Tax Cooperation and Exchange of Information

The Issue of 'Circulation of Evidences'

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Abstract

The article analyses the fragmentation that currently characterises the interstate tax cooperation environment. This also has repercussions for the functioning of national tax systems and taxpayer protection. The Italian experience is contextualised therein with an in-depth description and analysis of the international and European framework that accentuates the various evolutionary paths and reasons behind cooperation. In particular, the focus is on the issue of the circulation of evidence that is characterised in the Italian legal system by an additional level of fragmentation. In conclusion, elevating some standards already present at the European level is proposed in order to begin a process of piecing it together.

Keywords: administrative cooperation, taxpayer protection, evidences, evidences unlawfully obtained, tax cooperation, exchange of information.

1 Introduction

In the current increasingly globalised world, tax administrations possess a range of tools at their disposal for enforcing their jurisdiction's tax laws on taxpayers who are either located in or have their assets and activities situated abroad.

In the last few years, there has been considerable acceleration in this area at both the level of individual jurisdictions and international or supranational levels. The U.S. FATCA is an example of the former while examples of the latter are the Organisation for Economic Cooperation and Development (OECD) attempt to promote minimum standards and the automatic exchange of tax information or what is known as the EU's Directives on Administrative Co-operation (DAC 1 and DAC 2).

Very often, initiatives such as these are built on existing instruments and expand their scope and change their purpose and nature. To simplify, at the international level, for instance, information exchange mechanisms that were initially designed for the correct application of double taxation conventions have often been extended in their scope (and automated) which has turned them into major tools to be used in the fight against tax evasion and avoidance. Similarly, at the EU level, mutual assistance instruments initially aimed at the proper functioning of the single market have similarly transformed.

The outcome of these developments is a rather fragmented legal framework in which various instruments often work in parallel to achieve similar results that are not always optimal, such as in the area of taxpayer's rights.

Speaking generically about cooperation between jurisdictions in the field of taxation employs an expression currently covering three types of it: (i) exchange of tax information; (ii) assistance in tax collection abroad; and (iii) cooperation in criminal tax matters. Each of these instruments has its own functioning mechanism and its own specificities and may create different legal issues.

This contribution focuses primarily on the exchange of tax information and contextualises the Italian experience in the international context. Generally, there are grounds to state that the exchange of tax information presents a number of specific risks concerning the protection of taxpayer's rights. In fact, while collecting tax abroad and cooperating in criminal tax matters often lead to two jurisdictions interacting in the performance of activities in the requested state's territory for which specific safeguards are usually provided, the exchange of tax information functions in a partially different way. In itself, the collection of tax information is not detrimental to the rights of the taxpayer, especially if the information being exchanged is already in the possession of the administration or the parties that are obligated to share it. For this reason, the level of protection is also relatively low in many cases such as when there is no obligation for the requested tax authorities to notify or consult the taxpayer.

On the contrary, once the information is exchanged, the risks for the taxpayer become potentially significant. The jurisdiction that sent the information effectively loses all control over it and can no longer restrict its circulation in any way. This may potentially result in extreme consequences such as information about the centre of vital interests of an expatriate being exchanged with an authoritarian government on the grounds of its citizenship.

Theoretically, safeguards to avoid the impairment of taxpayer's rights may be introduced either with respect to outgoing information with, for instance, the taxpayer's right to appeal the exchange and regarding incom-

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doi: 10.5553/ELR.000223

ing information with checks and limits to their usability.[1]

The present contribution considers the latter case and particularly the issue of usability of the information exchanged as evidence by the tax authorities and courts. The Italian legal system is, in fact, based on the separation between administrative and criminal sanctions that may be contemporarily inflicted for the same tax conduct. This creates a certain level of fragmentation of taxpayer's protection which, as described hereinafter, adds to that which is present at the international level.

After having described and analysed the main features of the international framework under which states cooperate in the field of taxation, there is a focus on some EU peculiarities. Contextualised for the specific Italian situation, this contribution proposes adapting the protection beginning with some standards that are already present in the EU legal system. Even though this elaboration specifically considers the Italian reality, the outcome could constitute the basis for further discussion. This is because there is a possibility of elevating some of the standards that are already present in the EU legal system and incorporating them into the legal instruments on which the international tax cooperation is currently grounded. Additionally, they could be inserted into the domestic legislations regulating the usability of evidence collected under those instruments.

2 The Origins of Tax Cooperation Between States and the Reasons Behind It

The expression of 'tax cooperation' encompasses a number of stand-alone activities that are coordinated among two or multiple sovereign states with the shared purpose of enforcing their domestic tax laws. It consists of the provision of relevant information and means to another state in order to comply with the internationally accepted principle that prohibits them from exercising their sovereign powers. Taxing powers are among those that are certainly the most relevant in other jurisdictions.[2]

In recent decades, the increasing interaction between different national economies, known as *globalisation*, has severely challenged the traditional schemes for the exercise of taxing powers by sovereign states. This has also been facilitated by other phenomena such as the growth of digitalisation and computerisation of many aspects of human life[3] that have created a reality together with globalisation in which it is increasingly difficult for states to enforce their domestic tax laws. Taxpayers can move with increasing ease from one place to another and operate in different jurisdictions simultaneously while structuring their businesses and organising their assets according to their own convenience.

To oversimplify, it could be stated that taxpayers have become truly global while states as well as their structure and powers have remained what they were in past centuries. The stringent association of taxing powers with physical territory[4] has almost become a 'cage' for tax authorities in the globalised and digitised world that necessitates states to take a number of countermeasures. In this context, states are increasingly cooperating and interacting at various levels in order to not undermine the effectiveness of their tax systems.

Taxation is not the only sector where this has happened, but it is certainly one of the most relevant since tax collection is one of the most important functions for the functioning of governments and one of the most convenient to exploit.[5] In fact, there are still enormous differences in the tax burden between jurisdictions around the world, and some of them, known colloquially as *tax havens*, implement policies that are intentionally aimed at attracting foreign capital through particularly favourable tax (as well as non-tax) conditions.

There have also been no insufficiencies of unilateral attempts to respond to the challenges of globalisation and digitisation such as, for example, through what is known as controlled foreign company (CFC) rules.[6] They are enacted to counter certain offshore structures that result in either no taxation or an indefinite deferral of taxation. They are ultimately a tool to ensure the taxation of certain categories of MNE income in the jurisdiction of the parent company, thus guaranteeing an effective application of the worldwide taxation principle.[7]

Any solution, however, can hardly be effective without a certain degree of cooperation with the jurisdiction in which the taxpayer is present. At the minimum, the state must take action and enforce that its tax law is truthful and contains usable information about the taxpayer's situation. In addition to this minimum level, there are also more concrete forms of interaction and cooperation which consist of making some of one's own resources available to the other state up to the point of granting its officials access to their own territory.

1 See, among others, A. Buccisano, *Assistenza amministrativa internazionale dall'accertamento alla riscossione dei tributi* (2013), 86 et seq.

2 M. Udina, *Il diritto internazionale tributario* (1949), at 428.

3 K. Schwab, *The Fourth Industrial Revolution* (2016), 18 et seq. The scholar identifies *digital* as one of the drivers and megatrends of what he names the fourth industrial revolution. He explains that *In its simplest form, it can be described as a relationship between things (product, services, places, etc.) and people that is made possible by connected technologies and various platforms.*

4 With regard to this point particularly, see C. Sacchetto, 'Il principio di territorialità in materia tributaria', XLIV *Enciclopedia del diritto* 303 (1992).

5 See, among others, M. Gilleard, 'The Changing Face of Tax Havens', 25(8) *International Tax Review* 22 et seq. (2014).

6 See, among others, R.S. Avi-Yonah and O. Halabi, 'US Subpart F Legislative Proposals: A Comparative Perspective', *Law & Economics Working Papers* 69, 1 et seq. (2012).

7 G. Kofler, et al., *Controlled Foreign Company Legislation* (2020). Jurisdictions apply a variety of criteria to determine when a foreign company is to be considered as being controlled by a parent resident taxpayer. Among them are the voting rights held by the taxpayer or shareholder, substantial presence in the jurisdiction to which the controlled company belongs, etc.

doi: 10.5553/ELR.000223

Except for a few rare cases in the distant past,[8] tax cooperation in the modern context is usually considered to have begun with the first version of the model double taxation convention drafted in 1963 by the OECD which included a clause for the correct application of the treaty.[9] This is known as the *minor information clause*.

Currently, conversely, although the need to exchange information for the correct application of tax treaties has remained, there is a greater focus on tax avoidance and evasion and on the cooperation between states as a means of combating them. This is referred to as the *major information clause* and represents the gradual extension of the scope of the exchange of tax information. The path of this expansion has experienced multiple stages: (i) decoupling from the exclusive purpose of avoiding double taxation and the acquisition of the parallel function of preventing international tax evasion and avoidance; (ii) widening the objective scope to include taxes of any kind; (iii) broadening the personal scope by expanding the number and types of taxpayers whose information can be exchanged; (iv) the adoption of increasingly advanced techniques for transmitting information up to the adoption of automatic exchange as a standard; (v) increasing care for the reliability and usefulness of the information exchanged; and (vi) increasing support in the tax collection process.[10]

In the background of this evolution in recent years one finds a constant: the concept of tax transparency. Although it is not defined in any statute, it is undoubtedly one of the main *trait d'union* of all recent initiatives in the field of administrative cooperation.[11] In fact, they always have as their declared ultimate aim the implementation of transparency, both with regard to the taxation of individuals and the taxation of companies.

Among its multiple meanings, the notion of tax transparency as far as it is of interest herein refers to the taxpayer's transparency towards tax administration, that is, the duty to disclose all relevant tax information and not to hide any assets.[12]

In this sense, transparency is an indispensable feature for any tax system to be fair and equitable.

In this context, administrative cooperation is one of the tools that is used to promote tax transparency and has a twofold function: repressive, as it provides significant help to tax administrations in searching for hidden information from taxpayers and applying tax laws; and deterrent, as it seems reasonable to assume that taxpayers find it more convenient to be compliant when there is a well-established cooperation between jurisdictions. The number of jurisdictions involved in transparency initiatives has been very high in recent years, from the FATCA and OECD initiatives to the EU countries that have implemented the DAC directives.

It is also relevant to note, however, that at least at an academic level in recent years there has been a growing interest in taxpayer protection, especially with regard to the exchange of tax information, with some articles fuelling the debate about a possible excessive bias in favour of the tax authorities.[13]

3 The Types of Tax Cooperation and the Lack of Suitable Protection Standards

As previously mentioned, international tax cooperation covers various stages of the tax administration's activities and can be divided into three primary categories: (i) exchange of tax information; (ii) assistance in tax collection abroad; and (iii) cooperation in criminal tax matters.

For the first category, Article 26 of the OECD model is considered one of the main general standards for the exchange of tax information. Contracting parties commit, on the one hand, to formulating detailed and effective questions and, on the other hand, employing all available investigative powers and gathering the requested information regardless of whether it is beneficial for internal procedures. The rules currently endorsed provide for all the *foreseeable relevant* information to be exchanged for the purpose of the correct application of either domestic tax law or the convention in force between the contracting states.

This path has corresponded with the progressive automation of information exchanges which is currently articulated in three modes: exchange upon request, spontaneous exchange and automatic exchange with the latter becoming increasingly relevant and employed.[14]

Simultaneous tax examinations and *tax examinations abroad* are also an option. Within the EU, the presence of foreign officials in administrative offices and their

8 L. Einaudi, 'La coopération internationale en matière fiscale', XXV *Rec. des Cours de l'Academie de droit International de la Haye* 16 and 124 (1928).

9 See A.P. Dourado, 'Commentary on Article 26', in E. Reimer and A. Rust (eds.), *Klaus Vogel on Double Taxation Conventions* 1852 et seq. (2015).

10 For an overview, V. Wöhrer, *Data Protection and Taxpayers' Rights: Challenges Created by Automatic Exchange of Information* (2018); F. Cannas, 'The Historical Development of the Exchange of Information for Tax Purposes', in O. Günter and N. Tüchler (eds.), *Exchange of Information for Tax Purposes* 17 et seq. (2013).

11 J.P. Owens, 'Tax Transparency: The 'Full Monty', 68(9) *Bulletin for International Taxation* 512 et seq. (2014); A. Turina, '"Visible, Though Not Visible in Itself." Transparency at the Crossroads of International Financial Regulation and International Taxation', 8(3) *World Tax Journal* 378 et seq. (2016).

12 J. Hey, 'Chapter 1: General Report – The Notion and Concept of Tax Transparency in Tax Transparency', in F. Başaran Yavaşlar and J. Hey (eds.), *Courts and Tax Treaty Law* 2 (2020), available in the IBFD Tax Research Platform.

13 P. Pistone and P. Baker, 'General Report', 100B *The Practical Protection of Taxpayers' Fundamental Rights* 35 et seq. (2015); C.E. Weffe, 'The Right to Be Informed: The Parallel between Criminal Law and Tax Law, with Special Emphasis on Cross-Border Situations', 9(3) *World Tax Journal* (2017), available in the IBFD Tax Research Platform; F. Cannas, 'Taxpayer's Right of Defence in the International Context: the Case of Exchange of Tax Information and a Proposal for the 'English' Wednesbury Doctrine as the New OECD (BEPS) Standard', 12(2) *World Tax Journal* 377 et seq. (2020).

14 See S.M. González, 'The Automatic Exchange of Tax Information and the Protection of Personal Data in the European Union: Reflections on the Latest Jurisprudential and Normative Advances', 3 *EC Tax Review* 146 et seq. (2016), and the *Recommendation on the use of the OECD Model Memorandum of Understanding on Automatic Exchange of Information for Tax Purposes*, C.2001.28/*Final*, 21 October 2002.

participation in administrative enquiries are regulated under Article 11 of Directive 2011/16/EU.[15] That piece of legislation is transposed into the Italian tax system through Article 31-*bis* of the Presidential Decree on Tax Investigations of 1973[16] which establishes a number of procedural protections for the taxpayer and is later discussed (and problematised) more in depth.

These safeguards consist primarily of a confidentiality standard and provide that information collected in this way can be made available to a limited number of authorities of the state from which they are received and for the implementation of only some specific legislations (e.g., the anti-money laundering rules).[17] The requested state may therefore deny the exchange when this would be contrary to its own domestic law or public order, the information requested cannot be obtained by virtue of its current law or practices, or privileged commercial, industrial, or professional secrets would be disclosed.

The assistance in the collection of taxes abroad is a form of cooperation that allows a state that has failed to collect its tax to obtain assistance from those noncompliant taxpayers who have moved either their residence or assets abroad.[18] Since this type of collaboration has always been considered theoretically more invasive than the exchange of information, it was regulated later and more discretion was granted to each state to regulate it according to the principles of its own legal system.[19]

A reciprocal administrative assistance was provided by the Multilateral Convention on Mutual Administrative Assistance in Tax Matters developed jointly by the Council of Europe and the OECD. It was opened for signature by the Member States of both organisations on 25 January 1988 in Articles 11 to 16. This was the beginning of an evolutionary process that was similar in many ways to that of the exchange of information and culminated in 2003 with the introduction of Article 27 in the OECD Model Convention titled *Assistance in the collection of taxes*.

This type of assistance is based on what is known as the *principle of equivalence* under which contracting states receiving requests for assistance in recovery are required to make all necessary efforts to recover the tax claimed by the requesting state *as if they were their own tax claims*. However, this is subject to certain conditions including prior exhaustion of domestic appeals and legal remedies.

EU Directive 2010/24/EU[20] has contributed considerably to standardising procedures and creating uniform tools so that a substantial number of states with different languages and administrative traditions could interact within the single market.[21]

The requested state is not entitled to carry out any checks on the merit of the request and shall treat it as its own claim in the context that it may only verify compliance with formal requirements of the standard instrument such as, for example, the exhaustion of established domestic remedies.

Finally, for the cooperation in criminal tax matters, the international legal framework is also not homogeneous and is constantly being amended and updated. The relationship with domestic legal systems is complex since this type of cooperation has significant implications with regard to criminal procedures and some of the most relevant constitutional principles. The Italian legal system, for example, under Articles 723 et seq. of the criminal procedure code[22] provides for the letters rogatory that also covers tax offences.[23]

At the international level, some of the main legal sources covering criminal offences are the European Convention on Extradition of 1957 signed in Paris, the European Convention on Mutual Assistance in Criminal Matters of 1959 signed in Strasbourg, and the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 1990 also signed in Strasbourg. Their applicability to tax offences is questionable and must be evaluated on a case-by-case basis since a number of questions arise, for example, on the relationship between administrative law and criminal law, that are often resolved differently in various jurisdictions.[24]

The fact that all these instruments allow different tax and legal systems to interact creates a number of issues of which all are ultimately concerned with taxpayers' protection.[25] In fact, by observing the state of the art, it emerged that cooperation between states projects their taxing powers far beyond their territory. However, this is

15 Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.

16 Art. 31-bis, assistance for the exchange of tax information between the competent authorities of EU Member States (*assistenza per lo scambio di informazioni tra le autorità competenti degli Stati membri dell'Unione europea*) or the presidential decree of 29 September 1973, n. 600 (*Disposizioni comuni in materia di accertamento delle imposte sui redditi*).

17 See also D.A.H. Rivera, 'Ensuring Effective Taxpayer Remedies for Breaches of Confidentiality in Relation to Tax Treaties', 74(11) *Bulletin for International Taxation* (2020), available at the IBFD research platform.

18 C. Sacchetto, *Tutela all'estero dei crediti tributari dello Stato* (1978).

19 For a general overview, see I. De Troyer, 'Implementation of Agreements on International Assistance in Tax Collection: Avoiding the Complexity of a "Mirror" Approach', 71(8) *Bulletin for International Taxation* 424 et seq. (2017).

20 Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties, and other measures.

21 See, in particular, Art. 12 of the directive, titled *Instrument permitting enforcement in the requested Member State and other accompanying documents*, which mandates the standardisation of requests' substantial content and builds up a sole basis for the recovery and precautionary measures taken in the requested Member State without the need for any further act of recognition. The system is fine-tuned by the Commission Implementing Regulation (EU) No 1189/2011 of 18 November 2011 laying down detailed rules in relation to certain provisions of Council Directive 2010/24/EU […].

22 Art. 723 of the Criminal Procedure Code (*Codice di procedura penale*), regulating the powers of the Ministry of Justice (*Poteri del Ministero dell Giustizia*).

23 G. Di Chiara, *Rapporti giurisdizionali con autorità straniere*, in *Enciclopedia del Diritto* (*aggiornamento* II) (1998), 890 et seq.

24 On this complex relationship, see the decisions of the Italian Supreme Court (*Suprema Corte di Cassazione*), among others, in cases 12 July 2012, n. 27736 and 27 May 2009, n. 24653.

25 P. Mastellone, 'Tutela del contribuente nei confronti delle prove illecitamente acquisite all'estero', I *Diritto e pratica tributaria* 791 (2013).

doi: 10.5553/ELR.000223

vis-à-vis very general international protection standards such as those mentioned of *foreseeable relevance* and are prohibited in case commercial or industrial secrets or the public order are at risk. The protection of taxpayers is granted to the legal system of each single jurisdiction thus creating a framework under which, for example, it is relatively easy for the tax authorities to collect tax information. However, it can be burdensome for the taxpayer to prove the facts and circumstances that occurred abroad to the public authorities who must take the decision affecting it.

These dynamics must therefore be kept distinct from those that are in place at the domestic level. Even within the jurisdiction, in fact, tax administration may be endowed with broad powers to collect tax information, including the obligation for certain entities such as financial intermediaries to share it.

In the case of Italy, for instance, a large structure know as Tax Registry (*anagrafe tributaria*) was created in the 1970s,[26] which has precisely the function of collecting a large amount of tax information so that it is available to the tax authorities and is based in part on the obligation of certain entities, including banks,[27] to communicate data. Something very similar to an automatic domestic exchange of tax information.

Although access to such data by the authorities is simple and is covered by few guarantees for the taxpayer, such as the need in some cases to obtain authorisation from a regional director, all the exchanges involving this structure are set within a broader context in which the taxpayer enjoys a relatively wide range of protections. Just to give a few examples that specifically concern Italy, the taxpayer can challenge before a court the findings of the activity of the tax administration; in the event of an error, it can seek for compensation before a third and independent judicial power; the Director General of the tax administration is politically appointed, with the guarantee that its appointment is the last step of a democratic process; more in general, the powers of the tax administration are confined within the scope of the *typical powers* that a government has under the rule of law. This is not always true in the international administrative cooperation, especially outside the EU, since the two or more legal and tax systems involved may be very different. Such a radical potential difference is also why the relevant safeguards shall not be the same as those granted in the domestic context.

This problem emerged in all its magnitude a few years ago regarding the possibility of using *Falciani lists* to ground the work of tax investigators (and public prosecutors) in different jurisdictions in which the legal tax systems often reacted differently to each other.[28] In general, there is a high level of uncertainty as to the actual level of taxpayer protection and especially regarding the exchange of tax information.[29] Due to the lack of international detailed and consistent protection standards other than some general principles, it is *de facto* unpredictable for the taxpayer to determine the burden that may be placed on it should tax information be circulated among different authorities.

This is also true to some extent within the EU. While cooperation within the Union certainly involves states that respect democratic standards, as was also recently reaffirmed in the *Berlioz*[30] case, EU law in this field coordinates the activities of tax administrations but does not confer specific rights on the taxpayer.

Once the information is sent across the border by the jurisdiction from which it originated, in fact, there is no genuine guarantee that the receiving jurisdiction will be prevented from using it inappropriately or circulating it further under any legal tools even different than those regulating the exchange of tax information. At that point, each jurisdiction that receives the information bears the responsibility of the taxpayer's protection in a purely domestic dimension.

On this note, for example, there have been several lines of case law in Italy that have not always been consistent, although it is possible to conclude that the argument that generally prevailed is the one in favour of the usability of tax information that is unlawfully collected.[31] The Local Tax Court (*commissione tributaria provinciale*) of Genova, just to cite one case, rejected the appeal of a taxpayer whose name was on the Falciani list on the grounds that the tax information came from a legitimate source. The entity was the tax administration of an EU Member State, and it was irrelevant how they had obtained it.[32] In essence, the judges considered that a legal exchange of information is able to *cleanse* the information from the fact that it was collected unlawfully and without respecting any of the taxpayer's rights.[33]

More recently, in 2021, the Italian Supreme Court (*Corte di Cassazione*) was again requested to decide on an issue related to the *Falciani list* and (re)stated that *for the purposes of tax assessment, it is legitimate to use any evidence, even that acquired in an irregular manner, with the excep-*

26 G.A. Micheli, *Corso di diritto tributario* (1976), at 127.

27 G. Zizzo, 'Le autorizzazioni nelle indagini tributarie', 32(fasc. 44) *Corriere tributario* 3565 et seq. (2009).

28 This not the only case for which there was an exchange of unlawfully obtained tax information. Other famous cases are, for instance, the Vaduz list, the Pessina list, and the Panama Papers.

29 On this point, for example, see C.P. Delauriére, 'New Analysis: French Tax Authorities Lose Battle on Stolen Data', 62 *Tax Notes International* 3, at 175 (18 April 2011); and more in general C. Sacchetto, 'Exchange of Tax Information. Connections with Criminal Proceedings. The Italian Approach', I-II *Rivista di diritto tributario internazionale* 79 (2009).

30 CJEU, judgement of 16 May 2017, in the case C-682/15, *Berlioz Investment Fund SA*, ECLI:EU:C:2017:373.

31 For a detailed overview, A. Marinello, 'Prove illecitamente acquisite all'estero e tutela del contribuente: disorientamenti giurisprudenziali', II *Rivista trimestrale di diritto tributario* 485 et seq. (2015).

32 CTP Genova, sez. IV, 5 June 2012, n. 193. For a comment, see N. Raggi, 'Contenzioso 'Falciani': istruzioni per l'uso', I *Rivista di diritto tributario* 712 et seq. (2014).

33 Against this argument, see A. Carinci, 'Lista Falciani e tutela del contribuente: utilizzabilità vs. attendibilità dei relativi dati da parte dell'Autorità fiscale italiana', *Novità Fiscali* 14 (2012). On this topic, see also S. Armella and L. Ugolini, 'Il regolare scambio di informazioni tra Stati può sanare l'illegittimità originaria della lista Falciani?', *Corriere tributario* 3258 (2012).

tion of that expressly prohibited by the law and that violating the taxpayer's constitutional rights.[34]
In view of this level of fragmentation, even if it is inevitable that the material protection of the taxpayer's rights remains at the level of each single jurisdiction, it seems reasonable to promote standards that are as consistent and uniform as possible by also building on the experience of selected legal systems.

4 The EU as a Unicum in the Landscape of Tax Cooperation

In the complex and fragmentated framework described earlier, the EU is certainly unique. The institutionalisation of cooperation between European countries began within a small group of them soon after the end of World War II and has been progressively intensified.
The first forms of integration only concerned some very specific sectors where energy played a major role[35] with the intention of creating a common market where people, goods, services and capital could circulate and compete freely. In particular, the EEC had a wide scope that extended to a multiplicity of economic and social activities in which taxation, which is one of the most important prerogatives of states, began ascending to a new and peculiar supranational dimension.[36]
The concept behind the extremely slow pace of the European integration process that has seen both the areas involved and the number of countries expand over time is often referred to as *functionalism*, *neofunctionalism* or *functionalist theory*.[37] It expresses the need for states to cooperate first on matters when it is reasonable and functional to do so, creating even closer ties of interdependence, and then gradually broadening the scope of cooperation and proceeding to an integration of a political nature. The result of this slow process, which has seen many accelerations and setbacks, would be the progressive elimination of Member States' power and their transfer to the 'new' supranational body.[38]
Seen from an opposite perspective, functionalism is instead expedient for facing and overtaking the failure of the idea of Europe as a federal state that could have emerged from a constituent process.[39] This took the form, according to Monnet's idea[40] of a supranational order that would have a 'minimum' structure at its top and would widely rely on the administrative structures of the Member States to achieve its objectives. Stated differently, the European institutions had equipped themselves with *an executive power that does not execute, but enforces*.[41]
This process was affected by the post-World War II culture that continued to observe administration and executive power as inextricably linked to the state and its territory. Additionally, in the course of its development, there was resistance from Member States to transfer shares of their powers in many areas, including taxation, which is seen as one of the main components of sovereignty.[42]
One of the main foundations of this institutional structure has been and still is the principle of subsidiarity which was first introduced under the Treaty Establishing the European Community of 1992.[43]
The functionalist dynamic also affected the legal and tax systems of the Member States for which the main task was to create and ensure the proper functioning of the single market. Because of this, the intervention on some aspects of the tax systems has been graduated according to specific needs such as, for example, in the field of custom duties and consumption taxation.[44] In practice, this resulted, on the one hand, in an approximation of the domestic tax law of the Member States (i.e., procedures and implementation of the exchange of information) and, on the other hand, in the creation of both legal and non-legal (e.g., IT) structures to enable administrative systems to interact with one another.[45]
The current framework could be simplified by stating (in non-legal terms) that the integration is accomplished in custom matters and is at an advanced stage in the field of indirect taxation and at a minimum level in the field of direct taxation.

34 Cass., sez. V, 19 January 2021, n. 741. The passage contained in the text is an unofficial translation made by the author.
35 Here, reference is made particularly to the treaties establishing the European Coal and Steel Community (1951), the European Atomic Energy Community, and the European Economic Community (both signed in 1957).
36 See, among others, P. Boria, *Diritto tributario europeo* (2015), 34 et seq.
37 E.B. Haas, *The Uniting of Europe. Political, Social and Economic Forces, 1950-1957* (2004) (previous editions in 1958 and 1968), xiv et seq. of the Introduction.
38 E. Cannizzaro, *Il diritto dell'integrazione europea* (2015), 2 et seq.
39 S. Battini, 'L'Unione europea quale originale potere pubblico', in S. Cassese (ed.), *The European Administration* (1988), at 7. He employs an expression, *ripiegamento funzionalistico*, which could be translated as *functionalist retreat*.
40 J. Monnet, *Mémories* (1976). His view was, in some ways, in contrast to the idea of Altiero Spinelli who was a federalist and advocated an administrative structure much more similar to that of a state from the outset (see the following three books authored by A. Spinelli: *Il progetto europeo* (1985); *L'avventura europea* (1972); *Manifesto dei federalisti europei* (1957)).
41 In this context, G. della Cananea and C. Franchini, *I principi dell'ammnistrazione europea* (2013), 12 et seq. (note that what is written in the text about the 'executive power that does not execute' is not a literal translation of what they wrote but a summary and simplification of their thinking).
42 della Cananea and Franchini, above n. 41, 22 et seq.
43 A. Comelli, 'L'armonizzazione (e il ravvicinamento) fiscale tra lo 'spazio unico europeo dell'iva', la direttiva del Consiglio 'contro le pratiche di elusione fiscale' e l'abuso del diritto', IV *Diritto e pratica tributaria* 1397 et seq. (2018).
44 For a general overview, among others, see G. Bizioli, *Il processo di integrazione dei principi tributari nel rapporto tra ordinamento costituzionale, comunitario e diritto internazionale* (2008); F. Gallo, 'Mercato unico e fiscalità: aspetti giuridici del coordinamento fiscale', III *Rassegna tributaria* 279 et seq. (2000); L. Del Federico, *Tutela del contribuente ed integrazione giuridica europea. Contributo allo studio della prospettiva italiana* (2010); P. Boria, 'La tutela giurisdizionale dei diritti stabilita dall'ordinamento comunitario in materia fiscale', XXII(12) *Rivista di diritto tributario* 1094 et seq. (2012).
45 F. Saponaro, 'La cooperazione amministrativa in materia fiscale nell'Unione Europea: analisi e prospettive', XI(1) *Revista de Estudios Constitucionais, Hermenêutica e Teoria do Direito* 2 et seq. (2019).

doi: 10.5553/ELR.000223

This complex situation has also led to the set-up of different sets of rules for cooperation that respond to the dissimilar needs and levels of integration in the various areas of tax law. For direct taxes, the system is organised around Directive 2011/16/EU (also frequently referred to as the DAC or DAC1) that replaced Directive 77/799/EEC and its subsequent amendments.[46] For the VAT, since Directive 2003/93/EC divorced it from direct taxation, the system of cooperation is primarily organised around several regulations among which the most relevant is Regulation n. 904/2010 and around Regulation n. 389/2012 for excises.[47]

This representation also includes Directive 2010/24/EU for the mutual assistance in the recovery of claims relating to taxes, Regulation n. 515/97 on mutual assistance to ensure the correct application of the law on customs, and the recently introduced *Fiscalis 2020* Programme. The latter is a broad project aimed at ensuring the exchange of tax information and the creation of expertise with the Member States' tax administrations.

Regarding the cooperation in the field of VAT, a special report of the European Court of Auditors made many recommendations in 2019 that, despite the report, is about the challenges posed to the VAT system by e-commerce and are of general significance.[48] In particular, the auditors point out that Member States should increase the level of assistance with non-EU jurisdictions by, among other things, authorising the commission to negotiate agreements and sign and implement the instruments made available by the OECD for those Member States that belong to it. The example proposed is the agreement between the EU and the Kingdom of Norway entered into force on 1 September 2018. On a similar note, they observe that assistance instruments made available at the EU level, such as the OSS and *Fiscalis*, are robust but not fully exploited. Additionally, the European Commission affirmed in 2019 that Directive 2011/16/EU and Regulation 904/2010 are overall coherent and lay down similar provisions despite some differences.[49]

One year later, in 2020, the Court of Justice of the European Union delivered a judgement in the case *KrakVet*[50] in which the judges clearly delimited the scope of application of Regulation 904/2010. They state that it regulates only those aspects of cooperation that are necessary for the exchange of information. However, it does not regulate the competence of the authorities to proceed in the light of the information exchanged to the qualification of any of the transactions about which information is exchanged.[51]

Member States therefore have a duty to cooperate, for example, by exchanging information, but this obligation does not extend to the point of having to find a commonly agreed solution.[52] Ideally, although the court of one Member State is granted a certain power when it ascertains that the same transaction has been the object of a different tax treatment in another Member State. The court of a Member State in which a dispute arises involving an interpretation of provisions of EU law and requiring a decision by them have the capacity (or even the obligation) to refer a request for a preliminary ruling to the Court of Justice of the EU.[53]

The balance described earlier amounts to an effective representation of the current legal, economic, and political context of the EU. The Union's taxing power is of a regulatory nature, that is, functional to the realisation of the single market. Member States have a duty to cooperate and make the market function properly but preserve their founding constitutional values and the structure of their tax systems to the widest extent possible. In some limited circumstances, it can intervene upon request *with its judicial power*.[54]

Examining the issue from a taxpayer's perspective of protection, as mentioned before, the exchange of information should cause fewer risks within the EU since the legal systems of the Member States, even in their differences and lack of rights established directly under the EU law, guarantee high and broadly homogeneous standards of human rights protection. In the Italian tax system, this is represented by the content of Article 31-bis of Presidential Decree 29 September 1973, n. 600[55] transposing Article 11 of Directive 2011/16/EU. Under it, foreign tax inspectors belonging to an EU Member State's tax authority are entitled to interview assessed taxpayers in Italy and examine any relevant documenta-

46 The scope of cooperation has been constantly expanded: exchange of information on financial account (Directive 2014/107/EU. Or DAC2); exchange of cross-border tax rulings (Directive 2015/2376/EU, or DAC3); exchange regarding specific multinationals (Directive 2016/881/EU, or DAC4); access to anti-money laundering and beneficial ownership information (Directive 2016/2258/EU, or DAC5); and disclosure of information on potentially aggressive cross-border tax planning arrangements (Directive 2018/882/EU, or DAC6).

47 G. Beretta, 'VAT and Administrative Cooperation in the EU', 100 *Tax Notes International* 71 (2020).

48 European Court of Auditors, Special Report 'E-commerce: many of the challenges of collecting VAT and custom duties remain to be resolved' (pursuant to Art. 287(4), second subparagraph, TFEU), 32-69101-105, 139.

49 European Commission, Commission Staff Working Document Evaluation of the Council Directive 2011/16/EU, Brussels, 12 September 2019, SWD (2019) 327 final, 64.

50 CJEU, judgement of 18 June 2020, in the case C-276/18, *KrakVet Marek Batko sp.k.*, ECLI:EU2020:485.

51 See para. 48 of the judgement.

52 See paras. 46 and 48-49 of the judgement.

53 CJEU, judgement of 5 July 2018, in the case C-544/16, *Marcandi*, EU:C:2018:540, paras. 64 and 66.

54 This balance was recently described by Professor Bizioli in one of the most prestigious Italian newspapers (IlSole24Ore, 12 February 2022) in which he advocates for a higher level of European integration by stating that it is *necessary* in the light of the Covid-19 pandemic consequences. He writes that, regarding these issues, he is frequently reminded of the words of Emerick de Vattel, one of the founders of the modern theory of international law. In *Le droit de gens* (Book n. III, 1758), Vattel wrote that 'modern Europe is a sort of republic, formed by independent members who are connected by a common interest and join forces to keep order and freedom' (non-literal translation). Similarly, there are currently, on one side, the Member States that rely on their constitutional values and, on the other side, the European society that is built around common values contained in the treaties. In fact, the treaties and the European Union's legal system are legitimised by the European society rather than from European nations.

55 The DPR 600/73 is the legislation regulating tax assessments procedures.

tion present therein. This is subject to reciprocity with the other Member State and to a prior authorisation to be given by the Italian authorities.

There is no doubt that the tax authorities of EU Member States do not generally violate the taxpayer's fundamental rights. However, it is also true within the EU that it becomes difficult for the taxpayer to protect himself from further exchanges once information has been collected and exchanged. This may happen even using instruments other than those establishing tax cooperation and may even result in the transfer of the information out of the EU.

Similarly, regarding specifically incoming information, it can be difficult and burdensome for the taxpayer to prove that any information originally comes from a jurisdiction where its rights have been violated during the collection process, especially if it was last exchanged by an EU Member State. This raises issues especially with regards to its usability by tax authorities and courts.

5 The Case of 'Circulation of Evidences' Under the Italian Legal System

As stated in the conclusion of the previous paragraph, in practical terms, one of the main issues related to taxpayer protection in the context of exchange of tax information is the evidentiary value to be attached to the *incoming tax information*.

The Italian system, if examined in its entirety, is characterised by a rather fragmented framework with elements of additional fragmentation to those discussed earlier with reference to the international and European systems. This originates from the circumstance that the system of remedies to counter misconduct and ensure the correct application of tax law is divided into two fields of the law, specifically, administrative and criminal whereby each has its own procedures and set of rules. The exact allocation of tax rules and procedures to these two fields of the law is a complex issue and not relevant to the present contribution. It is sufficient to mention that administrative sanctions are imposed by the tax authorities while criminal sanctions are imposed by a court at the request of the public prosecutor.[56] In both cases, a system of appeals before courts is permitted.

The relationship between the two proceedings is governed by what is known as the *dual-track principle* (*principio del 'doppio binario'*) under Article 20 of Legislative Decree n. 74 of 2000 that mandates the autonomy between them.[57] This simply means that the same conduct may give rise to both administrative and criminal proceedings and that they may also have different outcomes.

However, the mentioned autonomy is not absolute, and its boundary and limits have been the subject of scholarly debate and judgements that have not always been consistent.[58] With regard to the possibility of using in one area evidence gathered in the other one, the *circulation of evidences* (*circolazione delle prove*) is *generally* allowed with some *limitation* for especially the criminal proceedings when what comes from administrative tax activities can be considered only as a mere indicium.[59] In any event, their assessment is granted to the discretion of the judge on a case-by-case basis.

Regarding the acceptability of evidence, generally, documents issued by competent authorities of other states are accepted without any specific formality provided that it is undisputed that the document is a genuine one. For example, in the context of the exchange of information under the Double Taxation Convention between Italy and the United States, the Italian Supreme Court[60] ruled that a document issued by the U.S. authorities can be valid evidence, even though it is neither signed nor dated, where there is no doubt that it was issued by the competent authority *of the other contracting State*.

The judges stated the principle that formal requirements shall be governed under the domestic law of the jurisdiction where the document was issued.[61]

The described framework is also applicable to the information received under the international tax cooperation which creates issues when the exchange takes place lawfully but the information exchanged was collected unlawfully.[62]

From a purely theoretical point of view, there are three possible approaches. According to the first theoretical approach, the circumstance that information is unlawfully collected in the sending state shall be irrelevant to the point that even a violation of the domestic law of the

56 F. Tesauro, *Istituzioni di diritto tributario – Vol. 1 Parte generale* (2020), at 315.

57 F. Amatucci, 'Doppio binario e 'connessione sufficiente' tra procedimento tributario e penale', II *Rivista trimestrale di diritto tributario* 271 et seq. (2017); S. Dorigo, 'Il 'doppio binario' nella prospettiva penale: crisi del sistema e spunti per una riforma', 60 *Rassegna tributaria* 436 et seq. (2017).

58 To give an example of the complexity of this relationship, one can also cite a recent decision of the Italian Constitutional Court. This is the judgement of 16 June 2022, n. 149, in which the judges ruled that Art. 649 of the Criminal Procedure Code infringes the Constitution insofar as it does not require the judge to dismiss a criminal case against a defendant already sanctioned by an administrative authority for the violation of copyright. Since the administrative sanction imposed has the characteristics of a *punishment*, a second punishment under criminal law would violate the *ne bis in idem principle*.

59 One of the last judgements on this issue was delivered by the Italian Supreme Court in 2019 (Cass., judgement of 18 February 2019, n. 7242) in which the judges state that presumptions applicable under *administrative tax law* can be accounted as no more than indicia for *criminal tax offences*, and at most ground precautionary measures.

60 Cass., judgement of 24 November 1999, n. 3254.

61 L. Favi, 'Chapter 12 – Italy', in G. Maisto (ed.), *Courts and Tax Treaty Law* (2007), 284 et seq.

62 G. Marino, 'Il tax whistleblowing: dal contrasto all'evasione fiscale internazionale alla prevenzione della pianificazione fiscale aggressiva', 91 *Diritto e pratica tributaria* 1347 (2020); A. Fazio, 'I rapporti tra processo tributario e processo penale: la crisi del principio del 'doppio binario' nella prospettiva dello scambio internazionale di informazioni fiscali', 91 *Diritto e pratica tributaria* 1955 (2020).

doi: 10.5553/ELR.000223

sending state shall be irrelevant.[63] This approach disregards how the information was collected abroad and may be only justified on the assumption that the taxpayer has solid substantial and procedural rights in the state receiving and processing the information.

Under the second theoretical approach that, in a sense, adopts an intermediate solution, the receiving state should be entitled to use the information if it is obtained in a way that is assessed as lawful in both jurisdictions. This approach evaluates and takes into consideration what happens abroad.

Finally, under the third theoretical approach, information that is collected in a manner that is unlawful from the perspective of any of the states involved shall not be usable in the receiving state. Additionally, in this case, what happens abroad is taken into consideration.

Due to the double-track system, Italy has an articulated approach to the usability of evidences unlawfully collected abroad and exchanged under administrative tax cooperation.

With specific regard to the *Falciani list*, it was held that it cannot be used for criminal prosecution purposes but is suitable to ground the infliction of sanctions of an administrative nature. This is because Article 199 of the criminal procedural code explicitly prohibits the employment evidences that are unlawfully collected while a similar rule is non-existent under the law regulating the administrative sanctions.[64]

Underlying this approach and these procedural arguments, there are issues of substantive law. The *economic rights*, although enacted by the constitution, are of a lower rank than human rights and personal freedoms. According to this view, secrecy and privacy attached to bank relationships do not protect the human being *per se* but rather its economic activities and therefore deserve a lower level of protection than other constitutional rights. In particular, the constitutional court had already established in the early 1990s that economic rights must not prevail in the face of the obligation under Article 53 of the constitution to pay the fair share of taxes based on one's ability to pay. It is because this constitutes the implementation of a superior constitutional principle.[65]

Concerning the procedure before tax courts that is effectuated when the taxpayer appeals the sanctions (of an administrative nature) imposed by the tax administration, it was already stated that there is no statutory prohibition on the use of unlawfully acquired evidence. This procedure is governed by a specific set rule and by the rules governing the procedure before civil courts for unregulated aspects. Regarding evidence, tax courts apply the rules of civil proceedings that are strongly focused on the *principle of free assessment by the judge* (*principio della libera valutazione delle prove da parte del Giudice*).[66] This principle is stated in Article 116 of the civil code and complemented by Articles 2727 and 2729 of the same code under which the evaluation of *indicia* (*presunzioni*[67]) not regulated by law are *left to the prudence of the judge*. He must consider only those that are serious, precise and consistent. This is also commonly (and colloquially) referred to as the *judge's monopoly in the evaluation* of evidence and indicia.

This approach was also reiterated by the Italian Supreme Court in its 2015 judgement n. 17183.[68] It concerned information discovered on the laptop of a Swiss lawyer arrested at an Italian airport for money laundering related issues and the possibility of Italian authorities using it for tax purposes by grounding some of his clients' assessments in them. The judges stated that tax law admits the entry of elements acquired in any way into both the assessment procedures and the trial before tax courts and thus also *atypical evidences* (*prove atipiche*), that is, data acquired in a manner other than statutorily regulated.[69]

6 As a Conclusion: Some Ideas for the Endorsement of International Agreed Minimum Standards

The framework of international tax cooperation is characterised by a significant level of fragmentation since the instruments on which it is based are many, have rather generic minimum taxpayer protection standards and essentially afford broad discretion for enforcement to the legal system of each jurisdiction. To this must be added that those instruments are rooted in different legal systems; in the case of Italy, for example, in both international and EU law that have various evolutions and partially different purposes. Finally, again in the specific case of Italy, this is compounded by elements of fragmentation at the level of domestic law. This was seen with the circulation of evidence collected and transferred by means of international cooperation that is

63 S.K. McCracken, 'Going, going gone… global: A Canadian Perspective on International Tax Administration Issues in the Exchange-of-Information Age', 50 *Canadian Tax Journal* 6, 1869 et seq. (2002).

64 See, among others, the following judgement of the Italian Supreme Court: Cass., judgement of 15 April 2025, n. 8605.

65 Corte Cost., judgement of 18 February 1992, n. 51. For a comment, see R. Lupi, 'Vizi delle indagini fiscali e inutilizzabilità della prova: un difficile giudizio di valore', 45 *Rassegna tributaria* 648 (2002); I. Caraccioli, 'Lista Falciani e Panama Papers: esiste una gerarchia tra le norme costituzionali?' IV *Rivista di diritto tributario* 50 (2016).

66 For an analysis that is not from an Italian perspective, C.E. Weffe, 'The Right to be Informed: The Parallel between Criminal Law and Tax Law, with Special Emphasis on Cross-Border Situations', 9(3) *World Tax Journal* (2017), available at IBFD tax research platform.

67 The Italian word employed is *presunzioni* which may seem similar to the English word *presumption*; in this context, it is closer to the concept expressed by the word *indicia*.

68 Cass., sez. V, of 26 August 2015, n. 17183.

69 This is the unofficial translation of the following passage of the judgement: *in tesi generale, che il diritto interno* […] *consente l'ingresso nell'accertamento fiscale, prima, e nel processo tributario, poi, di elementi comunque acquisiti e, dunque, anche di prove atipiche ovvero di dati acquisiti in forme diverse da quelle regolamentate.*

processed under a different body of rules according to the circumstances.

In general, there seem to be grounds to uphold that a higher level of international consistency in taxpayer protection standards could improve the functioning of international tax cooperation for both the taxpayers and tax administrations, for example, by increasing the level of predictability of the consequences of a certain behaviour. In light of the above, however, piecing together such a fragmented picture is actually quite challenging. The interests and rights to be balanced, in fact, are many, opposite and often have constitutional relevance. The *public side*, for example, must ensure the proper functioning of the market, fight tax avoidance and evasion, and guarantee the independence of judges and the collection of fair tax revenues. For the *private side*, it is necessary to protect a number of rights claimed by each person ranging from economic rights, privacy, right of defence up to the physical safety of natural persons. On top of this, any measure must take into account certain general constitutional values such as the rule of law.

Any proposal in this area shall consider the complex articulation of this branch of tax law. If there is a willingness to elaborate on possible solutions and standards that could theoretically be universally accepted, any potential proposal should be articulated accordingly even if it is only a conceptual and not a detailed legislative proposal. Regarding the outgoing information, for example, there might be reasoning about recommending the introduction of notification obligations so that the taxpayer would have a greater awareness of where tax information concerning itself is sent, likely to be sent or possibly sent.

Regarding the incoming tax information, more consistency would be beneficial on the usability of evidence by the receiving tax authorities, especially when they have been unlawfully collected.

One possible commencement is the judgements delivered by the CJEU in the cases of *Glencore*,[70] *WebMindLicenses*[71] and *Dziev*,[72] and the related opinions of Advocates General Melchior Wathelet[73] and Michal Bobek.[74] All these interests and rights were balanced against each other in the context of the VAT. There have been such reasonings in a circumscribed area of EU law, that is, that of the VAT responding to specific and limited issues such as the use of wiretaps authorised by an incompetent judge and more generally in a legal context. However, in the EU where the Member States have similar legal traditions and underlying values, these are suitable to be extrapolated, broadened in their scope, adapted, and generalised in order to be applicable in various jurisdictions and different fields of tax law. In this way, standards of usability of the tax information received from abroad could be drawn up that could be promoted at the international level. They could be gradually incorporated into the legal instruments on which tax cooperation is based and implemented in the domestic legislations of the states in order to begin to recompose the fragmentation that currently exists.

Tax authorities should not be precluded from being able, in principle, to use evidence collected in the context of parallel procedures. The information could have originated abroad and been exchanged by virtue of international administrative cooperation. The entities involved in this would be either the tax administration within an administrative procedure or the public prosecutor in the course of a criminal investigation concerning the taxpayer for establishing the existence of an abusive practice concerning taxes. This includes procedures that have not yet been closed and do not involve the taxpayer in the context that he was not a party to them. This, in principle, allows a wide circulation of tax information and thus safeguards the ability of tax authorities to perform their duties and thereby pursue public interests.

To balance this possibility of employing evidence, however, there must be a body of solid taxpayer rights. This shall be grounded on three main bases: the full disclosure of information to the taxpayer; effective judicial protection; and some impassable limits to be used when human rights have been violated.

The first consists of the fact that the tax administration must always make known to the assessed taxpayer all the evidence in the former's possession. This should apply to both the information on which it intends to ground its decision and to that which may be in the taxpayer's favour so that the latter can effectively oppose the tax authorities' arguments. The taxpayer must have the right throughout the proceedings to have access to such evidence and to discuss it with those who must make any decision affecting it.

Second, also by virtue of Article 47 of the European Charter of Fundamental Rights which establishes the right to an effective remedy and to a fair trial, an independent judge shall always be entitled to obtain full knowledge and assess the evidence that is used by tax authorities and to be utilised in any proceedings. When this is not the case, the evidence shall not be usable in the receiving state.

As affirmed by AG Bobek, a domestic court that is not being empowered to review the findings of tax authorities or the manner in which the evidence used was collected would result in a violation of the principle of equality of arms. This is a corollary of the right to a fair trial under Article 47 of the charter.

Finally, concerning the usability of unlawfully collected evidence, it is stated herein that the approaches of various jurisdictions are dissimilar and often strongly influenced by specific circumstances such as the values un-

70 CJEU, judgement of 16 October 2019, C-189/18, *Glencore*, ECLI:EU:C:2019:861.

71 CJEU, judgement of 17 December 2015, C-419/14, *WebMindLicenses*, ECLI:EU:C:2015:832.

72 CJEU, judgement of 17 January 2019, C-310/16, *Dziev*, ECLI:EU:C:2019:30.

73 Opinion of Advocate General Wathelet, delivered on 16 September 2015, Case C-419/14, *WebMindLicenses*, ECLI:EU:C:2015:606.

74 Opinion of Advocate General Michael Bobek, delivered on 5 June 2019, Case C-189/18, *Glencore*, ECLI:EU:C:2019:462; Opinion of Advocate General Michael Bobek, delivered on 25 July 2018, Case C-310/16, *Dzivev*, ECLI:EU:C:2018:623.

doi: 10.5553/ELR.000223

derlying the legal system. This is certainly acceptable and even partly unavoidable. There does not seem to be legal arguments to hold, for example, that all legal systems in the world should be equally divided between economic rights and tax revenue interests.

However, there are certain values that are universally agreed upon such as those of individuals' physical safety. In this regard, on the contrary, it is possible to advocate for the promotion of certain minimum standards at the international level. A catalogue of rights should be identified that would render it definitively unusable it if violated the collection of information to be used as evidence to ground a decision at any stage. This would apply even when the relevant information is then exchanged through lawful means and procedures.

Then, regarding the specific case of Italy, in order to recompense the fragmentation described at least in part, there are grounds to state that a legislative intervention should reduce the existing differences between criminal and tax proceedings. Adopting the standards outlined herein would, on the one hand, guarantee the need for tax collection and the proper functioning of the tax system such as the principle of free circulation of evidence. On the other hand, it would also guarantee minimum standards of effective taxpayer protection and overcome the consequences of certain specificities linked to the principle of a double track.

This would also be in accordance with the findings of international courts such as, for example, the European Court of Human Rights. From its judgement in the case *Engel*,[75] it appears that the differentiation between these two types of proceedings is at least partly arbitrary.[76] What is relevant regarding the protection of the taxpayer is the substantive nature of the penalties imposed rather than the procedure that is used to impose them.

75 ECHR, judgement of 8 June 1976 (plenary), case of *Engel and Others* v. *The Netherlands*, application no. 5100/71; 5101/71; 5354/72; 5370/72.

76 For a comment, among others, see F. Gallo, 'Il ne bis in idem in campo tributario: un esempio per riflettere sul "ruolo" delle Alte Corti e sugli effetti delle loro pronunzie', 60 *Rassegna tributaria* 915 et seq. (2017); F. Pistolesi, 'Il principio del ne bis in idem nella dialettica fra la Corte Costituzionale, i giudici italiani e le Corti Europee', 61 *Rassegna tributaria* 513 et seq. (2018).