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Efficiency of mutual assistance in tax affairs

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Summary: 1. Introduction; 2. Relationship between administrative and criminal procedures in tax assessment; 3. Tax crimes and money laundering crimes; 4. The legislative framework against cross border financial crimes; 5. Possible enforcements in counteracting financial crimes.

1. Introduction

In his general report Prof. Jan de Goede has faced the topic of the efficiency in mutual assistance for tax reasons, giving a selection of the aspects that in his opinion it was useful to dealt with. Indeed, the 13 national reports presented by the colleagues that joined the working group gave a rich information and comments about the topic. Many aspects have been highlighted and many questions have been raised in order to find the better way to enforce the mutual assistance network in the EU.

Prof. de Goede's presentation analyzed the national reports in an interesting perspective: how (if it is possible) to assess whether the mutual assistance can be considered efficient according to a common definition of efficiency in mutual assistance.

The general report gives an appropriate classification, on which I completely agree, of the different aspects of mutual assistance, distinguishing among them the following categories: organizational, legal and practical. Moreover, the same report points out on how to recognize a notion, on which I agree, as well[1], of efficiency related to mutual assistance that, according to the literal meaning of the definition, includes both a concept of efficiency in a narrow sense and a concept of effectiveness.

What we only need to keep in mind is that all these concepts are not to be considered separately. In this perspective, although they are often intertwined and therefore cannot be fully separated

1 A wider analysis of my opinion on this point is developed in P. SELICATO, *The efficiency of the mutual assistance: critical analysis and hypothesis of changes*, in P. SELICATO – M. DAFANO (editors), *The Mutual assistance in tax matters. Situation and perspectives in the EU Member States*, Reports of the International Meeting held in Rome, 26 January 2009 (Istituto Poligrafico e Zecca dello Stato, Roma, 2009), p. 52.

from each other, it useful to consider one by one their specific nature to find the right way to analyze the efficiency of a certain instrument related to mutual assistance in tax matters.

Another point of interest in the general report that also comes into evidence in this presentation is the focus made on the economic evaluation of efficiency of the mutual assistance: "do we have and use the right tools or types of assistance to achieve the aims in a cost effective way?" (general report, page 7). Organizational and budgetary aspects are always more relevant in the concrete exploiting of the administrative cooperation in tax matters and national reports refer that sometimes efficiency decreases due to these reason.

The aim of this presentation is to focus a specific aspect connected to the efficiency of mutual assistance in tax matters: how to enforce mutual assistance using the links between administrative and criminal investigation with specific regard to the crime of money laundering and, more in general, to financial crimes.

In this case we face first of all a problem that, according to the general report, can be related to the concept of efficiency in a narrow sense, because in my opinion the rules to be considered give indeed an adequate legal basis to proceed but they need to be correctly chosen and implemented. Moreover, both organizational and practical reasons would suggest to improve the diffusion of such methods, because they could give better result in counteracting illicit in financial and tax matters. But they seem by themselves to be an obstacle in this sense, due to the need of better organizing the tax offices charged of the investigative function. As a consequence, in such cases the effectiveness of mutual assistance could globally weaken.

It has to be pointed out that a great interest for such a kind of action has been developed in Italy due to the particular structure and functions of the Guardia di Finanza, a military force of financial police having in Italy a wide competence in the investigation, giving assistance both to the Agenzia delle Entrate (the Italian Inland Revenue Service) and to the criminal judge. For this reason, the inspectors of Guardia di Finanza are often involved both in tax assessment procedures and in criminal trials against the same persons[2].

Indeed, it is possible that this specific situation of the Italian Tax administration creates better conditions in the action of tax inspectors. But it has to be considered that the legal basis of the investigative actions here considered are the same for (about) all Member States due to the circumstance that the source of the relevant legislation can be found in Community law and in international treaties having a wide area of application (that includes many of the EU Member States). My task is to stimulate the audience to make their considerations about this particular form of cooperation, envisaging if the same approach can be carried out in their countries.

2. Relationship between administrative and criminal procedures in tax assessment

This topic has already been deepened in another presentation[3]. So I only need to remember some

2 Structure and functions of Guardia di Finanza are ruled by Legislative Decree 19 March 2001, No. 68. On this regard see R. MASSINO, *The Mutual assistance in tax investigation*, in P. SELICATO – M. DAFANO (editors), *The Mutual assistance in tax matters. Situations and perspectives in the EU Member States*, cit., p. 42.

3 See C. SACCHETTO, *Exchange of Tax Information. Connections with Criminal Proceedings. The Italian approach*, in P. *SELICATO – M. DAFANO (editors), The Mutual assistance in tax matters. Situations and perspectives in the EU Member States*, cit., p. 10.

points having specific relevance for my following thoughts.

From this limited point of view, it must be pointed out that information obtained in a criminal prosecution can be used in administrative procedures only if the criminal judge authorizes this use. In an international environment a more strict rule must be applied. In fact, in the most reliable opinion, evidences gathered for a criminal procedure cannot be used in an administrative procedure aimed at a tax assessment, due to the special limits arising from any the international agreement[4].

On the other hand, information obtained in administrative procedures can never be used in criminal prosecutions, where each evidence must be collected according to the constitutional right of defense. On this regard, it is a common idea that the content of an administrative act concerning statements given by a person to the foreign tax administration, when those statements were given without the presence of a lawyer, cannot be used in a criminal trial if, after that he/she became a person being prosecuted or under prosecution.

So, if a criminal judge needs to use information collected by the tax administration in an exchange of information procedure without the warranties of the criminal trial, he/she needs to repeat the acquisition following the judiciary cooperation procedures (the so-called "international rogatory letters")[5]. As a consequence, in the perspective of a possible use of information for different scopes, the investigative power in an administrative procedure is of course less effective than that existing in a criminal prosecution.

In the Italian experience, requests of cooperation in tax matters asked by mean of rogatory letters ruled by domestic laws are generally accepted by the States also in those cases where there isn't a convention with the other State[6]. For these reasons, when the officers of Guardia di Finanza, according to their "double function", are charged of a tax inspection were the taxpayer is also suspected of the crime of tax evasion, they directly ask information by mean of a rogatory letter, so that information can be used in a criminal trial also.

On this regard, it must be kept in mind that, according to the principles of reciprocity (Directive No. 77/799/CEE, art. 8.3) and equivalence (Directive No. 77/799/CEE, art. 8.1), rules regarding limitations of the investigative powers in a domestic environment apply also in mutual assistance procedures.

Every time there is a criminal investigation to carry out, conventions for the assistance in criminal matters apply with all the related guarantees. Nevertheless, it's very frequent that some criminal facts appear during an administrative tax inspection. For this reason, the Italian law (art. 220 of actuation rules of the Italian criminal procedural code) states that "when during a supervisory or

4 See G. PEZZUTO, *Paradisi fiscali e finanziari*, cit., p. 347. In the international law it has been pointed out that each treaty is based on a *sui generis* specialty. On this regard see B. CONFORTI, *La «specialitá» dei trattati internazionali eseguiti nell'ordinamento interno*, in AA.VV., *Studi in onore di G. Balladore Pallieri*, Giuffrè, Milano, 1978. Of the same Author see also, *Diritto internazionale*, Edizioni scientifiche italiane, Napoli, 1992, p. 303 ss.).

5 In the Italian legislation see articles 723 and foll. of the criminal procedure code. For a general comment on this tool of international cooperation from the perspective of the Italian right see G. KOJANEC, *Rogatoria internazionale*, in Enc. giur, Vol. XXVII (Treccani, Roma, 1991), where references both to the domestic and the conventional rules. With regard to the use of rogatory letters in tax investigations see C. SACCHETTO, *Exchange of Tax Information. Connections with Criminal Proceedings. The Italian approach*, cit., particularly at p. 13.

6 This circumstance is referred by G. PEZZUTO, *Paradisi fiscali e finanziari*, Il Sole 24 Ore, Milano, 2001, p. 340 and foll..

control activity provided by law appear some criminal evidences, the necessary operations to ensure the evidences and gather every useful element for the application of the criminal law must be carried out in conformity with the following code". This rule represents the borderline between the application of administrative assistance on the basis of tax treaties and the administrative assistance on the basis of conventions for the assistance in criminal matters.

As a consequence, when the tax authorities are proceeding against a conduct having a criminal relevance, only a criminal cooperation will be possible. Nevertheless, this doesn't mean that the presence of criminal evidences within an administrative-tax inspection imposes its merger inside the criminal proceedings. In fact, the borderline between the two proceedings is represented by the real purpose followed by the authority. In our literature it has been stated that tax inspector are free to carry out administrative activities without needing to respect criminal procedure rules, if they are made before that an evidence of a crime comes out[7]. But it is also clear that if the information are not collected by mean of a rogatory procedure they cannot be admitted as an evidence in a criminal trial f the evidence[8].

3. Tax crimes and money laundering crimes

In the more recent analysis of the international economy a new and worrying phenomenon is coming into evidence: the "criminal enterprise"[9]. This kind of subjects, often organized in a web of coordinated natural and juridical persons, use resident and nonresident companies (or other subjects) to hide and share among themselves the profits of their illegal activities.

In this perspective, there is a strong connection between tax evasion and money laundering, that can assume different shapes. In the practice, a bidirectional and synergic relationship can be observed between the two groups of illicit:

- From one hand, tax evasion produces illegal and hidden wealth in the same way of the most part of criminal activities: if tax evader wants to be free to use this wealth, he needs to "clean" it by mean of money laundering so that, in a second time, he/she can employ the "cleaned" money in regular financial or business activities.
- From the other hand, some kinds of tax crimes can help money laundering in different ways: a) crime of false invoicing can help tax evaders to recycle the profits of the evasion; b) purchasing goods without invoice helps criminal enterprises to recycle money deriving by (criminal) activities into goods to sell legally.

Due to this connection, the two kinds of illicit are normally carried out in the same time and by the same group of persons. They make use of the same resources and are carried out by mean of the same financial tracks[10]. For this reason the efficiency of investigations would increase if it could be

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7 On this regard see G. PEZZUTO, *Paradisi fiscali e finanziari*, cit., p. 358; F. ARDITO, *La cooperazione internazionale in materia tributaria*, (Cedam, Padova, 2007), p. 161 and foll..

8 Case law on this regard is not wide: for this statement see Tribunale di Bari, Sez. I, 9th-24th March 1999, no. 1261. The Italian Supreme Court has given the same opinion. See Cass. SS.UU. pen., no. 45477; Cass. pen. No. 2601. This trend follows a recent decision of the Constitutional Court which on this regard has stated that "to determine a conversion from a mere administrative control activity into a criminal one, or vice versa, it isn't sufficient a simple advice of crime, but it's necessary a real identification of a person as "quasi-defendant". See G. PEZZUTO, *Paradisi fiscali e finanziari*, cit., p. 358-361.

9 N. POLLARI, *L'impresa criminale ed i suoi effetti sui mercati e sugli aggregati macroeconomici*, in Riv. Guardia Fin., No. 3/99, pp. 1037 – 1099.

10 N. POLLARI, *Tecnica delle inchieste patrimoniali per la lotta alla criminalità organizzata*, (Laurus Robuffo, Roma,

carried out in a joint way.

4. The legislative framework against cross border financial crimes

To carry out their plans of tax evasion and money laundering in an international environment, taxpayers usually locate their companies in countries having the nature of a tax haven or a financial haven[11]. During the time, several international agreements have been laid down to counteract the illegal use of such kinds of locations. This wide network gives a big help in investigations related to this topic:

a) ***United Nations convention against illicit traffic in narcotic drugs and psycho-tropic substances (Wien, 19-20 December 1988):***
   This Convention, that has been signed by 145 States, that gives rules to counteract use of financial havens, by mean both of domestic measures and instruments of mutual assistance. The most important to remember for our scope are:
   - Specific criminal sanctions
   - Seizure of the illicit profits in all contracting States
   - Overcome national bank secrecy for exchange of information
   - Judiciary mutual assistance

   Nevertheless, this agreement is limited to the scope of counteracting drugs crimes. So that its use in tax matters is

b) ***Strasbourg Convention (8 November 1990):***
   To counteract tax crimes in the EU could be applied the Convention signed in Strasbourg, under the patronage of the Council of Europe, on 8th November 1990 concerning Judicial Assistance in Criminal Matters, put into effect in Italy with Law of 9th August 1993, No. 328. This convention integrates the U.N. Convention signed in Wien on 19-20th December 1988, put into effect in Italy with Law 5th November 1990, No. 328. The convention has been signed by 45 States.
   This Convention gives a more punctual definition of the crime of money laundering. With respect to the Wien Convention, its instruments of cooperation are not limited by the kind of crime from which raises money. So that also tax crimes are included.
   The Strasbourg convention deals with the crime of money laundering as the cause of tax crimes. The importance of this agreement in enforcing the struggle against tax crimes is due to the fact that it provides that the State where tax crimes are committed can pursue money laundering crimes, also if they are committed in another State.

c) ***New York Convention (9 December 1999):***
   This agreement has the scope to counteract illicit destination of money (the so-called "money dirtying") and not, as in the Wien Convention, its illicit origin. In this way it provides rules aiming at prevent financing of terrorism. In our perspective, the interest for the New York Convention raises to the fact that it gives a wide definition of "financial resources", including every kind of wealth, tangible and intangible, movable and immovable, whatever possessed. Also important is the new approach that the New York Convention gives to financial investigations, providing the so-called "pro-active investigations", aimed at preventing crimes and not only investigating crimes already done, as in the traditional

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2000), p. 807.

11 The difference between fiscal and tax havens is highlighted by G. PEZZUTO, *Paradisi fiscali e finanziari*, cit., p. 1 to 15, especially p. 11 to 15 for an overview of the non-fiscal opportunities in using these locations. On this topic see also M. LUPOI, *Tax havens*, in Enc. giur., Vol. XXX, (Treccani, Roma, 1993) and P. SELICATO, *Paradiso fiscale*, in Il Diritto. Enciclopedia giuridica del Sole 24 Ore (Milano, 2007).

scheme of "re-active investigations"[12].

d) ***European Treaty of Shengen (14 June 1985) and Convention for its implementation (19 June 1990):***

Italy is included among the Member States who signed the Treaty of Shengen ant the Convention for its Implementation[13]. According to article 39 of the Convention, each contracting State is expressly obliged to establish a national liaison office. At this scope, Italy has created a special central office charged of the exchange of information with the police corps of the other contracting States, named S.I.Re.N.E. (Supplementary Information Request at the national Entries)[14].

The Treaty of Shengen is not directly implied in tax matters but it provides some tools that enforce police cooperation between Member States. Articles 39 to 47 of the Treaty rule the procedures for the exchange of information. Particularly article 39 provides the "police mutual assistance" and binds the police services of Member States to give each other assistance within the limits of their powers. Article K19 of Maastricht treaty has stated the creation of an European office of police named Europol[15], that starting to 1st January 2002[16] expressly includes in its scope crimes against private and public property and frauds. Money laundering of profits derived by all crimes covered by the Treaty is included.

5. Possible enforcements in counteracting financial crimes

In the recent times, the Italian tax administration is implementing new strategies to counteract at the same time both money laundering crimes and tax evasion[17]. This joined action is based on the fact that, being included in criminal matters, the investigative power against money laundering is stronger than the power to ask information in administrative mutual assistance procedures and in judicial investigations on tax crimes as well.

Indeed, mutual judicial assistance agreements generally exclude tax crimes. But, according to the Conventions listed in point 4, States could ask for assistance related to money laundering crimes and then use information (also) for tax assessment purposes. For this reason the opportunity of a joined action against tax evasion and money laundering could be considered of great interest for the scope of enforcing efficiency of mutual assistance in tax matters.

This opportunity has been already caught by the OECD, aimed at avoiding the improper use by banks and other financial agents of the so-called "fiscal excuses"[18]. The OECD's action goes in the

12 These characteristics are well highlighted by M. ADINOLFI – C. DI GREGORIO – G. MAINOLFI, *Le transazioni finanziarie sospette e il contrasto al terrorismo: controlli e adempimenti* (Bancaria Editrice, Roma, 2006), p. 127.

13 Italy has ratified this Convention by Law No. 388 0f 30th September 1993.

14 G. TROTTA, *Scambio di informazioni ...*, cit., p. 937-940.

15 That has been established by the Convention signed in Brussels on 26 July 1995 and ratified in Italy by Law 23 March 1998 No. 93.

16 European Council, Dec. 6 December 2001.

17 On this regard see A. NUZZOLO, *Riciclaggio ed evasione fiscale: connessioni normative e sinergie nell'azione di contrasto*, in Notiziario (Scuola di polizia tributaria della Guardia di Finanza), 2003, No. 5, p. 683. On the same topic see also I. CARACCIOLI, *Indagini finanziarie, normativa antiticiclaggio e reati tributari*, in Il Fisco, 2009, p.1371. For the new perspectives in the tax assessment by mean of financial investigations see AGENZIA DELLE ENTRATE, *Indagini finanziarie – Poteri degli Uffici*, Circolare n. 32/E of 19 October 2006; GUARDIA DI FINANZA, *Istruzione sull'attività di verifica*, Circolare n. 1/2008.

18 Agents committed in gathering information under the money laundering rules often think they can refuse to report suspicious transactions of money because they are connected to tax evasion and not to money laundering. With regard to the "fiscal excuse" practice see OECD, *Access for tax authorities to information gathered by anti-*

line of a growing attention on this problem expressed in 1998 in a meeting of the G7 Ministry of Finances[19]. In the same period, the OECD organized a series of meetings of its FATF (Financial Action Task Force)[20] to deepen the same topic, who released the Recommendation no 13 of year 2003[21].

Notwithstanding, the legal base of these measures at a national level is still very different and there is a strong need to standardize measures aiming at counteracting money laundering together with tax evasion, due to the fact that it is a long time by now that the taxpayers have based the survival and the growth of these practices on the cultural, legislative and economic differences existing in the different States.

In the following lines are summarized information on a small number of OECD Member States (EU and non-EU) gathered in a recent study of Guardia di Finanza[22]. States are listed in an order based on the increasing level of effectiveness of their legislation:

a) **Japan:** tax authority has not access to the information on suspicious transactions gathered by the JAFIO (Japan Financial Intelligence Office).
b) **Luxembourg:** same situation of Japan about communication of information. Moreover, the SAV (*Service Anti Blanchement*) is placed under the direct control of the judiciary power.
c) **Belgium:** the Belgian system is based on the mediation of the judge. When a suspect of money laundering raises from the databank of transactions, the CTIF (*Cellule du Traitement des Informations Financières*) transmits a file to the competent judicial authority, that opens the criminal proceeding. If the judge sees that by the facts reported raise: I) an organized tax fraud or; II) an illicit coming into the competence of the Customs and excise administration, needs to inform the Ministry of Finance.
d) **Canada:** access to information on suspicious transactions is possible if the two following conditions are both present: I) the transaction is attributable to a money laundering activity; II) the same operation is also dangerous for the fiscal interests of the State.
e) **Australia:** According to a definition given by the FATF, Australia adopted a "whole system approach": information on suspicious transactions gathered under the anti-laundering legislation is direct and complete.
f) **United States of America:** lot of similarities with the Australian system: tax Authorities and anti-laundering Authorities are strictly connected.

As already said, the Italian case is particular, due to the double competence of the Guardia di Finanza, both in administrative and in criminal fields. In fact, according to article 19, par. 1, of the

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laundering authorities (Paris, 18 November 2002).

19 In the G7 Birmingham Summit of 15-17 May 1998, the Ministries of Finances of the Member States committed the G7 to lead international action on tax related crime by gathering more intelligence through money laundering systems and providing for it to be shared internationally by tax authorities. See press release of the meeting at http://www.g8.utoronto.ca/summit/1998birmingham/harmfultax.html.

20 The FATF (Also named GAFI – Groupe d'Action Financiére sur le Blanchement de Capitaux), has been instituted in 1989 in Paris between 33 States, for the most part OECD and EU members. The fundamental scope of FATF is to control and address the policies of its Member States in the implementation of measures aimed at realizing an effective combat against money laundering.

21 In the interpretative note of this Recommendation it is stated that *"les opérations suspectes devraient être declarées par les institutions financiers que ces opérations soient ou non considérées comme portant également sur des questions fiscales. Les pays devraient tenir compte du fait que, pour dissuader les institutions financiers de déclarer une opération suspecte, les blanchisseurs de capitaux s'efforceront sans doute d'affirmer, entre autres, que leurs operations portent sur des questions fiscales"*.

22 SCUOLA DI POLIZIA TRIBUTARIA DELLA GUARDIA DI FINANZA (34° Corso Superiore di Polizia Tributaria), *I rapporti tra evasione fiscale e riciclaggio* (Lido di Ostia, giugno 2008).

Italian Law 23 December 1991, No. 413, the officers of Guardia di Finanza "must" (not only "can") inform Agenzia delle Entrate of facts that can be considered fiscal violation. So, if the "Nucleo di Polizia Valutaria" of the Guardia di Finanza receives information of suspicious transactions valuable in the light of the money laundering legislation, it must transmit such information to the tax authority[23].

More recently, Agenzia delle Entrate[24] stated that bank investigations are autonomous control activities that can have different outcomes, and that Italian legislation allows tax administration to use information gathered in a criminal proceedings. In the same line, also Guardia di Finanza has stated that bank investigations are the main instrument in fighting tax evasion[25] and that the Italian legislation has recognized that information gathered by mean of the instruments provided in the anti-money laundering rules can be directly used for tax assessment[26].

Some problems could raise to coordinate a sole bank investigation for the two different purposes. In this case some criticalites can raise with reference to the rules regarding the taxpayer's protection[27]. The following differences can be observed:

- In the administrative bank investigations for tax purposes taxpayer must take part to the procedure;
- In money laundering criminal investigations he/she can't.

It is difficult to solve this problem, also in a *de iure condendo* perspective. In fact, in the administrative investigations (those other than bank investigations as well) an always wider participation of the taxpayer is generally requested according to the transparency principle that applies in the relationships between the individuals and every public administration. So that it seems impossible that such a rule could be cancelled at now[28]. On the other hand, it is also impossible that persons inquired in a pre-trial investigation for money laundering crimes would be informed of the investigation that is going on, due to the principle of secrecy of criminal investigations.

What could be done at the moment is to carry on separate investigations that should be compliant to their specific rules and after share the outcomes in the light of an integrated action against the "criminal enterprises".

In this perspective (and we see that Italian tax authorities are going in this direction), there is the need to widen the basis of the information gathered in financial investigations, including not only information related to income or VAT aspects but also related to fortune of the investigated persons and to their movements. The results of a so complete financial investigation could be

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23 In this sense see GUARDIA DI FINANZA, *Manuale operativo in materia di riciclaggio*, usura e circolazione di capitali, Circolare No. 176000 of 1 August 2001.

24 AGENZIA DELLE ENTRATE, *Indagini finanziarie – Poteri degli Uffici*, Circolare n. 32/E of 19 October 2006, Chapter V.

25 GUARDIA DI FINANZA, *Istruzione sull'attività di verifica*, Circolare n. 1/2008, Vol. III, Part V.

26 GUARDIA DI FINANZA, *Istruzione sull'attività di verifica*, Circolare n. 1/2008, Vol. I, Part I, Chapter 5, pages 39-40, where it is made reference to art. 36, par. 6, of the Legislative Decree 21 November 2007, No. 231, that implemented in Italy the Directive No. 2005/60/EC of 26 October 2005 (Third Directive on money laundering).

27 In this sense see A. NUZZOLO, *Riciclaggio ed evasione fiscale: connessioni normative e sinergie nell'azione di contrasto*, cit., p. 704-706.

28 A large part of the Italian literature thinks that taxpayer is always admitted to have access to the documents of the administrative procedures in which he/she is involved. On this regard see P. SELICATO, *L'attuazione del tributo nel procedimento amministrativo* (Giuffrè, Milano, 2001), p. 374 and foll.. For an updated review of this topic see P. BURLA, G. FRACCASTORO, R. BABORO, F. COLAPINTO, *L'applicabilità della L. 241/90 al procedimento tributario* (Giuffrè, Milano, 2008), p. 213 and foll., where the position favorable to the taxpayer is confirmed.

employed in both administrative and criminal procedures according to the different needs to pursue.

Of course this perspective is better pursuable in a legislative environment that excludes the bank secrecy for tax reasons. According to this, it seems important that the Directive Proposal No. 29 of 2009[29], amending the Directive No. 77/799/EEC, should be approved as soon as possible. As well known, this proposal provides the removal of the bank secrecy for tax reasons within EU Member States[30].

29 EUROPEAN COMMISSION, *Proposal for a Council Directive on administrative cooperation in the field of taxation*, COM(2009) 29 final of 2 February 2009.

30 For more references on this see again P. SELICATO, *The efficiency of the mutual assistance: critical analysis and hypothesis of changes*, cit., par. 5, p. 58.