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ASSET PROTECTION – HOW TO STRUCTURE ASSETS IN AN ANONYMOUS WAY, WHILE MEETING THE INTERNATIONAL TRANSPARENCY REQUIREMENTS

Commissions in charge of the Session/Workshop:
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Tax Law Commission

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1. Private Clients

1.1. Asset Protection – structuring possibilities and other means of asset protection

1.1.1. Does your jurisdiction recognize domestic or foreign trusts? If yes, what types of domestic trusts are there and what type of trusts is usually used for asset protections purposes? Are there any restrictions in your jurisdiction as to the possibility of the settlor to be a beneficiary at the same time?

Recognition of trusts

The Italian Civil Code does not provide for the institution of trusts. However, Trusts are recognized in Italy by way of Statutory Law 16 October 1989 n. 364, which enacted the Hague Trusts Convention 1 July 1985 (On the Law Applicable to Trusts and on Their Recognition). Because of the absence of an Italian trust law, Italy only recognises trusts governed by other jurisdictions' Laws.

The choice of the applicable law is governed by articles 6 and 7 of the Hague Trusts Convention 1985, where it is stated that "a trust shall be governed by the law chosen by the settlor". In other words, there is maximum freedom for the settlor in the choice of law. According to the Convention, where no applicable law is chosen, according to article 7 of the Convention, the trust will be governed by the law with which it is most closely connected. For the absence of an Italian trust law, if the law most closely connected happens to be Italian law, the trust is under a serious risk of being considered void. Therefore, the choice of a foreign proper law governing the trust is necessary when establishing a trust with strong Italian connections.

Settlor as beneficiary

As already mentioned, Italian Law does not provide for the institution of trusts, therefore, the restrictions as to the possibility of the settlor to be a beneficiary of the trust will mainly depend on the law chosen by the settlor as proper law of the trust.

In fact, the Hague Convention does not provide specific rules in this sense.

Under Italian law, from the settlor's creditors point of view, the fact that the settlor reserves for himself rights, privileges on the trust or shows among the beneficiaries does not *per se* invalidate the trust, but it weakens his/her position against personal creditors wishing to attack the trust structures, who in certain circumstances may also be able to substitute themselves in the

exercise of the powers/rights or benefits that are destined to the settlor (debtor).

1.1.2. Does your country recognize private foundations (domestic or foreign) which are suitable for asset protection purposes (such as family foundations or similar)? If yes, what are the main characteristics of such domestic private foundation and are there any restrictions in your jurisdiction as to the possibility of the founder/donor to be a beneficiary at the same time?

Private foundations, domestic or foreign, are in principle recognized in Italy if they meet specific conditions.

Domestic foundations are governed, together with associations, by article 11 and following of the Italian Civil Code.

Differently from other European legislative system, despite the silence of the law on the subject, it is a well-established principle that the creation of foundations is only allowed for the pursuit of public utility purposes. Italian foundations are therefore non-profit, private and autonomous entities equipped with a fund (assets) provided by the founder(s) and intended to realize public utility purposes indicated by the founder(s).

Foundations must obtain the approval of the public authority (which verifies the public utility of the purposes pursued), in order to become autonomous legal entities, with their own independent "patrimony" (estate).

Therefore, under Italian law, it is not possible to create family foundations for the benefit of relatives, as foundations must always have a public or social purpose. Relatives could benefit from the foundation (receive distributions) only in the case they meet the public/social conditions indicated in the purpose of the foundation.

Italian foundations are always irrevocable once they obtain the authorities' approval and the founder cannot in principle be a beneficial owner of the foundation. In fact, once the assets are transferred into the foundation, they become totally separated from the personal asset of the founder and must be completely dedicated to the purpose of the foundation.

Foreign foundations can be recognized in Italy as legal entities ruled by the law of the Country of origin. However, under a tax law perspective, the Italian Tax Authority verifies the effectiveness of the structure in order to exclude possible cases of fictitious interposition/dummy structures. When the foundation is effective and genuine, the Italian Tax Authority inspects the place of residence of the entity in order to understand the applicable taxation (article 73, paragraph 3, of the Italian Tax Code).

1.1.3. Are there any other asset protection vehicles which are commonly used in your jurisdiction? What are their specific characteristics?

Besides trusts (already examined in paragraph 1.1.1 above), the most relevant (direct or indirect) asset protection 'tools' in Italy are a *fondo patrimoniale*, *intestazione fiduciaria, vincolo di destinazione* and, for the purpose of segregating assets destined to a business, of course, corporations.

Fondo patrimoniale is a family agreement, governed by articles 167 and followings of the Italian Civil Code, pursuant to which spouses (or other interested parties) may dedicate specific immovable property or other registered assets to the purpose of satisfying the needs of the family. Both the assets allocated for this purpose and the income produced by them shall be exclusively destined to support the needs of the family. The asset protection is therefore realized by separating the assets destined to the needs of the family from all other assets owned by the spouses. Indeed, in principle, creditors whose credits derive from situations not concerning the family will not be able to seize the assets included in the *fondo patrimoniale* (save what explained in paragraph 1.1.4 below about protection of creditors under Italian law). However, Italian courts in some cases have accepted that also specific business credits can be to a certain extent linked to the needs of the family, often allowing creditors to attack the fund.

Intestazione fiduciaria is an asset protection tool based on an agreement between the principal and the fiduciary (generally a fiduciary company) by which the fiduciary is responsible for managing the asset of the principal under his/her precise instructions (similar to the English nomineeship agreement). The fiduciary activity is defined by the fiduciary mandate which sets the limits intended and determined by the mandatory agent. A fiduciary arrangement of this type changes the formal ownership of the assets, but does not shift the ultimate beneficial ownership, which remains with the principal. The assets are therefore still considered included in the estate of the principal and his/her creditors will be able to seize them. The *intestazione fiduciaria*, however, allows the principal to own assets anonymously, therefore, as a matter of fact, the localization of the seizable assets will be harder for the creditor. Additionally, the fiduciary company acts as withholding agent for Italian tax purposes.

Vincolo di destinazione. According to the recently introduced provision under article 2645-*ter*, it is possible to charge immovable property (and certain registered movable property) with a segregation lien. The assets subject to the lien will not be seizable by the personal creditors of their owner (save what explained in paragraph 1.1.4 below about protection of creditors under Italian law).

Simple corporations are also still commonly used as asset protection vehicles. In fact, an individual intending to undertake a risky business usually will set

up a corporation in the form of S.r.l. (*Società a responsabilità limitata*) or S.p.a. (*società per azioni*) in order to limit the liability towards the creditors of such business only to the assets held by the company.

1.1.4. Is your jurisdiction asset protection-friendly? E.g. does your jurisdiction typically respect asset protection structures or does it recognize principles such as "sham" or "piercing the corporate veil"? If yes, what are the prerequisites for a court/other administrative body to apply such principles? What is the right balance between settlor control and asset protection?

Asset protection

From a trust law perspective, under the terms of Article 11 of the Hague Convention 1985, assets held in trust are segregated, and therefore cannot be seized by the personal creditors of the trustee. Moreover, as they no longer belong to the settlor, in principle, his/her creditors cannot seize them either.

However, with regards to the possibility for the creditors of the settlor to seize the assets contributed by him to the trust, under article 15 of the Convention, the "protection of creditors" is mentioned among the matters where domestic laws cannot be prevented from being applied unless they can be derogated from by a voluntary act. As a result, the effect of the segregation is limited, under Italian law, by the following, aimed at protecting creditors from the debtor's insolvency:

- First of all, the Italian Pauline action (*i.e. azione revocatoria*, article 2901 of the Italian Civil Code). Under this provision, a creditor can ask the Court to set aside any gratuitous transfer of goods and rights made by his/her debtor (in the case of trusts, the settlor) if: (i) the transfer was made after the credit had arisen; or (ii) the transfer was made by the debtor with the deliberate intention of defrauding the creditor.
- Secondly, the recently introduced Article 2929-bis of the Italian Civil Code disciplines a special fast procedure allowing a creditor to directly seize assets transferred gratuitously by her/his debtor if: a) the transfer of the asset was made while the credit was existent; and b) the seizure is requested and registered within a year from the gratuitous transfer.
- Bankruptcy rules. In case of bankruptcy, all gratuitous transfers (with a very limited exceptions) made by an enterprise in the 2 years preceding the declaration of bankruptcy are considered ineffective (article 64, Royal Decree n. 267/1942, so called *legge falllimentare*).

Trust law perspective – Issue of sham

Italian Law does not have a specific domestic doctrine of sham for trusts (as there is no specific law on trusts either, as mentioned) and the Hague Convention does not contain specific rules in this sense.

Hence, the evaluation of whether the trust is a sham, from a trust law perspective, will mainly depend on the proper law chosen by the settlor.

Reservation of powers under the Hague Convention

Under article 2, paragraph 3 of the Hague Convention it is established that "*The reservation by the settlor of certain rights and powers* (…) [is] *not necessarily inconsistent with the existence of a trust*".

This implies that a settlor can reserve powers for himself to a certain extent and this does not infringe the standing of a trust as such under the Hague Convention (clearly, the validity of the trust will then have to be analysed under the proper law of the trust).

However, should these powers be too invasive, the trust itself might not be recognised as such by an Italian judge (for not being compliant with the limits drawn by the Hague Convention).

Italian tax law perspective: fictitious interposition (sham)

From a tax law perspective, with guidelines released at the end of 2010, the Italian tax authorities identified some types of trust, which are held to be non-existent for Italian tax purposes (fictitiously interposed).

On 27 December 2010 the Italian tax authorities issued a 'circular letter' the main purpose of which was to disregard a number of trusts in respect of which an Italian resident settlor or beneficiary have some degree of control.

In very broad terms, this circular letter (which was strongly criticized by commentators and professionals) states that any trust under which a settlor or beneficiary has any degree of control is a 'fictitious interposition' (sham). The circular contains the following (non-exhaustive) list of relevant scenarios where this applies:

(a) trusts where the settlor has the express power to terminate the trust at any time of his own initiative for his own benefit or the benefit of third parties;

(b) trusts where the settlor has the express power at any time to appoint himself as beneficiary;

(c) trusts where the trustee cannot make decisions without the settlor's or beneficiaries consent;

(d) trusts where the beneficiary has an express power to compel the trustee to distribute a share of the trust assets;

(e) trusts where the settlor has the express power, during the life of the trust, to change the beneficiaries;

(f) trusts where the settlor has an express power to assign trust assets or to give out loans.

Where a trust is treated as a 'fictitious interposition' any income / gains received by the trustee should be taxed in the hands of the person who has the effective power to control and manage the trust assets as if the trust did not exist. The assets held in trust are deemed as held by the person exercising the control.

As a result, in such circumstances it would be the Italian resident person to whom the power is conferred to be subject to Italian tax obligations.

1.1.5. Are there any other characteristics in your jurisdiction that make it particularly asset protection friendly, e.g. political stability, banking or other secrecy rules, favorable civil procedural rules (e.g. in relation to the (non-)recognition of foreign judgments) and have there been any changes to these principles recently?

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1.1.6. Has there been any recent case law particularly relevant with regard to asset protection structures and what was it about?

A great number of court cases relate to the setting-aside of transfer of assets into trust (*azione revocatoria*) – see above paragraph 1.1.4. Additionally, see paragraph 1.1.7 below on the most recent Supreme Court decisions on the taxation of transfer of assets into trust.

1.1.7. What, if any, taxes apply to trusts or other asset-holding vehicles in your jurisdiction, and how are such taxes imposed? How is the transfer of assets to trusts/foundation or other asset-holding vehicles taxed in your jurisdiction?

The Italian rules on the taxation of trusts have been introduced in 2007. Since their introduction, the issue of the tax implications arising from the creation and funding of a trust and its subsequent distributions has been at the centre of an ongoing debate.

Indirect taxation – Transfer of assets in trust

Transfer of assets into trust is subject to the Italian succession and gift tax (under Italian tax law, broadly speaking succession tax and gift tax follow the same rules and apply the same rates and taxable base).

The Italian Tax Authority stated its position vis-à-vis the application of the gift tax to trusts in its Circular letters (C.M. 48/E/2007 and C.M. 3/E/2008), notably that tax should be levied/charged when assets are brought into the trust (i.e. 'entry charge' theory) and not when distributions to beneficiaries take place.

Following representations made by a number of Italian notaries and commentators (backed by the decisions of some Italian lower tax tribunals), the Italian tax authority conceded that, in certain instances, the chargeable event (giving rise to taxation) should be the one that takes place at the time of the transfer of the assets from the trustees to the beneficiaries of the trust, and not at the time of the segregation of the assets.

The position is however very fluid and constantly debated. Additionally, the Italian Supreme Court (Tax department) has, in some recent decisions (2015), confirmed the position that gift tax should be charged upon the creation or funding of the trust (entry charge). However, some commentators have noted that the wording of the Supreme Court decisions has been drafted in wide terms, so that in theory it might be argued that tax is due both on the way in and on the way out.

At the time of writing, gift tax is levied in relation to the relationship between the donor and the donee. The current rates are as follows:

• 4% on property passing to a spouse, children or ascendants;

• 6% on property passing to siblings; and

• 8% on property passing to anyone else.

Property passing to immediate family members benefits from an exemption of €1million per beneficiary. However, the non-taxable amount for property passing to siblings is limited to €100,000 per beneficiary.

Care should be taken where the class of beneficiaries is made up of people that may fall in different categories (eg the spouse and a charity, or the children and a brother) as both the rates and the applicable non-taxable values may be subject to challenges.

Italian succession tax is normally levied on the net market value of the chargeable estate, with the exception of immovables, which are taxed by reference to the (much lower) 'cadastral' value, which is a tax value attributed to each immovable property by the Italian tax authorities.

It is also worth mentioning that the Italian Parliament is currently discussing the possibility of increasing the gift tax rates (up to 45%) and substantially reducing the non-taxable amounts (down to a maximum of €500,000).

Direct taxation – the life of the trust

The Italian Tax Authority (again through a series of circular letters: C.M. 48/E/2007, C.M. 3/E/2008 and C.M. 61/E/2010) set out guidelines on the imposition of direct taxation to trusts, which depends on whether a trust should be considered look-through or opaque, and on the type of activity carried out by the trust (commercial or non-commercial).

Trusts are opaque when beneficiaries do not have a set right to receive the income of the trust, but rather are members of an open class of beneficiaries. In this case, for income tax purposes the trust will be treated as akin to a company and income tax would therefore be chargeable on the trust itself. IRES (the Corporate Income Tax) would apply at the current rate of 27.50%, as well as IRAP (the regional production tax) at a current 3.9% rate.

As for capital gains, where trusts are opaque and do not operate activities which are commercial in nature, taxation in the hands of the trustees may benefit from specific rules that apply to private individuals.

Conversely, where the beneficiaries are specifically identified in the trust deed and immediately entitled to receive a certain share of income, the income deriving from assets in trust will be attributed directly to the beneficiaries, considered as taxable in their hands (so called 'transparent trust'), and thus chargeable to IRPEF (the general individual's income tax).

IRPEF is due every year and has a progressive rate that increases as the taxable base increases.

Distributions

Also in this respect, the Italian Tax Authority and the practitioners are not aligned, and the point is very much debated.

There are two opposing theories:

(a) *Gift tax approach (*distributions occur on a very irregular basis and in different amounts): from the perspective of indirect taxes (such as inheritance and gift taxes), one could argue that a one-off distribution of assets should be qualified as a "gift" for Italian tax purposes. As seen above, whether the distribution is taxed (again) in the hands of the beneficiaries is subject to debate, especially in light of the recent Supreme Court decisions.

(b) *Income tax approach* (distributions are made to a beneficiary on a regular basis, similarly to an income for the beneficiary): in the absence of any clear statutory provision/case law on the tax treatment of distributions to Italian resident beneficiaries, there is

currently a risk that a substantial distribution might be characterised as income in the hands of the beneficiary and taxed at the beneficiary's marginal tax rate at up to 43%.

1.2. National and international transparency requirements

1.2.1. What are the developments in your country with regard to the automatic exchange of information? Will your jurisdiction implement the OECD-CRS and if yes, when and how?

Council Directive 2014/107/EU of 9 December 2014, which amends and expands the scope of application of Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (see paragraph 2.2.2 for more details on the 2011/16/EU directive) (the 'Directive') was ratified in Italy by Law no. 95 of 18 June 2015, taking effect as of 1 January 2016 (or rather, the collection of data commenced on 1 January 2016, but the first exchange of information will be in September 2017) .

The Directive is aimed at clarifying the existing tax compliance framework and introducing new provisions specifically applicable to financial institutions for the purpose of implementing the CRS rules at European level. In fact, through the Directive the CRS has been introduced as law in the European countries, which – with the exception of Austria – will exchange information as from 2017.

Pursuant to the Directive, these obligations include, in essence, the duty of financial intermediaries to carry out a KYC due diligence on their clients and report the information collected to a central government agency responsible for forwarding it to the other countries parties to the CRS scheme.

Later last year, on 28 December 2015, the Ministry of Economy and Finance enacted a ministerial decree containing operating provisions to specify the exact scope and technical operation of those reporting duties[1].

The current rules apply to banks, life insurance companies, collective investments funds and fiduciary companies offering current and savings accounts, investment portfolios, collective investment undertakings, unit link life insurance policies and certain kind of financial trusts in Italy, either by means of a domestic company or through a permanent establishment of a foreign entity (hereinafter 'Financial Intermediaries').

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[1] http://www.finanze.gov.it/export/sites/finanze/it/.content/Documenti/Varie/Relazione-Illustrativa-DM-28-dicembre-2015.pdf

The definition of Financial Intermediaries, however, does not include certain financial institutions which are the same as or similar in kind to those exempted under letters a) and b), para. 1, part B, section VIII, Annex 1 of the Directive, such as, notably, the Italian Government and all its agencies, international organizations headquartered in Italy, the Bank of Italy, most pension funds, and credit card issuers.

Effective from 1 January 2016, Financial Intermediaries must apply the due diligence rules under the Directive (and attached to the ministerial decree as a schedule to it) in order to identify the accounts to be notified to the Italian authorities. In relation to each account so identified, the Financial Intermediaries are compelled to provide the Italian tax authorities with the personal details and residence of the holder, as well as the details and balance of the account at stake (or equivalent for other financial products) by 30 April of each year. This obligation applies both to existing accounts and new ones, although the extent of due diligence required is differentiated depending on their value. After receiving the aforementioned information, the Italian tax authority must forward it to its equivalent agencies in other countries by 30 September of the following year.

1.2.2. Has your country entered into a bilateral FATCA agreement? If yes, what are the main features of such agreement?

Yes, on 10 January 2014 Italy entered into an intergovernmental agreement with the United States of America in order to improve international tax compliance and implement FATCA (the '**IGA**'). See paragraph 2.2.3.1 below for more details.

Pursuant to the terms of the IGA, every year starting from 31 August 2015, all Italian financial institutions (defined in the same way as under the Directive; cfr. above) must submit to the Italian tax authority the information regarding the bank accounts or other investment products held by US citizens in relation to the previous financial year. The Italian tax authority, in turn, must forward it to the IRS within the next month.

In recent months, Italy has implemented a computer system to submit this information in electronic form, which uses the same standards as under FATCA.

1.2.3. FATF (Financial Action Task Force) recommendations and developments: What are the recent developments in your country and what are the specific due diligence obligations in your jurisdiction?

In February 2016, the FATF published its latest mutual evaluation report on Italy providing a summary of the anti-money laundering and combating the financing of terrorism (AML/CFT) measures in place in Italy as of January 2015[2].

The main key findings of the report were that Italy has a mature and sophisticated AML/CFT regime, with a correspondingly well-developed legal and institutional framework. However, the report also noted a few systemic shortfalls in particular with regard to the risk of money laundering (ML) stemming principally from tax crimes and activities most often associated with organised crime, such as corruption, drug trafficking, and loan sharking.

Italy is now developing a nationally coordinated AML/CFT strategy informed by its 2014 national risk assessment (NRA). Generally speaking, law enforcement agencies are able to access, use, and develop good quality financial intelligence and undertake large and complex financial investigations and prosecutions, which in some cases have led to large confiscations of crime proceeds.

Financial institutions were found to have a good understanding of ML threats, with larger banks being strongest in their mitigation efforts. On the contrary, the nonfinancial sector has a lower understanding of the ML/TF risk, an issue also hampered by the absence of detailed secondary legislation targeting that sector.

Despite the fact that customer due diligence measures are well embedded in the financial sector, in many instances the processes for identifying beneficial owners were considered not consistent throughout the various market players. Information on beneficial ownership of legal persons is accessible in a timely fashion, though the report suggested that its reliability should be increased through more consistent cross-checking. Also, it was reported that the nonfinancial sector, especially sole practitioner lawyers and accountants, lacked in complying with their reporting duties.

In Italy ML is criminalised in a comprehensive way. A recent law (article 648 ter 1 of CC—law of December 15, 2014, entered into force on January 1, 2015) also criminalised self-laundering, in the ambit of the voluntary disclosure program (see paragraph 2.1.1 below). All the categories of crimes listed in the FATF Glossary are predicate offenses to ML, including a range of tax crimes. Added to the re-criminalisation of "false corporate accounting"

[2] http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/MER-Italy-2016.pdf

it was a welcome step, and is particularly significant in light of the extent of tax crimes in Italy.

Italy also has a comprehensive framework for seizing and confiscating assets linked to crime which includes not only "ordinary" confiscation but also confiscation of per equivalent, confiscation for disproportion, and a range of preventive measures under the Anti-Mafia Code.

One area where the law and regulations have not been updated for the financial sector to reflect the revision of the FATF standards relates to wire transfers. Pending action at the EU level, Italy is still bound by the 2006 EU Wire Transfer Regulation, which does not take account of the new requirements with respect to beneficiary information and the obligations on intermediary FIs.

1.2.4. Will your country be subject to the Fourth EU Anti-Money Laundering Directive ("4AMLD") including UBO-register?

Yes it will.

By 26 June 2017 (date of entry into force of the 4AMLD) Italy will have to implement it into its legal system, thereby amending the current rules included in d.lgs.231/2007 (which in turn implemented the existing directives 2005/60/EC and 2006/70/EC). The d.lgs. 231/2007 entered into force on 1 January 2008, introducing sanctions for legal persons involved in the money laundering offences.

1.2.5. If not, does your jurisdiction know similar shareholder registers?

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1.2.6. Are there any other transparency requirements in your country that pose a threat on the anonymity of asset protection structures?

(As discussed elsewhere in the Report).

2. Tax

2.1. Transparency requirements under national law

2.1.1. Transparency obligations regarding income derived from other States and relevant tax treatment

Art. 53, para. 1, of the Italian Constitution (IC) provides the so-called *ability to pay principle*, according to which «*every person shall contribute to public expenditure in accordance with their capability*».[3] Therefore, in practice, the Italian tax system applies the worldwide income taxation principle to taxpayers considered "resident" for tax purposes,[4] while "non-resident" persons shall pay taxes only in relation to the income produced in the national territory.[5]

In addition, Italy provides reporting duties for certain resident taxpayers that have (or transfer) assets or investments in another country, regardless if the latter is considered "cooperative" or "uncooperative jurisdiction". In particular, the law governing foreign capital and property of Italian residents imposes a duty on resident individuals, non-commercial entities and limited liability partnerships to declare any assets exported and to declare their value annually within their income tax return. According to Law Decree no. 167 of 28 June 1990 (and subsequent amendments), these taxpayers must indicate in a particular section of their tax return (the so-called *Quadro RW*) all transfers to and from other countries – made through non-residents and without bank mediation – of cash or financial activities of a value that exceeds € 15,000.[6]

Similar reporting duties are provided for financial institutions that helped resident taxpayer in such transactions, which must also be reported to the Bank of Italy.

If these obligations are not fulfilled, the taxpayer will be subject to tax administrative penalties that range from 3% to 15% of the sums not indicated in the tax return and the corresponding value of goods can be seized. Nevertheless, if the undeclared transactions or assets involve an "uncooperative jurisdiction", the resident taxpayer shall be liable to tax administrative penalties that range from 6% to 30%. Financial institutions that helped taxpayers in such transactions or that have knowledge of foreign undeclared assets and failed to report them to the Italian tax authorities shall pay an administrative tax penalty from 10% to 25%.

Finally, the law provides that undeclared foreign activities are subject to a presumptive taxation, which considers them profitable at the official discount rate in force in the tax period when the activities should have been declared.

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[3] English translation proposed by the Italian Senate, available at *www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf*.

[4] For the definition of residence of individuals, *see* Art. 2, Presidential Decree no. 917 of 22 December 1986, (Income Tax Consolidated Act, hereinafter "ITCA").

[5] *See* Art. 23 ITCA.

[6] This threshold has been introduced by Law no. 186 of 15 December 2014, since before it was € 10,000.

After the G-20 held in London on 2 April 2009, the leading world economies decided to tackle tax evasion and "declared war" to tax havens, which were considered partially responsible of the global economic crisis by attracting foreign investments through their favourable tax disciplines and, especially, by providing "opaque" legislations and a banking secrecy policy.

This first strong signal from the international community led the Italian Government to introduce in 2009 a so-called *Tax Shield*,[7] which was an amnesty programme allowing applicant taxpayers to regularise or repatriate, in an anonymous way, their undeclared offshore assets by paying an "extraordinary tax" of 5% of their value.[8]

Following the latest initiatives of the international community aimed at strengthening mutual administrative assistance mechanisms and combating the phenomenon of "base erosion and profit shifting" (BEPS), Italy approved a *voluntary disclosure* programme, which – similarly to the *Tax Shield* – is reserved to those resident taxpayers that failed to report and pay taxes on offshore assets or transactions.[9] Nevertheless, and this clearly expresses that the Italian tax policy is aligning to the international trend, this discipline provides that applicant taxpayers shall: 1) disclose all their offshore undeclared assets directly to the Italian tax authorities; 2) pay in full the taxes that should have been paid in the tax years "covered" by the programme (*i.e.* from 2010 to 2013 in case of false tax return or from 2009 to 2013 in case of omitted tax return); 3) benefit from a reduction of tax administrative penalties.

The *voluntary disclosure* programme represents therefore a new kind of amnesty for Italy, much more severe from the previous *Tax Shield* or other broad official tax pardons (*condono fiscale*), which strengthen the importance of reporting duties on taxpayers.

Italy provides also a special anti-avoidance discipline aimed at limiting the deductibility of costs suffered by resident taxpayers for transactions made with companies resident in uncooperative jurisdictions to the measure of their "market value".[10] Before the recently introduced amendment,[11] which was necessary in order to render the discipline compatible with certain non-discrimination clauses contained in double tax conventions signed by Italy, such anti-avoidance discipline provided the general prohibition to deduct "black list" costs unless the taxpayer successfully gave evidence that those costs showed an effective economic interest and that the foreign company was not a "letter-box".

Finally, Art. 167 ITCA lays down specific duties for resident taxpayers that directly or indirectly control a foreign company (so-called *c.f.c. legislation*), also

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7 *See* Art. 13-*bis* of Law Decree no. 78 of 1st July 2009.

8 For more details, *see* P. MASTELLONE, *The new Italian Tax Shield: amnesty for undeclared offshore assets*, in *European Taxation*, vol. 50, no. 4/2010, p. 152 et seq.

9 For the analysis of the discipline and the critical aspects, *see* P. MASTELLONE, *The Italian voluntary disclosure programme: a new era of tax amnesty?*, in *European Taxation*, vol. 55, no. 8/2015, p. 374 et seq.

10 *See* Art. 110, paras. 10-12, ITCA.

11 *See* Art. 5, Legislative Decree no. 147 of 14 September 2015, which amended Art. 110, paras. 10-12, ITCA.

through trust companies or other subjects, with seat in a non-EU State or jurisdiction with a preferential tax regime or with a "non-cooperative" approach. Such discipline attributes profits of such non-resident entities to the controlling company proportionally to the shares held, if both the following requirements are satisfied:

a) the controlled foreign company is subject to a tax burden lower than 50% of the Italian one;
b) more than 50% of the controlled foreign company is composed by passive income.

If such requirements are met, the income of the controlled foreign company is taxed as it was produced by the Italian controlling company, according to the ordinary rules laid down in the ITCA. Nevertheless, the taxpayer may obtain the disapplication of such discipline through a preliminary ruling aimed at proving the existence of one of the following circumstances:

- the controlled foreign company carries out an effective industrial or commercial activity abroad; or
- from the shares held by the Italian taxpayer it does not follow the effect of fictitiously shifting the profits in low-tax jurisdictions.

The recent Legislative Decree no. 147 of 14 September 2015 has amended the c.f.c. discipline in order to render its definitions clearer and allow taxpayers to provide their counterproof more easily. Such amendment permitted such special anti-avoidance discipline to align to international best practices.[12]

2.1.2. Regulations to report the worldwide transfer pricing policy of the group

Transfer pricing provisions were introduced in Italy a long time ago:[13] the first regulation entered into force in 1936.[14]

The actual transfer pricing regime provides that, in regard to international intra-group transactions, the tax authorities shall not apply the principle of valuation at historical cost. Instead, they must determine the value of goods and services on the basis of the normal value, if this leads to an increase of the taxable

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[12] In literature, *see* L. MIELE – V. RAMAGLIONI, *"CFC rules" più aderenti alle "best practices" internazionali*, in *Corriere Tributario*, vol. 38, n. 38/2015, p. 3873 et seq.

[13] On this isse, *see* G. BIZIOLI, *Considerazioni critiche in merito all'orientamento giurisprudenziale in tema di* transfer pricing, in *Rivista della Guardia di Finanza*, vol. 63, n. 3/2014, p. 691 et seq.; R. CORDEIRO GUERRA, *La disciplina del* transfer price *nell'ordinamento italiano*, in *Rivista di Diritto Tributario*, vol. 10, no. 4/2000, p. 421 et seq. and G. MAISTO, *La disciplina del "transfer price" nel diritto tributario italiano e comparato*, Cedam, Padua, 1985.

[14] Art. 17, Law no. 1231 of 8 June 1936 provided that, in regard to «*the income of autonomous companies and share partnership companies that carry out their activity in the Reign [of Italy], on behalf of companies, firms or foreign associations […] all the amounts unduly indicated in the balance sheet in the form of price increases of raw materials, products and goods sold by the foreign entity or in the form of commissions, profit sharing […] are considered active*» (Author's translation).

base.[15] The tax authorities are entitled to make such an adjustment if both of the following requirements are satisfied:

- an Italian and a foreign company exist; and
- the Italian entity controls the foreign entity or vice versa.

The rationale of this specific anti-avoidance regime is to minimize a reduction to the tax burden through the manipulation of profits, by using group companies placed in tax-privileged jurisdictions.

The onus to demonstrate the existence of such tax avoidance is on the tax authorities to the extent that they intend on making adjustments. In this respect, the Italian Supreme Court (ISC) held that, «*the taxpayer is not required to prove the correctness of the transfer prices applied, if the tax authority did not prove prima facie the infringement of the normal value principle*».[16] In doing so, it recalled its longstanding case law in the field of specific anti-avoidance provisions.[17] Since the purpose of the transfer pricing provisions is to avoid a situation where, within a group of companies, the profits are transferred for less than the normal price of the goods sold, with the specific aim of avoiding Italian taxation thereon in favour of foreign more advantageous tax regimes, the ISC believes that Art. 110, para. 7, ITCA represents «*an anti-avoidance clause rooted […] in the EU principles of abuse of law*».[18] The burden to prove the existence of the requirements of the transfer pricing provision is on the tax authorities and the taxpayer only has to prove the correctness of the prices applied after the tax authorities have *prima facie* established a divergence from the arm's length principle. Nevertheless, in practice, it is not clear what evidence the tax authorities are required to provide to demonstrate that the taxpayer has infringed the transfer pricing provision. According to some scholars, what is required is not actual proof, but argumentation based on factual elements well-known to the parties, interpreted differently. Therefore, while the tax authorities must describe a sufficiently organic argumentative scenario, free from logical defects, the taxpayer must highlight the inconsistencies and contradictions inherent in such reasoning and also facts that would reduce its tax liability (*i.e.* deductible costs sustained in the business activity).

Art. 26, Law Decree no. 78 of 31 May 2010 (converted into Law no. 122 of 30 July 2010) substantially amended the transfer pricing regime by introducing a

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15 Art. 110, para. 7, ITCA provides that «*the income components deriving from transactions with companies not resident in the territory of the State, which directly or indirectly control the taxpayer, are controlled by the taxpayer or are controlled by the same company controlling the taxpayer, are measured at the normal value of the goods sold, services supplied and goods and services received, determined according to paragraph 2, if there is an income increase; the same provision applies also if there is an income decrease, but only in executing agreements concluded with the competent authorities of foreign states in force under special "mutual agreement procedures" provided by international double taxation agreements. This provision also applies to the goods sold and services supplied by companies not resident in the territory of the state on behalf of which the taxpayer undertakes an activity of sale or supply of raw materials or goods or an activity of manufacturing or processing*» (Author's translation).

16 *See* ISC, Tax Chamber, 13 October 2006, no. 22023, which has been confirmed by ISC, Tax Chamber, 16 May 2007, no. 11226.

17 *See* ISC, Tax Chamber, 25 March 2003, no. 4317.

18 *See* ISC, Tax Chamber, 13 October 2006, no. 22023.

"safe harbour" provision in regard to tax administrative penalties for taxpayers that previously prepared pre-determined documents proving the transfer prices applied.[19] This legislative amendment aims to align the Italian rules with the relevant OECD Guidelines and defines administrative penalty profiles in regard to infringement cases.[20]

The regime provides that in circumstances where a transfer price adjustment is made by the tax authorities that results in higher tax or a credit difference, the penalty for false tax return (from 100% to 200% of the higher tax or lower credit ascertained) shall not apply if:

a) during the access, inspection or tax examination, the taxpayer supplies to the tax officers the Transfer Pricing Documentation (hereinafter "TPD") that has been identified in a Decision of the Chief Commissioner of the Italian tax authorities, which is aimed at verifying compliance of transfer prices with the normal value; and
b) the taxpayer had already informed the tax authorities that it held such documentation.[21]

The Decision of the Chief Commissioner of the Italian tax authorities was enacted on 29 September 2010 (Protocol no. 137654/2010) and specifies the TPD that is required to enable tax officers to confirm whether or not the transfer prices are consistent with the "normal value". Any discrepancies would, thus, justify tax administrative penalties. In compliance with the EU Code of Conduct and the OECD Transfer Pricing Guidelines, the TPD must be:

– suitable and necessary to comply with the arm's length principle;
– sufficient to prove "reasonable effort" and the absence of disproportionate costs in regard to the specific transaction;
– complete in terms of all information that is reasonably available at the time of the transaction; and
– in line with the prudent business management principle.

The amendment enables the tax authorities to verify whether or not the prices used in intra-group transactions correspond with those used in a free market context by relying on a pre-defined standard of documentary evidence. The discipline provides that the taxpayer shall:

1) keep the *Masterfile* and the *Country-specific documentation* for intra-group transactions; and

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19 The Explanatory Memorandum to Law Decree No. 78/2010 explains that the new penalty protection system is guaranteed for those taxpayers that have a standardised set of documents that makes it possible to check compliance of the transfer prices applied with the normal value.

20 *See* R. CORDEIRO GUERRA – S. DORIGO, *La documentazione dei prezzi di trasferimento*, in *Corriere Tributario*, vol. 33, no. 33/2010, p. 2732 et seq.; E. DELLA VALLE, *La documentazione sulla 'transfer pricing policy' al debutto nell'ordinamento interno*, in *Corriere Tributario*, vol. 33, no. 28/2010, p. 2252 et seq.; P. MASTELLONE, *The shift in the burden of proof in regard to transfer pricing*, in *European Taxation*, vol. 51, no. 5/2011, p. 211 et seq.

21 *See* new Art. 1, para. 2-*ter*, Legislative Decree no. 471 of 18 December 1997.

2) inform periodically the tax authorities of the existence of the TPD, in order to allow the tax officers to rapidly obtain the available TPD in the event of an examination.

The Masterfile, which is kept by the holding company, contains all the relevant information of the company group and the economic characteristics of the intercompany transactions to be monitored. According to the EU Code of Conduct, the Masterfile «*should follow the economic reality of the business and provide a 'blueprint' of the MNE group and its transfer pricing system that would be relevant and available to all EU Member States concerned*».[22]

More precisely, the Masterfile shall contain:

a) a general description of the multinational group;
b) an outline of the structure of the group:
   – organization, list, legal form of the members and their shares; and
   – operative structure;
c) the general commercial strategy of the group;
d) the transactions carried out (described in a data flow diagram);
e) the intra-group transactions:
   – sale of material or immaterial goods;
   – supply of services;
   – supply of financial services;
   – services necessary to carry out the intra-group activity; and
   – agreements regarding the distribution of costs;
f) the company's functions, assets and risks;
g) intangible goods, royalties, etc.;
h) the company's transfer pricing policy and reasons why it complies with the arm's length principle; and
i) an outline of its relationships with the tax authorities of other Member States regarding Advance Pricing Arrangements (APAs) and rulings on transfer pricing.

The Country-specific documentation, which contains the information specifically related to the resident company involved in intra-group transactions, has the function of adapting the general description of the information provided in the Masterfile to the economic reality of the resident company. This document shall contain:

a) a general description of the company;
b) an outline of the areas of its business activity;
c) the operative structure of the company and of its business units;
d) general strategies of the company and changes from the previous business year;
e) intra-group transactions, including:

[22] *See* EUROPEAN COMMISSION, *Communication on the work of the EU Joint Transfer Pricing Forum on transfer pricing documentation for associated enterprises in the EU – Proposal for a Code of Conduct on transfer pricing documentation for associated enterprises in the EU*, COM(2005) 543 final, Brussels, 7.11.2005, Annex, para. 4.1.

- a description of the entities of the group with which the transactions are conducted;
- a comparability analysis;
- an indication of the transfer pricing method adopted;
- application criteria in respect of that method; and
- the results of the method adopted; and

f) the intra-group agreement for the distribution of costs.

In the event of an assessment, the tax authorities (knowing that the taxpayer has the TPD) shall ask the taxpayer to produce the TPD within 10 days. This term is shorter than the general one (15 days) and it is justified on the basis that the documents required are – in theory – available. However, the consequences of not meeting this deadline appear to be disproportionate in terms of the administrative sanctions that apply.[23]

A quite controversial aspect of the described discipline is that the non-application of the tax administrative sanction requires not only that the TPD be maintained, but also that the TPD be "suitable" according to the tax officers, since it should permit compliance of the transfer prices with the normal value to be determined. This aspect implies, in practice, a wide discretion of tax authorities to determine whether or not the TPD meets a certain degree of reliability, for example, in relation to information not updated or not complete.

Another critical aspect of the transfer pricing discipline was that its application did not automatically exclude criminal implications for the taxpayer involved: in this respect, the Italian system considers the false tax return punishable with tax administrative penalties and, if certain quantitative thresholds are exceeded, also with criminal penalties. In this respect, Legislative Decree no. 158 of 24 September 2015 (entered into force on 22 October 2015) has expressly excluded any criminal implication linked to transfer pricing claims by the tax authorities, which shall not inform anymore the competent public prosecutor.[24]

2.1.3. Obligations to report tax schemes

The Italian tax system does not provide obligations to report tax schemes.

Nevertheless, thanks to the international developments, Italy has introduced several non-compulsory instruments that enhance and favour a close cooperation between taxpayers and tax authorities.

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[23] According to Art. 2, para. 2, Legislative Decree no. 471 of 18 December 1997, if, for the purposes of individual taxes, the income reported in the tax return is lower than the income ascertained or, in any event, the tax is lower or a credit is higher than that due, an administrative penalty from 100% to 200% of the higher tax or credit applies.

[24] *See* new Art. 4, para. 1-*bis*, Legislative Decree no. 74 of 10 March 2000, as amended by Art. 4, Legislative Decree no. 158 of 24 September 2015.

2.1.3.1. Advance tax ruling for schemes potentially considered "abusive" by tax authorities

Until 2015, Italian law regulated tax avoidance through two main tools.

On the one hand, there were specific provisions that prohibit the unlawful saving of taxes.

On the other hand, the battle against tax avoidance was tackled through the application of Art. 37-*bis*, Presidential Decree no. 600 of 29 September 1973 (Income Tax Assessment Act, ITAA), introduced in 1997 and according to which the tax authorities were able to disregard transactions lacking a "valid economic purpose" and aimed at circumventing obligations or prohibitions or unduly obtaining tax reductions or reimbursements. Despite its wide application, such provision was not properly a general anti-avoidance rule (GAAR), since its application was limited to the specific list of transactions contained in paragraph 3.

Nevertheless, from 2006 onward – and, especially, with several decisions issued in 2008 by the Grand Chamber – the ISC started to enlarge its objective scope of application also to other transactions not specifically identified by the rule, invoking excessively the principle of "abuse of law" as defined by the Court of Justice of the European Union (CJEU) and considered rooted in the so-called *ability to pay principle* of Art. 53 IC. Such criticizable approach that *de facto* led to a judicial creation of a GAAR in the Italian tax system generated great uncertainty among taxpayers, which inevitably became scared that any transaction might have been considered abusive by tax authorities.[25]

This scenario has been finally solved with the introduction, in 2015, of a GAAR contained in Art. 10-*bis* of Law no. 212 of 27 July 2000 (the so-called *Taxpayers' Bill of Rights*, hereinafter "TBR").[26] Paragraph 5 of such new rule provide the possibility for the taxpayer to know in advance from tax authorities if a transaction will fall under the application of the GAAR.

2.1.3.2. Advance tax ruling for new investments

Art. 2, Legislative Decree no. 147 of 14 September 2015 (in force from 7 October 2015) provides that «*companies wishing to make investments in the territory of the State for amounts not less than € 30 million and that have significant implications for employment in relation to the activity in which the investment is made and to their duration, may submit to Tax Authorities an preliminary ruling concerning the tax treatment of their investment plan and of any extraordinary transactions that shall be considered linked for its implementation*».[27]

Companies willing to do new investments with the abovementioned characteristics may also use this procedure with the aim of checking if the

[25] For an analysis this case law, *see* R. CORDEIRO GUERRA – P. MASTELLONE, *The judicial creation of a general anti-avoidance rule rooted in the Constitution*, in *European Taxation*, vol. 49, no. 11/2009, p. 511 et seq.

[26] Introduced by Art. 1, Legislative Decree no. 128 of 5 August 2015.

[27] Author's translation.

proposed transaction or transaction will not be considered abusive by tax authorities under the new GAAR rule.

This tool is a very positive signal that contributes to strengthen a close cooperation between taxpayers and tax authorities, in order to abandon an historical conflictual relationship and align the Italian system to the new "compliance" trend emerging in the international scenario.[28]

2.2. Exchange of information under national law

2.2.1. Overview of current regulations regarding international tax assistance and exchange of information on the tax position of companies

Italy is as an OECD Member State and has developed a wide and effective system for exchanging tax relevant information in compliance with the international standards of transparency in tax matters, enforced through various instruments with other EU and non-EU Countries. As a member of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, Italy participates to the Peer Review Group of the Global Forum itself and is very active in the ongoing anti-BEPS strategy.

The legal and regulatory Italian framework for transparency and exchange of information includes an extensive network of bilateral double tax conventions (hereinafter DTCs),[29] as well as 6 tax information exchange agreements (hereinafter TIEAs)[30] based on the OECD Model Tax Convention issued in 2002[31] and other 20 bilateral working arrangements under the terms of the exchange of information provisions, signed by tax authorities.[32]

Moreover, as a Contracting Party to the Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters (hereinafter "MAAT Convention") – which is the only multilateral instrument on exchange of information – Italy has ratified it with Law no. 19 of 10 February 2005, as well as the recent Protocol amending this Convention that entered into force on 1st June 2011. This Protocol, which aims at adapting the MAAT Convention to the new international standards, in particular with regard to bank secrecy, has been ratified with Law no. 193 of 27 October 2011.

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[28] On this issue, *see* A. TOMASSINI, *L'interpello sui nuovi investimenti*, in *Corriere Tributario*, vol. 38, n. 22/2015, p. 1673 et seq.

[29] Italy has signed 93 DTCs, available at *www.finanze.it/opencms/it/fiscalita-comunitaria-e-internazionale/convenzioni-e-accordi/convenzioni-per-evitare-le-doppie-imposizioni/index.html*.

[30] Available at *www.finanze.it/opencms/it/fiscalita-comunitaria-e-internazionale/convenzioni-e-accordi/tiea-tax-information-exchange-agreement/*.

[31] *See* OECD, *Agreement on exchange of information on tax matters*, Paris, 2002, available at *www.oecd.org/ctp/exchange-of-tax-information/2082215.pdf*.

[32] Available at *www.finanze.it/opencms/it/fiscalita-comunitaria-e-internazionale/convenzioni-e-accordi/accordi-amministrativi-per-lo-scambio-di-informazioni/*.

Italy has also ratified the European Convention on Mutual Assistance in Criminal Matters signed in Strasbourg in 1959, including the so-called *fiscal Protocol*.[33]

2.2.2. The implementation in Italy of Directive no. 2011/16/EU of 15 February 2011

Italy has implemented Directive no. 2011/16/EU through Legislative Decree no. 29 of 4 March 2014, entered into force on 1st April 2014. Taking into account the deep changes introduced at the EU level, such enforcement clearly shows the will of the Italian Republic to make effective its commitment against international tax evasion, with particular attention to the automatic exchange of information provided by Art. 8 (*Mandatory automatic exchange of information*). Such type of information exchange has recently gained great political support in the international framework,[34] focusing on the possible benefits, such as the capacity to let tax authorities aware of non-compliance behaviours and, at the same time, to have a deterrent effect, increasing voluntary compliance and encourage taxpayers to fulfil their fiscal obligations timely and in the right way.

See above paragraph 1.2.1 for additional information.

2.2.3. Other developments regarding the automatic exchange of information

2.2.3.1. The Italian enforcement of FATCA regulations

The Italian discipline on exchange of information and administrative cooperation is highly influenced by EU law, OECD guidelines and, also, by US federal legislation. In this respect, the pivotal role of the United States in the international tax scenario is characterised by an impressive number of "unorthodox" tools for obtaining information from foreign financial institutions. After 9/11, the USA

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[33] Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, signed in Strasbourg on 17 March 1978, whose Art. 1 expressly provides that Contracting States «*shall not exercise the right provided for in Article 2.a of the Convention to refuse assistance solely on the ground that the request concerns an offence which the requested Party considers a fiscal offence*».

[34] *See* UN Committee of Experts on International Cooperation in Tax Matters, *Note on automatic exchange of information*, 9th Session, Geneva, 21-25 October 2013, where automatic exchange information procedures are clearly considered as one of the most important emerging issues in international tax and a fundamental step in tax transparency, «*comparable e.g. to the adoption of exchange on request as the international standard a few years ago*».

PATRIOT Act[35] has introduced, *inter alia*, several anti-money laundering provisions (Sec. 301),[36] which:

a) broaden the definition of "financial institutions";
b) oblige financial institutions to identify their clients according to more rigorous criteria;
c) prohibit the opening or maintenance in the United States of "correspondent accounts" that guarantee the anonymity of account holders;[37]
d) impose various due diligence obligations in relation to transactions from and to another country;
e) provide reporting obligations for "suspect" transactions.

Notwithstanding the significant global developments in the field of administrative tax cooperation, the United States is parallely conducting a "unilateral battle" for reaching the highest level of disclosure of bank information from foreign financial institutions. On 18 March 2010 the US enacted the Foreign Account Tax Compliance Act (FATCA), which substantially provides that foreign financial institutions (FFIs) and non-financial foreign entities (NFFEs) shall be subject to a 30% withholding taxation unless they disclose to the Internal Revenue Service (IRS) all the information concerning US account holders.[38]

Through FATCA regulations, US tax authorities may rely on an automatic and «*asymmetric*»[39] exchange of information from FFIs, without a formal request of information made according to a treaty provision. The aspect that makes FATCA unique in the international scenario is the possibility to strengthen its extraterritorial enforcement (*rectius* its extra-US enforcement) through the signature of intergovernmental agreements[40] based on a standard model, whose

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[35] Acronym for *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*.

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

[37] Sec. 311 of the USA PATRIOT Act defines a correspondent account as «*an account established to receive deposits from, make payments on behalf of a foreign financial institution, or handle other financial transactions related to such institution*».

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

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

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

first version was issued on 26 July 2012. For making such extra-US enforcement possible, the entry into force of FATCA rules were postponed at 1st July 2014.[41]

Italy – together with France, Germany, Spain and the United Kingdom – signed on 8 February 2012 the *Joint Statement regarding an intergovernmental approach to improving international tax compliance and implementing FATCA* [42], aimed at extending the FATCA mechanism of automatic exchange of information to financial information concerning citizens of these European Countries, since this is the real policy objective of FACTA itself (while collecting the withholding tax of 30% has a mere "deterrent" function).

As clearly remarked by the Italian Ministry of Economy and Finance, «*the intergovernmental approach is guided by the principle of reciprocity and enables a two-way automatic exchange of information (to and from the United States). The execution of bilateral agreements is therefore expected to facilitate international tax compliance and the application of revenue laws to the benefit of both countries. The Governments' objective is to achieve a close-knit collaboration aimed at reaching over time common standards in matters of tax return and due diligence obligations, keeping filing and requirement costs for financial institutions and other parties concerned by the application of the FATCA legislation at a minimum*».[43] Such scenario created great uncertainty in the national financial sector, which cannot even rely on guidelines issued by the tax authorities or the Ministry of Economy and Finance, and obstacles the development of updated software programs for managing financial transactions [44].

In January 2013 Italy initialed the FATCA Intergovernmental Agreement (IGA) with the US, which was signed in Rome on 10 January 2014.[45] Law no. 95 of 18 June 2015 finally ratified and enforced the FATCA legislation in Italy, as resulting from the Intergovernmental Agreement signed on 10 January 2014.

TREASURY, *Model 2 IGA, No TIEA or DTC*, 4 November 2013, available at *www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Model-2-Agreement-No-TIEA-or-DTC-11-4-13.pdf*.

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

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

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

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

[45] Agreement between the Government of the United States of America and the Government of the Republic of Italy to improve international tax compliance and to implement FATCA, Rome, 10 January 2014, available at *www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Italy-1-10-2014.pdf*.

2.2.3.2. Automatic exchange of information

On 21 July 2014 the OECD issued the comprehensive publication which contains the text of the Model Competent Authority Agreement and the Common Reporting Standard and the relevant Commentaries.

On 29 October 2014, 51 jurisdictions signed the Multilateral Competent Authority Agreement aimed at promoting automatic exchange information under the so-called *Common Reporting Standard* based on Art. 6 of the MAAT Convention. Italy signed such Agreement and will enforce the automatic exchange of information mechanism from September 2017.

2.3. The BEPS Action Plan and its initial enforcement in Italy

As an active member of the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, Italy is in the first line for the implementation of anti-BEPS initiatives.

In the view of tackling aggressive tax planning and harmful tax practices, the OECD addressed the various governments to adopt specific forms of communication and enhanced cooperation between taxpayers and tax authorities.

The Italian Parliament – with Art. 6, Law no. 23 of 11 March 2014 – has delegated the Government to regulate certain critical aspects of such relationship and, in particular:

a) good tax governance;
b) management of the tax risk;
c) cooperative compliance.

The same Legislative Decree no. 128 of 5 August 2015 that introduced a GAAR in the Italian tax system also regulates a special regime, according to which applicant companies may obtain tax breaks and simplifications if they enforce a so-called *tax control framework* that ensures tax transparency.[46] In this respect, Art. 3 expressly provides that, «*in order to promote the adoption of forms of communication and enhanced cooperation based on mutual reliance between tax authorities and taxpayers, as well as to encourage, in the public interest, the prevention and resolution of tax disputes, it is established the cooperative compliance regime between the Tax Agency and those taxpayers equipped with a system of detection, measurement, management and control of the tax risk, meaning the risk of operating in violation of tax rules or contrary to the principles or to the purposes of the tax system*».[47]

This new optional regime may permit to eligible taxpayers to «*reach, with the Tax Agency, a common evaluation on situations likely to generate tax risks prior to the filing of*

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[46] On this issue, *see* C. MELILLO, *«Regime di adempimento collaborativo» e monitoraggio del rischio fiscale: incentivi, semplificazioni e oneri*, in *Diritto e Pratica Tributaria Internazionale*, vol. 12, n. 6/2015, p. 963 et seq.

[47] Author's translation.

tax returns, through forms of constant and preventive communication on factual evidence, including the possibility of anticipating the control».[48]

Tax erosion has become, for the Italian Government, the new enemy to combat through domestic regulations and in line with the international coordination of OECD and of the European Union. Legislative Decree no. 160 of 24 September 2015 (*Estimate and monitoring of tax evasion and monitoring and reorder of provision against tax erosion, enforcing Articles 3 and 4 of Law no. 23 of 11 March 2014*) represents the most recent (but not the last) initiative in this sense.

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48 Art. 6, para. 1, Legislative Decree no. 128 of 5 August 2015.