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Tax Avoidance Revisited: Exploring the Boundaries of Anti-Avoidance Rules in the EU BEPS Context

Italy

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I.1. The Meaning of Tax Avoidance in National Legal Systems.

In the Italian legislation the first definition of tax avoidance appeared in 1990.[1]
Art. 10, the Law no. 408 of 29 December 1990 stated: "*The tax authorities may refuse to recognize the tax benefits received through business combinations, transformations, demergers, capital reductions, liquidations, valuations of shareholdings, transfers of credit and transfers or valuations of securities performed without sound economic reasons, for the sole purpose of fraudulently obtaining tax savings*".
This provision provided a rather ambiguous definition, since the term "fraudulently" could be interpreted as having the meaning of "contrary to the purpose of the relevant legal provisions", but also as having the meaning of "through false statements and documents". While the first meaning was in line with the common understading of the notion of tax avoidance, the second was not, recalling the notion of tax fraud.[2]
In order to dispel the doubts that it rised, the definition set out in art. 10 was replaced by a new one in 1997.
Art. 7, Legislative Decree no. 358 of 8 October 1997 inserted into Presidential Decree no. 600 of 29 September 1973, regulating the assessment of income taxes, art. 37-bis, entitled "Anti-Avoidance Provisions", which empowered the tax administration to disregard the tax advantages stemming from "*acts, facts and transactions, whether or not related, lacking of sound economic reasons, aimed at avoiding obligations or prohibitions foreseen by the tax system, and obtaining tax reductions or refunds otherwise not obtainable*".[3]

[1] On tax avoidance and abuse of law, in general: P. Tabellini, *L'elusione fiscale* (Giuffrè 1988); S. Cipollina, La legge civile e la legge fiscale (CEDAM 1992); S. Fiorentino, *L'elusione tributaria. Scelte di metodo e questioni terminologiche* (ESI 1996); A. Contrino, *Elusione fiscale, evasione e strumenti di contrasto* (Cisalpino 1996); A. Garcea, *Il legittimo risparmio d'imposta* (Cedam 2000); S. Cipollina, *Elusione fiscale*, in *Dig. disc. priv., sez. comm.*, agg. (UTET 2007); G. Zizzo, *Elusione ed evasione tributaria*, in *Dizionario di diritto pubblico* p. 2173 (S. Cassese, Giuffrè 2006); G. Zizzo, *Abuso del diritto, scopi di risparmio d'imposta e collegamento negoziale*, Rass. Trib., p. 869 (2008); G. Zizzo, *L'elusione tra ordinamento nazionale ed ordinamento comunitario: definizioni a confronto e prospettive di coordinamento*, in *Elusione ed abuso del diritto tributario* (G. Maisto ed., Giuffré 2009); A Marcheselli, *Equivoci e prospettive della elusione tributaria, tra principi comunitari e principi nazionali*, I Dir. Prat. Trib., p. 801 (2010); V. Mastroiacovo, *L'economicità delle valide ragioni (note minime a margine della recente evoluzione del principio dell'abuso del diritto)*, I Riv. dir. trib., p. 449 (2010); G. Fransoni, *Appunti su abuso del diritto e "valide ragioni economiche"*, Rass. Trib., p. 932 (2010); F. Tesauro, *Elusione e abuso nel diritto tributario italiano*, I Dir. Prat. Trib., p. 683 (2012); S. La Rosa, *Abuso del diritto ed elusione fiscale: differenze e interferenze*, I Dir. Prat. Trib., p. 707 (2012); G. Fransoni, *Spunti in tema di abuso del diritto e "intenzionalità" dell'azione*, Rass. Trib., p. 403 (2014).
[2] R. Lupi, *Prime ipotesi in tema di norma antielusione sulle operazioni societarie*, II Riv. dir. trib., p. 439 (1992).
[3] On this provision: P. Piccone Ferrarotti, *Riflessioni sulla norma antielusiva introdotta dall'art. 7 del D.Lgs. n. 358/1997 (art. 37-bis del D.P.R. n. 600/1973)*, Rass. Trib., p. 1147 (1997); M. Nussi, *Elusione tributaria ed equiparazioni al presupposto nelle imposte sui redditi*, I Riv. dir. trib., p. 503 (1998); G. Zizzo, *Prime considerazioni sulla nuova disciplina antielusione*, in *Commento agli interventi di riforma tributaria* p. 435 (M. Miccinesi ed., Cedam 1999); G. Vanz, *L'elusione fiscale tra forma giuridica e sostanza economica*, Rass. Trib., p. 1606 (2002); R. Lupi, *Le operazioni societarie tra lecita pianificazione fiscale ed elusione: concetti generali e casi applicativi*, in *La fiscalità delle operazioni straordinarie d'impresa* (R. Lupi - D. Stevanato eds., Il Sole 24 Ore 2002); D. Stevanato, *La norma antielusiva nei pareri del Comitato per l'interpello*, I Dir. Prat. Trib., p. 219

Tax avoidance transactions were thus defined as transactions that 1) circumvent (avoide) tax obligations or prohibitions, 2) are aimed at obtaining a tax reduction or refund which would not otherwise be obtained and 3) cannot be justified showing the existence of sound economic reasons.

The circumvention of tax obligations or prohibitions, which was at the core of this definition, implied the availability of an alternative route to the one taken, more adequate to the economic and legal outcome actually achieved. On the basis of this availability, it could indeed be argued that, by selecting the latter, the taxpayer managed to avoid the obligation or prohibition which the law attached to the former, therefore rising a conflict between the wording of the relevant provisions, which sheltered the taxpayer from facing the obligation or prohibition, and their purpose, which notwithstanding requested the enforcement of the same obligation or prohibition.

According to the Supreme Court, it was necessary to inquire if "*there is a manipulation or alteration of traditional legal instruments, to be considered inconsistent with ordinary market practices, and if there is an actual interchangeability with the solutions indicated by the tax authority*".[4]

In 2006 the Supreme Court started to apply the abuse of law doctrine in tax law cases.[5]

Until 2008, the Supreme Court grounded this doctrine on ECJ's case-law. [6] Although claiming it was referring to the ECJ's definition of abuse of law, the Supreme Court in most decisions focused mainly on the purpose to obtain a tax saving, setting apart the other element that characterized the ECJ's definition, i.e. the contrast between the accrual of the saving and the purpose of the relevant provisions. Indeed, in these decision the Supreme Court held that transactions were to be deemed abusive when, "*even if actually desired and not subject to invalidity, they are carried out, based on a group of objective elements, essentially for the purpose of obtaining a tax benefit*".[7]

Since reliance on ECJ's case-law was clearly weak outside the field of harmonized taxes, as in the case of income taxes, at the the end of 2008 the Joint Chambers of the Supreme Court stated that the doctrine was also grounded on the ability to pay principle set by art. 53 of the Italian Constitution. In this decisions, the Supreme Court also provided a new definition of abuse of

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(2002); G. Zizzo, *La nozione di elusione nella clausola generale*, Corr. trib., p. 3087 (2006); G. Falsitta, *Natura delle disposizioni contenenti "norme per l'interpretazione di norme" e l'art. 37 bis sull'interpretazione analogica o antielusiva*, I Riv. dir. trib., p. 519 (2010).

[4] IT: Sup. Ct., sec. V, 14 Jan. 2015, 438 and 439, commented by M. Beghin, *Ancora equivoci sul concetto di vantaggio fiscale elusivo e sulla sua inopponibilità al Fisco*, Corr. Trib., p. 895 (2015) and by D. Stevanato, *Il disconoscimento del prezzo pagato per acquistare l'azienda e il paradosso dell'elusione senza "aggiramento"*, GT – Riv. giur. trib., p. 501 (2015); IT: Sup. Ct., sec. V, 15 July 2015, 14760 and 14761; IT: Sup. Ct., sec. V, 27 Mar. 2015, 6226 commented by M. Beghin, "*Elusione", tassazione differenziale e impatto sulla motivazione degli avvisi di accertamento*, Corr. Trib., p. 1827 (2015).

[5] G. Zizzo, *L'elusione tra ordinamento nazionale ed ordinamento comunitario: definizioni a confronto e prospettive di coordinamento*, in *Elusione ed abuso del diritto tributario* (G. Maisto ed., Giuffré 2009); G. Zizzo, *La giurisprudenza in materia di abuso ed elusione nelle imposte sul reddito*, Corr. Trib., p.1019 (2012).

[6] On the European roots of the "abuse of law" concept, see P. Pistone, *L'abuso del diritto nella giurisprudenza tributaria della Corte di giustizia dell'Unione Europea*, Dir. Prat. Trib. Int., p. 431 (2012); P. Piantavigna, *Abuso del diritto fiscale nell'ordinamento europeo* (Giappichelli 2011); P. Piantavigna, *Tax Abuse in European Union Law: A Theory*, 3 EC Tax Review (2011).

[7] IT: Sup. Ct., sec. V, 9 Mar. 2011, 5583; IT: Sup. Ct., sec. V, 22 Sept. 2010, 20030; IT: Sup. Ct., sec. V, 9 Dec. 2009, 25710.

law, according to which it entails "*a distorted use of legal instruments capable of producing tax savings which, without violating specific provisions, lack of sound economic reasons other than the mere expectation of the tax saving*".[8]
Afterwards this definition has been steadly applied by the Supreme Court, which in later cases explained that the use of a legal instrument is distorted when the instrument is misused, manipulated, used inappropriately, in a way not suitable with its typical purpose and not consistent with ordinary market practices[9] and that the tax savings should be undue, i.e. not coeherent with the goal of the relevant provisions.[10]
In order to reconcile the definition of tax avoidance provided by art. 37-bis, Presidential Decree no. 600 of 29 September 1973 with the one of abuse of law developed by the Supreme Court, art. 1 Legislative Decree no. 128 of 5 August 2015 inserted into Law no. 212 of 27 July 2000 (Charter of Taxpayer's Rights) art. 10-bis, entitled "Abuse of Law or Tax Avoidance", according to which "*One or more transactions are deemed to be abusive when they do not have economic substance and, while formally consistent with tax law, achieve essentially undue tax advantages*".[11]
Two elements characterize this definition: 1) the transaction shall lack of economic substance and 2) the tax advantages shall be undue.
The first element is clarified by Art. 10-bis at par. 2, lett. a), which specifies that an arrangement or series of arrangement lacks of economic substance if it "*is unable to produce meaningful effects apart from the tax advantages. Signs of the lack of economic substance are, in particular, the fact that the legal characterization of the individual steps is inconsistent with the legal substance of the arrangement as a whole and the fact that the legal instruments are used in a manner inconsistent with ordinary market practices*". And at par. 3, under which transactions cannot be considered abusive when they are "*justified by sound non-tax reasons*".
While at first, referrig to the inability to produce meaningful non-tax effects, it appears that this element is aimed at striking only those transactions that are circular in nature. The examples that are subsequently provided indicate that it also encompasses situations where it is just a question of inconsistency between legal form and economic substance.
The relevance of this element is perfectly understandable in the light of the principle of ability to pay, which, in the opinion of the Supreme Court, justifies the adoption of anti-avoidance

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[8] IT: Sup. Ct., sec. V, 23 Dec. 2008, 30055, 30056 and 30057 commented by G. Zizzo, *Clausola antielusione e capacità contributiva*, Rass. Trib., p. 486 (2009), and by M. Cantillo, *Profili processuali del divieto di abuso del diritto: brevi note sulla rilevabilità d'ufficio*, Rass. Trib., p. 476 (2009). Similarly, IT: Sup. Ct., sec. V, 21 Jan. 2009, 1465; IT: Sup. Ct., sec. V, 20 Mar. 2009, 6800; IT: Sup. Ct., sec. V, 21 Apr. 2010, 9476; IT: Sup. Ct., sec. V, 12 Nov. 2010, 22994; IT: Sup. Ct., sec. V, 31 Mar. 2011, 7343; IT: Sup. Ct., sec. V, 12 May 2011, 10383; IT: Sup. Ct., sec. V, 13 May 2011, 10549; IT: Sup. Ct., sec. V, 20 May 2011, 11236; IT: Sup. Ct., sec. V, 16 Feb. 2012, 2193.
[9] IT: Sup. Ct., sec. V, 14 Jan. 2015, 405 commented by G. Zoppini, *Nuove prospettive giurisprudenziali in tema di abuso*, Rass. Trib., p. 1276 (2015); IT: Sup. Ct., sec. V, 27 Mar. 2015, 6226.
[10] IT: Sup. Ct., sec. V, 6 Mar. 2015, 4570; IT: Sup. Ct., sec. V, 18 Mar. 2015, 5378, 5379 and 5380.
[11] On the new GAAR: F. Gallo, *Brevi considerazioni sulla definizione di abuso del diritto e sul nuovo regime del c.d. adempimento collaborativo*, Dir. Prat. Trib., p. 10947 (2014); A. Giovannini, *L'abuso del diritto nella legge delega fiscale*, I Riv. dir. trib., p. 231 (2014); G. Zizzo, *L'abuso del diritto tra incertezze della delega e raccomandazioni europee*, Corr. Trib., p. 2997 (2014); Id., *La nuova nozione di abuso del diritto e le raccomandazioni della Commissione europea*, Corr. Trib., p. 4577 (2015); A. Contrino – A. Marcheselli, *Luci e ombre nella struttura dell'abuso fiscale 'riformato'*, Corr. Trib., p. 3787 (2015); D. Stevanato, *Elusione fiscale e abuso delle forme giuridiche, anatomia di un equivoco*, Dir. Prat. Trib., p. 695 (2015).

measures. If an arrangement or a series of arrangements is unable to affect the economic and legal sphere of the taxpayer, apart from taxes, it can be argued that its enactment does not change the taxpayer's ability to pay. Similarly, if an arrangement or a series of arrangements is able to affect the taxpayer's economic and legal sphere, but it does not represent the most efficient route available to those ends, it can be argued that its enactment is unable to differentiate the taxpayer's ability to pay from the one he would have shown if he had choosen the latter route.
Therefore, an arrangement or series of arrangements falls outside the scope of this element either if a certain modification in the taxpayer's economic and legal sphere is attained following the most efficient route, or if, when a certain modification in the taxpayer's economic and legal sphere may be attained following different routes, all alike for efficiency, the taxpayer chooses among them. Indeed, in both cases there are effects apart from the tax advantages, and the legal form is consistent with them.
The second element is clarified by art. 10-bis at par. 2, lett. b), which states that a tax advantage is undue when its "*accrual defeats the purpose of the tax provisions or of the principles of the tax system*". And at par. 4, pursuant to which "*The taxpayer is free to choose between different tax regimes or between transactions that bear a different tax burden*".
Since no distinction is made, the tax provisions mentioned could be either those applied by the taxpayer (the "abused" provisions) or those that would otherwise apply (the "avoided" provisions).
This element implies that, when the tax system offers the possibility to apply to a certain set of facts different tax regimes, the fact that the taxpayer chooses the most convenient one cannot qualify the tax saving as undue. Indeed, when providing an option between different regimes, unavoidably the system admits that the choice among them could be guided exclusively by their tax consequences. Similarly, when the tax system regulates differently transanctions that have the same economic substance, the choice among them of the most convenient one from a tax standpoint cannot qualify the tax saving as undue.
Indeed, as taxes are not levyed directly on the ability to pay of the taxpayers, but on situations deemed to reveal it, as they are selected and shaped by the law (through a judgement unquestionable if not unreasonable) taking into account various istances of a technical and political nature, there is no abuse of law when the tax savings are fully consistent with the legislative intent.

I.2. The Meaning of Tax Planning, Abusive Tax Planning and Aggressive Tax Planning in National Legal Systems.

The concept of "tax planning" has now a statutory basis in art. 10-bis, par. 4, of the Charter of Taxpayer's Rights, pursuant to which "*The taxpayer is free to choose between different tax regimes or between transactions that bear a different tax burden*". Tax-influenced behaviour is thus expressly allowed by the tax system, as long as it does not run afoul with the legislative intention. As already pointed out, when the system grants the option between different regimes or attaches different consequences to transactions that have the same economic substance, it is easy to argue that any benefit deriving from the choice among those regimes or those transactions shall be deemed coherent with the legislative intent.
Before, this concept could be grounded in the Supreme Court's case law. According to it, "*the use of contractual and/or organisational forms that allow a smaller tax burden constitutes*

exercise of free enterprise and commercial freedom",[12] and does not therefore amount, in itself, to abuse of law. In addition, in the light of the need to safeguard the principles of free enterprise and commercial freedom (art. 42 Constitution), as well as that of full legal protection of the taxpayer (art. 24 Constitution), the Supreme Court has held that "*the Administration's supervision cannot extend to imposing a restructuring measure different from those which are legally possible… only because this measure would result in higher taxation*".[13]
No statutory or case law basis may be found, on the other hand, for the concepts of "Abusive Tax Planning" and "Aggressive Tax Planning". It is therefore possible to argue that for the Italian tax system they overlap with the one of abuse of law. Sure enough the definition of abuse of law included in Art. 10-bis is mainly drawn, as it will be discussed later, from the Recommendation on aggressive tax planning issued by the European Commission on 6 December 2012.[14]

II. The Reaction to Avoidance And Aggressive Tax Planning in the BEPS Context.

II.1. Domestic General Anti-Avoidance Rules (GAARs).

As pointed out in paragraph I.1., The first Italian statutory GAAR was enacted in 1990, as Art. 10, Law no. 408 of 29 December 1990. Its scope was actually rather narrow. It regarded essentially corporate reorganizations and applied mainly in the field of income taxes.
A step further was taken in 1997, when art. 10 was replaced by art. 37-bis, Presidential Decree no. 600 of 29 September 1973. The new GAAR, while still relating to income taxes and requesting, for the abusive practice to be disregarded by the tax authority, the exploitation of one or more of the transactions specifically listed in its paragraph 3, had a broader working range than the previous. Its list (enlarged from time to time) encompassed indeed a significantly higher number of transactions than the one included in Art.10.
Alongside this GAAR, since 2006 the Supreme Court has developed a general anti-abuse of law doctrine, applicable to the entire tax system, although in some recent rulings, assuming a substantial identity between the statutory notion of tax avoidance provided by Art. 37-bis and the judicial one of abuse of law, it clarified that in the field of income taxes abusive practices could be disregarded only if the conditions set forth in Art. 37-bis were fulfilled[15]. The Supreme Court therefore recognized that Art. 37-bis, while providing a tool to fight abusive practices, had also the purpose to draw a line between more dangerous abusive practices, to curb, because

[12] IT: Sup. Ct., sec. V, 17 Oct. 2008, 25374.
[13] IT: Sup. Ct., sec. V, 21 Jan. 2011, 1372. See: S. La Rosa, *Ancora sugli incerti confini tra abuso del diritto, elusione ed illecito fiscale*, II Riv. dir. trib., p. 353 (2012); M. Beghin, *Una strana idea di libertà economica e di vantaggio fiscale asistematico (su elusione fiscale e abuso del diritto*, Corr. Trib., p. 731 (2015).
[14] EU Commission Recommendation, Brussels, 6.12.2012, C(2012) 8806 final.
[15] IT: Sup. Ct., sec. V, 14 Jan. 2015, 405 commented by G. Zoppini, *Nuove prospettive giurisprudenziali in tema di abuso*, Rass. Trib., p. 1276 (2015); IT: Sup. Ct., sec. V, 27 Mar. 2015, 6226.

unacceptable, and less dangerous ones, to uphold, because acceptable, in order to foster certainty in this specific area of tax law.

This judicial doctrine has been applied very successfully by the tax authority. The fuzziness of its boundaries has led the Court to apply it even in cases clearly outside its scope, where the tax authority had no need to resort to it in order to justify the assessment, as in cases dealing with sham transactions or in cases merely rising statutory construction issues.[16]

In 2015 Art. 37-bis was superseded by Art. 10-bis, Law no. 212 of 27 July 2000, which provides a real statutory GAAR, since it applies to all abusive practices, regardless the area of tax law and the transactions involved. Its scope therefore overlaps with the one of the judicial anti-abuse of law doctrine, the legislative intent being clearly to bring under the same regime all cases of abuse of law, going beyond the previous two prongs structure, and putting an end to the excesses brought about by the judicial doctrine. Indeed, at paragraph 10, art. 10-bis provides that there can be abuse of law "*only when the tax advantages cannot be disregarded claiming the violation of specific tax provisions*".

The definition of abuse of law outlined in this new GAAR is explicitly drawn from the one used in the Recommendation on aggressive tax planning issued by the European Commission on 6 December 2012.

According to it "*One or more transactions are deemed to be abusive when they do not have economic substance and, while formally consistent with tax law, achieve essentially undue tax advantages*". As pointed out in paragraph I.1., the definition of abusive practice provided by Art. 10-bis relies therefore on two elements: 1) the transaction shall lack of economic substance, i.e. shall be unable to produce meaningful effects apart from the tax advantages, and 2) the tax advantages shall be undue, i.e. shall be conflicting with the purpose of the tax provisions or of the principles of the tax system.

Both tests have an objective nature. No room is thus left to the subjective intention of the taxpayer.

Since the GAAR is new, there is no case law dealing specifically with it. Nevertheless, based on their similarity, in relation to its first element it is possible to recall the position taken by the Supreme Court on the circumvention element of Art. 37-bis. For the Court, in order to apply this provision it was necessary to inquire if "*there is a manipulation or alteration of traditional legal instruments, to be considered inconsistent with ordinary market practices, and if there is an actual interchangeability with the solutions indicated by the tax authority*".[17]

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[16] G. Falsitta, *Spunti critici e ricostruttivi sull'errata commistione di simulazione ed elusione nell'onnivoro contenitore detto "abuso del diritto"*, II Riv. dir. trib., p. 349 (2010); G. Zizzo, *La giurisprudenza in materia di abuso ed elusione nelle imposte sul reddito*, Corr. trib., p. 1019 (2012).

[17] IT: Sup. Ct., sec. V, 14 Jan. 2015, 438 and 439, commented by M. Beghin, *Ancora equivoci sul concetto di vantaggio fiscale elusivo e sulla sua inopponibilità al Fisco*, Corr. Trib., p. 895 (2015) and by D. Stevanato, *Il disconoscimento del prezzo pagato per acquistare l'azienda e il paradosso dell'elusione senza "aggiramento"*, GT – Riv. giur. trib., p. 501 (2015); IT: Sup. Ct., sec. V, 15 July 2015, 14760 and 14761; IT: Sup. Ct., sec. V, 27 Mar. 2015, 6226 commented by M. Beghin, "*Elusione", tassazione differenziale e impatto sulla motivazione degli avvisi di accertamento*, Corr. Trib., p. 1827 (2015).

As explained in paragraph I.1., the lack of economic substance to which Art. 10-bis refers is not limited to cases where no economic substance may be found (i.e. where no modification in the taxpayer's economic and legal sphere occurs). It also expands to cases where an economic substance is achieved (i.e. where a modification in the taxpayer's economic and legal sphere occurs), but the legal form chosen by the taxpayer is inconsistent with it. It is likely that the Supreme Court will identify this inconsistency when the above-mentioned conditions are met.

II.2. EC Recommendation C-(2012) 8806 of 6 December 2012 and subject-to-tax rule.

In general, Italy does not have subject-to-tax clauses in its DTCs since, as State of residence, it adopts the credit method to relief juridical double taxation, *i.e.* situations in which the same income is taxable in the hands of the same person by more than one State.[18] Accordingly, a case of double non-taxation is unlikely to arise when Italy acts as the State of residence. In such circumstance, if an item of income is not subject to tax in the source State, no foreign tax will be creditable and such income will be fully taxable in Italy. In this regard, a case of double non-taxation can originate only where Italy, as State of residence, does not retain the right to tax a certain income on the basis of domestic law, because, for example, it provides an exemption from income tax or does not have the right to tax that income in accordance with some provisions of the treaty such as art. 15, par. 3, art. 19 and art. 20 of the OECD MC.

A general subject-to-tax rule may be found in the Protocol to the Convention between Italy and France. Specifically, paragraph 15 of the Protocol stipulates that "*In the cases where, in accordance with the provisions of this Convention, income must be exempted by one of the States, the exemption shall be granted if and to the extent such income is taxable in the other State*".

A different type of general subject-to-tax clause may be found in the Convention between Italy and Germany[19]. Paragraph 16, lett. d), of the Protocol reads as follows: "*For the purposes of subparagraph (a) of paragraph 3 of Article 24, items of income of a resident of a Contracting State shall be deemed to arise in the other Contracting State if they have been effectively subjected to tax in the other Contracting State in accordance with the Convention*". This clause does not apply symmetrically, as the one provided by the Italy-France DTC, but deals only with the case in which Germany is the State of residence and *vice versa* Italy represents the State of source. Since Germany adopts the exemption method as suggested by art. 23A of the OECD MC, the clause has the purpose to avoid that, although Italy grants an exemption to an item of income, Germany does not have the power to tax it. The reciprocal situation cannot happen, since Italy adopts the credit method as ordinary relief method for double taxation.

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[18] *See* S. Mayr & P. Conci, *IFA Branch Report: Italy*, in *Cahiers de Droit Fiscal International. Double Non-Taxation*, p. 463 (IFA Cahiers 2004). *See* also P. Tarigo, *Doppia non imposizione e trattati italiani*, Dir. Prat. Trib., p. 11127 (2009).

[19] Protocol to the Italy-Germany Double Tax Convention, 18 October 1989, par. 16, lett. d). For a comment *see* M. Lampe, *General Subject-To-Tax Clause in Recent Tax Treaties*, 39 European Taxation 4, p. 183 (1999) Journal IBFD; A. Rust, *Avoidance of Double Non-Taxation in Germany*, in *Avoidance of Double Non-Taxation*, p. 111 (M. Lang ed., Linde Verlag 2003).

The same rationale lies behind the "switch-over" clause provided by the Protocol to the same DTC. Under Paragraph 16, lett. d), Germany is allowed to shift from the exemption method to the credit system if the following circumstances are met: (1) the income is categorized or attributed differently in the two States, (2) it is not possible to solve the problem by mutual agreement and (3) the relevant income is either subject to double taxation or is not taxed or, again, it faces a reduced taxation.

Specific subject-to-tax rules relate to those allocation rules enshrined in DTCs that attribute the right to tax to a single Contracting State, thus preventing the other State from taxing the same item of income.

When the power to tax an item of income is granted to the State of residence, the subject-to-tax clause provides the reversion of taxation to the State of source where the State of residence exempts such item.

An example of this kind of subject-to-tax rule may be found in some DTCs in the provision where they deal with the treatment of the income earned by teachers and professors resident of a Contracting State for a teaching or research activity performed in the other Contracting State. For instance, art. 20 of the Italy-Australia DTC reads as follows: "*a professor or teacher who visits one of the Contracting States for a period not exceeding two years for the purpose of teaching or carrying out advanced study or research at a university, college, school or other educational institution in that State and who immediately before that visit was a resident of the other Contracting State shall be exempt from tax in the first-mentioned State on any remuneration for such teaching, advanced study or research in respect of which he is, or upon the application of this Article will be, subject to tax in the other State*"[20]. Similar clauses are contained in the DTCs with New Zealand[21], Malaysia[22], South Africa[23], Mauritius[24], Albania[25] and Iceland[26].

Another subject-to-tax clause inserted in some Italian DTCs deals with the treatment of pensions. In general, pensions and other similar remunerations paid to a resident of a Contracting State in consideration of past employment shall be taxable only in the State of residence. However, in the DTC with Syria it is stated that "*1. Subject to the provisions of paragraph 2 of Article 19, pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State. 2. The provisions of paragraph 1 shall not apply if the recipient of the income is not subject to tax in respect of such income in the State of which he is a resident and according to the laws of that*

[20] Italy-Australia Double Tax Convention, 12 December 1982, art. 20.
[21] Italy-New Zealand Double Tax Convention, 6 December 1979, art. 20.
[22] Italy-Malaysia Double Tax Convention, 28 January 1984, art. 19.
[23] Italy-South Africa Double Tax Convention, 16 November 1995, art. 20.
[24] Italy-Mauritius Double Tax Convention, 9 March 1990, art. 20.
[25] Italy-Albania Double Tax Convention, 12 December 1994, art. 20.
[26] Italy-Australia Double Tax Convention, 10 September 2002, art. 20.

State. In such a case, such income may be taxed in the State where they arise"[27]. Analogous provisions are contained in the treaties with Ghana[28], Lebanon[29], Georgia[30] and Zambia[31].
A tailored subject-to-tax provision concerning interest is included in the Italy-United Kingdom DTC. The clause, that is aimed at preventing the application of the exclusive right to tax by the State in which the payee is resident, as set out in paragraphs 3 and 4 of art. 11, reads as follows: "*the reliefs from tax provided for in paragraph 2, 3 or 4, as the case may be, of this Article shall not apply if the beneficial owner of the interest is exempt from tax on such income in the Contracting State of which he is a resident and such recipient sells or makes a contract to sell the holding from which such interest is derived within three months of the date such recipient acquired such holding*"[32].
A reversion of taxation in favor of the State of source may also concern the profits from the operation of ships or aircraft in international traffic. This clause is included in art. 18, par. 2 of the Protocol to the Italy-Malta DTC. It stipulates that "*where profits derived from the operation of a ship in international traffic by an enterprise whose place of effective management is situated in Malta are exempt from tax under the provisions of section 86 of the Merchant Shipping Act, 1973, or under any identical or similar provisions, such profits may be taxed in Italy unless it is proved to the satisfaction of the competent authorities of Italy that not more than twenty per cent of the capital of the company owning the relative ship is owned, directly or indirectly, by persons not resident of Malta*"[33].
A rare provision which resembles closely a subject-to-tax clause is the so-called "remittance clause" contained in the treaties with Ireland[34] and Malaysia[35]. It provides that persons who qualify as residents of Ireland or Malaysia are taxable only on income derived from Italian sources to the extent that such income is effectively remitted in those countries. Conversely, Italy, as source State, has to grant an exemption or apply a reductive rate on such income only in so much and to the extent that the income is remitted in the State of residence. The underlying rationale rests on the consideration that such persons are not subject to potential double taxation to the extent that their foreign income is not remitted to their State of residence.
When the power to tax is granted to the State of source, the specific subject-to-tax clauses regulate the reversion of taxation to the State of residence where the State of source fails to tax such item.
An example of this kind of clause may be found in some DTCs where they deal with the taxation of remuneration for government services and public pensions. Ordinarily DTCs apply the

[27] Italy-Syria Double Tax Convention, 23 November 2000, art. 19.
[28] Italy-Ghana Double Tax Convention, 19 February 1994, art. 19.
[29] Italy-Lebanon Double Tax Convention, 22 November 2000, art. 18, par. 2.
[30] Italy-Georgia Double Tax Convention, 31 October 2000, art. 18, par. 2.
[31] Italy-Zambia Double Tax Convention, 27 October 1972, art. 18.
[32] Italy-United Kingdom Double Tax Convention, 21 October 1988, art. 11, par. 10.
[33] Italy-Malta Double Tax Convention, 16 July 1981, art. 18, par. 2.
[34] Protocol to the Italy-Ireland Double Tax Convention, 11 June 1971, par. 1, lett. a).
[35] Italy-Malaysia Double Tax Convention, 28 January 1984, art. 23.

"paying State principle" to this income. The subject-to-tax clause inserted in some DTCs provides that if the paying State does not exercise its power to tax such income, the resident State is allowed to tax that income. An example of this provision in respect of remuneration for government service is contained in the DTC with Poland which affirms that "*such remuneration shall be taxable only in the other Contracting State if the services are rendered in that State and the individual is a resident of that State who: (i) is a national of that State; or (ii) did not become a resident of that State solely for the purpose of rendering the services; or (iii) is not subject to tax in respect of such remuneration in the Contracting State from which the remuneration is paid*". A similar provision, included in the Protocol to the Italy-Germany DTC, states that "*Article 19 shall also apply to remuneration paid to German nationals (also when they are Italian nationals at the same time) who exercise their activities at German cultural institutions or at schools, insofar as such remuneration is paid out of German public funds and is subject to taxation in the Federal Republic of Germany*".[36]

In some DTCs the resident State is allowed to tax the income deriving from an employment exercised aboard a ship or aircraft operated in international traffic only if the source State does not tax such income. This clause, inserted in the treaty with France, reads as follows: "*notwithstanding the preceding provisions of this Article, remuneration derived in respect of an employment exercised aboard a ship or aircraft operated in international traffic may be taxed in the State in which the place of effective management of the enterprise is situated; if that State does not levy any tax on such remuneration, that remuneration may be taxed in the State of which the recipient is a resident*"[37].

A clause implying a reversion of taxation to the State of residence can be found in the Convention with Russia with regard to the remuneration for certain services[38]. Specifically, art. 9, par. 2, of the Italy-Russia DTC states that "*remuneration which a resident of a Contracting State receives in consideration for services performed in the other Contracting State shall not be liable to taxation in that other State if it is subjected to taxation in the first-mentioned State*"[39].

Finally, it may be relevant to highlight that sometimes subject-to-tax rules can also be framed as "deemed source" clauses, namely provisions that help at individualizing the origin of an item of income. In this regard, a deemed source clause can be found in the Italy-Ivory Coast DTC, which reads as follows: "*for the application of paragraphs 2 and 3 of this Article, profits, income or, capital gains of a resident of a Contracting State, which have been subjected to*

[36] Protocol to the Italy-Germany Double Tax Convention, 18 October 1989, par. 14, lett. c), point ii).
[37] Italy-France Double Tax Convention, 5 October 1989, art. 15, par. 3.
[38] The provision mentions "remuneration in respect of work directly connected with a construction or assembly project", "remuneration paid to individuals stationed in the other Contracting State as press, radio or television reporters or representatives, from sources outside that other State for two years from their arrival in that other State" and "remuneration derived by residents of a Contracting State, sent as technical specialists to the other Contracting State, during a year from the date of arrival in that other State".
[39] Italy-Russia Double Tax Convention, 26 February 1985, art. 9, par. 2.

taxation in the other Contracting State in accordance with this Convention, shall be deemed to be derived from sources situated in that other Contracting State".[40]

III. Transfer Pricing Rules, GAARs, Specific Anti-Avoidance Rules (SAARs) and Linking Rules.

III.1. Transfer pricing.

III.1.1. Transfer pricing and tax avoidance.

According to art. 110, par. 7, of the Presidential Decree no. 917 of 22 December 1986 [Income Tax Code], "*The items of income stemming from transactions with non-resident entities that directly or indirectly control the enterprise, are controlled by it, or are controlled by the same entity controlling the enterprise, shall be evaluated on the basis of the normal value of the goods or services supplied*".[41]

The adjustment is necessary only if the result is an increase of the taxable income. A downward adjustment is allowable only to the extent it is the result of a binding agreement concluded with the competent authorities of the other Contracting State pursuant to a mutual agreement procedure under a DTC.

The definition of "normal value" essentially mirrors the OECD "arm's length value". Art. 9, par. 3, ITC defines "normal value" as "*the average price or consideration paid for goods and services of the same or similar type, in free market conditions and at the same level of trade, at the time and place at which the goods were purchased or the services were performed, or, if no such data is available, at the time and place nearest thereto*".[42]

Detailed regulations on transfer pricing can be found in the Ministerial Circular No. 32 of 22 September 1980, which sets forth the instructions still representing the most exhaustive and complete source on transfer pricing regime in Italy. Among other topics, the Circular discusses the methods applicable to determine transfer price for each type of transaction (*i.e.* transfer of movable goods, transfer of technology, loans and intra-group services). Following the 1979 OECD guidelines the Circular classifies these methods into two categories: "traditional

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[40] Italy-Ivory Coast Double Tax Convention, 30 July 1982, art. 22, par. 5.

[41] On transfer pricing *see*: G. Maisto, *Il transfer price nel diritto tributario italiano e comparato* (Cedam 1985); E. Della Valle, *Il transfer price nel sistema di imposizione sul reddito*, I Riv. dir. trib., p. 133 (2009); F. Balzani, *Il transfer pricing*, in *Corso di diritto tributario internazionale* p. 413 (V. Uckmar ed., CEDAM 2002); R. Cordeiro Guerra, *La disciplina del transfer price nell'ordinamento italiano*, I Riv. dir. trib., p. 421 (2000); A. Stesuri, *La determinazione del reddito di impresa nel transfer pricing*, GT - Riv. giur. trib., p. 433 (1999); G. Zizzo, *Regole generali sulla determinazione del reddito di impresa*, in *Imposta sul reddito delle persone fisiche* p. 577 (F. Tesauro, UTET 1994).

[42] The provision specifies that reliable indications might be found in price lists or tariffs of the party which has supplied the goods or services or, if necessary, in price lists of the Chamber of Commerce and in professional tariffs, taking normal discounts into account. For goods and services subject to price control, reference has to be made to the regulations in force. For a comment *see* P. Adonnino, *La nozione di valore normale*, in *Il reddito di impresa nel nuovo Testo Unico* p. 272 (A. and V. Uckmar ed., Cedam 1988).

transaction based methods" and "profit based methods". As to the first category, the Ministry indicates the Comparable Uncontrolled Price (CUP) method as the preferable one. If the CUP method cannot be applied, then the Resale Price Method (RPM) has to be used, followed by the Cost-Plus Method (CSM). Should all these traditional criteria be inapplicable, alternative methods need to be taken into consideration, such as the Transactional Net Margin Method (TNMM) and the Profit Split Method (PSM).

The Supreme Court generally classifies transfer pricing among anti-avoidance rules. According to it transfer pricing is "*an anti-avoidance rule intended to prevent, within the group of companies, transfer of profits by applying prices below or above the normal value of the goods supplied, with the purpose of avoiding taxation in Italy in favor of lower foreign taxation (cfr. SC. 22023/06, 11226/07, 11949/12) or otherwise in favor of situations that make fiscally convenient the allocation of income to foreign companies of the group*".[43]

On this basis, for a period, the Supreme Court held that transfer pricing could apply only where the tax burden on the Italian company was, due to higher tax rate applicable, higher than the one borne by the non-resident company with which the transaction had been carried out.

Although shared by some scholars[44], this opinion appeared at odds with the wording of art. 110, par. 7, which compels the resident company to use the arm's length value to calculate its tax base, in place of the actual price, regardless the tax rate applicable to the non-resident one, as long as the substitution produces an increase of that base. It also appeared inconsistent with the purpose of this instrument as set out in the Commentary to the OECD Model.[45]

These shortcomings led the Supreme Court to change its position, recognizing that transfer pricing represents primarily a rule for the proper allocation of the tax base. In its most recent case law it therefore states that "*The manipulation of transfer prices applied in transactions between related parties... is prosecuted, at international level, not so much because it is aimed at achieving an undue tax saving... but because it distorts the proper allocation between States of tax bases generated by cross-border transactions*". So, "*While an anti-avoidance purpose exists, it does not exhaust the goals of this rule*".[46]

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[43] IT: Sup. Ct., sec. V, 25 Sept. 2013, 22010; IT: Sup. Ct., 16 May 2011, 11126; IT: Sup. Ct., sec. V, 16 May 2007, 11226; IT: Sup. Ct., sec. V, 13 Oct. 2006, 22023. For a comment *see* A. Ballancin, *La disciplina italiana del transfer price tra onere della prova, giudizi di fatto e l'(in)esistenza di obblighi documentali*, Rass. Trib., p. 1982 (2006).

[44] *See*, for instance, C. Galli, *Transfer Pricing Rules for Transactions Involving Low-Tax Countries*, 15 International Transfer Pricing Journal 1, p. 44 (2008), Journal IBFD; P. Mastellone, *The Shifts in the Burden of Proof in regard to Transfer Pricing*, 51 European Taxation 5, p. 211 (2011), Journal IBFD; D. Bergami – C. Rotondaro, *A new Challenge to Domestic Intercompany Relationships*, 7 International Transfer Pricing Journal 2, p. 57 (2000), Journal IBFD.

[45] A. Ballancin, *Natura e ratio della disciplina sui prezzi di trasferimento internazionali*, Rass. Trib., p. 73 (2014).

[46] IT: Sup. Ct., sec. V, 7 July 2015, 15005. See also: IT: Sup. Ct., sec. V, 21 July 2015, 15298; IT: Sup. Ct., sec. V, 5 Aug. 2015, 16399; IT: Sup. Ct., 19 Dec. 2014, 27087; IT: Sup. Ct., sec. V, 8 May 2013, 10739; IT: Sup. Ct., sec. V, 13 July 2012, 11949.

III.1.2. Transfer pricing litigation.

The last decade saw a remarkably increase in the number of transfer pricing cases.

Most of them deal with the allocation of the burden of proof between the taxpayer and the tax authority.[47]

For a period, assuming the primacy of the anti-avoidance purpose, the Supreme Court held that the burden of proof rested on the tax authority, which had to demonstrate that the price agreed upon by the parties was able to determine an overall tax saving, taking into account both Italian taxes on the resident company and foreign taxes on the non-resident counterparty, rather than only the former. According to the Supreme Court, "*since the burden of proof in tax avoidance cases always rests on the tax authority…*", the tax authority had to assess in the first place "*if taxes in Italy at the time were really higher than the ones levied*" by the other Country involved.[48]

As already pointed out, this position was later abandoned. The Supreme Court now recognizes that "*the burden of proof on the tax authority - in transfer pricing matter – remains limited to the demonstration of the existence of transactions between associated companies, and of a clear difference between the agreed price and the market value (normal value), while it does not include the avoidance purpose of the operation*".[49]

On this basis, the Supreme Court draws a distinction between assessments regarding positive items of income and assessments regarding negative items. In the first case "*undoubtedly lies on the tax authority – according to the relevant general rules (Art. 2697 of the Civil Code) – the burden of demonstrating the validity of the adjustment based on transfer pricing, with reference to the difference between the agreed price and the normal value of the goods or services exchanged*". While in the second, "*since the problem of distributing costs incurred in transactions between associated enterprises involves also the issue of pertinence, as the one of existence, of the costs reported as a consequence of the supply of goods or services…*", "*the burden of demonstrating the existence and the pertinence of those negative items, and, if dealing with costs deriving from the supply of goods or services between a non-resident company and its resident subsidiary, also every element capable of allowing the tax authority to check the normal value of the agreed prices shall lie - in accordance to the principle of proximity to evidence - on the taxpayer*".[50]

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[47] On this issue: E. Ceriana, *Transfer price e attività di accertamento*, GT - Riv. giur. trib., p. 905 (2007); P. Mastellone, *The Shifts in the Burden of Proof in regard to Transfer Pricing*, 51 European Taxation 5, p. 211 (2011), Journal IBFD; E. Della Valle, *Oggetto ed onere della prova nelle rettifiche da transfer price*, GT - Riv. giur. trib., p. 772 (2013); F. Menti, *Il transfer pricing e l'onere di provare la conformità dei prezzi praticati a quelli di libera concorrenza*, Dir. Prat. Trib., p. 35 (2014); A. Ballancin, *Italy. National Report*, in *The Burden of Proof in Tax Law. 2011 EATLP Congress*, p. 167 (EATLP International Tax Series), IBFD Book.

[48] IT: Sup. Ct., sec. V, 13 Oct. 2006, 22023.

[49] *See* for instance: IT: Sup. Ct., sec. V, 25 Sept. 2013, 22010; IT: Sup. Ct., sec. V, 8 May 2013, 10739.

[50] IT: Sup. Ct., sec. V, 5 Aug. 2015, 16399; IT: Sup. Ct., sec. V, 16 May 2007, 11226.

Following this line of reasoning, it can be argued that the distribution of the burden of proof in transfer pricing cases does not waive to rules ordinarily applied in other tax law cases.
Only a few decisions discuss the criteria for determining the “normal value”. In these decisions the Supreme Court has taken the position that, according to art. 9 ITC, the CUP method stands first, and that tax authority, in applying it, should look for internal comparables, and therefore to taxpayer’s transactions with independent enterprises. Only if internal comparables are not available, it should look for external comparables, and therefore to transactions between independent enterprises dealing in the same market.[51]

III.2. Limitation on Benefits (LOB) clauses.
In the Italian DTC network a LOB clause may be found in the 1999 DTC with the United States.[52]
Art. 2 of the Protocol to the Convention states that, only upon satisfaction of some tests put together to reveal the presence of a sufficient link between the resident of one Contracting State requesting the treaty benefits and the same Contracting State, the benefits of the treaty may be available, in some cases in full, in others to a certain extent, as determined by the DTC or, on a discretional basis, by the competent tax authority.
Among these tests, the publicly traded test requires that all the shares in the class or classes of shares representing more than 50% of the voting power and value of a company have to be traded on a recognized stock exchange. For persons, other than individuals, that otherwise do not qualify for treaty benefits, two other tests are provided: the ownership test and the base erosion test. Under the ownership test, persons must own directly or indirectly at least 50% of each class of shares or other beneficial interest in the company for at least half the days of the taxable year. To comply with this test, it is also necessary that, in the case of indirect ownership, each intermediate owner meets at least one of the conditions. The base erosion test prescribes that less than 50% of the person’s gross income for the taxable year is paid or accrued, directly or indirectly, to persons who are not resident of either Contracting State in the form of payments that are deductible for income tax purposes in the person’s State of residence. In applying the “base erosion test”, payments attributable to a permanent establishment of the person located in the other State are not taken into account.
If a resident of a Contracting State does not satisfy any of the afore-mentioned tests, the resident is allowed the access to the treaty benefits with respect to specific items of income derived from the other State if he meets the requirements of the “active trade or business test”, namely either he is engaged in the active conduct of a trade or business in his own State of residence, or the

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[51] IT: Sup. Ct., sec. V, 25 Sept. 2013, 22010; IT: Sup. Ct., sec. V, 23 Oct. 2013, 24005; IT: Sup. Ct., sec. V, 13 May 2015, 9709. About this topic see A. Vicini Ronchetti, *Transfer price tra normativa nazionale e internazionale*, Rass. Trib., p. 487 (2014).
[52] For a comment *see* G. Rolle – A. Turina, *Condizioni applicative e profili temporali della Convenzione Italia-USA*, Corr. Trib., p. 888 (2010); R. Dominici, *La ratifica della Convenzione Italia-USA contro le doppie imposizioni: un decennio di innovazioni*, Fisc. Int., p. 209 (2010).

income is connected with, or incidental to, the trade or business, or the trade or business is substantial in relation to the activity carried on in the other State generating income.
Finally, if a resident of a Contracting State does not satisfy the requirements of any of the above-mentioned tests, he may nonetheless be granted treaty benefits if the competent authority of the State from which the benefits are claimed so determines in its discretion.
LOB clauses are also included in the DTCs with Azerbaijan[53], Estonia[54], Latvia[55], Lithuania[56], Qatar[57], Kazakhstan[58], Kuwait[59] and Iceland[60]. They are more simple than the one included in the DTC with the USA, as they usually read as follows: "*Notwithstanding any other provision of this Convention, a resident of a contracting State shall not receive the benefit of any reduction in or exemption from taxes provided for in this Convention by the other contracting State if the main purpose or one of the main purposes of the creation or of the existence of such resident or any person connected with such resident was to obtain the benefits under this Convention that would not otherwise be available*".[61]

III.3. Controlled foreign companies (CFCs) rules.

Italy has adopted a CFC legislation in 2000.[62] Over the years this legislation has undergone extensive changes, althpugh following the same approach, the so-called jurisdictional approach, meaning that the resident person must include in his tax base his share of all CFC's income.[63]
Originally it applied both to controlled entities (defined by reference to Art. 2359 of the Civil Code, as entities in which a person holds, directly or indirectly, the majority of the votes at the shareholders' meeting or sufficient votes to exert a decisive influence in the shareholders' meeting, or which are under the dominant influence of another person due to a special contractual relationship)[64] and affiliated ones (i.e. entities in which the Italian person holds, directly or indirectly, a profit entitlement exceeding 20%, or 10% in the case of a listed company),[65] provided that they were resident of a State or territory included in a black-list

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[53] Italy-Azerbaijan Double Tax Convention, 21 July 2004, art. 30, par. 1.
[54] Italy-Estonia Double Tax Convention, 20 March 1997, art. 28, par. 1.
[55] Italy-Latvia Double Tax Convention, 21 May 1997, art. 30, par. 1.
[56] Italy-Lithuania Double Tax Convention, 4 April 1996, art. 30, par. 1.
[57] Italy-Qatar Double Tax Convention, 15 October 2002, art. 29, par. 1.
[58] Italy-Kazakhstan Double Tax Convention, 22 September 1994, art. 29, par. 1.
[59] 1993 Protocol to Italy-Kuwait Double Tax Convention, 17 December 1987, art. 1.
[60] Protocol to Italy-Iceland Double Tax Convention, 10 September 2002.
[61] Protocol to Italy-Iceland Double Tax Convention, 10 September 2002.
[62] IT: Art. 1, par. 1, lett. a) of the Law no. 342 of 21 November 2000. For a general overview on the Italian CFC rules *see* G. Maisto, *Il regime di imputazione dei redditi delle imprese estere participate, c.d Controlled Foreign Companies*, IV Riv. dir. trib., p. 39 (2000); D. Stevanato, *Controlled Foreign Companies: concetto di controllo ed imputazione del reddito*, I Riv. dir. trib., p. 777 (2000)*;* R. Cordeiro Guerra, *Le imprese estere controllate e collegate*, in *Imposta sul reddito delle società (IRES)* p. 961 (F. Tesauro ed., Zanichelli 2004).
[63] In this regard, *see e.g.* R. Franzé, *Il regime di imputazione dei redditi dei soggetti partecipati residenti o localizzati in paradisi fiscali*, in *Diritto tributario internazionale* p. 929 (V. Uckmar ed., CEDAM 2007).
[64] Art. 167 ITC.
[65] Art. 168 ITC.

issued by the Ministry of Finance, taking into account a level of taxation significantly lower of the Italian one (less than 50% of the taxation that would apply in Italy)[66] and the absence of adequate exchange of information with the Italian tax authority.
In 2009[67], its scope has been extended to controlled entities residing in States or territories not included in the black-list, if (1) they are subject to a taxation that is less than 50% of the one applicable in Italy and (2) more than 50% of their proceeds qualifies as passive income.
In 2015, the involvement of the affiliated entities in the CFC legislation has been abolished[68] together with the black-list system[69]. Therefore the CFC legislation now applies to all controlled foreign entities, except those resident in EU countries or in countries belonging to EESA with which Italy has an agreement that ensures an effective exchange of information, when their nominal level of taxation is less than 50% of the one applicable in Italy.
The application of this rule can be avoided provided that the resident person shows either that (1) the foreign entity predominantly carries on an actual business in the market of the country where it is located[70] or that (2) the participation in the foreign entity does not achieve the effect of positioning income in a country were the nominal level of taxation is less than 50% of the Italian one.
For entities residing in EU countries, or in countries belonging to EESA with which Italy has an agreement that ensures an effective exchange of information, the application of the CFC rules still requires that (1) they are subject to a taxation that is less than 50% of the one applicable in Italy and (2) more than 50% of their proceeds qualifies as passive income. In this case it can be avoided provided that the resident person shows that the foreign entity does not amount to a purely artificial construction.
In both cases the resident person has the possibility of submitting to the tax authority a request for an advance ruling on the applicability of the regime under Art. 11, par. 1, lett. b, od Law no. 212 of 27 July 2000.
The income of the foreign entity shall be calculated following (with some minor exceptions) the same set of rules that is applicable to resident ones and is taxed at the average rate of the resident taxpayer, but not lower than the corporate income tax rate.

III.4. Linking rules.
III.4.1. Hybrid instruments.

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[66] The criterion for determining a low-tax jurisdiction has been recently amended by Law no. 190 of 23 December 2014. As a result, Philippines, Malaysia and Singapore are no more included in the above-referred list.
[67] Art. 13 of the Law Decree no. 78 of 1 July 2009.
[68] Art. 8, par. 13, of the Legislative Decree no. 147 of 14 September 2015.
[69] Art. 1, par. 142, lett. b), n. 2, of the Law no. 208 of 28 December 2015.
[70] On this element, *see* G. Marino, *La nozione di mercato nella disciplina CFC: verso una probatio diabolica?*, I Riv. dir. trib., p. 1113 (2011).

Although no specific linking rule has been implemented so far in Italian tax legislation following the recommendation issued in Action 2 of the BEPS project, Italian legislation contains nevertheless some provisions that could be referred to as "linking rules".
One of these rules relates to hybrid instruments (instruments which can be classified differently, as equity in Italy and debt in the other country). Art. 44, par. 2, lett. a), second period, of the ITC[71], provides that "participation in the capital or equity, as well as securities and financial instruments… issued by companies and institutions mentioned in art. 73, par. 1, letter d), [i.e. non-resident entities] are considered similar to shares on the condition that the related remuneration is fully not deductible for the non-resident issuer in determining the taxable income in the foreign country of residence; the non-deductibility for this purpose must result from a statement by the issuer itself or by other certain and reliable elements of proof".
Therefore a payment made under one of these instruments is not treated as dividend at the level of the receiving resident taxpayer if the distributing company can deduct fully or partially its amount in its State of residence.
This provision is consistent with the 2014 update of art. 4 of the EU Parent-Subsidiary Directive[72] as well as with the Deliverable Action 2 of the OECD BEPS, which states that "*in order to prevent D/NI outcomes from arising under a financial instrument, a dividend exemption that is provided for relief against economic double taxation should not be granted under domestic law to the extent the dividend payment is deductible by the payer*".[73]

III.4.2. Dividends and participation exemption.
Another rule which aims at countering cross-border mismatches may be found in the provisions dealing with dividends (art. 89, par. 3, ITC) and capital gains stemming from the transfer of certain shares (art. 87, par. 1, lett. c), ITC). Under this rule the 95% exemption ordinarily granted to these items of income, in order to avoid economic double taxation on them, is not applicable when the participated company is located in a no-tax or low-tax jurisdiction. Indeed, in this case no economic double taxation, or an insignificant double taxation, occurs.[74]

III.4.3. Foreign tax credit.
Another linking rule is included in the Foreign Tax Credit (FTC) regime, which is the standard relief method adopted by Italy to avoid international juridical double imposition.

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[71] Art. 2, par. 1, lett. a) of the Legislative Decree no. 247 of 18 November 2005.
[72] EU: Council Directive, 30 November 2011, 2011/96/EU as amended by Council Directive, 8 July 2014, 2014/86/EU, EU Law IBFD.
[73] OECD, Action 2 2014 Deliverable - Neutralising the Effects of Hybrid Mismatch Arrangements, International Organizations' Documentation IBFD.
[74] For an overview of the Italian PEX regime *see e.g.* G. Zizzo, *Participation exemption e riorganizzazioni societarie*, Il fisco, p. 4428 (2003); C. Garbarino, *Le plusvalenze esenti*, in *Imposta sul reddito delle società (Ires)* p. 179 (F. Tesauro ed., Zanichelli 2004); F. Ghiselli – A. Vicini Ronchetti, *Esenzione dei dividendi e delle plusvalenze derivanti dalla cessione delle partecipazioni*, in *La tassazione delle società nella riforma fiscale* p. 149 (Il Sole 24 Ore 2004).

Foreign taxes paid on foreign-source income are creditable against the tax due in Italy up to an amount equal to the share of the Italian tax attributable to the foreign-source income.
Generally, all foreign taxes are creditable. However, art. 165, par. 10, provides that "*if income earned abroad is partially included in the computation of aggregate income, the foreign tax must be reduced accordingly*". The amount of the foreign taxes creditable is therefore limited when the income is partially exempt in Italy.
In the case of inbound dividends, this limitation has been extensively criticized, since it improperly connects the application of an instrument intended to prevent juridical double taxation (the FTC) to the application of an instrument (the dividend's exemption) intended to avoid economic double taxation.[75]

III.4.4. Linking rules connected with the implementation of EU Directives.
Other linking rules derive from the implementation of the EU Parent-Subsidiary Directive[76] and of the EU Interest-Royalties Directive.[77]
According to art. 27, par. 3-*ter*, of the ITAA, dividends and similar income paid by an Italian entity to a foreign person are subject to a withholding tax of 1,375% provided that the recipient is a company or an entity (1) subject to corporate income tax and (2) resident in an EU or EESA country that allows an adequate exchange of information with the Italian tax authorities.
Similarly, under the domestic law implementing the EU Interest and Royalties Directive[78], outbound interest and royalties are exempt from Italian withholding taxes provided that the recipient is an associated company of the paying company and is resident in another EU country or a permanent establishment of such associated company situated in another EU country.

III.5. Limits on the deduction of interest.
In 2003 thin capitalization rules were inserted in ITC.
Under them, if the proportion between debt directly or indirectly connected to qualified shareholdings and equity related to the same shareholdings exceeded 4 to 1, interest on the excess debt was assimilated for fiscal purposes to a dividend. It therefore could not be claimed as a deduction by the paying company and enjoyed the dividend's exemption in the hands of the receiving shareholder, unless it could be demonstrated that the excess debt was justifiable on the basis of the arm's length borrowing capacity of the company.
Since these rules applied even when no tax advantages could stem from the excess debt, it could be argued that they did not have (at least, essentially) an anti-avoidance purpose but were meant to characterize correctly the relation between the company and its shareholders.

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[75] *See* A. Contrino, *Contributo allo studio del credito per le imposte estere*, p. 147 (Giappichelli 2012).
[76] EU: Council Directive, 30 November 2011, 2011/96/EU, EU Law IBFD, as amended by Council Directive, 8 July 2014, 2014/86/EU, EU Law IBFD.
[77] EU: Council Directive, 3 June 2003, 2003/49/EC, EU Law IBFD.
[78] Art. 26-*quater* of the Presidential Decree no. 600 of 29 September 1973.

They were extremely complex to administer. This led to their sudden abrogation and to the enactment in 2007 of a new and more manageable regime.

Art. 96 ITC provides that net interest expenses (i.e. passive interest and like payments minus active interest and like proceeds) may be deducted up to 30% of the entity's EBITDA. The EBITDA, for the purposes of such limitation, is equal to the net value of the production, gross of amortizations and depreciations and lease expenses related to the same assets. Net interest expenses in excess of this amount may be carried forward, without a time limit. Their deduction may be claimed in the year or in the years in which net interest expenses are lower than the 30% of EBITDA. A similar carry forward mechanism is provided for the 30% of EBITDA in excess of net interest expenses.

Within the tax consolidation regime, net interest expenses in excess of one company's 30% of EBITDA may be used to offset the taxable income of the fiscal unit, provided that the 30% of EBITDA of another company participating to the unit exceeds its net interest expenses, and up to the amount of this surplus.

The new regime applies regardless not only of the tax advantages connected to the choice of financing the entity through debt instead of through equity, but also of the relation between the financed entity and the financing person. It clearly leaves behind any anti-avoidance concern, in order to foster a more balanced distribution between debt and equity of companies' capitalization. On this basis, these rules look rather irrational insofar that they apply the same threshold to all companies, regardless the kind of business they carry on.[79]

III.6. Other SAARs.

III.6.1. SAAR relating to tax losses carry-forward.

Art. 84, par. 1, of ITC provides that the tax loss of a tax year may be used to offset 80% of the income of each of the subsequent tax years. The 80% threshold does not apply, according to par. 2, to the tax losses incurred in the first three tax years of activity.

Pursuant par. 3 the carry-forward of the losses is prohibited when (1) there is a change of the shareholding structure of the company, i.e. the majority of shares with voting rights is transferred or otherwise acquired by a third party, even temporarily, and (2) in the tax year of the transfer of the shares, in the two previous years or in the two following ones, the core business changes.

The prohibition does not apply if (1) during the two years preceding the one of the transfer of the shares the company has had a number of employees never lower than 10 units and (2) the income statement of the year preceding the one of the transfer of the shares shows an amount of proceeds from the core business and an amount of costs of employment higher than 40% of

[79] For a critical comment see M. Beghin, *La nuova disciplina degli interessi passivi: dagli incentivi alla capitalizzazione (indicati dalla Commissione Biasco) al contrasto al finanziamento (previsto dalla Legge finanziaria per il 2008)*, in *Saggi sulla riforma dell'IRES. Dalla relazione Biasco alla finanziaria 2008* p. 121 (M. Beghin ed., Giuffré 2008).

the average of the amounts of the same items as shown in the income statements of the previous two years.

The provision aims at fighting the trade of tax losses, enacted through the acquisition of the ownership of a company in economic crisis for the purpose of pouring into it a profitable business and then using its tax losses to offset the income stemming from this business.

III.6.2. SAAR relating to loss carry-forward in merger and demerger.

A SAAR deals also with the carry-forward after a merger of the tax losses accrued before it by the companies involved.

According to art. 172, par. 7, of ITC the carry-forward of these tax losses is allowed only if the income statement of the loss company regarding the year preceding the one of the merger shows an amount of proceeds from the core business and an amount of costs of employment higher than 40% of the average of the amounts of the same items as shown in the income statements of the previous two years. No minimum amount is required, meaning that this requirement targets companies in economic crisis more than “empty boxes”.

If this condition is fulfilled, the tax losses may be used after the merger, but up to an amount equal to the value of the loss company’s net assets, as it figures in its last balance sheet, net of the amount of capital contributions performed in the last 24 months. Indeed, through these contributions the net assets of the company could be easily inflated before the merger just to avoid incurring in the restriction described.

Since there is no need for a change in the ownership of the loss company before the merger, the scope of this provision looks broader than the prevention of the trade of tax losses. It just deals with the combination of the tax losses of a company in economic crisis with the taxable income of a profitable one, through the merger of the two. Along this line, it seems that the first condition has the purpose to strike transactions that, due to the economic situation of the loss company, presumably lack of business reasons, while the intention of the second is to ensure some kind of link between the carry forward of the tax losses and the economics of the organization that accrued them.

According to Art. 173, par. 10, of ITC, the same restrictions apply in demergers to the beneficiary company, but only when it is a preexisting company. Indeed, when the beneficiary is a new company (i.e. established through the demerger), no combination of the tax losses of a company with the taxable income of another company occurs.[80]

III.6.3. SAAR relating to dividend washing transactions.

According to art. 109, par. 3-bis, of ITC, in the case of a transfer of shares or like kind investments, if certain conditions are met, the deduction of the capital loss or of the current loss is prohibited up to an amount equal to the one of the exempt part of the dividends received, in relation with the shares transferred, during the 36 months period preceding the transaction.

[80] *See* IT: Tax Authority, circular letter, 9 March 2010, 9/E.

The provision links the deduction of these losses to the treatment of the dividends received, on the assumption that the losses on the transfer of the shares derive from the payment of the dividends. It has therefore the purpose to avoid that exempt dividends turn into deductible losses, allowing the taxpayer to shelter from taxation income from other sources.
A similar rule, with the same underlying logic, may be found in art. 109, par. 8. Indeed, this provision disallows the deduction of the costs incurred in acquiring the usufruct of shares when the related dividends are exempt pursuant to art. 89 of ITC.

III.6.4. SAARs included in Italian DTCs.
Italian DTCs often include SAARs.
The most famous of them is the "beneficial owner" (BO) clause, dealing with dividends, interests and royalties. It can be classified under the so-called look-through approach[81], since it denies the treaty benefits granted by the source State if the taxpayer residing in the other contracting State is not the beneficial owner of the income.
The BO clause is included in almost all the Italian DTCs, although its content is not uniform. For instance, in the DTC between Italy and Mexico, for the application of the beneficial owner clause to interests and royalties, it is required that the avoidance purpose be exclusive.[82] In the DTC with the United States, the beneficial owner clause goes beyond its traditional boundaries, covering also other items of income.[83] The same happens in the treaties with India[84], Uganda[85], Ghana[86], where the BO clause applies also to the remuneration for technical services, and the treaty with Romania[87], where it applies also to commissions.
Few DTCs signed by Italy define the beneficial owner. The DTC with Germany[88], for example, provides that "*the recipient of the dividends, interest and royalties is the beneficial owner within the meaning of Articles 10, 11 and 12 if he is entitled to the right upon which the payments are based and the income derived therefrom is attributable to him under the tax laws of both States*".
Among other SAARs, it should be mentioned art. 10, par. 5, of the DTC with the UK[89] which grants tax credit on dividends provided that "*the recipient of a dividend shows (if required to do so by the competent authority of the United Kingdom or Italy respectively on receipt of a*

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[81] For an inquiry into the significance of the concept of "beneficial owner" *see* A. Ballancin, *La nozione di beneficiario effettivo nelle convenzioni contro le doppie imposizioni e nell'ordinamento tributario italiano*, Rass. Trib., p. 209 (2006); R. Lupi, *La clausola dell'effettivo beneficiario e il "Treaty shopping"*, in *Il diritto tributario nei rapporti internazionali* p. 86 (L. Carpentieri et al. eds., Il Sole 24 ore 2003); C. Perrone, *Brevi note sul significato convenzionale del concetto di beneficiario effettivo*, Rass. Trib., p. 151 (2003).
[82] Italy-Mexico Double Tax Convention, 8 July 1991, art. 11, par. 8 and art. 12, par. 8.
[83] Italy-United States Double Tax Convention, 25 August 1999, art. 22, par. 3.
[84] Italy-India Double Tax Convention, 19 February 1993, art. 13, par. 2.
[85] Italy-Uganda Double Tax Convention, 6 October 2000, art. 13, par. 2.
[86] Italy-Ghana Double Tax Convention, 19 February 2004, art. 13, par. 2.
[87] Italy-Romania Double Tax Convention, 14 January 1977, art. 13, par. 2.
[88] Protocol to Italy-Germany Double Tax Convention, 18 October 1989.
[89] Italy-United Kingdom Double Tax Convention, 21 October 1988, art. 10, par. 5.

claim by the recipient to have the tax credit set against United Kingdom or Italian income tax respectively chargeable on him or to have the excess of the credit over that income tax paid to him) that the shareholding in respect of which the dividend was paid was acquired by the recipient for bona fide commercial reasons or in the ordinary course of making or managing investments and it was not the main object nor one of the main objects of that acquisition to obtain entitlement to the tax credit referred to in sub-paragraph (b) or sub-paragraph (c) of paragraph 3 or in sub-paragraph (a) or sub-paragraph (b) of paragraph 4 of this Article, as the case may be".

It should also be recalled art. 13, par. 4, of the OECD MTC, which attributes the power to tax to the source State in respect to "*Gains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting State*". A similar provision is included in the DTCs with Canada[90], Philippines[91], Pakistan[92], Estonia[93], Ukraine[94], Azerbaijan[95], Ghana[96], China[97], Mexico[98], India[99], Israel[100], Australia[101], United States[102] and Finland[103].

Another SAAR, which follows the look-through approach and is extensively used in Italian DTCs, may be found in art. 17, par. 2, of the OECD MTC, whose purpose is to fight the diversion of the remuneration for the performances of entertainers or athletes to the so-called star companies. According to this provision, notwithstanding art. 7 and 15, the remuneration may be taxed in the Contracting State in which the activities of the entertainers or athletes are exercised.

Many Italian DTCs explicitly recognize the applicability of domestic SAARs to cases arising in International context. This clause provided under art. 24 of the OECD MTC, is included in the tax treaty with United Arab Emirates[104], Armenia[105], Qatar[106] and Jordan[107]. Similar provisions, although differently worded, are contained in the conventions with Macedonia[108],

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90 Italy-Canada Double Tax Convention, 3 June 2002, art. 13, par. 4.
91 Italy-Philippines Double Tax Convention, 5 December 1980, art. 13, par. 3.
92 Italy-Pakistan Double Tax Convention, 22 June 1984, art. 13, par. 3.
93 Italy-Estonia Double Tax Convention, 20 March 1997,art. 13, par. 1.
94 Italy-Ukraine Double Tax Convention, 27 February 1997, art. 13, par. 2.
95 Italy-Azerbaijan Double Tax Convention, 21 July 2004, art. 13, par. 3.
96 Italy-Ghana Double Tax Convention, 19 February 2004, art. 14, par. 4.
97 Italy-China Double Tax Convention, 14 January 2013, art. 13, par. 4.
98 Italy-Mexico Double Tax Convention, 8 July 1991, art. 13, par. 2.
99 Italy-India Double Tax Convention, 19 February 1993, art. 14, par. 4.
100 Italy-Israel Double Tax Convention, 8 September 1995, art. 13, par. 4.
101 Italy-Australia Double Tax Convention, 14 December 1982, art. 13, par. 2.
102 Italy-United States Double Tax Convention, 25 August 1999, art. 13, par. 1.
103 Italy-Finland Double Tax Convention, 12 June 1981, art. 13, par. 2.
104 Italy-United Arab Emirates Double Tax Convention, 22 January 1995, art. 24, par. 6.
105 Italy-Armenia Double Tax Convention, 14 June 2002, art. 25, par. 6.
106 Italy-Qatar Double Tax Convention, 15 October 2002, art. 24, par. 6.
107 Italy-Jordan Double Tax Convention, 16 March 2004, art. 24, par. 6.
108 Italy-Macedonia Double tax Convention, 20 December 1996, art. 25, par. 5.

Russia[109], Vietnam[110], Ukraine[111], Azerbaijan[112], Moldova[113], Belarus[114], Ethiopia[115], Oman[116], Croatia[117], Georgia[118], Uzbekistan[119], Ghana[120], Uganda[121], Saudi Arabia[122] and Iceland[123]. Among the most relevant domestic anti-avoidance provisions recalled by this clause, it is notable the rule that limits the possibility to deduct certain items of expenses[124], the thin-capitalization rule, which qualifies certain passive interests as dividends for tax purposes[125], or even domestic CFC rules.[126]

IV. Application of GAARs, TP Rules and SAARs.

IV.1. Interaction between GAAR, TP rules and SAARs.

Although GAAR and SAARs share the same purpose, i.e. to oppose tax avoidance practices, they work on two distinct levels. While SAARs, with the objective of safeguarding the effectiveness of the obligations and prohibitions that compose the set of obligations and prohibitions that regulate the determination of the tax base and of the tax, create new obligations and new prohibitions, expanding this set. GAAR is placed outside it, empowering the tax authority to disregard the ordinary regime of the transaction carried out in order to remove the tax advantages stemming from it.

These rules do not therefore clash.[127] The application of a SAAR does not leave out the application of the GAAR. It is true that, when the taxpayer fulfills all the conditions foreseen by a SAAR to enjoy a tax benefit, the assumption should be that the enjoyment of the benefit is consistent with the purpose of the provisions that establish it, so the GAAR cannot apply.

[109] Protocol to Italy-Russia Double Tax Convention, 9 April 1996.
[110] Italy-Vietnam Double Tax Convention, 26 November 1996, art. 24, par. 5.
[111] Protocol to Italy-Ukraine Double Tax Convention, 16 February 1997.
[112] Italy-Azerbaijan Double Tax Convention, 21 July 2004, art. 25 para 6.
[113] Italy-Moldova Double Tax Convention, 3 July 2002, art. 25, par. 7.
[114] Protocol to Italy-Belarus Double Tax Convention, 11 August 2005.
[115] Italy-Ethiopia Double Tax Convention, 8 April 1997, art. 24., par. 6.
[116] Italy-Oman Double Tax Convention, 6 May 1998, art. 24, par. 6.
[117] Italy-Croatia Double Tax Convention, 20 October 1999, art. 24. par. 6.
[118] Italy-Georgia Double Tax Convention, 31 October 2000, art. 25 par. 6.
[119] Italy-Uzbekistan Double Tax Convention, 21 November 2000, art. 24 par. 6.
[120] Italy-Ghana Double Tax Convention, 19 February 2004, art. 25, par. 6.
[121] Italy-Uganda Double Tax Convention, 6 October 2000, art. 25, par. 6.
[122] Italy-Saudi Arabia Double Tax Convention, 13 January 2007, art. 29 par. 1.
[123] Protocol to Italy-Iceland Double Tax Convention, 10 September 2002.
[124] Art. 110, paras. 10-12, ITC.
[125] Art. 96 ITC.
[126] Art. 167 ITC.
[127] G. Zizzo, *Prime considerazioni sulla nuova disciplina antielusione*, in *Commenti agli interventi di riforma tributaria* p. 435 (M. Miccinesi ed., CEDAM 1999); S. La Rosa, *Ancora sugli incerti confini tra abuso del diritto, elusione ed illecito fiscale*, II Riv. dir. trib., p. 353 (2012); Id., *Nozione e limiti delle norme antielusione analitiche*, Corr. Trib., p. 3092 (2006); P. Laroma Jezzi, *Il riporto delle perdite pregresse tra norme antielusive "speciali" e "generali"*, Rass. Trib., p. 200 (2002).

Indeed, it would be clearly in conflict with the logic underlying the choice of a SAAR to oppose tax avoidance practices, i.e. certainty and predictability, to allow a systematic review of the outcome of its application in the light of the GAAR. However, it cannot be ruled out the possibility that the obligations or prohibitions whose purpose is defeated are not (at least, directly) those safeguarded by the SAAR, but precisely those provided for by it. If this is the case, the GAAR shall step in.

In the Italian tax system the GAAR does not act only as a closing rule, intended to strike those avoidance practices that are outside the scope of SAARs, it also works as a guideline in the application of SAARs.

SAARs have two main shortcomings.[128] The first is connected with the risk of under-coverage, i.e. the risk of not catching all abusive practices carried out by taxpayers. This shortcoming can be overcame coupling SAARs with a GAAR. The second is connected with the risk of over-coverage, i.e. the risk of catching, beside the targeted abusive practices, transactions that do not belong to the area of tax avoidance. In order to remove this risk the Italian system allows taxpayers to disregard (certain) SAARs, when it can be shown, in the light of the circumstances of the specific case and of the definition of abuse provided by the GAAR, that the abusive effects that these provisions oppose cannot actually occur.

As pointed out in paragraph III.1.1., case law assigns to TP rules a scope broader than the anti-avoidance one. On this basis, their relation with the GAAR does not differ from the one that this latter rule has with any other rule regarding the determination of the tax base.

IV.2. Procedural rules relating to GAAR and SAARs.

Under art. 11, par. 2, Law no. 212 of 27 July 2000, taxpayers are allowed to disregard SAARs that "*limit deductions, reliefs, tax credits or other subjective positions otherwise permitted by tax system*", when it can be shown that the abusive effects that these provisions oppose cannot actually occur[129]. To this end, taxpayers shall request an advance ruling.

Under art. 11, par. 1, letter c), taxpayers may also request an advance ruling on the application of the GAAR to a specific arrangement or series of arrangements.

In the first case taxpayers have a duty to submit the request, although failure to file the request does not prevent them from disregarding the above mentioned SAARs, but it is punished with an administrative penalty.[130] In the second case they just have a right that they may exercise in order to restrict the level of uncertainty connected to the presence of the GAAR.

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[128] G. Zizzo, *Elusione ed evasione tributaria*, in *Dizionario di diritto pubblico* p. 2173 (S. Cassese, Giuffrè 2006).

[129] F. Pistolesi, *Gli interpelli tributari* p. 97 (Giuffré 2007); G. Fransoni, *Efficacia e impugnabilità degli interpelli fiscali con particolare riguardo all'interpello disapplicativo*, in *Elusione ed abuso del diritto tributario* p. 77 (G. Maisto, Giuffré 2009).

[130] See Art. 10, par. 7-ter, of the Legislative Decree no. 471 of 18 December 1997, according to which a penalty between euro 2.000 and euro 21.000 applies. The penalty is doubled if it is established that the conditions for disregarding the SAAR were lacking.

In both cases, the tax authority has 120 days to issue the ruling. If the term expires and no ruling has been issued, the ruling is deemed in favour of the taxpayer.
Rulings (or deemed rulings) are binding to tax authority, though only in relation to its object and to the taxpayer who filed the request. On the other hand, taxpayers are not bound to them.
In applying the GAAR the tax authority shall follow a specific procedure.
In first place, it shall deliver to the taxpayer a summon describing the reasons why it considers abusive a certain arrangement or series of arrangement and requesting him to file, within 60 days, a written statement on the topic[131]. More in detail, since according to art. 10-bis, par. 9, the burden of proof of the abusive nature of the arrangement or series of arrangements lies on the tax authority, the summon shall describe the reasons why, in its opinion, 1) the arrangement or series of arrangement lacks of economic substance and 2) the tax advantages are undue.
In second place, if the taxpayer files the statement, arguing that those elements (one or both) were absent or that there were sound non-tax reasons for entering the arrangement or series of arrangements, when drafting the grounds of the notice of assessment the tax authority shall specifically address these arguments, explaining the reasons why they were not accepted.
If the tax authority does not comply with these procedural rules the notice is void.

IV.3. Procedural rules relating to TP rules

IV.3.1. Advance pricing agreements (APAs)

Special methods are available for taxpayers in order to settle upward transfer pricing adjustments. To begin with, taxpayers may conclude an advance transfer pricing agreement (APA) with the tax authorities (the so-called “international ruling”).
Advance transfer pricing agreement represents an useful instrument to avoid both double taxation issues and possible subsequent disputes between the tax authorities and the taxpayer. It was introduced by art. 8 of the Law Decree no. 269 of 30 September 2003,[132] and it has been

[131] On this procedure, although in relation with Art. 37-bis Presidential Decree no. 600/1973, see: IT: Cost. Ct., 15 July 2015, 132 commented by G. Ragucci, *Il principio del contraddittorio nella giurisprudenza della Corte Costituzionale*, Rass. Trib., p. 1217 (2015), by G. Marongiu, *Una stella cometa a guida dell’abuso da “diritto vivente”*, Rass. Trib., p. 1213 (2015), and by F. Tundo, *La Corte costituzionale sulla nullità dell’accertamento “antielusivo” anticipato*, Corr. Trib., p. 2670 (2015); IT: Sup. Ct., sec. V, 14 Jan. 2015, 406. See also: IT: Sup. Ct., sec. V, 12 Jan. 2009, 351 commented by F. Tundo, *Richiesta di chiarimenti ex art. 37-bis, commi 4 e 5, del D.P.R. 29 settembre 1973, n. 600: inscindibilità di ratio e forma*, Rass. Trib., p. 1190 (2009); L. Salvini, *La “nuova” partecipazione del contribuente dalla richiesta di chiarimenti allo statuto del contribuente e oltre*, I Riv. dir. trib., p. 20 (2000).
[132] In the *Second Report on the International Standard Ruling Procedure*, issued 19 March 2013, the tax authority indicated that, since 2004, there had been 135 APA requests, 56 of which have been positively concluded. For details see G. Peracin – S. Benettin, *Tax Administration Releases Data on International Standard Ruling Procedures and First International Advance Pricing Agreements*, 20 International Transfer Pricing Rules 4, p. 287 (2013) Journal IBFD.

extensively amended by Legislative Decree no. 147/2015[133]. The relevant provisions can now be found under the new enacted art. 31-*ter* of the Presidential Decree no. 600/1973.
The APA procedure starts with a request of the taxpayer and it ends with an agreement between the taxpayer and the tax authority. Such an agreement is binding for the tax period in which the agreement has been entered and for the four subsequent periods, unless changes occur in the relevant factual or legal circumstances.

IV.3.2. Mutual Agreement Procedure (MAP)

Taxpayers have also the possibility to initiate a mutual agreement procedure (MAP) either under the DTCs concluded by Italy or under the EU Arbitration Convention of 23 July 1990. Detailed regulations on both MAPs are contained in circular letter, 5 June 2012, no. 21/E.
In order to commence a MAP, a resident taxpayer shall file a request, within a precise time limit, to the Ministry of Economy and Finance.
Most Italian DTCs require the case to be brought before the domestic courts before the initiation of a MAP (see, for instance, the treaties with Belgium[134], Russia[135], Sweden[136]). Other treaties do not consider this mandatory, but they recommended it (for example, the treaties with Austria[137], Switzerland[138] and Hungary[139]). Moreover, some DTCs (for example, those with Kazakhstan[140] and Austria[141]) include an arbitration clause, according to which the Contracting States may devolve the decision to the Arbitration Court if they are not able to reach consensus on the matter. Devolution to arbitration is allowed only with the consent of the States and with that of the taxpayer, which must confirm that it is willing to be bound by the arbitrators' decision. Furthermore, it should be noted that, if a MAP is commenced, the Ministry may suspend the collection of the taxes challenged by the tax authorities until the procedure is concluded.[142]
The scope of the EU Arbitration Convention of 1990 is limited to transfer pricing issues among EU Member States.[143]

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[133] For an overview, *see*: G. Gaffuri, *Il ruling internazionale*, Rass. Trib., p. 488 (2004); P. Adoninno, *Considerazioni in tema di ruling internazionale*, IV Riv. dir. trib., p. 68 (2004): C. Romano, *Il ruling internazionale*, in *Imposta sul reddito delle società (Ires)* p. 990 (F. Tesauro, Zanichelli 2007).
[134] Italy-Belgium Double Tax Convention, 29 April 1983, no. 148, art. 25, par. 1.
[135] Italy-Russia Double Tax Convention, 9 April 1996, art. 26, par. 4.
[136] Italy- Sweden Double Tax Convention, 6 March 1980, no. 439, art. 26, par. 1.
[137] Italy-Austria Double Tax Convention, 29 June 1981, no. 762, art. 25, par. 1
[138] Italy-Switzerland Double Tax Convention, 9 March 1976, art. 26, par. 1.
[139] Italy-Hungary Double Tax Convention, 16 May 1977, art. 26, par. 1.
[140] Italy-Kazakhstan Double Tax Convention, 22 September 1994, art. 25, par. 4.
[141] Italy-Austria Double Tax Convention, 18 October 1984, art. 25, par. 4.
[142] IT: Ministry of Finance, Decree of 28 February 2014, art. 5, implementing the Legislative Decree no. 149 of 14 August 2012.
[143] EU: Convention 90/436/EEC, 23 July 1990, on the elimination of double taxation in connection with the adjustment of profits of the associated enterprises, EU Law IBFD. For an overview from an Italian perspective, *see*: P. Adonnino, *Some Thoughts on the EC Arbitration Convention*, 43 European Taxation 11, p. 403 (2003), Journals IBFD; P. Adonnino, *La Convenzione europea 90/436 sulla cosiddetta procedura arbitrale. Limiti e*

The procedure under the Arbitration Convention involves two stages. In the first, a standard MAP is set forth. However, in case the competent authorities do not reach an agreement under the MAP, they are under an obligation to set up an arbitration commission before which the taxpayer has the right to provide any useful information, evidence or data, for the final definition of the procedure. The competent authorities are compelled to take a decision in order to eliminate the double taxation within a time-span of six months from the date on which the commission delivers its opinion. If they reach an agreement, this decision may deviate from the commission's opinion.
Regarding the initiation of the MAP, in a recent decision, the Joint Chambers of the Supreme Court has recognized the right of taxpayers to appeal before the tax courts the denial issued by the competent authority following a request for opening a MAP under the Arbitration Convention[144].

problemi, I Riv. dir. trib., p. 1211 (2002); C. Garbarino – G. Comi, *Mutual agreement procedure: la Convenzione Arbitrale europea sul transfer pricing*, Fiscalità e commercio internazionale 8/9, p. 5 (2012).
[144] IT: Sup. Ct., sec. V, 19 June 2015, 12760.