Mutual Recognition versus Transnational Administration in Tax Law: Is Fiscal Sovereignty Still Alive?

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Abstract

This paper analyses the evolution of the concept of mutual recognition in tax matters. For many decades, the prevailing idea was that a state's fiscal sovereignty prevented the recognition of a foreign tax decision. Now, however, the situation is changing, especially following the economic crisis of 2008 and the proliferation of international tax avoidance phenomena fed by multinational enterprises. As a consequence of these recent developments, tax decisions have often become the result of the contribution of several national authorities (sometimes also supported by supranational bodies). Mutual recognition has thus become basically useless. One can therefore speak about a new notion of tax sovereignty, according to which the peculiarities of a single legal system are not protected either through mutual closure or mutual recognition, but via ex ante procedural cooperation.

1. Introduction

Mutual recognition is a slippery concept: it has 'many facets and colours, many objects and addresses, and certainly more than one interpretation'.[1] However, it is widely recognized that in the context of the internal market, mutual recognition presupposes and helps to realize the exercise of the fundamental freedoms.[2] It is not my intention here to describe that concept, nor to take sides in the harsh debate still pending about it between scholars. I would limit myself to pointing out that mutual recognition is an instrument to

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1 E Reimer, 'Taxation: an Area without Mutual Recognition?', in I Richelle, W Schon, E Traversa (eds), *Allocating Taxing Powers within the European Union* (Vol. 2, Springer 2013) 203.

2 See M Möstl, 'Preconditions and Limits of Mutual Recognition' (2010) 47 Common Market Law Review 409.

concretise mutual trust, which in turn refers to the EU principle of sincere cooperation.[3]

Hence, it presupposes a high degree of trust between states and the will of each state to pursue genuine market integration.[4] As Reimer pointed out,

mutual recognition occurs where an EU Member State has made a legal decision, and where the effect of this decision goes beyond the territory of this State, as another member State refrains from deciding on the same issue again but adopts, into its legal order, the decision made by the first-mentioned State.[5]

At the end of the day, it is a matter of openness between different legal orders.

Mutual recognition in tax matters has never been very popular with tax law scholars. This is understandable in light of the link that tax matters have always had with state sovereignty. Acts and decisions issued by foreign tax authorities cannot – according to the traditional approach – automatically produce effects on the territory of another state. A manifestation of the will of the receiving state is always necessary in order to assess whether the latter is interested in transforming the foreign act into a domestic one. It is not, therefore, a question of mutual recognition, a concept which in itself implies trust and reciprocity. Rather, what prevails – in the context of a matter jealously considered to be of exclusive national competence – is the defence of the legal borders of a given system.

This attitude, resulting from the closure of the various legal systems and the competition between them, has undergone a profound evolution in recent times. The outbreak of the global economic crisis contributed greatly to this new scenario. There is widespread awareness that the crisis was partially favoured by the lack of tax cooperation between states, a situation which benefitted tax havens, as well as multinational companies being able to move their profits away from states with a higher tax burden. All the same, perhaps surprisingly, the perceived need for greater cooperation has not given rise to mutual recognition in tax matters.

As we will see, there are cases in which a state unilaterally recognizes a tax decision issued by the tax administration of another state. However, these cases have little to do with genuine mutual recognition in its ordinary sense. In tax law, mutual recognition is not aimed at realizing market integration, but at guaranteeing the correct exercise of fiscal prerogatives by each state under its own laws. It then presupposes (and sometimes hides) a situation of competition

3 The strict consequentiality between sincere cooperation, mutual trust and mutual recognition has been evidenced by H Wenander, 'Recognition of Foreign Administrative Decisions' (2011) ZaöRV 770ff.

4 See the analysis by J Pekelmans, 'Mutual Recognition: economic and regulatory logic in goods and services' (2012) 24 Bruges European Economic Research Papers 4.

5 Reimer (n1) 197.

between states, leaving aside in practice any form of genuine mutual trust. Moreover, it is an exceptional tool, while in other fields recognition is the rule and can be restricted only under exceptional circumstances.

Instead, it seems that, from the initial phase of non-recognition, national tax systems have jumped to much more sophisticated forms of transnational administrative procedure, in which their decisions are the result of the contribution of several national authorities (sometimes also supported by supranational bodies) and often represent the final outcome of a genuinely transnational decision-making procedure.

This evolution can be interpreted as emphasizing the aim of states to defend their sovereignty in fiscal matters as far as possible. It is evident that a state's sovereignty is more compressed when the system allows for the recognition of a foreign administrative act, even when the provision is for a procedure of *exequatur* or the foreign act's replacement with an internal act with equal content and effects. On the contrary, fewer problems arise when, right from the start, the state's tax administration contributes to the formation of an act that – albeit originating in one state and destined to produce effects in another – is shaped by the simultaneous participation of the various institutional actors involved in the different countries.

In short, as this contribution will show, the way in which the initial closure of tax systems has been concretely overcome appears coherent with the traditional features of tax law, that is, by protecting the sovereignty of each state as much as possible, even in the context of an economic and legal world no longer based on opposition, but on cooperation.

What has recently been happening within the European Union is a clear example of this evolution: in EU law, several examples of transnational procedures can be found that aim to guarantee 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's main features – a common legal space based on mutual trust between its Member States – and, as such, it makes the reference to 'foreign' acts subject to recognition somewhat obsolete.[6]

A study about the relevance of mutual recognition in tax law thus seems to be innovative, precisely because the issue has not been extensively dealt with by tax law scholars. There are multiple reasons for that. Mutual recognition has been largely overlooked, because its rare examples have been considered to be manifestations of coordination between states and subsequently subsumed

6 For an overview of the EU's role in developing efficient forms of cooperation in tax matters, see G Puoti, 'The Mutual Assistance in Tax Matters: Situation and Perspectives in the EU Member States' (2010) Rivista di Diritto Tributario Internazionale 187; R Seer & I Gabert (eds), *Mutual assistance and information exchange* (European Association of Tax Professors and Authors 2010).

under tax cooperation analysis. Hence, it has not been considered as an autonomous phenomenon deserving specific and separate attention. Moreover, while mutual recognition recalls the principles of free circulation, taxes cannot circulate; therefore, the issue remained peripheral in light of the apparent contradiction between mutual recognition and the functioning of national tax systems.

The present paper aims to (partially) fill the gap, placing mutual recognition at the centre of the perspective and analysing its role (if any) in today's tax law.

After giving an overview of the historical evolution of the concept of cooperation in fiscal matters (para 2), the paper will critically describe those situations in which – according to national law (para 3) and international or EU instruments (para 4) – a system of mutual recognition of foreign tax decisions seems to be at work. What will emerge is that, under the label of mutual recognition, states retain a wide margin of discretion in defence of their sovereignty and in contrast to a genuine sense of reciprocal trust. Thereafter, an analysis will be made of the elements of international and EU practice, showing the emergence of a new cooperative model based on the active participation of various national tax administrations in a common procedure (para 5). These examples will lead to the conclusion that transnational administrative cooperation is finally taking the place of mutual recognition as a tool to preserve each state's remaining fiscal sovereignty (para 6).

2. The evolution of cooperation in tax matters

It may seem contradictory to talk about the mutual recognition of foreign administrative acts in tax matters. In fact, for a very long time the opposite attitude prevailed in tax law, focusing neither on recognition nor on collaboration, but rather on competition and therefore mutual closure.

The reasons for this approach are twofold: sovereignty and territoriality. The power to impose and manage taxes has always been considered an expression of state sovereignty. Consequently, tax laws and administrative practices are accorded no importance in legal orders other than the ones from which they originate.[7] Were they permitted similar influence, the argument goes, this would mean that a state – or, more precisely, its norms and the procedures that

7 As one author has correctly highlighted, non-cooperation between states in tax matters depends on the nature of the tax rules and, therefore, on their essentially public and political implications. These characteristics, therefore, restrict the effects of these rules within the boundaries of the state which issued them; see F Persano, *La cooperazione internazionale nello scambio di informazioni. Il caso dello scambio di informazioni in materia tributaria* (Giappichelli 2006) 8. For a general overview of the impact of EU law on the tax sovereignty of Member States, see G Bizioli, 'Balancing the fundamental freedoms and tax sovereignty: some thoughts on recent ECJ case law on direct taxation' (2008) 48 European Taxation 133.

are rooted in them – operating in a foreign territory would consequently be in violation of the international law principle of sovereign equality.[8]

At the same time, the principle of territoriality[9] circumscribes both the facts to be regulated and the rules designed to regulate them within the boundaries of a single law system.[10] According to this view, the cases in which a tax decision issued by a particular state goes beyond its boundaries to involve the administrative authorities of another legal system are quite exceptional.[11]

Hence, both legal reasons (sovereignty and limitation of the effectiveness of tax rules within the boundaries of a single state) and factual circumstances (the economic model which prevailed for centuries only marginally contemplated exchanges between different states) hindered the recognition abroad of tax acts issued by another state for a long time. The only exceptions were those mutual procedures laid down in international conventions for the administration of matters of common interest.[12]

In this scenario, it is easy to understand the meaning of the 'revenue rule'[13] created by the jurisprudence of the United States: according to this rule, not only do states remain free not to cooperate in the implementation of mutual tax claims, but international law even imposes the strict obligation of non-cooperation.[14] The public nature of the duty to pay taxes and the consequent irrel-

8 M Isenbaert, 'The contemporary meaning of sovereignty in the supranational context of the EC as applied to the income tax case law of the ECJ' (2009) 18 EC Tax Review 264; JJM Jansen & S Jansen, *Fiscal Sovereignty of the Member States in an Internal Market: Past and Future* (Kluwer Law International 2011). On the doctrine of public international law, one can recall the study by F Pocar, *L'esercizio non autorizzato del potere statale in territorio straniero* (Edizioni Cedam 1974).

9 The principle of territoriality has for a long time dominated the relationship between two or more legal systems, ever since the judgment of the Permanent Court of International Justice of 7 September 1927 in the *Lotus* case. According to 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 AG Kokott on case C-482/18 *Google Ireland* [2019] EU:C:2019:728, para 44.

10 On the principle of territoriality in the context of EU tax law see, in general, E Traversa, 'Tax Incentives and Territoriality within the European Union: Balancing the Internal Market with the Sovereignty of Member States' (2014) 6 World Tax Journal 315.

11 R Cordeiro Guerra, 'I limiti alla potestà impositiva ultraterritoriale' (2012) 1 Rivista Trimestrale di Diritto Tributario 31.

12 From the very beginning of the analysis of international cooperation in tax matters, see C 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' (1976) 1 Rivista di diritto finanziario e scienza delle finanze 79. See also TR Erujimovich, *Intercambio internacional de información tributaria* (UBE 2004).

13 An in-depth analysis of the 'revenue rule', its origins and applicability in present times can be found in B Mallinak, 'The revenue rule: a common law doctrine for the twenty-first century' (2006) 16 Duke Journal of Comparative & International Law 79.

14 The judicial rule under consideration has spread quickly in many systems of common law: references in this sense can be found in the UK (*Attorney General v. Lutwydge* [1729] 26 ER 531), and in Canada (*USA v. Harden* [1963] SCR 366).

evance for a state of the tax decisions issued by the authorities of another state underpin this negative obligation. According to the well-known dictum of Lord Mansfield, 'No country ever takes notice of the revenue laws of another'.[15]

Over the years, this restrictive approach has been consolidated in common law systems as a result of wide support for Westphalian principles, and also thanks to the binding nature of the judicial precedents therein. Different legal systems, such as those from the civil law tradition, have sometimes shown favour for the principle of non-recognition too. Italian jurisprudence, for example, has stated the legal inexistence of foreign tax claims in Italy for decades.[16]

In this context, the fiscal acts issued by the tax administration of a foreign state were legally irrelevant outside its borders. Indeed, as noted, even an act of recognition was unable to give effect to acts within a different legal order, since this would have implied the subordination of the administrative structure of a state to interests irrelevant for the latter and linked only to a foreign legal order.[17]

Albeit strongly rooted – specifically in jurisprudential practice rather than in national legislations[18] – the revenue rule has undergone a great, albeit gradual, downsizing over the last twenty years.[19]

The first factor in this process has been the change in the economic context. Globalization has made people and wealth much more mobile, with the consequence that transnational cases – that is, cases situated in part outside a single legal system – have become much more frequent than in the past. The most recent scenarios, characterized by the dematerialization of wealth and the digitalization of economic activities, are currently shunting aside the traditional,

15 *Holman et al. v. Johnson* [1775] 1 Cowp 341.

16 '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 this examination of civil law systems, see P Mastellone, 'La mutua assistenza nella riscossione dei tributi all'estero' in R Cordeiro Guerra (ed), *Diritto tributario internazionale. Istituzioni* (Cedam 2016) 327.

17 This situation is discussed by C Sacchetto, *Tutela all'estero dei crediti tributari dello Stato* (Cedam 1978).

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

19 A Briggs, 'The Revenue Rule in the Conflicts of Laws: Time for a Makeover' (2001) 96 Singapore Journal of Legal Studies 280; JG Castel, 'Foreign Tax Claims and Judgments' (1964) 42 Canadian Bar Review 277; H Cohen, 'Non-enforcement of foreign tax law and the Act of State doctrine: a conflict in judicial foreign policy' (1970) 10-11 Harvard International Law Journal 1; BA Silver, 'Modernizing the revenue rule: the enforcement of foreign tax judgements' (1992) 22 Georgia Journal of International and Comparative Law 609. In the Italian doctrine, an early attempt to support the need to overcome the traditional revenue rule was proposed by A Fedele, 'Prospettive e sviluppi della disciplina dello scambio di informazioni fra amministrazioni finanziarie' (1999) 1 Rassegna tributaria 49.

territorially based taxation approach in favour of concepts more open to international influences.[20]

As a consequence – and here we come to the second factor – the need to open the national fiscal system to external influences is gradually being admitted: cooperation between tax administrations is becoming necessary so that they can correctly determine their resident taxpayers' global ability to pay;[21] and this is happening regardless of the existence of reciprocity clauses.[22] Among the most evident effects of the global economic crisis of 2008 is the perceived need for forms of tax coordination that can intercept the 'nomadic incomes' of multinational companies travelling to and from tax havens.

At present, many taxable facts are linked to two or more national legal systems. This brings about two consequences. The first is that transnational cooperation becomes essential, since the taxpayer's state of residence, which is legitimized to tax his/her income wherever produced in the world under the so-called 'worldwide principle', normally does not have the tools to exactly reconstruct sources of income originating beyond its borders.[23] Therefore, this state's tax claims cannot be satisfied without the collaboration of the territorial state.[24] The second consequence, which is strictly related to the first, regards the need to recognize fiscal administrative acts coming from another legal order even without reciprocity, or rather in the presence of a 'future and uncertain' reciprocity.[25]

It is worth noting that the revenue rule has also been overcome in the legal system from which this theory originated, that is, in the United States: here, in 2005, the Federal Supreme Court ruled in *Pasquantino* that the traditional duty

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20 J McLure & E Charles, 'Globalization, Tax Rules and National Sovereignty' (2001) 55 Bulletin for International Taxation 328.

21 For a thorough analysis of the origin and development of international cooperation, see D Bonhert, 'International mutual assistance through exchange of information' (1990) 18 Intertax 303. More recently, see S Dorigo, 'Scambio di informazioni nel diritto tributario internazionale' in *Digesto delle discipline privatistiche – Sezione commerciale* (Aggiornamento 8, Utet Giuridica 2015) 480.

22 On the development of the strong tendency towards cooperation between states see X Oberson, *International Exchange of Information in Tax Matters: Towards Global Transparency* (2nd edn, Elgar Tax Law and Practice 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' (2004) 1 Rivista di diritto tributario internazionale 11.

23 According to the 'worldwide principle', each state is allowed to tax the income of persons having their residence in that state, even if that income (or part of it) comes from sources outside the state territory. This method, therefore, privileges subjective links with the state (expressed by residency) for tax purposes, regardless of where the source is.

24 J Owens, 'Moving towards better transparency and exchange of information on tax matters' (2009) 11 Bulletin for International Taxation 557: 'cooperation between tax administrations is now becoming the rule'.

25 See P Mastellone, 'Recent developments in cross-border enforcement of tax liability' (2009) 6 Diritto e pratica tributaria internazionale 581.

not to cooperate would no longer force 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.[26]

The *Pasquantino* approach is now reflected in many instruments, both at national and international level, which somehow take for granted the possibility that foreign administrative tax acts operate outside the boundaries of the legal order of origin. And it is worth noting that these instruments often establish a system of mutual collaboration between different states for the formation of the tax decision and, subsequently, its effective implementation.

Along the same lines, as we will see later on, a decisive contribution comes from the European Union's legal system,[27] in which the principle of mutual recognition (outside the fiscal area) has long been recognized due to the need for mutual trust between Member States.[28] Thanks to the lengthy debates around the latter, despite the limitations imposed by the treaties on fiscal matters, the EU is gradually going beyond the concept of mutual recognition for tax purposes[29] in favour of common procedures aimed at creating genuinely transnational tax decisions.[30]

3. The sources of mutual recognition: domestic law

The section above showed that the original attitude of non-cooperation in tax matters has been left behind. However, the question remains as to whether, as a consequence of this development, mutual recognition has gained a significant place in tax relations between states. From a methodological point of view, it seems correct to first deal with the cases of mutual recognition

26 *Pasquantino et al. v. United States* 544 US 349 (2005).

27 The EU legal system has been convincingly defined as 'anti-sovereign'; see P Boria, *L'antisovrano: Potere tributario e sovranità nell'ordinamento comunitario* (Giappichelli 2004).

28 On this topic, see *inter alia* WH Roth, 'Mutual Recognition', in P Koutrakos & J Snell (eds), *Research Handbook on the Law of the EU's Internal Market* (Edward Elgar Publishing 2017) 427, as well as the bibliography in the other papers presented in this special issue.

29 It is worth noting that, according to one author, the development of the principle of mutual recognition for tax purposes within the EU runs counter to the legitimate expectations of Member States with regards to a non-harmonized field; see J Ghosh, 'Tax Law and the Internal Market: A Critique of the Principle of Mutual Recognition' (2014) 16 Cambridge Yearbook of European Legal Studies 1899. However, the Member States' resistance to mutual recognition also covers fields such as VAT, which has already been harmonized, according to P Genschel in 'Why no mutual recognition of VAT? Regulation, taxation and the integration of the EU's internal market for goods' (2007) 14 Journal of European Public Policy 743.

30 See F Lafarge, 'EU law implementation through administrative cooperation between Member States' (2010) 1 Rivista Italiana di Diritto pubblico comunitario 119. A wide study concerning the interactions between national tax law, EU law and international law, not limited to the issues under discussion in the present article, can be found in G Bizioli, *Il processo di integrazione dei principi tributari nel rapporto fra ordinamento costituzionale, comunitario e diritto internazionale* (Cedam 2008).

regulated by national rules, and save examination of the cases disciplined at international and European level for the following section. Firstly, it can be noted that national rules have a rather limited role in the regulation of mutual recognition phenomena: if a conventional or EU instrument is lacking, it is rare for national law alone to allow a foreign administrative act to have effect within the internal legal system. Nonetheless, some examples of such national rules are presented in the following paragraphs. What will emerge is that in most cases, so-called 'mutual recognition' in tax law lacks the typical character of a genuine openness (and trust) between states.

3.1. Certification of payment of a tax abroad in order for tax credit to be granted 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.[31] According to the worldwide principle, many states include profits produced abroad in their residents' national tax base: therefore, the same income runs the risk of being taxed twice, first in the source state and then in the state of residence.[32] Many jurisdictions unilaterally provide the taxpayer (who is considered fiscally resident therein) with a tax credit able to reduce the tax due by up to the amount already paid abroad on that same income.[33] In this way, double taxation is eliminated, at least in part. Of course, the mechanism works if the foreign tax has been paid abroad on a permanent basis – that is, if the payment is not provisional, nor liable to a partial or total refund; therefore, this gives rise to the question of how to verify this situation.

To this end, the state of residence frequently recognizes certification issued by the competent authority of the other state, indicating the amount of tax that has been paid there as well as the definitive nature of the payment. This happens, for example, in the Italian legal system, where the certification of the other state's tax authority is a valid evidential element for the granting of tax credit.[34] A similar mechanism – which can be found in other sectors when the tax paid in another state needs to be recognized in order to limit the national tax burden on the same income – allows foreign administrative acts, on the basis of which tax has been paid in another state, as well as the certification attesting to this

31 See R Franzè, 'I metodi di eliminazione della doppia imposizione internazionale sul reddito' in C Sacchetto (ed) *Principi di diritto tributario europeo e internazionale* (Giappichelli 2016) 83.
32 See (n23).
33 The tax credit method is typical of many national legal systems, including Italy's. For the discipline of the latter, see A Contrino, *Contributo allo studio del credito per le imposte estere* (Giappichelli 2012).
34 Italian Revenue Agency (*Agenzia delle Entrate*), Circular Letter no. 9/E of 5 March 2015, para. 2.4.

circumstance, to produce effects in a different legal system.[35] These effects are produced even in the absence of reciprocity and, above all, without granting the national tax administration the power to unilaterally question what is attested by its counterpart in the other state. The need to avoid a case of double taxation, in these cases, takes precedence.

3.2. Certificates of residence for tax purposes

Other cases involving the use of certifications issued by the tax authorities of a foreign state show rather different outcomes: recognition by the host state is not automatic, but involves an evaluation on the part of its tax administration. This is the case for certificates of residence for tax purposes issued by the state in which a natural or legal person is deemed to be fiscally resident and destined to a different state which, on the basis of its internal legislation, claims that the taxpayer's closest link is to that country, hence he/she has to be considered fiscally resident there.[36]

The relevant practice shows that many states have no problem in recognizing what is certified in these acts, on the implicit assumption that their content precisely documents the real circumstances of the case. Therefore, the principle of mutual trust between states comes to the fore.[37] There are, however, some remarkable exceptions.

The Italian tax administration, with the endorsement of some case law, has sometimes denied recognition of tax residence certification issued by the competent authorities of a foreign state, since it considered that the factual elements in its possession were sufficient to establish the tax residence and that, as opposed to the situation certified by foreign authorities – which did not have the same elements to take into account – was for that reason partial and

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35 For example, with regard to *CFC* rules (art. 167 Legislative Decree no. 917/1986, so-called *TUIR*) or permanent establishments (art. 162 TUIR).

36 The bibliography on the concept of residence for tax purposes is wide. One can refer *inter alia* to the various contributions in E Traversa (ed), *Corporate Tax Residence and Mobility* (IBFD Publications 2018); R Couzin, *Corporate Residence and International Taxation* (IBFD Publications 2002).

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

unreliable.[38] In these cases,[39] recognition is denied and what happens instead is a unilateral and internal reconstruction of the facts.[40]

It should be emphasized, however, that the Italian Supreme Court follows a different interpretative approach. According to its jurisprudence, certificates of residence issued by a foreign tax administration must in principle be recognized as a valid evidential tool; in the event that the Italian Revenue Agency has doubts about its content, it should add concrete evidence to the contrary and, before rejecting the certified situation, activate the international instruments for tax cooperation in force with the other state.[41]

This interpretative solution shows preference for recognition of foreign certification, but at the same time offers the receiving state the possibility of protecting itself, in any case by acting in cooperation with the issuing authorities. The Italian Revenue Agency, over the course of an infringement procedure by the EU Commission (subsequently closed), supported the same solution.[42]

3.3. 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. When a transaction occurs between companies belonging to the same group but residing in different states, it frequently happens that the tax administration of the state where the company resides increases the taxable income of the latter by considering that the price charged to its parent company, resident abroad, for a supply of goods or services, is lower than the free market value. This possibility aims to guarantee that intragroup transactions are made at the same prices as would be applied between independent companies, so that a level market playing field is respected. In order to avoid double taxation, this recovery should entail that the tax authorities of the other state allow a corresponding reduction (via the deduction of an

38 Provincial Tax Court of Florence, dec. no. 158 of 11 December 2008.

39 For an analysis of the main Italian jurisprudence of merit trends, see R Cordeiro Guerra, 'L'esterovestizione al vaglio dei giudici di merito' (2008) Giustizia tributaria 541.

40 It seems appropriate to underline that this paper analyses the case in which the tax administration considers the content of the certificate of residence to be incomplete 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.

41 Italian Court of Cassation, decisions no. 1552 and no. 1553 of 3 February 2012. The need to evaluate the taxpayer's place of residence for tax purposes through recourse to the international exchange of information procedure has been advocated by G Marino, 'Osservazioni in tema di residenza nel contesto dello scambio automatico di informazioni' (2018) 89 Diritto e pratica tributaria 1.

42 Letter of 22 December 2010 to the EU Commission, prot. 2010/157346.

identical amount) in the tax base of the company that paid the price considered not to be at arm's length.[43]

Hence, the legislation of many states allows for this downward adjustment following the assessment made by the other state: consequently, the foreign administrative act is implicitly recognized, in the sense that its content (with regard to the amount of the tax base charged to the foreign company) leads to a correction of the same amount, but of the opposite sign, in favour of the resident parent company.[44]

Again, the Italian practice shows some peculiarities. Although the legislation provides for the possibility of making a compensatory adjustment on the basis of the assessment made by the foreign tax administration,[45] the Italian Revenue Agency retains the power to review the correctness of the recovery made by the former. This implies that it is possible to refuse the adjustment where it is deemed that the foreign act has not correctly reconstructed the market value of the transaction.[46]

This shows that the recognition of the foreign tax act is submitted to assessment by the receiving state, with the aim of preserving the correct exercise of its sovereign prerogatives in tax matters.

3.4. Notification of acts of assessment from abroad

A further situation deserves special mention. Unlike the previous examples, it appears relevant not for substantial (i.e., related to the tax burden), but for procedural aspects. This situation concerns the notification of acts of assessment issued by a state to tax-payers resident in another state. The vast majority of national legislations allow foreign tax assessments to be served while respecting the forms prescribed by the internal regulations of the notifying state. 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. Accordingly, a state is obliged to accept that an act of assessment be notified within its territory following the rules for noti-

43 For the Italian system, see E Della Valle, 'Il transfer price nel sistema di imposizione sul reddito' (2009) Rivista di diritto tributario 133; G Maisto, *Il transfer price nel diritto tributario italiano e comparato* (Cedam 1985). An interesting analysis of various comparative experiences can be found in P Selicato, 'Il transfer pricing interno e la disciplina fiscale dei gruppi di imprese: appunti per una analisi comparata' (1999) 1 Rivista di diritto tributario internazionale 336. For an international approach, see M Lang, G Cottani, R Petruzzi & A Storck, *Fundamentals of Transfer Pricing* (Kluwer Law International 2018).

44 A Vicini Ronchetti, 'I prezzi di trasferimento' in *Principi di diritto tributario europeo e internazionale* (Giappichelli 2016) 213.

45 Art. 31-quater Presidential Decree no. 600/1973.

46 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 arm's length principle (prot. 108954/2018 of 30 May 2018).

fication applicable in another state, even if these rules differ from those provided for by its internal legislation. This is a prerogative of the issuing state, that even those international instruments introducing common forms of notification of tax acts, take care to preserve.[47]

In the event that the notification method chosen by the foreign authority does not guarantee the recipient's actual knowledge of the act – for example, if the home state deems the notification to have been carried out even if the addressee was not present at the place of delivery – the host state does not seem to have any means of opposing it under the applicable rules. However, it should be considered that the host state can deny the effects of the notification when it is clear that the applied foreign rules do not guarantee knowledge thereof.

4. International and EU law

The examples in the preceding paragraphs show that the spontaneous recognition of a foreign tax act is quite rare; moreover, the receiving state often retains a margin of discretion to protect the basic rules of its own tax system.

Frequently, however, recognition of the foreign fiscal act is prescribed by supranational (EU) or international instruments. In these cases, the acceptance by the individual state is not spontaneous (or unilateral), but is an implementation of the supranational or international obligations of the state. The present section will provide some examples of such situations with reference to compensatory adjustments in transfer pricing cases (para 4.1), the recognition of certificates for tax purposes (para 4.2) and the circulation of tax claims (para 4.3).

47 Art 17, para 4 of the OECD/CoE Multilateral Convention on Mutual Administrative Assistance in Tax Matters (ETS No. 127) (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 Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures [2010] OJ L 84/1 (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 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC [2011] OJ L 64/1 ('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').

4.1. The international and European discipline regarding compensatory adjustments in transfer pricing cases

The first example concerns the discipline for transfer pricing, which was already touched upon in the previous section. At the end of the OECD BEPS project works,[48] the participating states signed the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (so-called *MLI*), which came into force in July 2018.[49] The aim of the MLI is to modify all the double taxation conventions of the state parties at once, according to the new rules and principles set out in the various actions of the BEPS project, thus avoiding the need to renegotiate the bilateral conventions one by one.

As regards transfer pricing, the MLI changes the conventional rule by explicitly imposing that the state of the subsidiary company allow a compensatory adjustment of its tax base, as a consequence of a tax assessment made by another state towards the parent company. In the event that the former state has doubts about the correctness of the recovery made by the foreign act of assessment, a round of consultations between the two states is prescribed.[50]

Here, the principle of mutual recognition seems to be realized together with a mechanism of tax dispute resolution, which avoids non-recognition *tout court*, but at the same time preserves the sovereignty of the receiving state.[51] As such, one could speak of a form of 'conditional' mutual trust among states that have chosen to bind themselves by means of agreements. Interestingly, a similar attitude also emerges at the EU level, particularly thanks to the case law of the

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48 The OECD drew up the BEPS (base erosion and profit shifting) project in 2013. It consists of a series of actions suggested to states to update their national discipline concerning international taxation. These actions, although not mandatory for the states, would deeply influence their behaviour (leading them, in particular, to conclude international agreements), thus demonstrating greater persuasiveness than many formal international binding rules. About the BEPS project, see AP Dourado, 'The Base Erosion and Profit Shifting (BEPS) Initiative under analysis' (2015) 43 Intertax 2, 2.

49 An in-depth analysis of the new multilateral convention can be found in M Lang, P Pistone, A Rust, J Schuch & C Staringer (eds), *The OECD Multilateral Instrument for Tax Treaties: Analysis and Effects* (Kluwer Law International 2018).

50 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'.

51 In this sense, see P Das, 'Corresponding Adjustment and Its Interaction with the Mutual Agreement Procedure under Article 25 of the OECD Model' (2019) 26 International Transfer Pricing Journal 1. On the particular relevance of international (and EU) arbitration procedures concerning transfer pricing cases, see M Trivellin, *Studi sugli strumenti di soluzione delle controversie fiscali internazionali, con particolare riguardo al transfer pricing* (Giappichelli 2018).

Court of Justice, albeit in a legal context that is less influenced by the Member States' unilateral positions.[52]

In sum, international practice shows that the actual implementation of mutual recognition obligations, especially outside the EU, is characterized by the preservation of a wide margin of discretion by the requested state to make a compensatory adjustment. True automatism is therefore lacking, even though the recognition duty stems from obligations undertaken under international instruments.[53]

4.2. The circulation of certificates for tax purposes

Supranational sources also offer some interesting cues as to the recognition of certificates for tax purposes issued by the authorities of a foreign country. There are at least two cases that deserve to be analysed in this context: the circulation of certificates of residence in the EU legal system, and the recognition abroad of documents certifying the legal nature of an entity established under the laws of a Member State.

With reference to the first, it must be recalled, as the Court of Justice stated in *Planzer* (concerning a dispute over VAT), that a certificate issued by a Member State attesting to the status of an undertaking as a taxable person 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.[54]

Here, one can observe the peculiarity of the influence of EU law. Unlike the examples of national rules discussed above, in which recognition was voluntarily granted by the host state, in this case the principles of loyal cooperation and mutual trust between Member States lead, in certain circumstances, to situations in which the act issued by the tax authorities of a state produces effects in a

52 Case C-311/08 *Société de Gestion Industrielle v. Belgian State* [2010] EU:C:2010:26.

53 For some useful examples of practice, please refer to E Reimer and A Rust (eds), *Klaus Vogel on Double Taxation Conventions* (Kluwer Law International 2015) 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.

54 Case C-73/06 *Planzer Luxembourg Sàrl v Bundeszentralamt für Steuern* [2007] EU:C:2007:397, para 50.

different legal order on the basis of imposed and implicit recognition by the recipient state.[55]

As for the second case mentioned above, one may recall the qualification of a private entity as a charitable organization in the Member State where it has its legal seat: when the resident of a different Member State makes a donation to it, if the altruistic nature of the entity is certified by the authorities of its state of residence, a deduction from the tax base must be allowed as if it were a donation made to a charitable entity resident in the same state. The Court of Justice, in the *Hein Persche* judgment, emphasized the importance of mutual recognition of those certifications, although each Member State remains free to determine, according to its own rules, whether an entity can be qualified as having charitable status.[56] However, as for the other situations discussed above, when the Member State called upon to accept the deduction has doubts, it cannot simply disregard the qualification given by the other legal system, but must activate the EU instruments of mutual cooperation.[57]

It is interesting to note that this mechanism is also used in certain international conventions. For example, article 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.[58]

However, as compared to the solution suggested by the Court of Justice, in this example the emphasis is placed on the agreement between the two states

55 The problematic matter of the validity of certificates of residence issued by foreign tax authorities is analysed by G Marino, 'Esterovestizione ed esterocertificazione: due facce della stessa medaglia' (2012) 55 Rassegna tributaria 1019.

56 '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' (Case C-318/07 *Hein Persche v. Finanzamt Lüdenscheid* [2009] EU:C:2009:33, para 49).

57 See S 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' (2009) Diritto e pratica tributaria internazionale 959.

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

regarding the recognition of the charitable nature of an entity. In EU law, on the other hand, there is a presumption of conformity, save for the activation of mechanisms of supranational cooperation in the event of doubts.

4.3. Recognition of foreign acts aimed at the recovery of tax-related claims

A case of particular interest for the purposes of our analysis concerns one state's recognition of another state's tax claims, so that the former may assist the latter in the recovery of said 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 claim against it is pending before the competent court. The double taxation conventions stipulated on the basis of the OECD Model Convention permit the requested state to replace the foreign act with an internal one, which must respect the requirements imposed by its internal legislation in order for it to be implemented.[59] The Multilateral Convention on Mutual Administrative Assistance in Tax Matters (also cited with the acronym *MAAT*), stipulated within the OECD and the Council of Europe, is also very clear on this matter. According to article 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.[60]

In the cases under consideration, therefore, whether the foreign instrument permitting enforcement in the requiring state is recognized is left to the discretion of the authorities of the requested state, given the particular invasiveness of the procedure with respect to the latter state's sovereign prerogatives: indeed, this procedure leads to a situation in which the national administrative organization is acting in service of a credit that belongs to a different state. As clarified by the explanatory statement to the aforementioned provision in the MAAT, while some states could implement the foreign act as such, others may need a recognition procedure according to their internal rules. In the latter case, the foreign act should be replaced by an internal one, in which the characteristics are required by the national law.[61]

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59 Art 27 of the OECD Model Convention (2017). See the analysis of the article in MA Grau Ruiz, *Mutual assistance for the recovery of tax claims* (Kluwer Law International 2003).

60 MAAT, art 13, para 2 (n47).

61 *Explanatory Report to the Convention on Mutual Administrative Assistance in Tax Matters 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

5. Overcoming mutual recognition with supranational instruments: towards a system based on cooperation?

As already mentioned, in recent practice a distinctive feature of tax law has emerged, based on the fact that in several cases international and supranational sources do not impose recognition of a decision 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 providing for the institution of common entities) and is aimed at the issuance of a new act which replaces the national one and, as such, is simultaneously valid for all the states concerned. It is interesting to note that many of the examples that will be provided concern regulatory changes introduced, at the international and EU level, after the outbreak of the global economic crisis in 2008: this confirms what was mentioned above about the weight that this event had on the development of coordinated forms of fiscal collaboration between states.

This situation is not new for administrative (non-tax) law scholars:[62] one author, referring to the emergence of such forms of transnational administrative cooperation, recognized that the system of mutual recognition was being overcome in favour of 'common activities of national and supra-national public authorities and, more specifically, [...] new, trans-national patterns of public action'.[63] However, tax law shows some peculiarities in the implementation of this scheme.

In the present section, some examples will be provided, showing the recent tendency of international and EU law to prioritize common procedures rather than establish a system of mutual recognition. These examples will confirm that, for tax law purposes, procedure is rapidly becoming more important than acts.

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

The most obvious example demonstrating the tendency to set up common decision-making procedures (instead of systems based on mutual

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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').

62 L De Lucia, 'From Mutual Recognition to EU Authorization: A Decline of Transnational Administrative Acts?' (2016) 1 Italian Journal of Public Law 90; K Nicolaidis & G Shaffer, 'Transnational Mutual Recognition Regimes: Governance Without Global Government' (2005) 68 Law and Contemporary Problems 263.

63 See, in particular, G Della Cananea, 'From the Recognition of Foreign Acts to Trans-national Administrative Procedures' in J Rodriguez-Arana Muñoz (ed), *Recognition of Foreign Administrative Acts* (Springer 2016) 220.

recognition) can be found in EU law and particularly in the rules concerning mutual assistance for the recovery of tax-related claims. In contrast to what is established by international conventions, Directive 2010/24/EU concerning assistance for the collection of taxes introduces a 'uniform instrument': this is an enforceable title drawn up according to a standard approved by 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.[64]

According to this scheme – binding for all Member States, some of which had earlier also made unilateral attempts to achieve the same objective- the requested Member State is obliged to proceed with the execution of the other state's tax claim if it is included in a document containing all the formal requirements provided by the Directive.[65] Nonetheless, at the same time, it is not possible to carry out any verification of the existence of the credit itself. The former state must therefore treat the uniform instrument as if it embodied a claim of its own. As a consequence it must activate the procedures provided by its own legislation for forced recovery on the basis of the mere attestation by the requesting state of the fact that, according to its internal legislation, the original title is suitable for implementation.[66]

The case of the European uniform instrument represents the highest achievement of the model aimed at creating genuinely transnational administrative procedures and acts. Indeed, the Directive does not limit itself to outlining a procedure through which one state's tax claim can be brought to execution in another state; rather, it introduces a uniform instrument which can operate as such in the whole of the European area, proceeding from the contribution of both Member States concerned: the credit holder who forms it and transmits it to the other state's authorities, who, in turn, give it practical implementation.

The Directive also regulates the methods of redress for the taxpayer subject to the forced execution.[67] Disputes concerning the claim, the uniform instrument or the validity of the notification must be brought in front of the competent

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64 Art 12, para 1 of Directive 2010/24 (n47): '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'.

65 In Italy, see art 5 of Legislative Decree no. 69/2003, according to which the foreign acts aiming at executing a tax claim 'have direct and immediate effect for execution' as if they were internal acts [translation by the author].

66 See F Saponaro, 'Il titolo esecutivo europeo: prospettive in materia fiscale' (2008) 51 Rassegna tributaria 86, which anticipates some of the subsequent developments of the 2010 Directive.

67 C Sozzi, 'Spazio giudiziario europeo e collaborazione alla riscossione dei crediti tributari' (2006) Rivista di diritto tributario 217.

bodies of the requesting state, while disputes about the measures taken by the requested states fall within the competence of the competent body of the latter.[68]

5.2. Mutual agreement procedures (MAPs)

Further examples reveal the current trend in international tax law (as well as in EU tax law) of developing supranational or international forms of administrative procedure.

The reference goes first and foremost to mutual agreement procedures, which are genuine administrative procedures put together by the tax authorities of two states, in order to avoid a situation of double taxation in a specific case, or to clarify controversial aspects in the application or interpretation of a conventional norm.[69]

Many international instruments contemplate these procedures and regulate their use: one can mention article 25 of the OECD Model (which is incorporated into the bilateral conventions negotiated against double taxation having reference to the Model) as the most common example, but MAPs can also be found in the MAAT Convention, as well as in European Union law.[70] The EU legal system, in particular, originally limited recourse to dispute resolution mechanisms for controversies concerning transfer pricing only.[71]

However, the recent Directive 1852/2017 on the mechanisms for resolving tax disputes in the European Union has extended the procedures for the resolution of tax controversies between Member States to all possible cases.[72]

Despite some differences, all these instruments show some common features.

Firstly, the procedures in question take place between the competent tax administrations of the two (or more) States involved. They lead – possibly following an arbitration stage – to the binding definition of the tax claim. Therefore, after the procedure has been concluded, the agreed solution replaces the initial national act of assessment, and as such, is implemented within the two legal

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68 The rule is enshrined in art 14 of Directive 2010/24 (n47).

69 P Pistone, 'Arbitration procedures in tax treaty and Community law: a study from an Italian perspective' (2001) 1 Diritto e pratica tributaria internazionale 613.

70 MAAT, art 24 (n47) which also envisages the creation of a co-ordinating body, composed of representatives of the competent authorities of the Parties, having the function of monitoring the implementation and development of the convention (para 3) but also furnishing opinions on the interpretation of its provisions (para 4).

71 Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises [1990] OJ L 225/10.

72 Council Directive (EU) 2017/1852 of 10 October 2017 on tax dispute resolution mechanisms in the European Union [2017] OJ L 265/1. For a general comment, see P Pistone, 'The Settlement of Cross-Border Tax Disputes in the European Union' in PJ Wattel, O Marres & H Vermeulen (eds), *European Tax Law* (7th edn, Kluwer Law International 2018) 329.

orders concerned.[73] In this case, it is a real joint procedure that gives rise to a common act representing the basis for the subsequent recovery activities put in place at national level.[74]

Secondly, they sometimes provide for the creation of joint commissions or bodies, both for the management of the phase aimed at determining the correct imposition and the resolution of disputes that may arise.[75]

Finally, some form of taxpayer participation is envisaged during these procedures. The taxpayer concerned can, in certain cases, initiate the procedure by addressing a request to his/her state of residence, but, above all, at the end of the procedure he/she has the possibility of contributing 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 in an increasing number of cases, shows that this represents a new regulatory paradigm of international tax law, founded not on the system of 'issuance of an act by a state – recognition by another', but on the joint adoption of a unitary act.

The case of residency for tax purposes appears emblematic in this regard. Article 4, paragraph 3 of the OECD Model – as amended in 2017 – and article 4 of the MLI establish that if a person other than an individual is, according to their national laws, a resident of both states party 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 fell swoop and the task of resolving the issue is attributed to the active and proceduralized collaboration of the tax administrations involved.[76]

5.3. The exchange of information

Finally, the information exchange system is the most frequent form of international tax cooperation between states.[77]

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73 See Reimer & Rust (n53) 1801ff. for the relevant international practice.

74 See *inter alia* A Jones & F John, 'The relationship between the mutual agreement procedure and internal law', in *EC Tax Review* (Wolters Kluwer Deutschland 1999) 4.

75 See Reimer & Rust (n53) 1807.

76 The said outcome is not devoid of questionable aspects. In particular, the question arises concerning the effective guarantee of the taxpayer's rights in the absence of adequate applicable rules that are binding for the states during the negotiation. On these issues, see S Dorigo & P Mastellone, 'L'evoluzione della nozione di residenza fiscale delle persone giuridiche nell'ambito del progetto BEPS' (2015) Rivista di diritto tributario 35.

77 See F Amatucci, M Barassi, L del Federico, C Sacchetto, P Selicato, C Soncini, AS Crisafulli, MP Mastroeni, R Massino, 'Italy' in Seer & Gabert (n 6) 339. For a recent overview with regard to the Italian constitutional set-up, see M Pierro, 'Il dovere fiscale e lo scambio di informazioni' (2018) Rivista di diritto finanziario e scienza delle finanze 449.

The exchange of information, particularly in the form of exchange upon request, is specifically based upon a request that the tax administration of a state addresses to its counterpart in the other state, in order to collect useful information for reconstructing the tax position of a taxpayer resident in the former state. The system thus entails the presence of two actors: a state which needs information to check whether the taxpayer has faithfully fulfilled his/her tax obligation, and another state that, even if it is not interested in the information itself, is required to activate its internal investigative procedures to collect and transmit it to the former state.

All the international and EU instruments covering this form of cooperation – international conventions against double taxation, the MAAT Convention, Directive 2011/16 /EU – recognize that the obligation of the requested state stems from the mere reception of a request from the other state, that meets some formal requirements. Therefore, these instruments lay out a system of implicit recognition of the administrative act that contains the request for information.

Two further elements confirm that these instruments do not create a system based on the mere recognition of acts in the context of a common supranational framework.

First of all, the requested state has the discretion to assess the existence of some minimal requirements within the request made by the other state: namely, that the request has been issued by a competent authority and that the information is 'foreseeably relevant' for the correct application of that state's tax rules to a specific case. The possibility of such an evaluation emerges from the practice concerning bilateral double taxation conventions.[78] It has also been confirmed with reference to the European Union's legal system by the Court of Justice, which has also permitted this verification to be carried out by the courts of the requested state.[79]

78 See Reimer & Rust (n53) 1201.

79 In case C-682/15 *Berlioz* [2017] EU:C:2017:373, the Court of Justice held that the requesting authority 'which is in charge of the investigation from which the request for information arises, 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 this judgment, see K Pantazatou, 'Fundamental Rights in the Era of Information Exchange – The Berlioz Case (C-682/15)' in M Lang, P Pistone, A Rust, J Schuch, C Staringer & A Storck (eds), *CJEU: Recent Developments in Direct Taxation* (Linde Verlag Ges.m.b.H. 2018) 127.

Secondly, joint bodies are established to direct the procedure between the two states involved in a coordinated way.[80] A clear example is that of simultaneous audits, in which the two tax authorities coordinate their activities in such a way as to carry out a simultaneous check on the same taxpayer, while possibly allowing the presence of officials from the other tax administration, in order to assist local colleagues in collecting information, and also being able to act in a partially autonomous way. In the latter case, while taking place entirely in the territory of a single state, the administrative activity leads to an outcome that is the result of the joint activity of both the administrations involved and takes the form of one or more acts or documents that can be used as such in the other legal system.

6. Conclusions: towards a supranational fiscal administrative system?

The analysis of the development of national, EU and international tax practice allows for a number of concluding remarks.

It clearly emerges that the tax governance system has evolved from the initial stage of closure, driven by the preponderance of the need to defend tax sovereignty in the relationship between states, to a situation in which cooperation based on joint or parallel activities by national public authorities is becoming the rule. In this context, mutual recognition appears unable to become relevant in its own right, except in sporadic and circumscribed cases.[81] Even those examples that seem to realize a genuine form of mutual recognition ultimately show a sense of distrust on the part of the national legal orders, which are instead mostly concerned with defending the essential features of their tax capacity.

Many findings highlighted in this contribution point in this direction.

First of all, the cases of unilateral recognition of foreign tax acts – that is, recognition given on the basis of national regulations in the absence of an international or supranational legal framework – are rather limited in number. However, there are more numerous situations in which, even if given by one single legal system, recognition is imposed by the need to fulfil obligations arising at the international or European level.

At the same time, the international and EU instruments make clear that the recognizing state retains the power to graduate the effects of recognition in

80 For example, the directive on mutual cooperation in tax matters creates a European data supervisor and an information exchange 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 also operates with regard to the circulation of information for tax purposes.

81 An author correctly noted that 'the fundamental freedoms do demand mutual recognition at the periphery of tax law', Reimer (n1) 204.

order to protect its sovereign interests; however, any limitations to the full recognition of the foreign act must be placed at the end of a procedure that fosters cooperation between the administrations of both the states involved. In other words, even when it seems justified to speak of the recognition of acts, cooperation between states seems to be the hallmark of tax practice.

This 'proceduralization' clearly emerges from the last group of examples analysed, which seem to be becoming numerically prevalent, particularly as a reaction to the damage caused by the global economic crisis. The specific characteristic of these cases is that they go beyond the single state perspective, in favour of the introduction of a procedure that – through the full and equal participation of the administrations involved – leads to the identification of a single act, effective as such in all the states concerned.

Therefore, owing to its incapacity to meet the needs of these new realities, the system of mutual recognition is losing importance once and for all, while the notion of transnational administrative procedure, regulated by international or European standards and aimed – in some cases through the establishment of joint bodies – at creating common decisions, is rising to the fore. In other words, cooperation between states is becoming the rule, and it is leading to the identification of common procedures and decisions which supplement the national ones. Consequently, the relevance of the *act*, which is implicit in the scheme based on mutual recognition, somehow becomes secondary, while *administrative procedures* emerge as central.

It can be argued that this last group of cases represents the most significant outcome of international tax law today. However, they do not yet signal that the time for tax sovereignty is definitively over. Rather than demonstrating states' effective openness to the shared management of tax matters, they in fact stand as the last defence of the principle of fiscal sovereignty in a globalized world.[82] In a context in which there is no longer room for forms of 'hunting reserves', and the scope for the recognition and circulation of tax acts issued by foreign authorities is becoming narrower, the joint procedures route allows new legal realities to be taken into account while maintaining a central role for the state. The state is not 'invaded' by a foreign act (as happens in mutual recognition); instead, a common procedure is built, through the contribution of every state involved, and a decision-making function is put in place at the transnational level. One can speak, therefore, of a new notion of sovereignty, under which the protection of the peculiarities of a single legal system is no longer realized

82 The evolution of the notion of sovereignty under international tax law is outlined by L Espadafor & C Maria, 'Premesse internazionali dell'evoluzione della sovranità tributaria' (2013) 3 Rivista di diritto tributario internazionale 7.

through opposition and non-recognition, but through a kind of 'cooperative openness'.[83]

In conclusion, tax law is a field in which a new paradigm – already proposed in theory by administrative law scholars – is concretely emerging: a field in which we can witness the fading of theories based on mutual recognition in favour of a system built on transnational administrative procedures, which is no longer founded on the circulation of acts issued by a single system, in which only the final part (that of recognition) calls for the intervention of another state.[84] Rather, in this system, the decision-making processes are governed by common rules and managed from the outset on the basis of forms of cooperation between states and between them and supranational entities.

Certainly, this outcome sharply digresses from the one advocated by the supporters of a genuine multilateralism in the tax field.[85] Here, rather, we are faced with a sort of 'inevitable' multilateralism, which in reality hides the enduring aspiration of every state to defend its own interests. Tax law thus seems to be at the centre of a real paradox: from sovereignty to multilateralism, with the persistent aim of protecting the remaining sovereignty. As expressed by Tancredi in Tomasi di Lampedusa's famous novel *Il Gattopardo*, 'Se vogliamo che tutto rimanga come è, bisogna che tutto cambi'.[86]

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83 The new features of sovereignty in tax matters have been explored by a number of scholars in recent times. See, *inter alia*, T Dagan, 'Tax Sovereignty in an Era of Tax Multilateralism' in D Weber (ed), *EU Law and the Building of Global Supranational Tax Law: EU BEPS and State Aid* (IBFD 2017); B Peeters, 'Tax sovereignty of EU Member States in view of the global financial and economic crisis' (2010) 19 EC Tax Review 236; L van Apeldoorn, 'BEPS, Tax Sovereignty and Global Justice' (2018) 21 Critical Review of International Social and Political Philosophy 478. On the contributions of the Italian doctrine, see F Gallo, 'Giustizia sociale e giustizia fiscale tra decentramento e globalizzazione' (2014) 14 Rivista di diritto tributario 1069; and G Tremonti, *La paura e la speranza. Europa: la crisi globale che si avvicina e la via per superarla* (Mondadori 2009).

84 According to Della Cananea (n63) 239, the analysis of non-fiscal practice demonstrates 'that in a variety of fields public authorities do not only 'recognize' the rules and decisions taken elsewhere, but concur in adopting them'.

85 Some authors have proposed the idea of an international organization devoted solely to taxation issues as the final seal on the evolution towards genuine multilateralism: see for example HD Rosenbloom, N Noked & MS Helal, 'The Unruly World of Tax: A Proposal for an International Tax Cooperation Forum' (2014) Rivista trimestrale di diritto tributario 183. Another author has stressed the importance of deeper cooperation between state tax administrations in order to overcome a stricter approach rooted in the needs of each state, M Stewart, 'Transnational Tax Information Exchange Networks: Steps towards a Globalized, Legitimate Tax Administration' (2012) 4 World Tax Journal 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', P Pistone, 'Coordinating the Action of Regional and Global Players during the Shift from Bilateralism to Multilateralism in International Tax Law' (2014) 6 World Tax Journal 4.

86 'If we want everything to remain as it is, everything must change' [translation by the author].