered by the obligation of "official secrecy". The taxpayer has no right to be informed, nor to participate, nor to be heard during the procedure.

This legal framework risks to enter in contrast with the consolidated principles elaborated by the jurisprudence of the Court of Justice of the European Union (hereinafter CJEU)[15] and of the European Court of Human Rights (hereinafter ECtHR), firstly regarding the exercise of the right of participation of the taxpayer and

[13] About the different positions of Italian case-law around the legitimacy of the administrative and criminal assessments, based on these information exchanged by other States, see DORIGO, S., *Italy – Exchange of information and cross-border cooperation between tax authorities*, in IFA Cahiers de Droit Fiscal International, Vol. 98b, The Hague, 2013, p. 377 et seq.

[14] *See* CALDERÓN, J.M., *Taxpayer protection within the exchange of information procedure between State tax administrations*, in *Intertax*, Vol. 28, No. 12/2000, p. 462 et seq.; DEL FEDERICO, L., *Le verifiche transnazionali: scambio di informazioni fra autorità fiscali e tutela del contribuente*, in *Neotera*, Vol. 4, No. 2/2011, p. 32 et seq.; NIJKEUTER, E., *Exchange of information and the free movement of capital between Member States and Third countries*, in *EC Tax Review*, Vol. 20, No. 5/2011, p. 232 et seq.

[15] CJEU, Second Chamber, case C-349/07 *Sopropé v. Fazenda Pública*, 18 December 2008, in ECR I-10369.

the right of defense during the administrative procedure, including the right to be heard, before any individual measure which would affect him adversely is taken.[16]

These open questions assume relevant importance with respect to the effective control of the limits provided for processing the request of information (Art. 26 OECD MTC and Directive No. 2011/16/EU). We believe the taxpayer has the right to appeal also before civil, administrative or penal court asking for the immediate stop of the illegitimate and harmful public activity and to claim damages against the administration where requirements are met, regardless of the impugnment and the annulment of the conclusive tax administrative act, potential and consecutive, as a consequence of that activity.

Art. 17 of the Directive provides, in particular, that a Member State does not have to carry out the enquires or provide information if this is not compatible with its internal law. At the same time, the request may be refused «*where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy*».

In the Preamble of the Convention on Mutual Administrative Assistance in Tax Matters the need of administrative cooperation «*in matters concerning taxes of any kind*» is balanced with the need to «*ensuring adequate protection of the rights of taxpayers*». The Preamble of the Directive No. 2011/16/EU (para. 28) states the respect of the fundamental rights and observation of the principles which are recognized in particular by the Charter of Fundamental Rights of the European Union.

In this context, we make reference to the Art. 41, para. 2, which establishes «*the right of every person to be heard, before any individual measure which would affect him or her adversely is taken*» and «*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*».

Moreover, almost all of the DTCs in force for Italy, as well as the Convention on mutual administrative assistance in tax matters, which entered into force on 1st June 2011 contain a confidentiality clause (Art. 22), requiring any information obtained and shared must be treated as secret and protected in the same manner as information obtained under the domestic law, to the extent needed to ensure the necessary level of protection of personal data. The information can be disclosed exclusively to persons or authorities involving in the tax assessment and used only for the legal purposes covered by the applicable legislation.

In our opinion from the analysis of the exchange of information system clearly emerges a lack of fair balance between the need for effective administrative cooperation and the protection of taxpayers' rights, even of those contemplated by the same provisions which represent the legal basis of the exchange of information itself. Notwithstanding the secrecy and efficiency of tax examinations, the taxpayer should be generally be informed of the existence of the request and of the beginning of the procedure, to have access to the acts of the procedure, taking knowledge of the documents before they were exchanged and before the notification of tax assessment, in order to question in consultation with the competent authorities, at least to ensure the respect of the provided limits, to prevent illegitimate disclosure of protected secrecies and to guarantee that the States involved, when acting as both sending and receiving jurisdiction, adequately safeguards the right of confidentiality.

Concerning the "pure tax conflicts", we limit to say that the lack of participation of taxpayer has a negative impact also on his right to a fair trial before the tax Courts.

The information communicated by foreign States and used as base for tax assessment on residents cannot assume a special evidential force.

In the case a no-resident is involved, the right to be informed would be necessary to let the taxpayer to confront with his own State of residence due to his unlimited tax liability in that country.

[16] *See* the following judgments against France: ECtHR, Third Section, 21 February 2008, application No. 18497/03 *Ravon*, available at *http://hudoc.echr.coe.int/webservices/content/pdf/001-85184?TID=hxrvcctvdk*; ECtHR, Fifth Section, 24 July 2008, application No. 18603/03 *Andrè*, available at *http://hudoc.echr.coe.int/webservices/content/pdf/001-87938?TID=hxrvcctvdk*; ECtHR, Fifth Section, 18 September 2008, application No. 18659/05 *Kandler*, available at *http://hudoc.echr.coe.int/webservices/content/pdf/001-88403?TID=xkmlqihalv*; ECtHR, Fifth Section, 16 October 2008, application No. 10447/03 *Maschino*, available at *http://hudoc.echr.coe.int/webservices/content/pdf/001-88988?TID=xkmlqihalv*; ECtHR, Fifth Section, 20 November 2008, application No. 2058/04 *IFB*, available at *http://hudoc.echr.coe.int/webservices/content/pdf/001-89739?TID=xkmlqihalv*.

4. The exchange of information system in practice.

As reported in the *Global Forum on Transparency and Exchange of Information for Tax Purposes peer review report - Italy, 2011,* Italian legal framework supports effective access to and provision of information requested by competent authorities of other countries. During the period 2007–2009, Italy received more than 1,000 requests from abroad in the field of direct taxation, and more than 2.000 requests in the field of VAT. There were only a few instances where Italy was not in position to provide the information requested and this was usually due to missing elements in the requests themselves.

According with official data, answers to incoming requests are provided on average within 90 days in 15% of cases, while about a third of them are answered after more than one year. Anyway where delays in the provision of information have been mentioned by Italy's partners, these partners have also highlighted the high quality of the responses furnished by Italy's competent authorities.

Timeframe depends on complexity of the request (also considering the translation procedure) and the availability of the information; where not already accessible in domestic databases, it's necessary to coordinate the collection by local authorities.

During 2007-2009, Italy spontaneously sent VAT information to its EU partners between 100 and 200 times. In 2010, Italy sent data in exchanging information automatically, under the scope of the EU "Savings Directive" No. 2003/48/EC, under the DTCs or the *EU Mutual Assistance Directive* on a reciprocal basis, to 21 Countries.

There are no official or unofficial data concerning the spontaneous and automatic exchange of information, nor analysis about the requests made by the Italian administration during the same period. It seems that the stronger relationships are with EU Member States, in particular with France, Germany and the United Kingdom. No data are available of course around TIEAs' agreements because they did not enter into force yet.

We believe an effective contribution to make more efficient and speed the European Union exchange of information system will come from the implementation of the Directive No. 2011/16/EU, especially with respect to the use of standardized forms, the introduction of the *Central Liaison Office* and *Liaison Departments*, stated in article 4, and of the mechanism of feedback by the Member States that have received the information.

5. The new era of the automatic exchange of information: huge investments, but are we sure on the return?

The Italian discipline on exchange of information and administrative co-operation is highly influenced by EU law and, especially, by the US. The pivotal role of the United States in the international tax scenario is characterised by an impressive number of "unorthodox" tools for obtaining information from foreign financial institutions. After 9/11 the USA PATRIOT Act (acronym for *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*) introduced, *inter alia*, several anti-money laundering provisions (Sec. 301),[17] which:

a) broaden the definition of "financial institutions";
b) oblige financial institutions to identify their clients according to more rigorous criteria;
c) prohibit the opening or maintenance in the United States of correspondent accounts that guarantee the anonymity of account holders;
d) impose various due diligence obligations in relation to transactions from and to another country;
e) provide reporting obligations for "suspect" transactions.

Such unilateral regulation significantly restricted the access of sensitive, financial and bank data of US citizens with particular regard to international transactions, and represents the first step towards a global strategy aimed at monitoring financial flows. From 2001 onward the international community, and also Italy, engaged an intensive co-operation against terrorism and transnational crimes, building a framework that inevitably serves *also*

[17] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), 26 October 2001, available at *www.gpo.gov/fdsys/pkg/BILLS-107hr3162enr/pdf/BILLS-107hr3162enr.pdf.*

for tax purposes.[18] In other words, money laundering and tax evasion – although they represent two different phenomena – share the same sophisticated technique of hiding money: therefore, the countermeasures adopted by the international community shall be part of a coordinated strategy.[19]

At the London G-20 of April 2009 the leading States agreed that the new path to follow was «*regulation against irregularities, transparency against opacity, integrity against corruption. The G20 reacted against market abuses, financial abuses and also against tax evasion and money laundering and the traffic of capital*».[20] With particular regard to the exchange of information, three requirements were identified in order to qualify a jurisdiction as "co-operative":

a) commitment to adopt the OECD international standards on administrative co-operation;
b) signature of at least 12 treaties providing a specific exchange of information clause;
c) check on the effective implementation of the goals of transparency, exchange of information and anti-money laundering through the internal legislation. Such analysis is carried out through the so-called *peer review process* made by the OECD.

Notwithstanding these significant global developments in the field of administrative tax co-operation, the United States is parallely conducting a unilateral battle for reaching the highest level of disclosure of bank information from foreign financial institutions. On 18 March 2010 the US enacted the Foreign Account Tax Compliance Act (FATCA), which substantially provides that foreign financial institutions (FFIs) and non-financial foreign entities (NFFEs) shall be subject to a 30% withholding taxation unless they disclose to the Internal Revenue Service (IRS) all the information concerning US account holders.[21]

Through FATCA regulation US tax authorities can rely on an automatic and «*asymmetric*»[22] exchange of information from foreign financial institutions, without a formal request of information made according to a treaty provision. The aspect that makes FATCA unique in the international scenario is the possibility to strengthen its extraterritorial enforcement (*rectius* extra-US) through standard intergovernmental agreements,[23] whose first

[18] On this issue, GORDON, R.K., *Losing the war against dirty money: rethinking global standards on preventing money laundering and terrorism financing*, in *Duke Journal of Comparative & International Law*, Vol. 21, No. 3/2011, p. 555, remarks that «*certain tax administrations select tax returns for audit in a manner analogous to some of the proposals suggested above for reforming the system of preventive measures. If they can work for income tax they could also work for anti-money laundering and terrorism financing. Unlike the anti-money laundering system, there is no single global standard for the design and implementation of tax administrations. That being said, a number of tax authorities from advanced countries, including the United States, have developed administrative systems that share many features. A key function of these systems is to improve compliance with revenue laws*».

[19] According to SELICATO, P., *Comments: How linking tax assessment procedures and criminal prosecutions could enforce the efficiency of mutual assistance in tax matters*, in SEER, R. – GABERT, I. (edited by), *Mutual assistance and information exchange*, Proceedings of the 2009 EATLP Congress (Santiago de Compostela, 4-6 June 2009), Amsterdam, 2010, pp. 137-138 , «*on the one hand, tax evasion produces illegal and hidden wealth in the same way as most criminal activities: if the tax evader wants to be free to use this wealth, he needs to "clean" it by means of money laundering so that, in a second time, he/she can employ the "clean" money in regular financial or business activities. On the other hand, some kinds of tax crimes can help money laundering in different ways: a) crime of false invoicing can help tax evaders to recycle the profits from evasion; b) purchasing goods without invoices helps criminal enterprises to recycle money derived from (criminal) activities into goods to sell legally. Due to this connection, the two kinds of illicit activities are normally carried out at the same time and by the same group of persons. They make use of the same resources and are carried out by means of the same financial tracks. For this reason the efficiency of investigations would increase if they could be carried out jointly*». On this topic, *see* also LUPI, R. – MARINO, G. – STEVANATO, D., *La normativa antiriciclaggio può essere uno strumento antievasione?*, in *Dialoghi Tributari*, Vol. 1, No. 1/2008, p. 31 et seq.

[20] *See* ROSEMBUJ, T., *Tax avoidance and tax evasion in the financial crisis*, in SALVINI, L. – MELIS, G. (edited by), *Financial crisis and single market*, Proceedings of the Eucotax Wintercourse opening conference held in Rome on 7 April 2011, Rome, 2012, p. 26.

[21] For an in-depth analysis, *see* ROSENBLOOM, H.D., *The Foreign Account Tax Compliance Act and Notice 2010-60*, in KOFLER, G. – MADURO, M.P. – PISTONE, P. (edited by), *Human right and taxation in Europe and the world*, Amsterdam, 2011, p. 211 et seq.

[22] In this sense, *see* SORIANO, A.G., *Toward an automatic but asymmetric exchange of tax information: the US Foreign Account Tax Compliance Act (FATCA) as inflection point*, in *Intertax*, Vol. 40, No. 10/2012, p. 540 et seq. and, in particular, pp. 546-547.

[23] *See* US TREASURY, *Model 1A IGA Reciprocal, Preexisting TIEA or DTC*, 4th November 2013, available at *www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Reciprocal-Model-1A-Agreement-Preexisting-TIEA-or-DTC-11-4-13.pdf*; US TREASURY, *Model 1B IGA Non-Reciprocal, Preexisting TIEA or DTC*, 4th November 2013, available at *www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Nonreciprocal-Model-1B-Agreement-Preexisting-TIEA-or-DTC-11-4-13.pdf*; US TREASURY, *Model 1B IGA Non-Reciprocal, No TIEA or DTC*, 4th November 2013, available at *www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Nonreciprocal-Model-1B-Agreement-No-TIEA-or-DTC-11-4-13.pdf*; US TREASURY, *Model 2 IGA, Preexisting TIEA or DTC*, 4th November 2013, available at *www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Model-2-Agreement-Preexisting-TIEA-or-DTC-11-4-13.pdf*; US TREASURY, *Model 2 IGA, No TIEA or DTC*, 4th November 2013, available at *www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Model-2-Agreement-No-TIEA-or-DTC-11-4-13.pdf*.

version was issued on 26 July 2012. For making such extraterritorial enforcement possible, the entry into force of FATCA rules has been postponed at 1st July 2014.[24]

Italy – together with France, Germany, Spain and the United Kingdom – signed on 8 February 2012 the *Joint Statement regarding an intergovernmental approach to improving international tax compliance and implementing FATCA*,[25] which extends the FATCA mechanism of automatic exchange of information to financial information concerning citizens of these European Countries, since this is the real policy objective of FACTA itself (while collecting the withholding tax of 30% has a mere deterrent function). In January 2013 Italy initialed the FATCA Intergovernmental Agreement (IGA) with the US, which, nevertheless, has not yet been ratified and entered into force. The actual situation where Italy has agreed the contents of the IGA with the United States creates great uncertainty in the national financial sector, which cannot even rely on guidelines issued by the tax authorities or the Ministry of Economy and Finance, and obstacles the development of updated software programs for managing financial transactions.[26]

As clearly remarked by the Italian Ministry of Economy and Finance, «*the intergovernmental approach is guided by the principle of reciprocity and enables a two-way automatic exchange of information (to and from the United States). The execution of bilateral agreements is therefore expected to facilitate international tax compliance and the application of revenue laws to the benefit of both countries. The Governments' objective is to achieve a close-knit collaboration aimed at reaching over time common standards in matters of tax return and due diligence obligations, keeping filing and requirement costs for financial institutions and other parties concerned by the application of the FATCA legislation at a minimum*».[27]

The huge flow of bank account information of European citizens towards the US started after 9/11, when the Bush Administration – through the Terrorist Finance Tracking Program (TFTP) – imposed to the Belgian company that invented the database SWIFT (standing for *Society for Worldwide Interbank Financial Telecommunication*) to allow US authorities unlimited access to it. Although the main purpose of such US legislation was aimed at tackling international terrorism, EU institutions claimed that it represented a clear violation of European privacy regulations.[28] On 27 June 2007, the US and the European Union signed an agreement (so-called *EU-US SWIFT Agreement I*) where the first guaranteed that all information obtained from the SWIFT database would have been used exclusively for anti-terrorism purposes and agreed to destroy them after 5 years.[29] Such initial treaty on access to SWIFT data was subsequently substituted by a new agreement signed on 28 June 2010 (so-called *EU-US SWIFT Agreement II*), which was considered necessary for better enforcing citizens' privacy rights.[30]

The enforcement of FATCA in Italy through the forthcoming IGA will inevitably re-open the issue of compatibility with the taxpayers' right to maintain secret their bank account information. Such issue shall be analysed from three different perspectives:

a) *Italian*. Since the 1973 tax law reform, Italy expressly admitted certain exceptions to bank secrecy for tax assessment purproses and, in the very recent years, bank secrecy has been substantially abolished. At this stage, Italy has no restrictions on access to bank account information for international tax co-operation purposes. As already remarked *supra* at § 2.1., from 2006 onwards every financial institution must report

[24] *See* IRS, *Revised Timeline and Other Guidance Regarding the Implementation of FATCA*, Notice 2013-43, available at *www.irs.gov/pub/irs-drop/n-13-43.pdf*.

[25] U.S. TREASURY DEPARTMENT, *Joint Statement from the United States, France, Germany, Italy, Spain and the United Kingdom regarding an intergovernmental approach to improving international tax compliance and implementing FATCA*, 8 February 2012, available at *www.treasury.gov/press-center/press-releases/Documents/020712%20Treasury%20IRS%20FATCA%20Joint%20Statement.pdf*.

[26] *See* the parliamentary inquiry of 24 October 2013 made by Hon. Filippo Busin in the Parliamentary Commission for Finances: BUSIN, F., *Operatività del modello IGA concernente l'attuazione della normativa FATCA relative allo scambio di dati con l'amministrazione finanziaria statunitense per il contrasto all'evasione fiscal*e, VI Commissione Permanente (Finanze), 24.10.2013, p. 38.

[27] *See* MINISTRY OF ECONOMY AND FINANCE, *Fight against international tax evasion: potential application of the US "FATCA" legislation, via bilateral agreements, being examined*, Press release No. 13, Rome, 8 February 2012, available at *www.mef.gov.it/en/ufficio-stampa/comunicati/2012/comunicato_0013.html*.

[28] For an in-depth analysis, *see* CONNORTON, P.M., *Tracking terrorist finance through SWIFT: when U.S. subpoenas and foreign privacy law collide*, in *Fordham Law Review*, Vol. 76, No. 1/2007, p. 283 et seq.

[29] *See* EUROPEAN COMMISSION, *USA to take account of EU data protection principles to process data received from Swift*, Press release IP/07/968, Brussels, 28.6.2007, available at *http://europa.eu/rapid/press-release_IP-07-968_en.pdf*.

[30] Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program, in *Official Journal of the European Union*, L 195, 27.7.2010, p. 5 et seq. On this issue, *see* ANAMOURLIS, T. – NETHERCOTT, L., *The EU-US ("Brussels") Agreement on European banking secrecy and the effect on tax information exchange agreements*, in *Bulletin for International Taxation*, Vol. 65, No. 1/2011, published online on 23 September 2010.

to the Financial Relationships Archive (*Archivio dei Rapporti Finanziari*, included in the Taxpayer Register) the existence and the nature of any transaction higher than € 1.500,00, with the duty to indicate the name and the tax code of taxpayers involved. Finally, from 1st January 2012 the Monti Government imposed to every financial institution the reporting of any information concerning financial transactions necessary for tax assessments.[31] The Italian Privacy Authority considered admissible such discipline, although it required more rigorous (technical and organisational) measures aimed at minimising the risk of "abusive" and "improper" accesses to such information by non-authorised parties:[32] after this warning, the Italian Tax Authorities issued new Guidelines on 5 October 2012 on the practical management and storage of financial data, which received the approval from the Privacy Authority.[33] These recent developments of the Italian discipline on reporting duties from financial institutions appears to be perfectly in line not only with the global trend of tax compliance and transparency, but also with the path indicated by the European Commission in its proposed amendment of the "Savings Directive" No. 2003/48/EC made in 2008, which emphasizes the automatic exchange of information as the only tool capable of identifying the beneficial owner for anti-money laundering purposes:[34] this is the umpteenth proof that in the actual global scenario money laundering and tax evasion shall be combated with the same weapons.

b) *European Union*. The European scenario provides a mandatory automatic exchange of information for several income categories according to Art. 8 of Directive No. 2011/16/EU and such instrument expressly admits «*limitations of certain rights and obligations laid down by Directive 95/46/EC in order to safeguard*»[35] an interest laid down by Art. 13, para. 1, letter e) of Directive No. 95/46/EC: «*an important economic or financial interest of a Member State or of the European Union, including monetary, budgetary and taxation matters*». In the light of these norms, Italy (jointly with Germany, France, Spain and the United Kingdom) sent a letter to the European Commission on 9 April 2013 announcing the intention to establish a multilateral system of automatic exchange of information with non-EU Countries (so-called *Pilot Multilateral Automatic Exchange Facility*): through this tool, the five proponent Member States would be able to «*exchange the same type of information amongst themselves as they will exchange with the USA under FATCA*».[36] At the ECOFIN Council of 14 May 2013 other Member States joined this proposal and, interestingly, on 11 June 2013 also Mexico requested to participate to the initiative. In the view of the European Commission, bilateral agreements between US and Member States aimed at enforcing FATCA regulations are a positive signal that renders the European Union a «*global leader in the area of automatic information exchange*».[37]

c) *European Convention on Human Rights*. Art. 8 ECHR provides the right to respect for private and family life, which shall not be subject to the interference of a public authority «*except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others*». The enforcement of FATCA rules in Italy as a Contracting Party of the ECHR requires, therefore, an accurate balance between this fundamental human right and the collection of information by the tax authorities involved. In this sense, also the Article 29 Working Party expressed its concerns on the FATCA enforcement in the EU since

[31] Art. 11, para. 2, Law Decree 6 December 2011, No. 201, converted in Law 22 December 2011, No. 214.

[32] GARANTE PER LA PROTEZIONE DEI DATI PERSONALI, *Comunicazione dei dati contabili all'anagrafe tributaria da parte di banche e operatori finanziari: parere all'Agenzia delle entrate sulle modalità di trasmissione e di conservazione dei dati*, Administrative Provision No. 145 of 17 Aprile2012, p. 6, available at *www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/export/1886775*.

[33] GARANTE PER LA PROTEZIONE DEI DATI PERSONALI, *Comunicazioni all'anagrafe tributaria da parte di banche e operatori finanziari: parere sulle modalità di trasmissione e di conservazione dei dati*, 15 November 2012, available at *www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/export/2099774*.

[34] EUROPEAN COMMISSION, *Proposal for a Council Directive amending Directive 2003/48/EC on taxation on savings income in the form of interest payments*, COM(2008) 727 final, Brussels, 13.11.2008. On the importance of anti-abuse measurements of the Savings Directive and the 2008 Commission proposal to close loopholes, see MENYHEI, Á., *Anti-abuse concepts in the Savings Directive*, in SIMANDER, K. – TITZ, E. (edited by), *Limits to tax planning*, Vienna, 2013, p. 562 et seq.

[35] Whereas No. 27.

[36] EUROPEAN COMMISSION, *Automatic exchange of information: frequently asked questions*, MEMO/13/533, Brussels, 12.6.2013, available at *http://europa.eu/rapid/press-release_MEMO-13-533_en.pdf*.

[37] Again, *see* EUROPEAN COMMISSION, *Automatic exchange of information: frequently asked questions*, MEMO/13/533, Brussels, 12.6.2013, available at *http://europa.eu/rapid/press-release_MEMO-13-533_en.pdf*.

«*currently there is no legal basis within EU or national law of a Member State to ensure lawful processing of the data within the scope of FATCA*» and, with particular regard to Art. 8 ECHR, it showed perplexities on the «*bulk transfer and the screening of all*» the bank data to the IRS and not only those that are strictly necessary for achieving FATCA goals: «*therefore more selective, less broad measures should be considered in order to respect the privacy of law-abiding citizens, particularly; an examination of alternative, less privacy-intrusive means must to be carried out to demonstrate FATCA's necessity*».[38]

What emerges from this brief analysis is that FATCA's enforcement in Italy will undoubtedly have a positive effect in terms of reciprocity for monitoring tax evasion of Italian taxpayers, but, on the other side, the enormous amount of data exchanged to and from the US needs to be strictly disciplined in compliance with taxpayers' rights of privacy and, as correctly remarked by the Article 29 Working Party, the data transfer and processing shall be proportionate to FATCA's policy objectives.

6. Joint audits and multinational audits: two Tax Administrations are better than one?

From the Eighties onwards, Italy has signed specific agreements with 12 States aimed at conducting simultaneous tax examinations. In particular:[39]

a) Italy-US Agreement I (signed in Washington on 31 March 1983)[40] and Italy-US Agreement II (signed in Washington on 22 June 1984);[41]
b) Italy-France Agreement (signed in Paris on 1 March 1985);
c) Italy-Austria Agreement (signed in Rome on 21 October 1987);
d) Italy-Denmark Agreement (signed in Rome on 29 November 1996);
e) Italy-Belgium Agreement (signed in Rome on 9 April 1997 and in Brussels on 11 July 1997);
f) Italy-Slovakia Agreement (signed in Rome on 22 April 1997);
g) Italy-Sweden Agreement (signed in Rome on 29 April 1997);
h) Italy-Hungary Agreement (signed in Budapest on 5 June 1997);
i) Italy-Finland Agreement (signed in Rome on 12 December 1997);
j) Italy-Norway Agreement (signed in Rome on 8 April 1998);
k) Italy-Poland Agreement (signed in Krakow on 4 September 2000);
l) Italy-Australia Agreement (signed in Rome on 6 June 2002).

These Agreement are usually based on Art. 26 of the relevant DTC signed and the main characteristic of these peculiar kind of administrative tax co-operation is the simultaneous, but independent, examination by tax inspectors of the two Contracting States.[42]

The OECD proposal following the Istanbul meeting of 15-16 September 2010 aimed at spreading the tool of *joint audits* represents a development of simultaneous tax examinations.[43] Paragraph 7 of the Report considers that a joint audit occurs when two or more countries «*join together to form a single audit team to examine an issue(s) / transaction(s) of one or more related taxable persons (both legal entities and individuals) with cross-border*

[38] ARTICLE 29 DATA PROTECTION WORKING PARTY, *Letter to the Director General of Taxation and Customs Union of the European Commission*, Just.c.3(2012)866296, Brussels, 21.6.2012, available at *http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2012/20120621_letter_to_taxud_fatca_en.pdf*.

[39] The text of all the following Agreements is available at *www.finanze.it/export/finanze/Per_conoscere_il_fisco/fiscalita_Comunitaria_Internazionale/convenzioni_e_accordi/accordi_amministrativi.htm*.

[40] Working Arrangement between the Ministry of Finance of the Republic of Italy and the United States Internal Revenue Service under the terms of the exchange of information provisions of the Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.

[41] Working Arrangement between the Ministry of Finance of the Republic of Italy and the United States Internal Revenue Service for the application of the provisions of the exchange of information provided for by the Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income. Simultaneous investigations (*verifiche*) program between Italy and the United States for the investigation of criminal tax and related offenses.

[42] Emblematically, Art. VII of the Italy-Australia Agreement expressly provides that tax administration officials located in Australia and in Italy «*will attempt, as far as practicable, to syncronise their work schedules*».

[43] *See* OECD, Forum on Tax Administration, *Joint Audit Report*, Paris, September 2010.

business activities, perhaps including cross-border transactions involving related affiliated companies organized in the participating countries, and in which the countries have a common or complementary interest; where the taxpayer jointly makes presentations and shares information with the countries, and the team includes Competent Authority representatives from each country».

Although Italy was not part of the 13 Countries-group (so-called *OECD Study Team*) that promoted the use of joint audits,[44] the Italian tax authorities immediately embraced the conclusions reached in the Joint Audit Report and declared that «*Italy will be a leading actor in this innovative form of control, also thanks to the wide net of treaties and international agreements signed, which is the legal basis necessary for enforcing this new form of control, and in the light of the experience in multilateral controls gained in the last 7 years*».[45]

This new form of cross-border tax assessment appears to be very elastic and does not seem to have legal obstacles, since a joint audit does not have a precise legal definition and its practical enforcement by the Italian tax authorities is made in line with the underlined bilateral or multilateral tax treaty.[46] The sole practical difficulties may be linked to the different procedures and rules applicable in the two (or more) jurisdictions involved and the different language.[47] Since the Italian tax authorities does not publicise statistical data on the use of joint audits, it is possible to imply that this instrument may be used in any field of taxation having a cross-border application (*e.g.* transfer pricing, CFC rules, financial products, etc.).

7. The "realpolitik": tax solutions of equivalent effect alternative to exchange of information.

The "informational gap" towards foreign-based income and capital has also been reduced unilaterally by Italy through alternative and unilateral instruments to the exchange of information with other tax authorities.

With particular regards to foreign assets and capital owned by resident taxpayers, the failure to declare their existence to the tax authorities leads to specific administrative sanctions. Nevertheless, Italy often approved offshore amnesty programs aimed at stimulating taxpayers to declare foreign properties illegally held abroad and ignored by tax authorities. These programs, also known as "Tax Shields" (*Scudi fiscali*), have been introduced in 2001,[48] in 2002[49] and in 2009.[50] The third "Tax Shield" allowed taxpayers to disclose, through authorised intermediaries, their financial activities and properties held abroad by paying an extraordinary tax of 5% of their value, with the guarantee of anonymity and without being subject to certain administrative and criminal sanctions. According to the Ministry of Finance, the third tax shield led to the repatriation of approximately € 95 billion.

From the exchange of information point of view, the secrecy that governs information related to taxpayers that applied to the Tax Shield does not impede tax authorities from transferring (spontaneously or upon request) such information to foreign tax authorities, provided that the information in question were obtained lawfully: for example, when the taxpayer involved in an Italian tax assessment discloses in his defense the fact that in 2009 a certain amount of assets held abroad was subject to the Tax Shield discipline.

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[44] The group was composed by Australia, Canada, Denmark, France, Japan, Korea, Mexico, Netherlands, South Africa, Spain, Turkey, the United Kingdom and the United States. According to DORIGO, S., *Italy – Exchange of information and cross-border cooperation between tax authorities*, in IFA Cahiers de Droit Fiscal International, Vol. 98b, The Hague, 2013, p. 387, «*it is surprising that Italy has not taken part in the project*».

[45] AGENZIA DELLE ENTRATE, *Il Fisco si fa globale, senza confini. E le Amministrazioni finanziarie dei Paesi Ocse, riunite ad Istanbul, inaugurano l'era dei controlli congiunti, cd. "Joint Audits"*, Press release, Rome, 16.9.2010, available at *www.agenziaentrate.gov.it/wps/file/nsilib/nsi/agenzia/agenzia+comunica/comunicati+stampa/archivio+comunicati/cs+2010/cs+settembre+2010/cs+16092010+fisco+globale/184_CS_Forum+OCSE+160910.pdf*. [Author's translation]

[46] According to OECD, Forum on Tax Administration, *Joint Audit Report*, Paris, September 2010, para. 8, «*the term "joint audit" as such is not a legal term. In tax matters the term "joint audit" has been used in practice to express the idea that two or more tax administrations work together. If countries want to carry out a joint audit, it is first necessary to determine the legal framework on which they can co-operate. The basis for cooperation can be found in a network of bilateral and multilateral tax treaties which provide for varying degrees of mutual assistance*».

[47] *See*, again, DORIGO, S., *Italy – Exchange of information and cross-border cooperation between tax authorities*, in IFA Cahiers de Droit Fiscal International, Vol. 98b, The Hague, 2013, p. 387.

[48] *See* Artt. 11 et seq., Law Decree 25 September 2001, No. 350.

[49] *See* Art. 6, Law Decree 24 December 2002, No. 282.

[50] *See* Art. 13-*bis*, Law Decree 1 July 2009, No. 78. For comments, *see* MASTELLONE, P., *The new Italian Tax Shield: amnesty for undeclared offshore assets*, in *European Taxation*, Vol. 50, No. 4/2010, p. 152 et seq.

Recently the special Department of the Italian tax authorities for tackling international tax evasion (*Ufficio Centrale per il Contrasto agli Illeciti Fiscali Internazionali*, UCIFI) is studying the possibility to introduce the so-called *voluntary disclosure* for undeclared offshore assets, which will enact OECD's recommendations[51] and will ensure a huge tax revenue without guaranteeing the anonymity and without derogating to anti-money laundering provisions.

At the same time, Italy is considering with the Swiss authorities the opportunity to sign a "Rubik Agreement" aimed at regularising undeclared income and properties held in Switzerland by Italian taxpayers, estimated between € 120-189 billion. The possibility of signing such bilateral treaty appears quite strange in this phase, considering that on 15 October 2013 Switzerland has become the 58th Contracting Party of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters and, therefore, all bank account information should be made available if requested by Italy.

8. The legitimacy of tax solutions other than exchange of information: where do we stand?

Among the various alternative routes to the regular exchange of information provided by treaty rules or European Directives, Italy has been recently involved in several cases of acquisition of stolen bank data. In particular, the Italian tax authorities issued a great number of tax assessment notices to taxpayers based, almost exclusively, on bank account information illegally obtained abroad, but received after a legal process of exchange of information.

This criticizable practice linked to the *Liechtenstein* and *Falciani* cases raises many issues of compatibility with taxpayers' rights and the absence of specific norms regulating such "unorthodox" acquisition of information is generating a great confusion in Italian case law. While criminal courts consider that a citizen cannot be condemned for a tax crime since such illegally obtained information are unusable and need to be destroyed,[52] tax courts are divided between an approach more respectful of taxpayers' rights protection and another that consider such information valid for supporting a tax assessment, given that the Italian "segment" of evidence acquisition is perfectly lawful and renders irrelevant potential violations made abroad in relation to the original acquisition.[53]

In the actual scenario where tax authorities have a virtually unlimited number of instruments for obtaining information related to foreign undeclared assets, the recourse to stolen information cannot be justified and represents an elementary violation of taxpayers' right of defence and an application in tax matters of the so-called *fruit of the poisonous tree doctrine*. In other words, the current U-turn made by the international community from the 2009 G-20 onward led to consider tax co-operation as the *rule* and not anymore as the *exception*, but this important development against international tax evasion has not been accompanied by a parallel international recognition of taxpayers' safeguards that shall be enforced during exchange of information procedures.[54]

With particular regard to the right of the taxpayer to be informed on an ongoing exchange of information procedure, the Court of Justice of the European Union recently ruled that «*European Union law, as it results in particular from Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums, as amended by Council Directive 2006/98/EC of 20 November 2006, and the fundamental right to be heard, must be interpreted as not conferring on a taxpayer of a Member State either the right to be informed of a request for*

[51] *See* OECD, *Offshore voluntary disclosure. Comparative analysis, guidance and policy advice*, Paris, September 2010.

[52] *See*, in particular, Tribunal of Pinerolo, Judge Dr. Reynaud, decree 4 October 2011, in *Corriere del Merito*, Vol. 8, No. 1/2012, p. 61 et seq., with comments of BASSI, A., *Inutilizzabilità processuale e distruzione dei documenti frutto di accesso abusivo a sistema informatico*, *ibidem*, p. 62 et seq.

[53] On this issue, *see* MASTELLONE, P., *First decisions on the Liechtenstein case: exchange of information, burden of proof and taxpayer's rights protection (comment to Tax Court of first instance of Mantua, Section I, 27 May 2010, No. 137, and Tax Court of first instance of Milan, Section XL, 15 December 2009, No. 367)*, in *Rivista di Diritto Tributario Internazionale*, Vol. 13, unique No. 2011, p. 499 et seq.; MASTELLONE, P., *Tutela del contribuente nei confronti delle prove illecitamente acquisite all'estero*, in *Diritto e Pratica Tributaria*, Vol. 84, No. 4/2013, p. 791 et seq.

[54] According to DEL FEDERICO, L., *La rilevanza della legge generale sull'azione amministrativa in materia tributaria e l'invalidità degli atti amministrativi*, in *Rivista di Diritto Tributario*, Vol. 20, No. 6/2010, Part I, p. 760, «*tax interest, ability to pay and taxpayer's rights protection shall be balanced and safeguarded coherently*». [Author's translation]

assistance from that Member State addressed to another Member State, in particular in order to verify the information provided by that taxpayer in his income tax return, or the right to take part in formulating the request addressed to the requested Member State, or the right to take part in examinations of witnesses organised by the requested Member State».[55] If this principle may be justified in case of a correct exchange of information in compliance with the EU Directive, we believe that in the "pathological" cases of exchange of information illegally obtained abroad – apart from the issue of usability of such information in a tax assessment – the taxpayer should at least be informed and heard, in order to fully exercise his right of defense.

From the human rights perspective, the use of illicitly collected information appears to be an unjustified interference of State's activities in the sphere of taxpayer's fundamental rights. In this respect, the European Court of Human Rights, in decision *N.K.M. v. Hungary* of 14 May 2013 concerning confiscatory taxation, considers that «*an interference […] must strike a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights*».[56] Applying this principle to the criticizable practice of using bank data stolen abroad for tax assessments, it is hard to see a "fair balance" between the public interest to the collection of taxes and taxpayers' rights: in this sense, it is perfectly comprehensible that in literature this practice is considered a *receiving of stolen information* rather than a proper *exchange of information*.[57] In particular, while obtaining illegally bank account information in Italy would inevitably lead to an unlawful tax assessment, it is not logic that the same method of evidence collection carried out abroad (and, then, transferred to Italian tax authorities) would not bring to the same result.[58]

9. Conclusions.

Italy stays in the first line in tackling international evasion and avoidance, since it is progressively adopting all the available tools for giving (and receiving) administrative assistance to (and from) foreign tax authorities. The Italian experience accurately testifies the acknowledgement that the global economy does not only needs a globally-oriented approach of *substantial* tax rules, but also *procedural* tax rules capable of realising an intensive net of co-operation among States.

The lack of regulation of taxpayers' right in the international environment generates, especially in the European Union, an unacceptable different treatment of taxpayers based on their nationality and on the sensibility that domestic institutions have on this delicate issue. For example, while Germany considers legitimate a domiciliary inspection against a taxpayer based exclusively on the *Liechtenstein list*,[59] France – in relation to the *Falciani list* – considers that bank account information illegally obtained abroad cannot support a lawful administrative activity.[60] For these reasons, the impressive job carried out by the OECD in tackling international tax evasion and harmonizing the administrative practices of tax authorities should now focus on the position of the taxpayers subject to cross-border assessments.[61] In the meantime, Italian tax authorities and tax court should apply the relevant provisions regulating mutual administrative assistance in a manner that taxpayers' rights are properly safeguarded.

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[55] CJEU, Grand Chamber, 22 October 2013, case C-276/12 *Sabou*, in ECR I-0000.

[56] ECtHR, Second Section, 14 May 2013, application No. 66529/11 *N.K.M. v. Hungary*, para. 42, available at *http://hudoc.echr.coe.int/webservices/content/pdf/001-119704?TID=aqmcdhqmmt*.

[57] *See* MARINO, G., *Paradisi fiscali: dalle* black list *alle* white list, *dallo scambio di informazioni alla ricettazione di informazioni*, in FRANSONI, G. (edited by), *Finanziaria 2008*, Quaderni della Rivista di Diritto Tributario, Milan, 2008, p. 213 et seq.

[58] In this sense, *see* LUPI, R., *Delazioni e indagini fiscali*, in VIGNOLI, A. – LUPI, R., *Sono utilizzabili le informazioni bancarie illecitamente sottratte da impiegati di istituti di credito esteri?*, in *Dialoghi Tributari*, Vol. 4, No. 3/2011, p. 271, who remarks that stealing indiscriminately an entire bank accounts database containing information of thousands of clients, in violation of the principle of hearing both sides, appears an illicit on which tax authorities cannot rely in their tax assessment activity nor, *a fortiori*, in the trial before tax courts.

[59] *See* Bundesverfassungsgericht, decision of 9 November 2010, No. 2101/09, available at *www.bundesverfassungsgericht.de/entscheidungen/rk20101109_2bvr210109.html*.

[60] *See* Cour d'Appel de Paris, Pôle 5 – Chambre 7, Ordonnance du 8 Février 2011, which has been subsequently confirmed by Cour de Cassation, Chambre Commerciale, Financière et Économique, 31 January 2012, No. 141 (recourse No. P 11-13.097).

[61] On this issue, *see* the comprehensive research of SCHENK-GEERS, T., *International exchange of information and the protection of taxpayers*, Alphen aan den Rijn, 2009.