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From the «Revenue Rule» to transnational administration in tax law*

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Abstract

The essay analyses the evolution of the concept of mutual recognition in tax matters. Starting from the less recent manifestations of State sovereignty, on the basis of which the only relevant fiscal law in one State is its own and no recognition of foreign acts could be made, we come to more recent times in which - after the overcoming of that approach - the final landing place remains unclear.

Apart from those exceptional cases in which a State unilaterally recognizes an act coming from the tax administration of another State, it seems that from the initial non-recognition, the national tax systems has jumped to much more sophisticated forms of transnational administrative procedure. According to such recent development, the act is the result of the contribution of several national authorities (sometimes also supported by supranational bodies) and, as such, it is a genuinely transnational act or -at least- an internal act that represents however the final outcome of a genuine transnational procedure.

This evolution can be understood in the perspective of the aim of States to defend their sovereignty in fiscal matters as far as possible. It is clear that the tax sovereignty is more compressed where the matter concerns the recognition of a foreign administrative act. On the contrary, fewer problems arise when the tax administration of a State contributes since the beginning,

together with other administrations, to the formation of an act that - albeit originated in one State and destined to produce effects in another - is shaped by the simultaneous participation of the various institutional actors involved.

One can speak, therefore, about a new notion of tax sovereignty, under which the protection of the peculiarities of a single legal system is realized no more through the opposition and the non recognition, but with a *ex ante* procedural cooperation.

A strong influence in this sense comes from the European Union, where we can find several examples of transnational procedures aimed at guaranteeing the circulation of fiscal administrative acts and decisions among the Member States. In the common space, the reference to the «foreign» act subject to recognition becomes somehow obsolete.

1. Historical background: tax law as a place of non-cooperation

Talking about mutual recognition of foreign administrative acts in tax matters may seem like a contradiction. Tax law, in fact, is an area in which, for a very long time, an opposite attitude prevailed: not recognition, nor collaboration; rather, competition and therefore mutual closure.

The reasons for this original approach are twofold: sovereignty and territoriality. The power to impose and administer taxes has always been considered as an expression of State sovereignty, with the consequence that no relevance of tax laws and administrative practices is allowed in a legal order other than that from which they originate[1]. Reasoning differently, according to this approach, would mean admitting a kind of interference of State - more precisely, of its norms and of the procedures that are rooted in them - in a foreign territory, with consequent violation of the international law principle of sovereign equality of States[2].

At the same time, the principle of territoriality[3] circumscribes both the facts to be regulated and the rules designed to regulate them within the boundaries of a single law system[4]. Therefore, the cases in which the tax claim of a State goes some way beyond its boundaries, involving the administrative authorities of another legal system, are quite exceptional[5].

It has been therefore the concurrent operation of legal reasons (sovereignty and limitation of the effectiveness of tax rules within the boundaries of a single State) and of factual circumstances (the economic model which prevailed for centuries did contemplate only marginally exchanges between the various States) which long prevented from contemplating forms of recognition abroad of tax acts issued by a State, apart from mutual procedures

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1 As an author has correctly highlighted with regard the seminal stage of non cooperation, «*la non collaborazione fra Stati in materia fiscale dipenderebbe dalla natura delle norme tributarie e, quindi, dal carattere essenzialmente pubblico e politico di queste disposizioni, che ne confinerebbero il rilievo entro il territorio dello Stato che le ha emanate*» (Persano, *La cooperazione internazionale nello scambio di informazioni. Il caso dello scambio di informazioni in materia tributaria*, Turin, 2006, 8).

2 Isenbaert, *The contemporary meaning of soveregnty in supranational context of the EC as applied to te income tax case law of the ECJ*, *EC Tax Review*, 2009, 264; Janssen, *Fiscal Sovereignty of the Member States in an Internal Market. Past and Future*, Alphen aan den Rijn, 2011. For the doctrine of public international law, one can recall the study of Pocar, *L'esercizio non autorizzato del potere statale in territorio straniero*, Padua, 1974.

3 The principle of territoriality for a long time dominated the relationship between two or more legal systems, as evidenced by the judgment of the Permanent Court of International Justice of 7 September 1927 in the *Lotus* case. According to the AG Kokott, the latter judgment stated that «international law leaves States a wide measure of discretion which is only limited in certain cases for rules which relate to acts outside their territory» (Opinion of Advocate General Kokott delivered on 12 September 2019, case C-482/18, para. 44).

4 On the principle of territoriality see, in general, Fransoni, *La territorialità nel diritto tributario*, Milan, 2006.

5 Cordeiro Guerra, *I limiti alla potestà impositiva ultraterritoriale*, *Rivista trimestrale di diritto tributario*, 2012, 31.

for the administration of matters of common interest introduced by international conventions[6].

In this scenario, one can easily understand the rule coined by the jurisprudence of the United States[7], the so called «revenue rule»[8]: according to the latter, not only States remain free not to cooperate with each other for the realization of mutual tax claims, but even there would be an international law obligation of non-cooperation, based precisely on the public nature of the duty to pay taxes and on the consequent irrelevance for a State of the tax rules and tax acts implemented by the authorities of another State. According to the well known dictum of Lord Mansfield, «no country ever takes notice of the revenue laws of another»[9].

A similar approach, crystallized in common law systems as a result of the binding nature of the judicial precedents, has also, over time, penetrated into different legal systems, like the civil law ones. For example, in a not recent Italian decision we find it stated that *il debito tributario verso uno Stato straniero è legalmente inesistente in Italia*[10].

In such a context, no space could be left for the attribution of legal relevance to administrative acts originating from the tax administration of a State other than the territorial one. Indeed, as has been said, there is an obligation to deny that such acts could operate outside the borders even after an act of recognition, in order to avoid the risk of a subordination of the administrative structure of a State to interests irrelevant for the latter and linked only to a foreign legal order[11].

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[6] See, at the very beginning of the analysis of international cooperation in tax matters, Sacchetto, *Il principio della irrilevanza e della inapplicabilità delle leggi tributarie e degli atti di imposizione di ordinamenti stranieri nella giurisprudenza degli Stati di common law e dell'Europa continentale*, in *Rivista di diritto finanziario e scienza delle finanze*, 1976, part I, 79.

[7] The judicial rule under consideration has spred quickly in many systems of common law: references in that sense can be found in UK (*Attorney General v. Lutwydge*, 1729) and Canada (*USA v. Harden*, 1963).

[8] An in-depth analysis of the «revenue rule», its origins and its applicability in present times can be found in Mallinak, *The revenue rule: a common law doctrine for the twenty-first century*, in *Duke Journal of Comparative and International Law*, 2006, 79.

[9] House of Lords, 5 July 1775, *Holman et al. v. Johnson*.

[10] «The individual's tax debt to a foreign state is legally non-existent in Italy» (Tribunale di Genova, 21 May 1951) (author's translation). On such a penetration, see Mastellone, *La mutual assistenza nella riscossione dei tributi all'estero,* in *Diritto tributario internazionale. Istituzioni* (edited by Cordeiro Guerra), Milan, 2016, 327.

[11] That situation is clearly put in evidence by Sacchetto, *Tutela all'estero dei crediti tributari dello Stato*, Padua, 1978.

2. Signs of evolution: the overcoming of the revenue rule

Although strongly rooted - specifically in jurisprudential practice more than in national legislations[12] - the principle of the revenue rule has undergone a strong, albeit gradual, downsizing during the last twenty years[13]. In this reverse path, some factors have led to its development more than others.

First of all, the change in the economic context. Globalization has made people and wealth much more mobile, with the consequence that transnational cases - that is, cases that place themselves partly outside a single legal system - have become much more numerous than in the past. The most recent scenarios, with the dematerialization of wealth and the digitalization of economic activities, are actually imposing the overcoming of the traditional taxation approach on a territorial basis, in favor of concepts more open to international influences[14].

As a consequence of the operation of these elements - and here we come to the second profile of interest - the importance of opening the nationl fiscal system to external influences is gradually admitted: cooperation between tax administrations becomes necessary to allow them to determine correctly the ability to pay of their resident taxpayers[15]; and that regardless of the existence of clauses of reciprocity[16].

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[12] The fact that, in the absence of positive rules, the principle in question has been for a long time applied in practice could suggest that it assumed a customary nature. Naturally, to confirm this impression, a deep examination of international practice would have to be carried out, which is clearly not possible here.

[13] Briggs, *The Revenue Rule in the Conflicts of Laws: Time for a Makeover*, *Singapore Journal of Legal Studies*, 2001, 280; Castel, *Foreign Tax Claims and Judgements*, *Canadian Bar Review*, 1964, 277; Cohen, *Non-enforcement of foreign tax law and the Act of State doctrine: a conflict in judicial foreign policy*, *Harvard International Law Journal*, 1970, 1; Silver, *Modernizing the revenue rule: the enforcement of foreign tax judgements*, *Georgia Journal of International and Comparative Law*, 1992, 609. In the Italian doctrine, an early attempt to strengthen the need to overcome the traditional revenue rule has been proposed by Fedele, *Prospettive e sviluppi della disciplina dello scambio di informazioni fra Amministrazioni finanziarie*, in *Rassegna tributaria*, 1999, 49.

[14] McLure, *Globalization, Tax Rules and National Soveregnty*, *Bulletin for International Taxation*, 2001, 328.

[15] For a thorough analysis of the rising and development of international cooperation, see Barassi, *Cooperazione tra amministrazione fiscali*, in *Dizionario di Diritto pubblico* (edited by Cassese), Milan, 2006, 1525. More recently, one can make reference to Dorigo, *Scambio di informazioni nel diritto tributario internazionale*, in *Digesto delle discipline privatistiche - Sezione commerciale*, Agg. VIII, Turin, 2015, 480.

[16] About the development of a large path for cooperation between States see Oberson, *International Exchange of Information in Tax Matters. Toward Global Transparency*, Cheltenham,

At present, many taxable facts are linked to two or more national legal systems. Therefore, two consequences emerge: the essentiality of transnational cooperation - because the State of residence of the taxpayer, legitimized to tax his income wherever produced in the world, is not able to know exactly the sources of income located beyond its borders and therefore is not able to satisfy its tax claims without the collaboration of the territorial State[17] - and the need to recognize the fiscal administrative acts coming from another legal order even without reciprocity, or rather in the presence of a «future and uncertain» reciprocity[18].

It is worth noting that the revenue rule has been overcome also in the legal system where this theory had its origin, that of the United States: here, the Federal Supreme Court in *Pasquantino* ruled that the traditional duty not to cooperate would no longer impose the US tax authorities to deny the implementation of a tax claim held by Canada, even though the US Treasury did not have any direct interest in this matter[19].

However, the position expressed in Pasquantino is now reflected in many instruments, both national and international, which somehow take for granted the possibility that foreign administrative tax acts operate outside the boundaries of the legal order of origin and establish a system of mutual collaboration between different States both for the formation of the tax act and, subsequently, in relation to its effective implementation.

From this point of view, and as we will see later on, a decisive contribution comes from the European Union's legal system[20], where moreover the principle of mutual recognition (outside the fiscal issues) has long been recognized following the need of mutual trust between Member States[21].

2015. The issue of reciprocity in the context of international cooperation procedures has been investigated by P. Selicato, *Il Modello di convenzione OCSE del 2002 in materia di scambio di informazioni: alla ricerca della reciprocità nei trattati in materia di cooperazione fiscale*, in *Rivista di diritto tributario internazionale*, 2004, 11.

17 Owens, *Moving towards better transparency and exchange of information on tax matters*, in *Bullettin for international taxation*, 2009, 557, notes that «cooperation between tax administrations is now becoming the rule».

18 See Mastellone, *Recent developments in cross-border enforcement of tax liability*, in *Diritto e pratica tributaria Internazionale*, 2009, 581.

19 US Supreme Court, 26 April 2005, *Pasquantino et al. v. United States*.

20 The EU legal system has been incisively defined as «anti-sovereign» (Boria, *L'antisovrano. Potere tributario e sovranità nell'ordinamento comunitario*, Turin, 2004).

21 On the issue, see *inter alia* Favilli, *Reciproca fiducia, mutuo riconoscimento e libertà di circolazione di rifugiati e richiedenti protezione internazionale nell'Unione Europea*, in *Rivista di diritto internazionale*, 2015, 1; Bassi, *Mutuo riconoscimento e tutela giurisdizionale*, Milan,

Thanks to the latter character, the EU -despite the limitations imposed by the Treaties- is experiencing a gradual overcoming of the concept of mutual recognition for tax purposes[22], to the advantage of common procedures aimed at creating genuine transnational tax acts[23].

3. The circulation of fiscal administrative acts in the supranational context: an overview

Before analyzing some of the more relevant cases that confirm in practice the abstract considerations which precede, it may be useful to delineate the main features of the system which, as we will see, emerges from this analysis. The now established overcoming of the previous status quo based on non-cooperation does not yet clarify what the characteristics of the new course based on collaboration are. Thus, the question arises as to whether and within what limits one can speak of mutual recognition in the tax law sphere.

The picture appears in that context quite complex. Although there are cases in which a State unilaterally recognizes an act coming from the tax administration of another State, they appear to be exceptions. It seems that from the initial non-recognition, the national tax systems has jumped to much more sophisticated forms of transnational administrative procedure, in which the act is the result of the contribution of several national authorities (sometimes also supported by supranational bodies) and, as such, it is a genuinely transnational act or -at least- an internal act that represents however the final outcome of a genuine transnational procedure. And this

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2008; Nicolin, *Il mutuo riconoscimento tra mercato interno e sussidiarietà*, Padova, 2005.

[22] It is worth noting that according to an author the development of the principle of mutual recognition for tax purposes within the EU runs counter the legitimate expectations of Member States with regards a not harmonized field (Ghosh, *Tax Law and the Internal Market: A Critique of the Principle of Mutual Recognition*, in *Cambridge yearbook of European legal studies*, 2014, 1899). However, the resistance of Member States towards mutual recognition covers also a field already harmonized like that concerning VAT, according to Genschel, *Why no mutual recognition of VAT? Regulation, taxation and the integration of the EU's internal market for goods*, in *Journal of European Public Policy*, 2007, 743.

[23] See Lafarge, *EU law implementation through administrative cooperation between Member States*, in *Rivista Italiana di Diritto pubblico comunitario*, 2010, 119. A wide study concerning the interactions between national tax laws, EU law and international law, not limited to the issues under discussion in the present article, can be found in Bizioli, *Il processo di integrazione dei principi tributari nel rapporto fra ordinamento costituzionale, comunitario e diritto internazionale*, Padua, 2008.

by omitting, or in any case by not assigning particular importance, to the intermediate phase of recognition of the act in a different legal system, which instead has always had a central importance outside the tax area[24].

This evolution can be understood in the perspective of the aim of States to defend their sovereignty in fiscal matters as far as possible. It is clear that the tax sovereignty is more compressed where the matter concerns the recognition of a foreign administrative act, even if this is done through a procedure of exequatur or replacement of it with an internal act of equal content and effects. On the contrary, fewer problems arise when the tax administration of a State contributes since the beginning, together with other administrations, to the formation of an act that - albeit originated in one State and destined to produce effects in another - is shaped by the simultaneous participation of the various institutional actors involved.

In short, - as we will see soon - the way in which the revenue rule has been concretely overcome appears coherent with the traditional features of tax law, that is to protecti as much as possible the sovereignty of each State even in the context of an economic and juridical world no longer based on opposition but on cooperation.

Again, a strong influence in this sense comes from the European Union: here we can find several examples of transnational procedures aimed at guaranteeing the circulation of fiscal acts and decisions among the Member States, in some cases through the establishment of supranational bodies. This situation is justified in the light of the EU main features - a common legal space based on mutual trust between Member States - and as such makes the reference to the «foreign» act subject to recognition somehow obsolete[25].

4. The sources of mutual recognition: domestic law

Keeping in mind the preceding overview, it is now necessary to analyse in detail the elements of practice which can base our reasoning. To this end, it seems useful to conduct our research discriminating between the

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[24] See in that sense Reimer, *Taxation: an Area without Mutual Recognition?*, Richelle, Schön, Traversa (eds.) *Allocating Taxing Powers within the European Union*, vol. 2, Springer, 2013, 197.

[25] See, for an overview of the EU role in developing efficient forms of cooperation in tax matters, Puoti, *The mutual assistance in tax matters. Situation and perspectives in the EU Member States*, in *Rivista di Diritto tributario Internazionale*, 2010, 187.

various sources which regulate those elements: national and supranational. In this regard, we note that national rules have a rather limited role in the regulation of phenomena of mutual recognition: if a conventional or EU instrument lacks, it is rare that the national law alone allows the operation of foreign administrative acts within the internal legal system. But let's turn to some examples in that sense.

4.1. The certification regarding the payment of a tax abroad for the granting of tax credit by the taxpayer's State of residence

A first interesting case concerns the granting of a tax credit related to income from foreign sources and as such already taxed in the source State[26]. In fact, many jurisdictions provide unilaterally the taxpayer (who is considered fiscally resident therein) with a tax credit able to reduce the tax due up to the amount already paid abroad on that same income[27]. In this way, double taxation is eliminated, at least in part. Naturally, this applies if the tax has been paid abroad definitively: therefore, the question of ascertaining this situation arises.

Frequently, the State of residence recognizes the certification, coming from the other State, regarding the amount of the tax that has been paid therein and the definitive nature of the payment. This happens, for example, in the Italian legal system, where the certification of the tax authority of the other State is a valid evidential element for the granting of the tax credit[28]. A similar mechanism - which can be found in other sectors in which the tax paid in another State needs to be recognized in order to limit the burden of the national taxes on the same income[29] - allows the foreign administrative acts, on the basis of which the foreign tax has been paid, and the certification attesting this circumstance to produce effects in a given legal system. Such an effect is produced without any relevance of

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[26] See Franzè, *I metodi di eliminazione della doppia imposizione internazionale sul reddito*, in *Principi di diritto tributario europeo e internazionale* (edited by Sacchetto), Turin, 2016, 83.

[27] The method of tax credit is typical of many national legal systems, included Italy. See for the discipline of the latter Contrino, *Contributo allo studio del credito per le imposte estere*, Turin, 2012.

[28] Italian Revenue Agency (*Agenzia delle Entrate*), Circular Letter n. 9/E of 5 marzo 2015, para. 2.4.

[29] For example, with regard to *CFC* rules (art. 167 Legislative Decree n. 917/1986, so called *TUIR*) or permanent establishment (art. 162 TUIR).

the eventual reciprocity and, above all, without granting the national tax administration the power to unilaterally questioning what is attested by its own counterpart in the other State.

4.2. Certificates of residence for tax purposes

Other cases involving the use of certifications issued by the tax authorities of a foreign State show a quite different outcome: the recognition by the host State is not automatic but involves a merit assessment by its tax administration. This is the case of certificates of residence for tax purposes issued by the State in which a natural or legal person deems to be fiscally resident and destined to the different State which, on the basis of its internal legislation, claims that the taxpayer has there his closest link (and therefore has to be considered fiscally resident therein)[30].

The relevant practice highlights that many States have no problem to recognize what is attested by these acts, on the basis of the implicit assumption of the correspondence of their content to the reality of the facts and therefore making reference to the principle of mutual trust between States[31].

There are, however, some remarkable exceptions.

In Italy, for example, the tax administration, with the endorsement of the case law[32], has sometimes denied the effectiveness of certifications of tax residence issued by the competent authorities of a foreign State, considering that the factual elements in its possession were sufficient to establish the tax residence and that, on the contrary, the foreign authorities - not being able to take account of the same elements - had for that reason certified a partial and unreliable situation. In those cases, recognition is denied

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[30] The bibliography on the concept of residence for tax purposes is wide. One can refer *inter alia* to Marino, *La residenza nel diritto tributario*, Padua, 1999; and Melis, *Il trasferimento della residenza fiscale nell'imposizione sui redditi*, Roma, 2008.

[31] See a case of India with respect to Mauritian tax residence certificate, decided by the India Authoity for Advance Ruling on Income Tax, 28 March 2011; or that of Spain wit regard to Austrian certificate of residence decided by the Audencia Nacional on 15 June 2006. In certain cases, national authorities require the taxpayer to provide such a certification (Dutch Hoge Raad, decision of 16 January 2009, concerning a controversy on the convention between The Netherlands and Sri Lanka).

[32] Provincial Tax Court of Florence, dec. n. 158 of 11 December 2008.

and, on the contrary, a unilateral and internal reconstruction of the facts prevails[3334].

It should be emphasized however that the Italian Supreme Court follows a different interpretative approach. According to its view, the certificate of residence issued by the foreign tax administration must in principle be recognized as a valid evidential tool; in case the Italian Revenue Agency has doubts about its content, it should add concrete contrary evidences and, before putting aside the certified situation, it should activate the international instruments for tax cooperation in force with the other State[35].

This interpretative solution keeps the recognition necessary, but at the same time offers the receiving State the possibility of protecting itself, in any case acting in concert with the issuing authorities. The Italian Revenue Agency - in the course of an infringement procedure by the EU Commission, subsequently closed - has supported the correctness of this solution[36].

4.3. The compensatory adjustments in transfer pricing cases

Another sector in which internal rules often allow the recognition of foreign tax acts is that of transfer pricing. In case a transaction occurs between companies belonging to the same group and residing in different States, it frequently happens that the tax administration of a resident company increases the taxable income of the latter by considering that the price charged to the other company, resident abroad, for a supply of goods or services is lower than the free market value. In order to avoid economic double taxation, this recovery should imply a corresponding reduction (via

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[33] For an analysis of the main trends of the Italian jurisprudence of merit, see Cordeiro Guerra, *L'esterovestizione al vaglio dei giudici di merito*, in *Giustizia tributaria*, 2008, 541.

[34] It seems appropriate to underline that this paper analyses the case in which the tax administration considers that the content of the certificate of residence is uncomplete or irrelevant. A different issue - which is not addressed here - is the acceptance by the same administration of the certificate as an original document issued by the competent authority of the foreign State. In this case, most of the time, the certificate will have to be completed for this purpose with an apostille in accordance with the 1961 Hague Convention.

[35] Italian Court of Cassation, decisions n. 1552 and n. 1552 of 3 February 2012. It has been emphasized that there should be a strict link between the evaluation of the place a taxpayer is resident for tax purposes and the recourse to the international procedure for exchange of information (Marino, *Osservazioni in tema di residenza nel contesto dello scambio automatico di informazioni*, in *Diritto e pratica tributaria*, 2018, 1).

[36] Letter of 22 December 2010 to the EU Commission, prot. 2010/157346.

the deduction of a higher amount) in the income of the company that paid the price considered not to be at arm's lenght by the tax authorities of the other State[37].

Hence, the legislation of many States allows this downward adjustment stemming from the increasing assessment made by the other State: therefore, a recognition of the foreign administrative act is realized, the results of which (in terms of the recoverable amount) are placed at the basis of a correction of the same amount but of opposite sign in favour of the company of the group resident therein[38].

Yet in this case the Italian practice is peculiar. Although the legislation provides for the possibility of making a compensatory adjustment on the basis of the assessment made by the foreign tax administration[39], the Italian Revenue Agency retains the power to review the correctness of the correction made by the former. This implies the possibility of refusing the adjustment where it is deemed that the foreign act has not correctly reconstructed the market value of the transaction[40].

It is therefore confirmed that the recognition of foreign tax act is in any case subject to the assessment by the receiving State, aimed at preserving the correct exercise of its sovereign prerogatives in tax matters.

4.4. The notification abroad of acts of assessment

A last mention deserves a situation which is relevant not for substantial (i.e. related to the tax burden) but for procedural profiles. In relation to the notification of acts of assessment issued by a State to taxpayers resident in another State, most of the national regulations admit that it can be done respecting the forms prescribed by the internal regulations of the former.

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[37] For the Italian discipline, see Della Valle, *Il transfer price nel sistema di imposizione sul reddito*, in *Rivista di diritto tributario*, 2009, part I, 133; Maisto, *Il transfer price nel diritto tributario italiano e comparato*, Padua, 1985. An interesting analysis of various comparative experiences can be found in Selicato, *Il transfer pricing interno e la disciplina fiscale dei gruppi di imprese: appunti per una analisi comparata*, in *Rivista di diritto tributario internazionale*, 1999, 336.

[38] Vicini Ronchetti, *I prezzi di trasferimento*, in *Principi di diritto tributario europeo e internazionale* (edited by Sacchetto), Turin, 2016, 213.

[39] Art. 31-*quater* Presidential Decree n. 600/1973.

[40] In an official document issued by the Italian Revenue Agency, it is clearly stated that the internal authority can evaluate if the assessment made by the other authority respects the art's length principle (prot. 108954/2018 of 30 May 2018).

In this way, the act of assessment produces its effects outside the borders of the State to which the issuing authority belongs, on the basis of the rules for notification in force in that State. In the same way, a State is obliged to accept that an act of assessment is notified within its territory according to a procedure that is proper to another State and, in hypothesis, different from that provided for in its internal legislation. This is a prerogative that even the international instruments that introduce common forms of notification of tax acts take care to preserve[41].

No means of protection for the legal order in which the notification must be made are explicity provided, in the event that the method chosen by the foreign authority does not guarantee the success of the notification, or the actual knowledge of the act by the recipient. However, it should be considered that the host State can deny the effects of the notification when it is clear that the applied foreign discipline does not guarantee such knowledge.

5. Continued: International and EU law

As we have seen, cases in which the recognition of a foreign tax act occurs spontaneously are therefore rather limited; moreover, the receiving State mostly keeps a margin of discretion to protect the basic rules of its own tax system.

Frequently, however, the recognition of the foreign fiscal act is prescribed by supranational instruments, be them regulated by international law or by EU law. In these cases, the acceptance by the individual State is not spontaneous (or unilateral), but it implements the obligations assumed

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[41] Art. 17, para. 4, of the OECD/CoE Multilateral Convention on Mutual Administrative Assistance in Tax Matters (hereinafter *MAAT*) states that «Nothing in the Convention shall be construed as invalidating any service of documents by a Party in accordance with its laws». In the same sense, see; art. 9, para. 2, of the EU Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (the service of acts according to the laws of the requested State «shall be without prejudice to any other form of notification made by a competent authority of the applicant Member State in accordance with the rules in force in that Member State»); and art. 13, para. 4, of the EU Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC («The competent authority of a Member State may notify any document by registered mail or electronically directly to a person within the territory of another Member State»).

by the latter on the supranational plan. Therefore, recognition continues to be carried out by the competent authority of the receiving State, however this does not happen on the basis of internal rules, but in the context of a framework outlined by the relevant international instruments.

5.1. International and European discipline regarding compensatory adjustments in transfer pricing cases

Turning back again to the case of transfer pricing, already touched in the previous paragraphs, it is worth noting that the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (so called MLI), which came into force in July 2018[42], aims to modify the double taxation conventions of the States Parties by imposing a compensatory adjustment as a result of the assessment that the other State has made against a company belonging to a multinational group. In the event that the receiving State has doubts about the correctness of the adjustment made by the foreign act of assessment, a round of consultations between the two States is prescribed[43].

Here we have a full realization of mutual recognition, together with the predisposition a latere of a mechanism of tax disputes resolution, which avoids the non-recognition tout court but at the same time preserves the sovereignty of the receiving State[44]. Mutual trust prevails among States that have chosen to bind themselves by means of agreements; and it is not by

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[42] An in-depth analysis of the new multilateral convention can be found in *The OECD Multilateral Instrument for Tax Treaties. Analysis and Effects* (a cura di Lang, Pistone, Rust, Schuch e Stringer), Alphen aan den Rijn, 2018.

[43] See art. 17 of the MLI, according to which «where a Contracting Jurisdiction includes in the profits of an enterprise of that Contracting Jurisdiction - and taxes accordingly - profits on which an enterprise of the other Contracting Jurisdiction has been charged to tax in that other Contracting Jurisdiction and the profits so included are profits which would have accrued to the enterprise of the first-mentioned Contracting Jurisdiction if the conditions made between the two enterprises had been those which would have been made between independent enterprises, then that other Contracting Jurisdiction shall make an appropriate adjustment to the amount of the tax charged therein on those profits».

[44] In that sense, see Das, *Corresponding Adjustment and Its Interaction with the Mutual Agreement Procedure under Article 25 of the OECD Model*, in *International Transfer Pricing Journal*, 2019, 1. On the particular relevance of international (and EU) arbitration procedures concerning transfer pricing cases, one can refer to Trivellin, *Studi sugli strumenti di soluzione delle controversie fiscali internazionali, con particolare riguardo al transfer pricing*, Turin, 2018.

chance that the same solution is also shared at the EU level, thanks in particular to the case law of the Court of Justice[45].

However, international practice shows that the actual implementation of these obligations, especially outside the EU, is characterized by the preservation of a wide margin of discretion by the requested State to make the compensatory adjustment, confirming the absence of a real automatism even if the obligation to recognize stems from obligations assumed under international instruments[46].

5.2. The circulation of certificates of residence for tax purposes

The supranational sources offer some interesting landfalls also with reference to the recognition of certificates of residence for tax purposes issued by the authorities of a foreign country.

This is the case of the EU legal system. The Court of Justice, in its decision in Planzer which concerned a dispute over VAT, stated that the certificate issued by a Member State and certifying the status of an undertaking as a taxable person actually established in that State must be recognized by another Member State, which is therefore bound by it. However, this does not mean that «the tax authorities of the refunding Member State are prohibited, where they have doubts as to the economic reality of the establishment whose address is given in that certificate, from verifying that reality by having recourse to the administrative measures made available for that purpose by Community legislation on VAT»[47].

Here one can touch with his own hands the peculiarity of the influence of EU law. The importance of the principle of loyal cooperation and mutual trust between Member States leads, in certain cases, to situations in which the act issued by the tax authorities of a State produces effects in a different legal order on the basis of an imposed and implicit recognition by the recipient State[48].

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[45] Court of Justice of the EU, 21 January 2010, *Societé de Gestion Industrelle v. Belgian State*, C-311/08.

[46] *Klaus Vogel on Double Taxation Conventions* (Reimer and Rust eds.), Alphen aan den Rijn, 2015, I, 676. The US Model Convention explicitly recognizes that the second State is obliged to make the corresponding adjustment only if it *agrees* that the profit attributed to the parent company in the first State is correct.

[47] C-73/06, *Planzer Luxembourg Sàrl v Bundeszentralamt für Steuern*, 28 June 2007, para. 50.

[48] The problematic issue concening the validity of the certificate of residence of the foreign tax

A similar example concerns the qualification of a private entity as a charitable one in a member State: where the resident of another Member State makes a donation to it, a deduction from the tax base must be recognized - as if it were a donation made to a charitable entity resident of the same State - where the authorities of the former certify its nature. The Court of Justice, in the Hein Persche judgment, emphasized the profile of mutual recognition, basing it on the existence of a common juridical space in which the recognition of the charitable nature of an entity made by one State in principle also binds the others[49]. According to a scheme already seen, however, where the Member State which is called to admit the deduction has doubts, it can not simply disregard the qualification given according to the other legal system, but it must activate the EU instruments of mutual cooperation[50].

It is interesting to note that this perspective, specific to EU law, is also shared in certain international conventions. For example, art. 22 of the double taxation convention between the Netherlands and Barbados, stipulates that «contributions by a resident of a Contracting State to an organization constituting a charitable organization under the income tax laws of the other Contracting State shall be deductible for the purposes of computing the tax liability of that resident under the tax laws of the first-mentioned Contracting State under the same terms and conditions as are applicable to contributions to charitable organizations of the first-mentioned State, where the competent authority of the first-mentioned State agrees that the organization qualifies as a charitable organization for the purposes of granting a deduction under its income tax laws»[51].

Compared to the solution suggested by the Court of Justice, however, in this example the emphasis is placed on the agreement between the two

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authorities is analysed by Marino, *Esterovestizione ed esterocertificazione: due facce della stessa Medaglia*, in *Rassegna tributaria*, 2012, 1019.

[49] «The fact remains that where a body recognised as having charitable status in one Member State satisfies the requirements imposed for that purpose by the law of another Member State and where its object is to promote the very same interests of the general public, so that it would be likely to be recognised as having charitable status in the latter Member State, which it is a matter for the national authorities of that same Member State, including its courts, to determine, the authorities of that Member State cannot deny that body the right to equal treatment solely on the ground that it is not established in that Member State» (ECJ, 27 January 2009, *Hein Persche v. Finanzamt Lüdenscheid*, C-318/07, para. 49).

[50] See Dorigo, *La potestà degli Stati in materia di imposte dirette ed i limiti derivanti dal diritto comunitario secondo la sentenza Hein Persche della Corte di giustizia*, in *Diritto e pratica tributaria internazionale*, 2009, 959.

[51] Art. 22 of the Barbados-The Netherlands Income Tax Treaty 2006 (as amended in 2009).

States regarding the recognition of the charitable nature of an entity, whereas in EU law there is a presumption of conformity, save the activation of forms of international cooperation in case of doubts.

5.3. Recognition of foreign acts aiming at the recovery of claims related to taxes

A case of particular interest for the aims of our analysis concerns the recognition by a State of tax claims of another in order for the former to assist the latter in the recovery of those claims.

A tax claim consists in an act of assessment that is enforceable in the State to which the issuing authority belongs, either because it has become definitive, or because the law allows it to be provisionally executed even if a suit on it is pending before the competent court. The double taxation conventions stipulated on the basis of the OECD Model provide that such an act is subject to a procedure in the requested State aimed at transforming it into an internal act having the requisites imposed by the law of the latter in order for it to be implemented[52]. The Multilateral Convention on Mutual Cooperation in Tax Matters, stipulated within the OECD and the Council of Europe, is also very clear in the same sense. According to its art. 13, «the instrument permitting enforcement in the applicant State shall, where appropriate and in accordance with the provisions in force in the requested State, be accepted, recognized, supplemented or replaced as soon as possible after the date of the receipt of the request for assistance, by an instrument permitting enforcement in the latter State»[53].

In the cases under consideration, therefore, the recognition of the foreign instrument permitting enforcement in the requiring State is left to the discretion of the authorities of the requested State, given the particular invasiveness of the procedure with respect to the sovereign prerogatives of the latter: that procedure, in fact, leads to put the national administrative organization at the service of a credit that belongs to a different State. As clarified by the explanatory statement to the aforementioned provision of the MAAT, while some States could implement the foreign act as such, others need a recognition procedure, which may also involve the replacement by an internal act having the characters required by the national law[54].

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[52] Art. 27 of the OECD Model Convention. See the analysis of the article in Grau Ruiz, *Mutual assistance for the recovery of tax claims*, The Hague, 2003.

[53] Art. 13, para. 2, MAAT.

[54] *Explanatory Report to the Convention on Mutual Administrative Assistance in Tax Matters*

6. *The overcoming of mutual recognition in supranational instruments*

As already mentioned, the peculiarity of tax law lies in the fact that supranational sources in most cases are not limited - as we saw in the previous paragraph - to impose the recognition of the act issued by the tax administration of another State. Rather, they outline a procedure that involves the tax authorities of both the interested States (sometimes even giving life to common entities) and that is aimed either at the issuance of an administrative act that continues to belong to a single State or -in some cases- at the creation of a joint or unitary act, valid as such simultaneously for all the States concerned.

Such a scheme has been analysed by the administrative law doctrine[55], which recognized precisely in the emergence of such forms of transnational administrative cooperation an overcoming of the traditional concept based on mutual recognition[56]. But that scheme finds in the practice of tax law a particularly convincing implementation.

6.1. The EU uniform instrument permitting enforcement of a tax claim

The most obvious example in that direction can be found in EU law and in particular in the discipline concerning mutual assistance for the recovery of claims relating to taxes. Differently from what is established by international conventions, the EU directive 2010/24/EU concerning the assistance for the collection of taxes introduces a uniform instrument, which is an enforceable title drawn up according to a standard approved by

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as Amended by the 2010 Protocol, para. 134 («Some States may be able to accept a foreign instrument as permitting enforcement in their own territory. Other States, however, will not be able to recover the tax claim of the applicant State within their territory without further measures. These can be of various kinds: the instrument permitting enforcement in the applicant State may have to be recognised in the requested State, or it may have to be supplemented or even replaced by an instrument permitting enforcement in the territory of the requested State»).

55 De Lucia, *From Mutual Recognition to EU Authorization: A Decline of Transnational Administrative Acts?*, *Italian Journal of Public Law*, 1/2016, 90; Nicolaidis, Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, *Law and Contemporary Problems*, 2005, 263.

56 See, in particular, Della Cananea, *From the Recognition of Foreign Acts to Trans-national Administrative Procedures*, *Recognition of Foreign Administrative Acts* (Rodriguez-Arana Muñoz (ed.), Springer, 2016, 219.

all the Member States and able to operate in the requested State as if it were an internal instrument permitting enforcement. There is therefore no need for any process of recognition or nationalization[57].

According to this scheme - approved by the Member States, some of which had also earlier attempted unilaterally to achieve the same objective[58] - the requested State is obliged to proceed with the execution of the tax claim of the other State, without being able to carry out any verification of the existence of the credit itself. The former must treat the uniform instrument as if it embodied a claim of its own, therefore activating the procedures provided by its legislation for the forced recovery on the basis of the mere attestation by the requesting State about the fact that the original title is suitable, according to its internal legislation, to be implemented[59].

The case of the European uniform instrument represents the highest achievement of the model, which was previously mentioned, aimed at creating genuinely transnational administrative procedures and acts. The Directive, in fact, does not limit itself to identify a procedure through which the tax claim of a State can be brought to execution in another State; but it introduces a uniform instrument which can operate as such in the whole of the European area and which proceeds from the contribution of both Member States concerned: the credit holder, who forms it and transmits it to the authorities of the other State; and the latter, which gives it practical implementation.

The Directive regulates also the methods of redress for the taxpayer who undergoes the forced execution[60]. Disputes concerning the claim, the uniform instrument or the validity of the notification shall be brought in front of the competent bodies of the requesting State; while disputes about

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[57] Art. 12, para. 1, of the EU Directive 2010/24/UE: «Any request for recovery shall be accompanied by a uniform instrument permitting enforcement in the requested Member State. This uniform instrument permitting enforcement in the requested Member State shall reflect the substantial contents of the initial instrument permitting enforcement and constitute the sole basis for the recovery and precautionary measures taken in the requested Member State. It shall not be subject to any act of recognition, supplementing or replacement in that Member State».

[58] In Italy, see Art. 5 of the Legislative Decree n. 69/2003, according to which the foreign acts aiming at the executing a tax claim «have direct and immediate effect for execution» as if they were internal acts [translation by the author].

[59] See Saponaro, *Il titolo esecutivo europeo: prospettive in materia fiscale*, in *Rassegna tributaria*, 2008, 86, who anticipated some of the subsequent developents of the 2010 Directive.

[60] Sozzi, *Spazio giudiziario europeo e collaborazione alla riscossione dei crediti tributari*, in *Rivista di diritto tributario*, 2006, part I, 217.

the measures taken by the requested States shall fall within the competence of the competent body of the latter[61].

6.2. The mutual agreement procedures (MAPs)

There are, however, other cases that reveal the current trend in international tax law (as well as in EU tax law) to develop supranational forms of administrative procedure.

The reference goes first and foremost to mutual agreement procedures, which are genuine administrative procedures developed between the tax authorities of two States in order to avoid a situation of double taxation in a specific case or to clarify controversial profiles in the application or interpretation of a conventional norm[62].

Many international instruments contemplate those procedures and discipline the recourse to them: one can mention art. 25 of the OECD Model (which is incorporated into the bilateral conventions against double taxation negotiated having reference to the Model) as the most common example, but a MAP can also be found in the MAAT Convention[63], as well as in European Union law. Here, in particular, we have moved from a limited procedure available only in case of questions concerning transfer pricing[64] to a new one, having general nature and application, contained in the Directive 1852/2017 on the mechanisms for resolving tax disputes in the European Union[65].

All these instruments show, even with inevitable differences in detail, some common features.

First of all, the procedures in question take place between the competent tax administrations of the two (or more) States involved. They lead

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[61] The rule is enshrined in art. 14 of the EU Directive 2010/24/UE.

[62] Pistone, *Arbitration procedures in tax treaty and Community law: a study from an Italian perspective*, in *Diritto e pratica tributaria Internazionale*, 2001, 613.

[63] Art. 24 MAAT, where it is also envisaged the creation of a a co-ordinating body, composed of representatives of the competent authorities of the Parties, having the function to monitor the implementation and development of the convention (para. 3) but also to furnish opinions on the interpretation of the provisions of it (para. 4).

[64] Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises of 23 July 1990.

[65] Council Directive EU 2017/1852 of 10 October 2017 on tax disputes resolution mechanisms in the European Union. See Garbarino, *Mutual Agreement Procedure: la Convenzione arbitrale europea sul Transfer Pricing*, in *Fiscalità del commercio internazionale*, 2012, 5; and Trivellin, *op. cit.*, 205.

-in case following a stage of arbitration- to the definition of the tax claim. Therefore, after the conclusion of the procedure the agreed solution replaces the initial national act of assessment and as such is implemented within the two interested legal orders[66].

In this case, there is a real joint procedure that gives life to a common act representing the basis for the subsequent activities of recovery put in place at national level[67].

Secondly, the creation of joint commissions or bodies is sometimes provided for both the management of the phase aimed at determining the correct imposition and the resolution of disputes that may arise[68].

Finally, some form of participation of the taxpayer concerned is envisaged in the course of these procedures. The taxpayer, in fact, is the subject who can give rise, in certain cases, to the procedure, but above all he has the possibility to contribute to the practical implementation of the solution reached by the authorities of the two States involved.

The growing importance of these procedures, which can be activated for an increasing number of cases, shows that they represent a paradigm of the new way of being of international tax law: a way of being founded not on the binomial «issuance of an act by a State-recognition by another», but on the joint identification of a unitary act and its content. The case of residence for tax purposes appears emblematic in this regard.

Article 4, para. 3, of the OECD Model - as changed in 2017 - and art. 4 of the MLI establish that if a person other than an individual is, according to their national laws, a resident of both States parties to a bilateral agreement against double taxation, the competent authorities of these States «shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention».

Thus, all the problematic issues concerning the recognition of certificates of residence are overcome in one shot and the task of resolving the issue is attributed to the active and proceduralized collaboration of the tax administrations involved[69].

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[66] See *Klaus Vogel on Double Taxation Conventions* (Reimer and Rust eds.), Alphen aan den Rijn, 2015, II, 1801 ff. for the relevant international practice.

[67] See *inter alia* Avery Jones, *The relationship between the mutual agreement procedure and internal law*, in *EC Tax Review*, 1999, 4.

[68] See again *Klaus Vogel on Double Taxation Conventions*, cit., 1807.

[69] The said outcome is not devoided of doubtful aspects. In particular, the question arises

6.3. The exchange of information

There is a last case that should be mentioned since it is placed in the same context of the preceding ones. I refer to the exchange of information, which is the most frequent form of international tax cooperation between States[70].

The exchange of information, particularly in its form of exchange upon request, is based precisely on a request that the tax administration of a State directs to its counterpart in the other State, so that the latter collects information useful for reconstructing the tax position of a taxpayer resident in the former. There is therefore a State, which needs such information to check whether the taxpayer has faithfully fulfilled his tax obligation; and another State that, even in case it has not an own interest in the information, is required to activate its internal investigative procedures to collect and transmit it to the former.

All the international instruments covering this form of cooperation - international conventions against double taxation, the MAAT Convention, Directive 2011/16 /EU - link the obligation of the requested State to the mere receipt of a demand from the other State meeting some form requirements. We are therefore facing of a phenomenon of recognition of the administrative act that contains the request for information.

Moreover, the aforementioned instruments outline a common procedure and - sometimes - also the establishment of common bodies aiming at correctly managing the procedure: therefore, it is reasonable to state that we find ourselves in the context of the transnational procedures we are talking about and not of the case of mere recognition in the context of a common supranational framework, we have referred to in the preceding paragraphs. There are two elements which apparently confirm it.

First of all, it is admitted that the requested State has discretion in assessing the existence of some minimal requirements of the request by the

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concerning the effective guarantee of the taxpayer's rights lacking adequate applicable rules binding for the States during the negotiation. On these issues, see Dorigo, Mastellone, *L'evoluzione della nozione di residenza fiscale delle persone giuridiche nell'ambito del progetto BEPS*, in *Rivista di diritto tributario*, 2015, 35.

[70] See Amatucci, Barassi, Del Federico, Sacchetto, Selicato, Soncini, Crisafulli, Mastroeni, Massino, *Italy*, in *Mutual assistance and information exchange* (edited by Seer and Gabert), Amsterdam, 2010, 339. For a recent overview with regard the Italian constitutional asset, see Pierro, *Il dovere fiscale e lo scambio di informazioni*, in *Rivista di diritto finanziario e scienza delle finanze*, 2017, 449.

other State: that the request has been issued by a competent authority and that the information is «foreseeable relevant» for the correct application of the tax rules of that State to a specific case. The possibility of such an evaluation emerges from the practice concerning bilateral double taxation conventions[71]. It has also been confirmed with reference to the European Union's legal system by the Court of Justice, which has also admitted that such verification is carried out by the courts of the requested State[72].

Secondly, the establishment of joint bodies is allowed to direct the procedure in a coordinated way between the two States involved[73]. A clear example is that of simultaneous audits, in which the two tax authorities coordinate each other in such a way as to carry out a simultaneous control on the same taxpayer, eventually allowing the presence of officials of the other tax administration in order to assist local colleagues in collecting information and with the faculty to act also in a partially autonomous way. In the latter case, the administrative activity, while taking place entirely in the territory of a single State, leads to an outcome that is the result of the joint activity of both the administrations involved and which takes the form of one or more acts or documents which can be used as such in the other legal system.

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[71] See again *Klaus Vogel on Double Taxation Conventions*, cit., 1201.

[72] In *Berlioz* (judgement of 16 May 2017, C-682/15), the Court of Justice held that the requesting authority «which is in charge of the investigation from which the request for information arises, to assess, according to the circumstances of the case, the foreseeable relevance of the requested information to that investigation on the basis of the progress made in the proceedings and, in accordance with Article 17(1) of Directive 2011/16, after having exhausted the usual sources of information which it has been able to use in the circumstances» (para. 70). The same authority «must provide an adequate statement of reasons explaining the purpose of the information sought in the context of the tax procedure underway in respect of the taxpayer identified in the request for information» (para. 80). However, «the requested authority must nevertheless verify whether the information sought is not devoid of any foreseeable relevance to the investigation being carried out by the requesting authority» (para. 78) and the same power shall be attributed to the judicial power of the requested State (para. 84). For a comment on that judgment, see Mastellone, *Una nuova alba per i diritti fondamentali del contribuente europeo: alcuni spunti sistematici a margine della sentenza Berlioz della Corte di Giustizia*, in *Diritto e pratica tributaria internazionale*, 2017, 591.

[73] For example, the Directive on mutual cooperation in tax matters creates a European Data Supervisor and an exchange of information Committee (art. 26), with the task of assisting the Commission in the work of supervising and implementing the discipline therein. Moreover, the European Data Supervisor operates also with regards the circulation of information for tax purposes.

7. Conclusions: towards a supranational fiscal administrative system?

The examination - necessarily summary - of the national and international tax practice shows therefore some fixed points with respect to the argument of the present survey.

First, the cases of unilateral recognition of foreign tax acts - that is, recognition made on the basis of national regulations in the absence of a supranational legal framework - are rather limited in number. On the other hand, there are more numerous situations in which recognition, even if carried out by the single legal system, is imposed by the need to fulfil obligations assumed at the international or European level. In these cases, the existence of supranational instruments that direct the activity of the national tax administrations guarantees a connotation of mutual recognition, since the conditions that today lead a State to carry out the recognition can later apply to another State that is subject to the obligations deriving from the same international instrument.

There remains a discretion of the State called to recognize to graduate the effects of the recognition in order to protect its sovereign interests; however, any limitations to the full recognition of the foreign act must be realized, in case, at the end of a procedure that enhances the cooperation between the administrations of both the States involved.

Here, therefore, there is a clear manifestation of the principle of mutual recognition, but the influence of the applicable international and European instruments gives as much unity and coordination as possible to the action of the individual State.

This «proceduralization» is finally the hallmark of the last group of analyzed cases, which seem to become numerically prevalent. These cases are characterized, precisely, by the overcoming of the single State optics, in favor of the introduction of a procedure that - through the full and equal participation of the administrations involved - leads to the identification of an act, effective in all the States concerned.

Here, therefore, the recognition loses importance, while the notion of transnational administrative procedure, regulated by international or European standards and destined - in some cases through the establishment of common bodies - to lead to the regulation of a certain type of case, rises to the fore. And this, it deserves to be recalled, through the equal participation of the administrations involved (and sometimes also of the taxpayer).

It seems to me that this last group of cases represents the most significant outcome of international tax law today. They highlight, as anticipated back, the extreme defense of the principle of fiscal sovereignty[74]: in a context in which there is no longer space for forms of «hunting reserve», and the limits to the recognition and circulation of tax acts issued by foreign authorities become narrower, the path of joint procedure allows to open to new needs while maintaining a central role for the State[75]. The State is not «invaded» by a foreign act, rather a common procedure is built, through the contribution of every State involved, and a decision-making function on the transnational level is put in place. One can speak, therefore, about a new notion of sovereignty, under which the protection of the peculiarities of a single legal system is realized no more through the opposition and the non recognition, but with a kind of «cooperative openness»[76].

Therefore, tax law represents the field where a new paradigm -already proposed by administrative law scholars[77]- can emerge. A field where one assists to the overcoming of theories on mutual recognition and the affirmation of transnational administrative procedures founded no longer on the circulation of acts issued by a single system and that only in the final part (that of recognition) call for the intervention of another State; but rather on decision-making processes governed by common rules and managed from the outset on the basis of forms of cooperation between States and between them and supranational entities.

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[74] The evolution of the notion of sovereignty under international tax law is enlightened by Espadafor, *Premesse internazionali dell'evoluzione della sovranità tributaria*, in *Rivista di diritto tributario internazionale*, 2013, vo. 3, 7.

[75] The proposed interpretation seems to be shared by an author, who wrote that *il fenomeno della globalizzazione e le crisi ricorrenti a livello Internazionale hanno stimolato gli Stati a organizzare forme di coordinamento o* standard rules *motivati forse più dalla preoccupazione di difendere il fronte interno anziché porsi il problema di predisporre forme di governance per rendere più gestibile il sistema internazionale* (Sacchetto, *La trasformazione della sovranità tributaria: i rapporti fra ordinamenti e le fonti del diritto tributario*, in *Principi di diritto tributario europeo e internazionale*, Turin, 2011, 7).

[76] The new features of sovereignty in tax matters have been explored by a large number of scholars in recent times. Limiting to the contributions of the Italian doctrine, see Gallo, *Giustiza sociale e giustizia fiscale tra decentramento e globalizzazione*, in *Rivista di diritto tributario*, 2014, part I, 1069; and Tremonti, *La fiscalità nel terzo millennio*, in *Rivista di diritto finanziario e scienza delle finanze*, 1998, part I, 69.

[77] See again Della Cananea, *cit.*, who recognizes - following the analysis of non-fiscal practice - that the latter demonstrates «that in a variety of fields public authorities do not only «recognize» the rules and decisions taken elsewhere but concur in adopting them» (239).

Certainly, this outcome greatly differs from that advocated by the supporters of a genuine multilateralism in the tax field[78]. Here we are rather in front of a sort of «unavoidable» multilateralism, which in reality hides the enduring aspiration of every State to defend its own interests.

In short, tax law seems to be at the center of a real paradox: from sovereignty to multilateralism with the aim of protecting the residual sovereignty itself. As in the sentence pronounced by Tancredi in the famous Tomasi di Lampedusa's novel *Il Gattopardo*, «se vogliamo che tutto rimanga come è, bisogna che tutto cambi»[79].

[78] Some authors proposed the idea of an international organization devoted only to taxation issues as a final seal of the evolution towards a genuine multilateralism: see for example Rosenbloom, Noked, Helal, *The Unruly World of Tax: A Proposal for an International Tax Cooperation Forum*, in *Rivista di diritto tributario*, 2014, 183. Another author has stressed the importance of a deeper cooperation between the tax administrations of each State in order to overcome a stricter approach rooted in the needs of each State (Stewart, *Transnational Tax Information Exchange Networks: Steps towards a Globalized, Legitimate Tax Administration*, in *World Tax Journal*, 2012, 152). On these issues, it has also been argued that the real need is «to supplement the existence of multilateral legal instruments on mutual assistance with a true multilateralism also in the decision-making phase» (Pistone, *Coordinating the Action of Regional and Global Players during the Shift from Bilateralism to Multilateralism in International Tax Law*, in *World Tax Journal*, 2014, 4).

[79] «If we want everything to remain as it is, everything must change» (translation by the author).

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