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Il Direttore responsabile, il Comitato scientifico e il Comitato di redazione ringraziano
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Presentazione

Bocconi Legal Papers non è solo la prima rivista giuridica interamente gestita da studenti in Italia, ma anche un progetto a lungo termine che dei giovani raccoglie le idee, l›impegno e le speranze, evolvendo positivamente, con il passare degli anni accademici, verso una sua propria specificità.

È appena il caso di ricordare che, in una congiuntura critica come quella attuale, vedere concretizzarsi i risultati dei propri sforzi è operazione non facile, tale da richiedere una tenacia probabilmente senza precedenti. Ciononostante, uno sparuto gruppo di studenti è riuscito a dimostrare che è possibile fare udire la propria voce attraverso i canali istituzionali, nonostante le difficoltà, se solo ci si appella alla forza delle idee e ci si rivolge agli interlocutori più impegnati e capaci.

In particolare, dopo aver raggiunto il primo traguardo della pubblicazione cartacea, ritenuta necessaria per una diffusione della rivista anche presso i luoghi canonici della dottrina giuridica, *Bocconi Legal Papers* sta ora cercando di sviluppare un proprio percorso all'interno dell'Università che l›accoglie.

A partire da questo numero, dunque, ci si propone un cambiamento di piano editoriale, cosicché, da volumi tendenzialmente monografici di argomento variabile, ci si orienti verso il più generale tema del «diritto dell›economia», inteso in termini ampi, che abbracciano non soltanto il diritto commerciale, ma anche il diritto tributario, il diritto del lavoro, il diritto penale dell›economia, il diritto civile...

Non posso che essere fiera dei risultati ottenuti da coloro che hanno collaborato alla redazione ed alla raccolta dei contributi che costituiscono questo volume, e spero che anche il lettore riesca ad apprezzare l›innovatività del taglio di questa rivista, la quale non analizza soltanto la realtà italiana, ma rivolge al contempo il proprio sguardo anche all›Europa ed al mondo.

In conclusione, non mi resta che ringraziare, dal profondo del cuore, tutti gli studenti ed i docenti che hanno creduto e continuano a credere in *Bocconi Legal*

Papers. Perchè il vero cancro dell›Italia è la mancanza di fiducia, soprattutto nei confronti dei giovani, ma quando si assiste alla nascita ed alla crescita di iniziative come questa si comincia a credere che vi sia ancora, nonostante tutto, una possibilità vera di ripresa, o meglio, di riscatto.

Michela Riminucci
Editor-in-chief A.A. 2012/13

Corporate Governance as an Economic Theory: Can Non-Economic Principles of Antitrust Law Be Imported to Reduce Shareholder Primacy and Promote Stakeholder Objectives?

di Cory Howard

I. Introduction

At its base, corporate governance can be considered as an economic theory, with economic efficiency being one of the motivating forces behind the study of director/shareholder interaction[1]. Since early scholars hypothesized that agency costs could be reduced and thus, the value of the firm increased, through the implementation of corporate governance reforms, stakeholder participation in corporate governance

[1] Ronald J. Gilson, *Corporate Governance and Economic Efficiency: When do Institutions Matter?*, WASH. U. L. REV. (ISSUE 74, 1996), PP. 327, 329: the Author hypothesizes the link between corporate governance and economic efficiency.

has been marginalized[2]. However, the notion of increasing stakeholder participation and even prioritizing some stakeholder claims by corporate decision makers has recently gained increased recognition[3]. Whether this change will eventually be implemented through "other constituency" statutes enacted by state legislatures or calls for imposing fiduciary duties towards stakeholders, policy makers and academics are increasingly vocalizing the benefits of adopting a stakeholder centric regime in corporate governance. Even with strong proponents, efforts to increase stakeholder participation have been fragmented and there is little consensus as to how to effectively include employees, creditors, suppliers and communities in the corporate decision making process.

In order to fill this void, this article will look to antitrust law, as it is an economic discipline too, which has successfully implemented non-economic norms in order to achieve its economic and societal welfare goals. Part II of this article will briefly explore antitrust law, paying particular attention to how the courts and legislatures have applied non-economic norms and economic efficiency to craft a comprehensive vision of antitrust law. Part III will then look to explain how corporate governance has treated shareholders and stakeholders, emphasizing the recent resurgence in shareholder democracy and how that poses problems for the longevity of corporations. Part IV will apply the previously enumerated maxims of antitrust law to corporate governance, finding parallels between the implementation of non-economic objectives in each and noting that by adopting non-economic antitrust norms, corporate governance scholars can adopt a new stakeholder centric vision of corporate governance.

II. Principles of antitrust law

Broadly speaking, the purpose of "anti-trust" law is to "preserve and advance the system of free and open competition and to secure to everyone an equal opportunity to engage in business, trade, and commerce"[4]. What is notable about the principles of antitrust law is the integral role that non-economic objectives have

[2] Amir N. Licht, *The Maximands of Corporate Governance: A Theory of Value and Cognitive Style*, DEL. J. CORP. L. (ISSUE 29, 2004), PP. 649, 743: even the Organisation for Economic Cooperation and Development Principles of Corporate Governance only vaguely and half-heartedly mentions the role of stakeholders in the corporate governance debate.

[3] P.M. Vasudev, *The Stakeholder Principle, Corporate Governance and Theory: Evidence from the Field and the Path Onward*, HOFSTRA L. REV. (ISSUE 41, 2012), PP. 399, 399.

[4] 58 C.J.S. Monopolies § 7 (2013).

and continue to play in the advancement of that particular body of law. The Author believes, and this article stands for the proposition, that the focus of an almost the entire economic doctrine on non-economic objectives can be replicated with tremendous success in corporate governance, thus advancing not only corporate value, but also accomplishing societal welfare and general economic advancement goals as well. Although the prominent role that non-economic goals played in the practical application of antitrust law would have later been critically reassessed after its original exposition, a number of scholars - including Thomas Kauper, and Carl Kaysen and Donald Turner - continued to promulgate the importance of including non-economic objectives in the consideration of antitrust laws and policy[5].

A. Economic Efficiency

Sometime in the mid-twentieth century, economic efficiency seemed to have become one of the, if not the only, goals of antitrust law[6]. Although originally encompassing and even embracing non-economic objectives, by the time of the Regan and Bush administrations, the Chicago School had decisively moved the goals of antitrust law and policy to the economic sphere[7]. Promulgated by prominent legal scholars such as Richard Posner, economic efficiency has become not just an important goal of antitrust law, but the only one[8]. This rationale has not just dominated Chicago School literature, as federal courts have adopted the view that antitrust laws "have as one of their primary goals, the promotion of economic efficiency"[9]. As a result, courts throughout the country and a significant portion of legal academia have focused on several, more specific criteria to provide a bright line benchmark for determining whether antitrust laws and policies have been successful in promoting economic efficiency.

B. Achieving Fair Price Competition in an Open Market

Fair competition in an open market is the essence of antitrust law[10]. In fact, the 7th Circuit Court of Appeals has taken the position that antitrust law is first and

[5] The Sedona Conference Working Group on the Role of Economics in Antitrust, *The Sedona Conference Commentary on the Role of Economics in Antitrust,* Sedona Cong. J. (issue 6, 2005), pp. 23, 26.
[6] *Id.* p. 25.
[7] Maurice E. Stucke, Reconsidering Antitrust's Goals, B.C. L. REV. (issue 53, 2012), pp. 551, 565-566.
[8] Richard Posner, *Antitrust Law: An Economic Perspective* (1976), indicative of the Chicago School model of antitrust law, which holds that economic efficiency is not just the most important goal of antitrust law, it is the only goal.
[9] Shapiro v. General Motors Corp., 472 F.Supp. 636, 648 (D.Md. 1979), *citing* R.H. Bork, The Antitrust Paradox: a Policy at War With Itself (1978), pp. 91-92.
[10] Reiter v. Sonotone Corp., 442 U.S. 330, 99 S.Ct. 2326, 2332 (1979).

foremost dedicated to achieving fair competition and, secondly, to promoting economic efficiency and encouraging consumer protection[11]. In the seminal antitrust case *Brown Shoe Co. v. U.S.*[12], the Supreme Court echoed this philosophy, noting that antitrust laws are primarily intended to preserve and stimulate competition[13]. Federal courts have even chastised economic theories that fail to understand this connection, explicitly stating the "general purpose of antitrust law is to promote competition by freeing from monopoly a firm's sources of labor and markets for its products"[14].

However, this view is by no means a certainty in the antitrust community, as many scholars continued to advocate for the inclusion of non-economic norms in antitrust law development and application[15]. But courts have not always seen antitrust jurisprudence as a binary division and do not necessarily require it to promote either economic objectives or non-economic goals[16].

C. Non-Economic Objectives of Antitrust Law

Because antitrust law is predominately driven by economic considerations, "the status of non-commercial, social welfare justifications is unclear"[17]. Even if antitrust attorneys and policymakers only focus on the economic objectives of antitrust law, there is no avoiding its non-economic values[18]. Over decades of interpretative case law, U.S. federal courts, including the Supreme Court, have espoused a number of non-economic values that antitrust law can serve to promote, including: (1) to "protect the public from the failure of the market"[19], (2) the reduction in over-

[11] MCI Communications Corp. v. America Tel. and Tel. Co., 708 F.2d 1081, 1113 (7th Cir. 1983), stating that "antitrust laws are designed to encourage vigorous competition, as well as to promote economic efficiency and maximize consumer welfare".

[12] 370 U.S. 294, 82 S.Ct. 1502 (1962).

[13] *Id.* pp. 330, 1526-1527.

[14] Northwest Power Products, Inc. v. Omark Industries, Inc., 576 F.2d 83, 88 (1978).

[15] Daniel L. Rubinfeld, *On the Foundations of Antitrust Law and Economics*, in How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust, pp. 51, 56 (Robert Pitofsky ed., 2008), noting that there has been considerable disagreement in the antitrust community over whether economic efficiency should be the focal point of antitrust law or whether other objectives such as consumer welfare should also be recognized.

[16] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 n. 21, 97 S.Ct. 2549, 2559 (1977), noting that competitive economies, which are supported by antitrust law, have "social and political advantages as well as economic ones".

[17] Michael Sabin, *Antitrust and Positional Arms Races*, Harv. J.L. & Pub. Pol'y (issue 30, 2007), pp. 1023, 1037.

[18] Stucke, *supra* note 7, p. 604.

[19] *Id.* p. 561; *see also* Associated Gen Contractors, 459 U.S. p. 538; Kochert v. Greater Lafayette Health Servs., Inc., 463 F.3d 710, 715 (7th Cir. 2006); In re Cardizem CD Antitrust Litg., 332 F.3d 896, 904

concentration of economic powers, and (3) the protection of the community. Many scholars have adopted this broader-based interpretation of antitrust law and often suggest that antitrust analysis should consider the effects of antitrust policy on corporate governance, wealth distribution, and political institutions in addition to economic efficiency[20].

1. Consumer Protection as a Legitimate Non-Economic Norm

Antitrust jurisprudence in New York has explicitly adopted consumer protection as not just a legitimate goal of antitrust law, but has also recognized that antitrust claims can be predicated on consumer protection rationale alone[21]. Under this theory, a federal district court in California applying and interpreting New York State law in *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*[22] reached a similar conclusion. In determining whether state unfair and deceptive trade practices act encompasses antitrust behavior the court adopted a plain text reading of the statute.

In addition to common law recognition of the legitimacy of consumer protection as a goal of antitrust law, the federal legislature has been receptive to employing antitrust law to achieve this non-economic goal as well. The Senate report accompanying the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"), a principal piece of antitrust legislation, stated that the statute was adopted in order to create "an effective mechanism to permit consumers to recover damages for conduct which is prohibited by the Sherman Act"[23]. Passage of the HSR Act was motivated, at least in part, to give consumers relief from the anticompetitive activities and justifications for the bill's enactment were often based on strengthened consumer protection rationales[24].

(6th Cir. 2003).

[20] Brett H. McDonnell, Daniel A. Farber, *Are Efficient Antitrust Rules Always Optimal?*, Antitrust Bull (ISSUE 48, 2003), PP. 807, 833: "An adequate analysis of antitrust policy must thus trace out the effects of that policy on political institutions, corporate governance, distribution, and risk bearing".

[21] *See* Cox v. Microsoft Corp., 8 A.D. 3d 39, 778 N.Y.S. 2d 147, 148 (N.Y.App.Div. 2004): anticompetitive and antitrust allegations sufficient to state and carry a claim under § 349 of New York StatÈs Deceptive Trade Practices Act; New York v. Feldman, 210 F.Supp.2d 294, 300-01 (S.D.N.Y. 2002), noting that violations of § 2 of the Sherman Act qualify as deceptive activity under § 349 of the New York FTCA.

[22] 516 F.Supp.2d 1072 (N.D.C. 2007).

[23] S.Rep.No. 94-803 (1976), P. 6.

[24] *See id.* PP. 42: "Section 4C is intended to assure that consumers are not precluded from the opportunity of proving the amount of their damage and to avoid problems with respect to manageability of class actions". The bill's passage was at least partly motivated in response to consumer's inability to protect themselves from anticompetitive conduct.

Both sStock state consumer protection and unfair and deceptive trade practices acts are also evidence of the pervasive use of non-economic policy objectives (*i.e.* consumer protection) guiding the development of antitrust law. A number of states, including Nebraska[25], Kentucky[26], Nevada[27] and Illinois[28], pair their state antitrust law with their consumer protection statutes, or permit for their consumer protection statutes to encompass antitrust and anticompetitive behavior. Since a well-known cannon of statutory construction is that "the primary source of insight into the intent of the Legislature is the language of the statute"[29], the significance of including antitrust and anticompetitive prohibitions within a statÈs consumer protection statutes signifies legislative concern that antitrust behavior is a consumer protection issue. Compared to instances where a state chooses to regulate antitrust activities as a separate area of jurisprudence[30], placing anticompetitive activities within the realm of consumer protection is a strong indication that noneconomic objectives of antitrust law are widely accepted and geographically pervasive.

2. A Fear of Concentrated Economic Power

Congress has demonstrated its fear that the concentration of economic power in the hands of a few giants could, if left unchecked, facilitate in the overthrow, or at least overhaul, of democratic institutions[31]. In fact, this concern is so strong that it occasionally trumps economic efficiencies, imposing additional costs on the country's economic well-being in order to limit monopolistic powers[32]. Scholars have long echoed the belief that markets structured to avoid monopolistic firms tend to be associated with contemporaneous democracies, which restraint on com-

[25] Arthur v. Microsoft Corp., 267 Neb. 586, (2004), stating that the clear purpose of Nebraska's Consumer Protection Act is "to provide consumer protection against the monopolization of trade or commerce".

[26] Ky Rev. Stat. Ann. §§ 367.175, 367.170, placing antitrust activities within the sphere of Kentucky's Consumer Protections Act.

[27] *See* in re Wellbutrin XL Antitrust Litigation, 260 F.R.D.143, 163 n. 8 (E.D. PA. 2009), noting that the Nevada anti-trust laws codified by § 598A.010-598A.280 are contained within the "Nevada Unfair Trade Practices Act".

[28] Banning antitrust and anticompetitive behavior under the Consumer Fraud and Deceptive Business Practices Act. What is notable about the Illinois approach is that the language of the statute explicitly bans these practices to the extent that consumers are deceived, placing added weight to the argument that an economic doctrine such as antitrust law can be used to further noneconomic objectives.

[29] Ciardi v. F. Hoffman-La'Roche, Ltd., 436 Mass. 53, 60, 762 N.E.2d 303, 310 (2002), *quoting* International Fidelity Ins. Co. v. Wilson, 787 Mass. 841, 443 S.E.2d 1308 (1983).

[30] *See* Fla. Stat. §§ 542.18-542.19, banning restraint of trade, monopolies and collusion under the Florida Antitrust Act.

[31] Robert Pitofsky, *The Political Content of Antitrust,* U. PA. L. REV. (ISSUE 127, 1979), PP. 1051, 1053-1054.

[32] *See id.*

petition tends to be associated with totalitarian regimes[33]. The Supreme Court in *U.S. v. Von's Grocery Co*[34] took note of this widespread fear of the concentration of economic power in the hands of the few[35]. In fact, Justice Black, writing for the majority, recognized that this concern was the impetus for the passage of the Sherman Act by Congress in 1890 and later, the Celler-Kefauver Act (the "CFA") in 1950[36]. Justice Black's hypothesis is supported by the legislative history of the CFA, in which several representatives stated that the purpose of the bill was to protect small businesses from the threat that concentrated economic power of large corporations possessed.

3. Protection of the Community

In *Standard Oil Co. v. United States*[37], Justice Douglas reminded the court that when local businesses are acquired by outside interests "a loss of citizenship occurs as local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy"[38]. Although not necessarily anti-big business, Congress have shown its concern over the power that big businesses have over small communities, making one independent towns dependent on foreign goodwill[39]. Of more concern is the shift in the locus of control, first noted by Professor Carstensen, whereas outside corporations are left with substantial discretionary power to make managerial decisions that have the potential to adversely impact the lives of other people without having to take into account their decisions effects on the common good[40]. Permitting "men on the 54th floor of their New York skyscrapers" to decide the fate of people and communities with which they have little or no contact has troubled the Supreme Court for decades[41] and have threatened the economic and cultural survival of local communities[42]. These threats have prompted academics and policy makers to study the effects of mergers and acquisitions by large corpora-

[33] *Id.* p. 1055.
[34] 384 U.S. 270, 86 S.Ct. 1478 (1966).
[35] *Id.* pp. 274, 1481: "From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly-that is the concentration of economic power in the hands of the few".
[36] *Id.*
[37] 337 U.S. 293, 318 (1949).
[38] *Id.* pp. 319 (Douglas, J., separate opinion).
[39] *See* 95 Cong. Rec. 11, 495 (1949) (statement of Rep. Bryson), indicating his concern that anti-competitive mergers have left southern communities dominated by northern big business.
[40] David W. Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, Wm. & Mary L. Rev. (issue 30, 1989), pp. 787, *citing* Carstensen, Questal, *The Use of Section 5 of the Federal Trade Commission Act to Attack Large Conglomerate Mergers*, Cornell L. Rev. (issue 63, 1978), pp . 841, 864.
[41] *See* Falstaff Brewing, 410 U.S. 526, 543 (1973) (Douglas, J. concurring).
[42] Barnes, *supra* note 32, pp. 831.

tions of small, community businesses. Between concerns over reinvestment in the community, declining civic engagement, and negative effects on local distributional preferences, antitrust scholars have been concerned with the impact of mergers and anti-competitive behavior on the community[43].

III. Corporate governance and shareholder primacy

A. What is Corporate Governance?

Broadly categorized as the processes "by which business decisions are made and the processes by which the persons who make those decisions are chosen"[44], corporate governance can more narrowly be seen as a concerted legal and policy effort to reduce agency costs.[45] Conceptualizing corporate governance in this manner may seem simplistic, but in fact it incorporate "the whole set of legal, cultural, and institutional arrangements that determine what publically traded corporations can do, who controls them, and how that control is exercised"[46]. Although shareholders play the dominant role in traditional conceptions of corporate governance, some economists, such as Oliver Williamson, believes that corporate governance can more broadly be seen as the relationship between the firm and its constituencies, such as labor, capital, suppliers, customers, the community and management[47]. This kind of broad based vision of the players in corporate control is the definition that this article will adopt in its discussion about making stakeholders the focal point of corporate governance discussions.

[43] *See generally* P. Blumberg, The Megacorporation in American Society (1975); *Id.* pp. 832-34.
[44] David C. McBride, *For Whom Does this Bell Toll?,* Del. Law. (issue , 2009), pp. 28-30.
[45] Cory Howard, *Amgen and Proving Materiality in Class Action Securities Litigation: How the Seventh and Ninth Circuit's Approach to Materiality Offers the United States Supreme Court the Chance to Reinforce legal Mechanisms of Corporate Governance*, Wake Forest J. of Bus. Intell. Prop. Law (issue 13, 2013), pp. 257, 268,noting that although there is debate over the role of stakeholders and shareholders in corporate governance, it is predominately focused on reducing the friction and accompanying agency costs between shareholder and manager priorities and decision making.
[46] Margaret M. Blair, Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century (The Brookings Inst. 1996).
[47] Donald C. Clarke, *The Independent Director in Chinese Corporate Governance*, De. J. Corp. L. (issue 31), pp. 125, 144, *citing* Oliver E. Williamson, The Economic Institutions of Capitalism (The Free Press 1985), pp. 298.

B. The Role of the Shareholder in Corporate Governance

1. The Rise of the Power of Shareholders

Since prominent corporate governance scholars have recognized "increased shareholder power [as] one of the most significant corporate governance phenomenon of our decade"[48], there have been a number of efforts by academics, policy makers, corporate lawyers and business leaders to reduce shareholder influence over corporate decision making. The growth of shareholder democracy has been substantial, as shareholder power has transformed from influence over traditional sources of corporate power[49] to more informal, yet equally pervasive, control over the corporate affairs[50]. Now, shareholders do not even have to engage in protracted (and expensive) proxy battles or shareholder votes to ensure their voice is heard by corporate executives and directors, as more and more corporate leaders make decisions for the sole purpose of placating the increasingly powerful shareholder, sometimes at the expense of the organization's long-term financial health[51]. Shareholders are no longer exercising their newfound judicial and administrative recognition to affirmatively exercise their rights and determine the corporation's agenda[52], but also informally flexing their collective muscle to force corporations to act in their best interests without having to employ traditional power plays.

As the power of shareholders has steadily increased over the past two decades or so, there has been a corresponding increase in the dangers of permitting corporate governance to become shareholder-centric. Indeed, shareholder primacy is by no means a universally accepted, or approved, phenomena[53]. A number of Authors,

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[48] Lisa M. Fairfax, SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER ACTIVISM AND PARTICIPATION (2011).

[49] *Id.,* detailing the traditional methods of power that shareholders have sought control of, including director selection and control, proxy access and executive compensation.

[50] Henry Blodget, *HerÈs Who to Blame for America's Lousy Economy,* BUSINESS INSIDER (July 31, 2013), http://www.businessinsider.com/why-economic-growth-is-so-slow-2013-7, noting that 'shareholder valuÈ, also known as short-term profitability, has become the driving force behind corporate decision making at the expense of long term profitability and stakeholder objectives.

[51] Justin Fox, *How Shareholders are Ruining American Business*, THE ATLANTIC (Jun. 19, 2013), http://www.theatlantic.com/magazine/archive/2013/07/stop-spoiling-the-shareholders/309381/, noting that corporate directors have been increasingly concerned with shareholder opinion and will often make business decisions on the basis of what the shareholder would prefer.

[52] Robert B. Thompson, *Shareholders as Grown-Ups: voting, Selling and Limits on the Board's Power to "Just Say No"*, U. CIN. L. REV. (ISSUE 67, 1999), PP. 999.

[53] *Shareholder Democracy: Battling for Corporate America*, THE ECONOMIST (Mar. 9, 206), *available at* http://www.economist.com/node/5601741, noting that legal academics that advocate for increased shareholder power are rare.

including Roberta Romano, have warned that increased shareholder participation in the corporation, especially by institutional investors, imposes costs on the corporation without any corresponding increase in corporate value[54]. These warnings have been echoed by a variety of reporters and economists in the post-Great Recession aftermath, as both are quick to suggest shareholder dominance as one the primary motivations behind the 2007 financial markets collapse and subsequent slow recovery[55]. Before the collapse there was a common sentiment in corporate law that stakeholder interests should be considered "to maintain good relations with employees, creditors, suppliers and customers"[56], a notion that was passively framed and lacked any convictions that stakeholder interests could or should be a fundamental voice in corporate decision making. However, given the increased potential that shareholders have to affect business practices and everyday decisions of corporate directors and executives, the second tier classification of stakeholders should at least be reconsidered, if not reconfigured, to maximize corporate and societal welfare.

C. Legal Inclusion of Stakeholders has Not been Successful

In the wake of a decade of hostile takeovers, a number of states passed "other constituency statutes", which permitted and even required directors to evaluate the impact of corporate business decisions on non-shareholder constituencies, such as creditors, suppliers, employees, and communities[57]. Additionally, some state legislatures have considered expanding directors and officer's fiduciary duties to incor-

[54] *See* Roberta Romano, *Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, YALE JOURNAL ON REGULATION (ISSUE 18, 2001), PP. 174, 177, noting that a survey of corporate law demonstrates that contrary to popular opinion on the value of shareholder activism, empirical studies tend to show a negligible impact on corporate performance, and, in fact, can cause corporate value to slip.

[55] Henry Blodget, HerÈs Who to Blame for America's Lousy Economy…, BUSINESS INSIDER (Jul. 31, 2013), http://www.businessinsider.com/why-economic-growth-is-so-slow-2013-7, noting that the shareholder value has forced corporations to become obsessed with maximizing short-term profit at the expense of accomplishing stakeholder objectives and long-term investments; Justin Fox, How Shareholders are Ruining American Business, THE ATLANTIC (Jun. 19, 2013), http://www.theatlantic.com/magazine/archive/2013/07/stop-spoiling-the-shareholders/309381/, explaining that the level of shareholder dominance was directly linked to financial institution's problems, primarily because it drives executives to take "bold, financial-system-endangering risks".

[56] CORPORATE DIRECTIONS NEWSLETTER NO. 218, PP. 2 (Apr. 22, 1997), 1997 WL 34897692 (C.C.H).

[57] Mark E. Van Der Weide, *Against Fiduciary Duties to Corporate Stakeholders*, DEL. J. CORP. L. (ISSUE 21, 1996), PP. 27, 29, (briefly explaining what precipitated the rise of stakeholder statutes; for examples of "other constituency statutes" *see,* FLA. STAT. ANN. § 607.0830(3) (1993); GA. CODE ANN. § 14-2-202(B)(5) (1994); ILL. COMP. STAT. ANN. CH. 805, § 5/8.85 (1993); NEB. REV. STAT. § 21-2035(1)(c) (1991).

porate consideration of business decisions on corporate stakeholders[58]. However, these reforms either failed outright or were later repealed after the hostile-takeover fever that gripped corporate America in the 1980's died down. Since then, corporate scholars, wary of corporate officer and director malfeasance that swept the United States in the late 1990's and early 2000's, began to advocate for the expansion of the role of shareholders[59]. With the shareholder democracy movement came the subsequent fall of importance that academics placed on stakeholder objectives. As the most recent recession and meager post-recession GDP growth has shown us, including stakeholders in corporate decision-making is necessary. Therefore, the following section will apply antitrust's non-economic principles to corporate governance to serve as the guiding principles for an intellectual regime change that has historically lacked a solid basis of overarching principles.

IV. Non-economic antitrust norms applicable to corporate governance

A. Using Non-Economic Antitrust Norms to Reduce Shareholder Power and Increase Stakeholder Participation

The discussions surrounding corporate governance have become too oriented on shareholder democracy and, as a result, far too much power has been doled out to this particular group of stakeholders. Given the disastrous financial and economic conditions that have resulted in part from shareholder activism in the corporate world, this article believes corporate governance scholars and policy makers can create a new stakeholder regime by borrowing from the principles of antitrust law. Although now a primarily economic theory, antitrust law has a storied history of promoting and achieving non-economic and social welfare goals through increased economic efficiency. Given these rather successful outcomes, antitrust historical principles and jurisprudence can serve as a road map for corporate governance experts who wish to depart from the traditional shareholder centric regime in which the corporate world is currently mired. Although antitrust jurisprudence is littered

[58] *Id.* pp. 31-32, noting that Delaware and other states have or considered expanding director's fiduciary duties to include stakeholders.

[59] Richard A. Posner, *Are American CEOs Overpaid, and, if so, What if Anything Should be Done about It?*, Duke L.J. (Vol. 58, 2009), pp. 1013, 1039, explaining that corporate scandals, such as Tyco and WorldCom led to the passage of Sarbanes-Oxley Act, which was intended to "make corporate managers more faith agents of…the shareholders"; Lisa M. Fairfax, *Shareholder Democracy on Trial: International Perspective on the Effectiveness of Increased Shareholder Power*, Va. L. & Bus. Rev. (Vol. 3, 2008), pp. 1, 21 , noting that proponents of increased shareholder power focus on the shareholder's ability to curb corporate fraud and misconduct.

with cautionary tales about the expansion of liability if non-economic norms were to become an integral part in antitrust analysis[60], this is actually a desired goal in corporate governance, as liability to more than one constituency (shareholders) will drive sustainable business practices.

1. Principle One: "Protecting the Consumer from the Failure of the Market"

Just as a number of states and courts have either explicitly or implicitly held that antitrust law is a function of consumer protection law, corporate governance scholars can base their regime change on the same logic. Given the tremendous number of market inefficiencies that have resulted from shareholder centric corporate governance regime[61], protecting the public from another shareholder-driven financial collapse justifies the imposition of stakeholder centric norms in corporate governance, under the guise of consumer protection. The focus that shareholders and, as a result, corporate directors have placed on short term profits has made corporations a singular issue entity, incapable of doing anything more than maximizing today's profits, even if it is at the expense of long-term financial health[62]. This kind of self-destructive behavior is indicative of a serious market inefficacy[63], one that threatens not just shareholders long-term value, but the ability of the firm to function for an extended period of time. As the most recent recession and sluggish economic recovery have shown, when this short-term profit mentality prevails over long-term, sustainable growth, consumers, not just shareholders, suffer. Therefore, corporate governance must borrow a long utilized non-economic principle that courts have used to justify antitrust laws and policies and protect the public from shareholder created market inefficiencies.

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[60] William H. Page, *The Scope of Liability for Antitrust Violations*, STAN. L. REV. (ISSUE 37, 1985), PP. 1445, 1451 n. 32, *citing* Clare Deffense, Comment, *A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damage Actions*, CAL. L. REV. (ISSUE 72, 1984), PP. 437, noting that if non-economic goals are permitted in antitrust analysis, then the scope of liability will drastically expand.

[61] Jesse Eisinger, *How Shareholders are Hurting America*, PROPUBLICA (June 27, 2012), http://www.propublica.org/thetrade/item/how-shareholders-are-hurting-america, noting that shareholder dictatorship has eroded firm value and warped corporate motivation; Sonjay Sanghoee, *Bad to Worse: Why Shareholder Activism Hurts Shareholders*, HUFFINGTON POST (May 3, 2013), http://www.huffingtonpost.com/sanjay-sanghoee/frying-pan-to-the-fire-ho_b_3203935.html, noting that shareholder activism dominated by short term profit margins is undertaken at the expense of the corporation's long-term financial health. *See generally*, Lynn A. Stout, THE SHAREHOLDER VALUE MYTH (2012).

[62] Jill Treanor, *Unilever Boss Slams Short-Term Profit Mentality*, THE GUARDIAN (April 5, 2010), *available at* http://www.theguardian.com/business/2010/apr/05/unilver-paul-polman-shareholder-value, noting that Unilever's CEO has slammed the short-term profit maximizing approach adopted by shareholders as incompatible with noneconomic and long-term corporate goals.

[63] Henry Blodget, *Amazon's Letter to Shareholders Should Inspire Every Company in America*, BUSINESS INSIDER (Apr. 14, 2013), http://www.businessinsider.com/amazons-letter-to-shareholders-2013-4.

2. Principle Two: Free Competition

Free competition has been held again and again to be a prominent objective of antitrust law, specifically of the Sherman Act[64]. At the time the Sherman Act was passed, the domination of a number of industries by cartels and large businesses had threatened the existence of the small businesses and the communities that relied on them[65]. So too has corporate governance become dominated by the "cartel" of shareholders, which threaten to block out the legitimate claims advanced by stakeholders, whose cries are increasingly choked out by shareholder capture. Just as free competition of products has been seen as essential for economic efficiency and for the advancement of societal welfare, healthy competition between the desires and claims made by multiple parties can only benefit corporate decision makers. Antitrust law has been primarily concerned with protecting competition in the marketplace, based on the proposition that competition benefits consumers generally by lowering prices[66]. So too will consumers and society benefit if corporate governance protects the free competition of ideas by protecting directors from the monopolistic control over corporate affairs that shareholders are now exercising. If directors can consider what ramifications closing a plant will have on a small town, or whether to use capital to fund research into initially costlier, but more sustainable energy sources to power operations, consumers will ultimately benefit. Although the returns may not be as tangible as the price lowering effect that free competition among business has, they will undoubtedly benefit from weakened shareholder short-term profit seeking activities, even if the return is simply that the firm has retained its long-term value at the expense of short term returns to shareholders.

3. Principle Three: A Fear of Concentrated Economic Power

Just as antitrust law is concerned with concentrated economic power and the havoc then it can play with liberal democratic institutions and principles, so too should corporate governance be concerned with unchecked accumulation of

[64] Heike K. Sullivan, *Fraser v. Major League Soccer: The MLS's Single Entity Structure is a "Sham"*, TEMPLE L. REV. (ISSUE 73, 2000) PP. 865, 869, stating that the goal of antitrust law, and the Sherman Act more specifically, is to protect competition.

[65] See 96 Cong. Rec. 16,433 (1950) (statement of Sen. O' Connor), explaining that the desired objective in passing the Sherman Act was to advance "the interests of small business as an important competitive factor in the American economy".

[66] Glen Holly Entertainment, Inc. v. Tektronix Inc., 343 F.3d 1000, 1010 (9th Cir. 2003), *citing* Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 988 (9th Cir. 2000) holding that "every precedent in the field makes clear that the interaction of competitive forces […] is what will benefit consumers. *See also* Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co., 20 Cal.4th 163, 223 (S.Ct. Cal. 1999), noting that under modern economic theory assumes that competition benefits customers by lowering prices.

shareholder power. However, today's corporate decision makers are almost entirely devoted to maximizing short-term profit at the expense of long-term profitability and sustainability because of the influence shareholders have over corporations[67]. In fact, the desire for corporations to please shareholders has become so pervasive that it is not just decreasing firm value, but imputing negative impacts on the United States economy on a larger scale[68]. As a result, there is little doubt that shareholders have amalgamated a vast quantity of hard, and soft, economic power over corporations[69], so much so that their power makes them the sole consideration of corporate leaders. Shareholders can effectively control major business decisions which have substantial effects on the economy[70] and therefore, employing norms which seek to limit the concentration of economic power should be a principal concern of corporate governance. By advocating for and protecting corporate consideration of stakeholder objectives, corporate governance can break shareholder economic domination.

4. Principel Four: Impact of Shareholder Dominance on the Community

Although considering the impact on the local community has been "the mushiest of balancing factors"[71] in antitrust analysis, it ought to be a prominent concern for corporate governance scholars. Just as the discretionary power of large multinational corporations can threaten the livelihood of small communities, so too can the detached decision making of shareholders wreak havoc on citizen's quality of life. For example, an in effort to increase shareholder value, in 2012 the directors at Bank of America cut approximately 5% of the bank's workforce in an effort to lower costs[72]. This business decision was primarily motivated by appeasing share-

[67] *See* Gordon Pearson, *The Truth about Shareholder Primacy*, THE GUARDIAN (Apr. 27, 2012), http://www.theguardian.com/sustainable-business/short-termism-shareholder-long-term-leadership, noting that shareholder primacy has become the motivating force behind business decision making.

[68] Henry Blodget, *Enough with this Obsession with Stock Prices-It's Ruining America*, BUSINESS INSIDER (May 24, 2013), http://www.businessinsider.com/shareholder-value-is-ruining-america-2013-5.

[69] *See* Lisa M. Fairfax, *Mandating Board-Shareholder Engagement*, 2013 U. ILL. L. REV. 821, 824-825 (2013), exploring the ways in which shareholders have gained significant economic power over the recent decades.

[70] *See* Martin Lipton, *The Bebchuck Syllogism*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Aug. 26, 2013), http://blogs.law.harvard.edu/corpgov/2013/08/26/the-bebchuk-syllogism/#more-51801, noting the severity of the economic impacts that shareholder activism can have; Jill Priluck, *The Darkside of Shareholder Activism*, REUTERS (Apr. 20, 2013), http://blogs.reuters.com/great-debate/2013/04/12/the-dark-side-of-shareholder-activism/, explaining anecdotal evidence of large economic impacts that shareholder activism imposes on corporations and the economy as a whole.

[71] Barnes, *supra* note 31, PP. 835.

[72] Andrew Dunn, Deon Roberts, *BofA Chairman Tells Shareholders: "The Train is on the Tracks"*, CHARLOTTE OBSERVER (May 8, 2013), *available at* http://www.charlotteobserver.com/2013/05/08/4030265/

holders calls to maximize short-term profits at the expense of communities that relied on these relatively well-paying jobs. Instead of businessmen on the 54th floor of New York skyscrapers, corporate governance scholars should be wary of the institutional investors and shareholder activists on the 54th floor who are able to disrupt local communities they have never visited.

In order to counter this ever-growing trend, corporate governance needs to devote more resources to studying the impact that shareholder value motivated decisions has on local communities. Whether it be shareholder mandated cut in charitable contributions to local communities or forced cost-cutting that can decimate a small-town's workforce, business leaders and scholars can avoid decisions which drastically reduce societal welfare by prioritizing stakeholder objectives over shareholder demands. Reversing the conception that balancing community impacts is a "mushy factor", corporate governance scholars can implement a new regime that protects communities from the profiteering decisions made by shareholders that can drastically affect smaller communities.

B. Should Noneconomic Considerations be the Determining Factor in Switching to a Stakeholder-Centric Regime?

Although a number of non-economic objectives, such as societal welfare and consumer protection, of antitrust law are widely recognized, there is no consensus as to the weight they should be given in the practical application of antitrust law. In fact, the Supreme Court has been ambiguous in their treatment of non-economic goals, holding that the "ultimate reckoning of social and economic debits that a weighing of non-economic and economic factors would entail […] is a task more appropriately addressed by Congress"[73]. However, when applying non-economic norms to corporate governance, the picture is significantly clearer, especially because of the almost perfect congruence between economic and non-economic goals. But corporate governance does not need to turn to abstract principles in order to justify the imposition of non-economic norms and goals to reduce shareholder power. Instead, legislative intent and common law history provides sufficient justification for promoting stakeholder objectives.

bofa-chairman-tells-shareholders.html#.UiZP-T_xiTY.

[73] Lee Goldman, *The Politically Correct Corporation and the Antitrust Laws: The Proper Treatment of Noneconomic or Social Welfare Jusitifications under Section 1 of the Sherman Act*, YALE L. & POL'Y REV. (ISSUE 12, 1995), PP. 137, 143 n. 45, *citing* United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963).

1. History of State Legislatures Promoting Stakeholder Claims over Shareholder Prerogatives

An examination of the legislative history of state "other constituency" or corporate constituency statutes reveals an intent by legislatures to protect corporate longevity, or even, stakeholder interests, above shareholder economic concerns. For example, the Pennsylvania Business Law, of which corporate constituency sections are key provisions, explicitly states that it is the corporation, not shareholders, for which directors are responsible[74]. One of the primary concerns in passing this statute was the protection of in-state jobs that could be eliminated during corporate mergers[75]. By providing directors with non-economic defenses during hostile takeover bids, the state legislature was responding to and echoing the concerns of citizens who had a negative view of hostile takeovers, namely because of the perceived job loss that one would entail[76].

Other states have historically expanded their corporate constituency statutes, in some cases requiring the consideration of interests of non-shareholders constituencies[77]. Reading these statutes not just according to their plain meaning, but in accordance with their legislative intent[78], paints a picture of legislatures continually recognizing that the rights of stakeholders can be, or should be, superior to that of shareholders. The texts of corporate constituency statutes in a variety of states demonstrate that the legislative purpose is not just to codify common law, but to "broaden the permissible range of corporate interests that a board may consider"[79].

2. Common Law Recognition of Stakeholder Legitimacy

A number of courts in several jurisdictions have recognized that corporate consideration of the potential effects of a business decision, such as a merger, on

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[74] *See* PA. CONS. STAT. ANN. §§ 1712, 1715, 1716, AND 1717.

[75] Commonwealth of Pennsylvana, Legislative Journal-Senate, Dec. 6, 1983, PP. 1431: Senator Fumo iterating that the motivating force behind the bill was to "prevent foreign interests from coming in […] and obliterating those corporations [… and] increasing unemployment because of the people who they would lay off after the mergers were consummated".

[76] *See* Commonwealth of Pennsylvania, Legislative Journal-Senate, Dec. 6, 1983, at 1431, recognizing that the bill would have a chilling effect on adverse corporate takeovers; Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, GEO. WASH. L. REV. (ISSUE 61, 1992), PP. 14, 24, noting that "other constituency" statues were passed by state legislatures in an effort to respond to constituent cries to protect local jobs.

[77] CONN. GEN. STAT. ANN. § 33-313(e)(1992), *repealed by* (1994, P.A. 94-186, § 214 (1997).

[78] *See* 2A Sutherland, Statutory Construction §§ 45.05, 45.06 (Norman J. Singer ed., 5th ed. 1992), recognizing the importance of interpreting statutes in accordance with legislative intent in addition to examining the statutÈs plain meaning.

[79] Orts, *supra* note 51, PP. 75-76.

non-shareholders is an integral part of the corporate decision making process. In *Paramount Communications, Inc. v. Time, Inc.*, the Supreme Court of Delaware has explicitly held that "directors may consider, when evaluating the threat of a takeover bid […], the impact [on] 'constituencies' other than shareholders"[80]. The court went on to further devalue the weight that directors should give to shareholder's economic concerns, noting that the board of directors is under no obligation to maximize shareholder short term value[81].

Federal courts in Pennsylvania have echoed the applicability of stakeholder concerns in the corporate decision making process. In *Stilwell Value Partners I, L.P. v. Prudential Mut. Holding Co.*[82], the court was forced to evaluate the Pennsylvania's corporate constituency statutÈs applicability to director's fiduciary duties during a proposed merger of a local community bank. Reading the statute broadly, the court took into account a number of non-traditional stakeholder claims, including those of Prudential's customers and the community at large[83]. The court further recognized that public policy counsels employing a broad interpretation of the best interest of the corporation standard used to evaluate director's fiduciary duties when considering proposed mergers[84].

C. The Inability to Separate Noneconomic from Economic Goals

There is a significant amount of literature and judicial reasoning devoted to determining what role, if any, non-economic goals of antitrust law should play in practical application. Still, some, including Professor Herbert Hovenkamp of the Chicago School, believe that the economic and non-economic (in his theory, distributional) affects and implications of antitrust law cannot be separated[85]. If this is truly the case, as this Author believes, then switching to a stakeholder centric vision of corporate governance does not have to be based on "softer", non-economic considerations. Instead, corporate directors, scholars, and policy makers can focus on stakeholder concerns based not just on abstract principles such as consumer protection or free competition, but instead on economic efficiency grounds, with

[80] 571 A.2d 1140, 1153 (1989).

[81] *Id.* pp. 1150.

[82] 2008 WL 1900945, No. 06-4432 (E.D.Penn. 2008).

[83] *Id.* pp. 16: "I will take into account multiple factors and interests, including Prudential's customers, officers and employees, and the community, as well as the goals of the mutual holding company structure".

[84] *Id.* pp. 13, n. 10.

[85] Herbert Hovenkamp, *Antitrust Policy after Chicago*, Mich. L. Rev. (issue 84, 1985), pp. 213, 245-246: "In the real world, efficiency and distributional effects generally cannot be separated from one another".

societal welfare increase being an ancillary benefit. Therefore, even if the two sets of principles, economic and non-economic norms, are irreconcilable, then economic efficiency arguments still counsel for adopting a stakeholder centric model of corporate governance.

V. Conclusion

During the past two decades, corporate governance scholars and policy makers have pushed for increased shareholder power in response to what they perceive to be egregious abuses of corporate power by directors. However, as the United States' slow recovery from the most recent recession has shown, the power of shareholders to dictate corporate decision making in favor of short term profits at the expense of long-term sustainability has given shareholders a monopoly over economic power. As a result, academics and practitioners have begun to call for decreased shareholder activism and for a corporate governance model that focuses on stakeholders other than shareholders. This article stands for the proposition that this can be achieved by borrowing guiding principles from antitrust jurisprudence, which has successfully employed non-economic norms to increase societal welfare. By relying on legislative and judicial legitimacy to impose antitrust's staple non-economic values of community protection, fair competition in the marketplace of ideas, and consumer protection, corporate governance can end shareholders dominance and refocus on stakeholders.

Dodd-Frank's Inverse Effects: The Codification of "Too Big to Fail" and the Evisceration of the Bankruptcy Code

di Zachary Meyer

I. Introduction

In the early twentieth century, Justice Louis Brandeis ominously warned of banks and industry: "Size is not a crime, but size may, at least, become noxious by reason of the means through which it is attained or the uses to which it is put"[1]. Nearly a century later, Justice Brandeis' foresight regarding the "Too Big To Fail" (TBTF) model has proven to be true in the context of the 2008 financial crisis, revealing the fragility of the American financial system. Both the means through which TBTF has been attained, and the consequences of its existence continually threaten the financial health of our markets and macro-economy. Certainly, the recently implemented financial reform legislation, commonly known as the Dodd-Frank Act, has attempted to mitigate the effects of TBTF. However, claims of Dodd-Frank's success entirely depend on whom the question is posited toward.

[1] Eric Dash, *If It's Too Big to Fail, Is it Too Big to Exist?*, N.Y. Times, June 21, 2009, *citing* Louis Brandeis, Other PeoplÈs Money and How Banks Use It, (Fredrick A. Stokes Co.,1914), p. 162.

II. Framing the TBTF Problem

At the outset, the Gramm-Leach-Bliley Act[2] is largely attributed to enabling the TBTF model[3]. Gramm-Leach-Bliley explicitly repealed sections 20 and 32 of the Glass-Steagall Act[4], effectively knocking down the firewall between commercial banks - whose primary business consists of receiving deposits and making loans - and investment banks - whose business comprises securities underwriting[5]. Without the repeal of Glass-Steagall, financial institutions would have been barred from buying and selling mortgage-backed securities[6], credit-default swaps[7], and other financial derivatives[8], in addition to procuring exemptions for excess leverage rules [9,10]. The confluence of these financially unsound trading activities bears the majority of the responsibility for the 2008 financial crisis[11].

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[2] Financial Services Modification Act, Pub. L. No. 106-102 (1999).

[3] Cyrus Sanati, *10 Years Later, Looking at Repeal of Glass-Steagall*, N.Y. Times, Nov. 12, 2009 (visited Feb. 13, 2013), http://dealbook.nytimes.com/2009/11/12/10-years-later-looking-at-repeal-of-glass-steagall/.

[4] *Times Topics: Glass-Steagall Act,* N.Y. Times (visited Feb. 13, 2013), http://topics.nytimes.com/topics/reference/timestopics/subjects/g/glass_steagall_act_1933/index.html.

[5] Sanati, *supra* note 3.

[6] "*Mortgage Backed Security",* Investopedia (visited Feb. 13, 2013) http://www.investopedia.com/terms/m/mbs.asp.: A mortgage-backed security (MBS) is a type of asset-backed security that is secured by a mortgage or collection of mortgages. These securities must also be grouped in one of the top two ratings as determined by an accredited credit rating agency, and usually pay periodic payments that are similar to coupon payments. When investing in an MBS, money is leant to a homebuyer or business. An MBS is a way for a smaller regional bank to lend mortgages to its customers without having to worry about whether the customers have the assets to cover the loan. Instead, the bank acts as an intermediary between the homebuyer and the investment markets.

[7] "*Credit Default Swap"*, Investopedia (visited Feb. 13, 2013), http://www.investopedia.com/terms/c/creditdefaultswap.asp.: A credit default swap (CDS) is a contract in which the purchaser of the swap makes payments up until the maturity date of the contract. Payments are made to the seller of the swap. In return, the seller agrees to pay off a third party debt if this party defaults on the loan. A CDS is considered insurance against non-payment. A buyer of a CDS might be speculating on the possibility that the third party will indeed default.

[8] "*Derivative"*, Investopedia (visited Feb. 13, 2013), http://www.investopedia.com/terms/d/derivative.asp.: A derivative is a security whose price is dependent upon or derived from one or more underlying assets. The derivative itself is merely a contract between two or more parties. Its value is determined by fluctuations in the underlying asset.

[9] "*Leverage"*, Investopedia (visited Feb. 13, 2013), http://www.investopedia.com/terms/l/leverage.asp.: Leverage is the use of various financial instruments or borrowed capital, such as margin, to increase the potential return of an investment. It may also be the amount of debt used to finance a firm's assets. A firm with significantly more debt than equity is considered highly leveraged. Leverage is most commonly used in real estate transactions through the use of mortgages to purchase a home.

[10] *See* Sanati, *supra* note 3.

[11] *Id.*

The TBTF label is applied to entities, typically banks and financial institutions, which have become so interconnected in essential facets of the financial system that their failure would have devastating consequences[12]. For Wall Street, these consequences include disrupted financial system stability and frozen credit markets[13]. For "Main Street", the trickle-down consequences consist in a higher unemployment and vastly increased economic hardship[14]. Oftentimes, the government will make the cost-effective, risk-adverse decision to bail out the failing entity[15]. The bailout, though politically unpopular, is the preferred option, as the expected costs of systemic failure to society are catastrophically large when compared with the short-term costs of providing extraordinary liquidity support or other emergency assistance necessary to keep a financial institution solvent[16].

Moreover, the TBTF model poses a myriad of complex problems. Most notably these problems include: systemic risk, contagion and moral hazard. Systemic risk is a negative externality of a financial institution's TBTF status, whereby a triggering event, such as single firm's failure, can produce cascading failures that directly result from the widespread interconnectedness among financial institutions[17]. The theoretical response to a triggering event is contagion, arising when substantial systemic risk is present; it can be characterized by direct losses for counter-parties, fire sales of assets held by other leveraged financial institutions, or loss of confidence that precipitate runs on firms with similar business models[18].

Moral hazard arises in the financial context when markets interpret the government's willingness to prevent widespread failure through bailouts as implicit guarantees of the creditors' investments in an entity[19]. This reduces the firm's cost of funds, entailing a more readily available credit supply[20]. Recent estimates suggest that implicit government backing provides the largest United States bank holding companies with an average credit rating uplift of more than two notches, thereby lowering average funding costs a full percentage point relative to their smaller competitors[21]. More conservative estimates have indicated that a discount of ap-

[12] "*Too Big To Fail*", Investopedia (visited Feb. 13, 2013), http://www.investopedia.com/ terms/t/ too-big-to-fail.asp.

[13] William C. Dudley, *Solving the Too Big to Fail Problem*, Federal Reserve Bank of New York (visited Feb. 13, 2013) http://www.newyorkfed.org/newsevents/speeches/2012/ dud121115.html.

[14] *See supra,* note 12.

[15] *Id.*

[16] Dudley, *supra*, note 13.

[17] *See* Steven L. Schwarcz, *Systemic Risk,* Geo. L. J. (Issue 97, 2008), pp. 193, 198.

[18] Dudley, *supra*, note 13.

[19] *Id.*

[20] *Id.*

[21] Richard W. Fisher, *Ending Too Big to Fail: A Proposal for Reform Before It's Too Late*, Federal Reserve Bank of Dallas (visited Feb. 13, 2013), http://www.dallasfed.org/ news/speeches/fisher/2013/

proximately 0.8 percent exists as an implicit subsidy, resulting in a borrowing cost advantage for the TBTF financial institutions[22]. A United States taxpayer subsidy of $83 billion per year is realized when the 0.8 percent TBTF subsidy is multiplied by the liabilities of the ten largest United States banks[23].

Likewise, current estimates indicate that the current implicit TBTF global subsidy accounts for $300 billion per year for the 29 global institutions identified by the Financial Stability Board as "systemically important"[24]. This perverse market discipline encourages financial institutions to engage in high-risk ventures, as the gains are privatized while the losses are socialized through bailouts or equivalent assistance provided by the federal government[25]. This same market discipline encourages firms to engage in more risky ventures in order to attain TBTF status, reaping the foregoing benefits[26].

The TBTF model could better be understood in terms of the finance industry's asset holding concentration. As of the third quarter of 2012, approximately 5,600 commercial banking organizations exist[27]. These banks can be stratified into three distinct categories: 98.6% are community banks (with assets amounting to less than $10 billion), holding 12% of industry assets; 1.2% are regional banks (with assets between $10 and $250 billion), accounting for 19% of industry assets; while 0.2% can be considered TBTF (assets between $250 billion and $2.3 trillion), accounting for 69% of industry assets[28]. A great inequality of the finance industry's asset concentration can be observed, which lends a distinctly palpable advantage to the small number of firms, as discussed below.

While community banks and regional banks can fail, be dissolved and are subject to a sufficient regulatory discipline, TBTF institutions are implicitly immune from failure and dissolution, and are subject to a largely inefficient regulatory discipline for their lack of prudent risk-aversion[29]. In the TBTF model, an inversely proportional correlation diverges from conventional economics and decision-making; firms that make increasingly reckless financial investments receive an increasingly unjust

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[22] Kenichi Ueda, Beatrice Weder Di Mauro, Quantifying Structural Subsidy Values For Systemically Important Financial Institutions, International Monetary Fund (Issue 12, 2012).

[23] Bloomberg's Editors, *Why Should Taxpayers Give Big Banks $83 Billion a Year?* (visited Feb. 20, 2013), http://www.bloomberg.com/news/2013-02-20/why-should-taxpayers-give-big-banks-83-billion-a-year-.html.

[24] *See* Andrew Haldane, *On Being the Right Size*, Bank Of England (visited Feb. 13, 2013), http://www.bankofengland.co.uk/publications/Documents/speeches/2012/speech615.pdf.

[25] Fisher, *supra*, note 21.

[26] Dudley, *supra*, note 13.

[27] Fisher, *supra*, note 21.

[28] *Id.*

[29] *Id.*

enrichment, while firms that make sound investments are increasingly driven out of the market place because they cannot adequately compete as a direct result of the TBTF subsidy. Therefore, under the TBTF model, the largest institutions reap a windfall from their financial imprudence, while the remaining institutions that cannot accrue enough assets to cross the TBTF threshold will suffer.

III. The 2008 Financial Crisis & Governmental Response

The TBTF institutions parlayed their distinct market advantage with a number of untenable investments, as evidenced by the 2008 financial crisis. The aforementioned crisis was precipitated by a well-documented confluence of sub-prime mortgage[30] offerings, enabling a voracious investor appetite for mortgage-backed securities[31] (hereinafter, "MBS") and collateralized debt obligations[32,33] (hereinafter, "CDO"). Likewise, the major credit rating agencies[34] failed to adequately assess the risk of these investment opportunities[35]. The credit rating agencies' collective failure to adequately assess risk shouldn't be outright surprising, as an inherent conflict of interest exists in their payment scheme; the prevailing practice is that the financial institution issuing the investment pays the credit rating agency's fee[36]. Moreover, for

[30] "*Subprime Mortgage*", Investopedia (visited Feb. 13, 2013), http://www.investopedia.com/terms/s/subprime_mortgage.asp.: A subprime mortgage is a type of mortgage that is normally made out to borrowers with lower credit ratings. As a result of the borrower's lowered credit rating, a conventional mortgage is not offered because the lender views the borrower as having a larger-than-average risk of defaulting on the loan. Lending institutions often charge interest on subprime mortgages at a rate that is higher than a conventional mortgage in order to compensate them for carrying more risk.

[31] *Supra,* Note 6.

[32] "*Collateralized Debt Obligation*", Investopedia (visited Feb. 13, 2013), http://www.investopedia.com/terms/c/cdo.asp.: A collateralized debt obligation (CDO) is an investment-grade security backed by a pool of bonds, loans and other assets. CDOs do not specialize in one type of debt but are often non-mortgage loans or bonds. CDOs are unique in that they represent different types of debt and credit risk. These different types of debt are often referred to as "tranches" or "slices". Each slice has a different maturity and risk associated with it. The higher the risk, the more the CDO pays.

[33] Anthony Hearn, *Dodd-Frank Simpler: How Congress Codified an Article I Financial Takeover*, U. Miami Bus. L. Rev. (Issue 19, 2011), pp. 219, 228-229.

[34] "*Bond Rating Agencies*", Investopedia (visited Feb. 13, 2013), http://www.investopedia.com/terms/b/bond-rating-agencies.asp.: Credit rating agencies are companies that assess the creditworthiness of both debt securities and their issuers. In the United States, the three primary credit rating agencies are Standard &Poor's, Moody's and Fitch. Each uses a unique letter-based rating system to quickly convey to investors whether a bond carries a low or high default risk and whether the issuer is financially stable.

[35] Charles Murdock, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: What Caused the Financial Crisis and Will Dodd-Frank Prevent Future Crises*, SMU L. Rev. (Issue 64, 2011), pp. 1243, 1302.

[36] *Id.,* p. 303.

a large fee, credit rating agencies offered consulting services to financial institutions, where the institutions would be instructed on how to earn higher ratings for various tranches of CDO and MBS issuances[37]. What is most shocking is that credit rating agencies have been immune from liability for their involvement in the financial crisis, despite their failure to perform due diligence on the CDO and MBS[38].

Nevertheless, incrementally rising mortgage default rates forced major subprime lenders into default, resulting in downgrades of mortgage-backed securities and collateralized debt obligations by the major credit rating agencies[39]. This, in turn, decimated the demand for the mortgage-backed securities and collateralized debt obligations, forcing many large hedge funds[40] into bankruptcy[41]. Widespread loss mitigation and containment strategies of financial institutions across the economic spectrum stranded firms which were over-exposed to the mortgage-backed securities and collateralized debt obligation market[42]. Resultantly, a number of financial institutions were faced with the choice of filing for bankruptcy or an asset fire sale[43].

Accordingly, the federal government applied a number of strategies making an effort in mitigating contagion and systemic risk. In mid-March, 2008, the federal government facilitated the sale of Bear Sterns to JPMorgan Chase & Co. for approximately $236 million, while providing as much as $30 billion in financing for Bear Sterns' less-liquid assets[44]. This approach may have been marginally successful in the short term; however, continually utilizing mergers as a mechanism for resolution would ultimately be an unsuccessful strategy, as mergers require the approval of a majority of the shareholders of outstanding common shares[45]. To induce a favorable

[37] Stephen Harper, *Credit Rating Agencies Deserve Credit for the 2007-2008 Financial Crisis: An Analysis of CRA Liability Following the Enactment of the Dodd-Frank Act*, Wash. & Lee L. Rev (Issue 68, 2011), pp. 1925, 1943.

[38] *Id.*

[39] *Id*. p. 229, *citing* Testimony of Vickie A. Tillman, Standard & Poor's Credit Market Services: Hearing Before the Subcommittee On Capital Markets, Insurance And Government Sponsored Enterprises United States House of Representatives, 110th Cong. 21 (2007), http:// financialservices.house.gov/ hearing110/tillman.pdf.

[40] "*Hedge Fund*", Investopedia (visited Feb. 13, 2013), http://www.investopedia.com/terms/h/hedgefund.asp.A hedge fund is an aggressively managed portfolio of investments that uses advanced investment strategies such as leveraged, long, short and derivative positions in both domestic and international markets with the goal of generating high returns.

[41] Hearn, *supra* note 33 p. 229.

[42] *Id*., *citing* David Enke, *Merrill Lynch's Counterparty Risk*, Seeking Alpha (visited Apr. 17, 2008), http://seekingalpha.com/article/72787-merrill-lynch-s-counterparty-risk.

[43] Robin Sidel et al., *JPMorgan Buys Bear in Fire Sale, As Fed Widens Credit to Avert Crisis*, Wall Street Journal (Mar. 17, 2008), http://online.wsj.com/ article/SB120569598608739825.html.

[44] *Id*.

[45] *See* Jeffery N. Gordon, Christopher Muller, *Confronting Financial Crisis: Dodd-Frank's Dangers and the Case for a Systemic Emergency Insurance Fund*, Yale J. On Reg. (Issue 28, 2011), pp. 151, 182.

shareholder vote, deal forcing provisions and high break fees are oftentimes necessary[46]. Consequently, this results in a great deal of uncertainty and great difficulty in piecing together a transaction in the midst of a financial crisis[47]. The difficulty of a transaction of this nature is compounded by the fact that in the midst of crisis, time is of the essence, as the failing institution hemorrhages billions of dollars with each passing hour. Additionally, loss avoidance could be construed as self-dealing, resulting in potential exposure to personal liability beyond the corporate veil for the board of directors[48].

Conversely, in mid-September, 2008, the federal government provided an $85 billion bailout package to American International Group, just days after allowing Lehman Brothers Holding, Inc. to file the largest bankruptcy in the history of the United States[49]. Bankruptcy is a poor resolution method for financial crisis. Financial companies depend on collateralized short-term rollover financing for their core business activities, as well as financing portfolio positions at a significant leverage ratio[50]. To avoid cascading failures as a result of a single institution's insolvency, the Bankruptcy Code provides safe harbors from the automatic stay for various contracts necessary in the finance industry[51]. Immediately upon filing, these creditors may seize pledged collateral, and sell it to discharge the indebtedness[52]. As a result, it is unlikely that the unsecured creditors will have much equity to split amongst themselves. This situation can lead to devastating systemic consequences and a cascading number of financial institutions failings due to contagion.

Moreover, the Bankruptcy Code is generally not suited to resolve financial distress in times of crisis, as the due process rights of creditors and their various property interests are protected in bankruptcy[53]. Similarly, mitigating systemic risk is low on the list of bankruptcy goals, which include maximizing a firm's valuation and respecting the bargained-for priorities of the creditors[54].

Unfortunately, the federal government's *ad hoc* application of alternatingly allowing defaults and approving bailouts effectively froze the commercial and consumer credit market, as banks and financial institutions were unwilling to lend in uncertain

[46] *Id.*
[47] *Id.*
[48] *Id.*, note 88.
[49] Emerich Gutter, *Too Big to Fail and the Financial Stability Oversight Council*, Rev. Banking & Fin. L. (Issue 30, 2011), pp. 73, 76-77,, *citing* Matthew Karnitschnig et al., *U.S. to Take Over AIG in $85 Billion Bailout; Central Banks Inject Cash as Credit Dries Up*, Wall Street Journal (Sept. 17, 2008).
[50] Gordon, *supra* note 45, p. 180.
[51] 11 U.S.C. § 546(e)-(g) (2006).
[52] *Id.*
[53] *Id.* p. 181.
[54] *Id.* p. 182.

economic times[55]. Frozen credit markets are disastrous on an economy, especially in the finance industry, which is reliant on a working system of interdependence to remain solvent. A frozen credit market inhibits an entity's ability to receive commercial paper[56], which, in turn, exacerbates any existing liquidity issues[57]. For the consumer this can result in greatly increased financing costs for homes, automobiles, credit cards and higher education[58]. Failure as a solution to quickly alleviate a frozen credit market would essentially bring an economy to a standstill.

In an attempt to mitigate the broad complications of a frozen credit market, Congress approved the Troubled Asset Relief Program (known as the "TARP" Program)[59], with a mandate to unfreeze credit markets by purchasing $700 billion of toxic assets[60] from the balance sheets of the entire financial industry[61]. Of the $700 billion TARP allocation, the United States Treasury engaged in an aggressive $250 billion Capital Purchase Program, whereby the Treasury purchased shares of preferred stock in the nation's largest financial institutions in an effort to encourage lending among the institutions[62]. These institutions included: Bank of America Corporation, Bank of New York Mellon Corporation, Citigroup Incorporated, Goldman Sachs Group Incorporated, JPMorgan Chase & Company, Morgan Stanley, State Street Corporation, Wells Fargo and Company, as well as 42 other smaller institutions.

Subsequently, TARP's proponents have argued that its enactment was an economic necessity that saved the United States from an unemployment rate approaching fifteen percent[63]. However, TARP was vastly unpopular at the time of its passage, as its opponents framed it as a program utilizing public funds to insulate

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[55] Edmund L. Andrews, *U.S. Shifts Focus in Credit Bailout to Customer*, N.Y. Times, at A1 (Nov. 13, 2008).

[56] "*Commercial Paper",* Investopedia (visited Feb. 13, 2013), http://www.investopedia.com/ terms/c/commercialpaper.asp.: Commercial paper is an unsecured, short-term debt instrument issued by a corporation, typically for the financing of accounts receivable, inventories and meeting short-term liabilities. Maturities on commercial paper rarely range any longer than 270 days. The debt is usually issued at a discount, reflecting prevailing market interest rates.

[57] *See* Andrews, *supra* note 55.

[58] *Id*.

[59] H.R. Res. 1424, 110th Cong. (2008, enacted); Pub. L No. 111-203; 12 U.S.C. § 5211-44.

[60] "*Toxic Assets"*, Investopedia (visited Feb. 13, 2013), http://www.investopedia.com/terms/t/toxic-assets.asp.: Toxic Assets are assets that become illiquid when its secondary market disappears. The term was coined in the financial crisis of 2008, in reference to mortgage-backed securities, collateralized debt obligations and credit default swaps, all of which could not be sold after they exposed their holders to massive losses.

[61] Hearn, *supra* note 33, p. 231, *citing* H.R. Res. 1424, 110th Cong. at § 101(a)(1).

[62] Baird Webel, Cong. Research Serv., R41350, The Dodd-Frank Wall Street Reform And Consumer Protection Act: Issues And Summary (2010).

[63] Ross Douthat, *The Great Bailout Backlash*, N.Y. Times, at A27 (Oct. 25, 2010) (Op-Ed).

well-connected private actors from the consequences of their recklessness[64]. Moreover, TARP uncomfortably vested unprecedented economic authority in Treasury Secretary, Henry Paulson, further increasing its public disapproval[65].

IV. The Codification of Too Big To Fail

Public condemnation of bailouts and outcries of Wall Street excess resulted in the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act[66]. Dodd-Frank's purported goals are: promoting the financial stability of the United States by improving accountability and transparency in the financial system, putting an end to the principle of "Too Big To Fail" and protecting the American taxpayer by ending onerous bailouts[67]. President Obama remarked at Dodd-Frank's signing: "There will be no more taxpayer-funded bailouts. Period"[68]. However, rather than merely accepting the President's statement as truth, a careful examination of the mechanisms, broad powers granted, and new regulatory agencies created by the Dodd-Frank Act would be much more indicative as to whether the President's remarks were rooted in truthfulness or optimism.

A. Financial Stability Oversight Council

The Financial Stability Oversight Council (hereinafter, "FSOC") is the first line of defense against the systemic risk that can result from a TBTF firm at risk of default. FSOC members[69] are collectively tasked with identifying risks to the financial stability of the United States, promoting market discipline by eliminating expectations that the government will provide a bailout, and responding to emerging threats

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[64] *Id.*

[65] *Id.*

[66] 12 U.S.C.A § 5301-41 (2010); Pub. L. No. 111-203 (July 21, 2010).

[67] *Id.*

[68] Barak Obama, *Remarks by the President at Signing of Dodd-Frank Wall Street Reform and Consumer Protection Act*, The White House (July 21, 2010), http://www.whitehouse.gov/the-press-office/remarks-president-signing-dodd-frank-wall-street-reform-and-consumer-protection-act.

[69] Hearn, *supra* note 33 p. 105, *citing* 12 U.S.C.A. § 5321(b) (2010): The FSOC will be comprised of ten voting members: the secretary of the Treasury, Chairman of the Board of Governors, Comptroller of the Currency, Director of the Bureaus of Consumer Financial Protection, Chairperson of the SEC, Chairperson of the FDIC, Chairperson of the CFTC, Director of the Federal Housing Finance Agency, the Chairman of the National Credit Union Administration Board, and an independent member appointed by the President whose term is 6 years. The five non-voting members are: Director of the Officer of Financial Research, Director of the Federal Insurance Office, a state insurance commissioner, a state banking supervisor, a state securities commissioner.

to the stability of the United States financial system[70]. Any financial company with aggregate assets of at least $50 billion may fall within the purview of the FSOC's reporting mandate and receive a Systemically Important Financial Institution (hereinafter, "SIFI") designation[71]. Accordingly, such a firm may be required to regularly report its financial condition[72].

Additionally, the FSOC may determine that a financial institution below the $50 billion aggregate asset threshold is a systemic risk and designate such a firm as SIFI[73]. In utilizing its discretionary authority, the FSOC will consider factors such as: (i) the extent of the leverage of the company, (ii) the extent and nature of the off-balance-sheet exposures of the company, (iii) the extent and nature of the transactions and relationships of the company with other significant nonbank financial companies and significant bank holding companies, (iv) the importance of the company as a source of credit for low-income, minority or underserviced communities, and the impact that the failure of such company would have on the availability of credit in such communities, (v) the extent to which assets are managed rather than owned by the company, and the extent to which assets under management is diffuse, (vi) the nature, scope, size, scale, concentration, interconnectedness and mix of the activities of the company, (vii) the degree to which the company is already regulated by one or more primary financial regulatory agencies, (viii) the amount and nature of the financial assets of the company, (ix) the amount and types of the liabilities of the company, including the degree of reliance on short-term funding, and (x) any other risk-related factors that the Council deems appropriate[74].

Once a financial institution has acquired a "systemic risk" designation, it may be required to meet heightened prudential standards[75]. These more stringent standards will pertain to: risk-based capital requirements, leverage limits, liquidity requirements, resolution plans, credit exposure report requirements, concentration limits, contingent capital requirements, enhanced public disclosures, short term debt limits and overall risk management requirements[76]. The heightened prudential standards are instituted to enable systemically risky firms to better handle shocks to its individual business model and shocks from the financial system, overall. Moreover, these banks will be required to undergo stress tests annually[77]. The stress tests will

[70] 12 U.S.C.A. § 5322(a)(1)(A)-(C) (2010).
[71] *Id.* at § 5326(a).
[72] *Id.* at § 5326(a).
[73] *Id.* at § 5323(a)(1).
[74] *Id.* at § 5323(a)(2)(A)-(K).
[75] *Id.* at § 5325.
[76] *Id.* at § 5325(b)(1)(A)-(I).
[77] *Id.* at § 5365(i)(1)(A).

be applied under at least three market conditions: baseline, adverse and severely adverse[78]. However, other analytics may be developed and applied, as part of the annual stress testing[79]. The stress tests are meant to ensure that each systemic institution has the total consolidated capital on hand to withstand adverse market conditions and events[80].

Furthermore, the FSOC will require each firm with a systemic risk designation to maintain a rapid resolution plan[81]. The resolution plan is tantamount to a "living will", and is effectively a road map for the dissolution of a firm seized by the government[82]. The rapid resolution plan must contain: (i) information regarding the manner and extent to which any insured depository institution affiliated with the company is adequately protected from risks arising from the activities of any nonbank subsidiaries of the company, (ii) a full descriptions of the ownership structure, assets, liabilities, and contractual obligations of the company, (iii) identification of the cross-guarantees tied to different securities, identification of major counterparties, and a process for determining to whom the collateral of the company is pledged, and (iv) any other information that the Board of Governors and the Corporation jointly require by rule or order[83]. However, it is worth noting that a resolution plan is not binding on a bankruptcy court, or on a receiver appointed under Title II of the Dodd-Frank Act, as discussed below[84].

Additionally, FSOC regulators have neglected an opportunity to force downsizing with respect to a TBTF institution's living will[85], while they have the authority to promulgate higher capital ratio requirements in a TBTF institution's living will[86] providing equity cushions in times of systemic crisis. This would allow an institution to have better withstand systemic shock and mitigate the effects of cascading defaults. Unfortunately, there is no indication whether the FSOC will be promulgating such a requirement, thus far[87]. However, higher capital ratio requirements in forthcoming legislation may be an adequate solution to mitigating the risk of allowing TBTF institutions to exist with the current leverage ratio minimums.

[78] *Id.* at § 5365(i)(1)(B)(i).
[79] *Id.* at § 5365(i)(1)(B)(iii).
[80] Hearn, *supra* note 33, p. 234.
[81] 12 U.S.C.A. § 5365(d)(1) (2010).
[82] Hearn, *supra* note 33, p. 235.
[83] 12 U.S.C.A § 5365(d)(1)(A)-(D) (2010).
[84] *Id.* at § 5365(d)(6).
[85] Simon Johnson, *BernankÈs Credibility on 'Too Big to Fail'*, N.Y. Times (Feb. 28, 2013), http://economix.blogs.nytimes.com/2013/02/28/bernankes-credibility-on-too-big-to-fail/.
[86] 12 U.S.C.A. § 5365(d)(1) (2010).
[87] Johnson, *supra,* at note 85.

Nevertheless, failure to properly submit a credible plan may result in the FSOC imposing more stringent capital, leverage or liquidity requirements, or restrictions on the growth, activities or operations of the company, or any subsidiary thereof, until such time as the company resubmits a plan that remedies any deficiencies[88]. Further failure to submit a credible plan may result in the forced divestiture of certain assets or operations[89].

Lastly, after notice and a hearing[90], the FSOC may issue a determination that an entity poses a grave threat to the financial stability of the United States[91]. Upon a grave threat designation, the FSOC will limit the ability of the company to merge with, acquire, consolidate with, or otherwise become affiliated with another company, restrict the ability of the company to offer a financial product or products, require the company to terminate one or more activities, impose conditions on the manner in which the company conducts one or more activities[92]. Alternatively, the FSOC may force complete divestiture of assets or off-balance-sheet items if any of the previous remedies are inadequate to mitigate the grave threat[93].

Consequently, the logical outcome of a systemic risk designation is that the government will take special precautions to prevent failure and additional precautions if failure nevertheless occurs or might concretely occur[94]. Thus, merely labeling an institution as systemically important under Title I, the Act perpetuates the implicit subsidy of moral hazard and resulting financing benefits for a systemically important firm[95].

B. Orderly Liquidation Authority

The Orderly Liquidation Authority (hereinafter, "OLA") expressly grants the FDIC the authority to recommend covered financial companies enter into receivership[96]. Although the Dodd-Frank Act will not change the current regulatory reality for commercial banks, which were barred from bankruptcy reorganization prior to Dodd-Frank's adoption, the OLA expands regulatory power to all entities that qualify as "covered financial companies"[97]. Covered financial companies include

[88] 12 U.S.C.A. § 5365(d)(5)(A).
[89] *Id*. at § 5365(d)(5)(B).
[90] *Id*. at § 5331(b).
[91] *Id*. at § 5331(a).
[92] *Id*. at § 5331(a)(1)-(4).
[93] *Id*. at § 5331(a)(5).
[94] Peter J. Wallison, *Too Big to Ignore: The Future of Bailouts and Dodd-Frank after the 2012 Election*, American Enterprise Institute For Public Policy Research (Oct. 2010).
[95] *Id*.
[96] See 12 U.S.C.A § 5381 (2010).
[97] Hearn, *supra* note 33, p. 236.

bank holding companies, non-banking financial companies, companies predominantly engaged in financial activities and any subsidiaries thereof[98].

To fall within the purview of the OLA, a firm must receive a systemic "risk designation" from the FSOC[99]. The Secretary of the Treasury may only make such a determination after considering a number of factors, specifically: an evaluation of whether the financial company is in default or in danger of default, a description of the effect that the default of the financial company would have on financial stability in the United States, a description of the effect that the default of the financial company would have on economic conditions or financial stability for low income, minority, or underserved communities, a recommendation regarding the nature and the extent of actions to be taken regarding the financial company, an evaluation of the likelihood of a private sector alternative to prevent the default of the financial company, an evaluation of why a case under the Bankruptcy Code is not appropriate for the financial company, an evaluation of the effects on creditors, counterparties, and shareholders of the financial company and other market participants, and an evaluation of whether the company satisfies the definition of a covered financial company[100].

Once the Secretary of the Treasury makes a systemic risk determination, the Secretary must notify the covered financial institution's Board of Directors (or governing equivalent) of the commencement of its orderly liquidation[101]. If the Board acquiesces, it will be relieved of all liability[102]. Conversely, this leads to a permissible inference that the institution's Board of Directors may be found liable if the Directors do not acquiesce. Nevertheless, if the covered financial company does not acquiesce, the Secretary shall petition the United States District Court for the District of Columbia for an order authorizing the Secretary to appoint the FDIC as receiver[103]. The Board may challenge the petition in the District Court, but the Court's review will be limited to the highly deferential "arbitrary and capricious" standard[104]. If the agrees with the challenge, by law, it must allow the Secretary to

[98] 12 U.S.C.A. § 5381(a)(11)(B)(i)-(iv) (2010).
[99] *Id*. at § 5383(a).
[100] *Id*. at § 5383(a)(2)(A)-(H).
[101] *Id*. at § 5382(a)(1)(A)(i).
[102] *Id*. at § 5387.
[103] *Id*. at § 5382(a)(1)(A)(i).
[104] Hearn, *supra* note 33, p. 238, *citing* n. 163, 12 U.S.C.A. § 5382(a)(1)(A)(iii); *see also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971): "Section 706(2)(A) requires a finding that the actual choice made was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'. To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency".

immediately amend and re-file the petition[105]. Moreover, the Secretary's petition may be granted by operation of law if the Court does not make a determination within twenty-four hours of receipt of the petition[106]. Granting the petition by operation of law has the same effect as the Court granting the petition: the covered financial company enters FDIC receivership, and liquidation may thereafter commence[107].

Once the FDIC is appointed receiver, the procedure for liquidation under the OLA provides notable variation from the reorganization proceedings under Chapter 11 of the Bankruptcy Code, whereby a debtor remains in possession, and the Board of Directors and management remain in place[108]. Dodd-Frank's OLA expressly grants authority to the FDIC to succeed to all rights, titles, powers and privileges of the covered financial company and its assets, and of any stockholder, member, officer or director of the company[109]. Moreover, the FDIC may exercise supreme control and discretion over the entity during the period of orderly liquidation[110]. However, this grant of authority is constrained by a mandate to manage the assets and property of the covered financial company, consistent with maximization of the value of the assets[111], and to respect the rights of secured creditors[112].

Despite Dodd-Frank's purported mandate of ending bailouts, a pragmatic reading of the law suggests that the legislation, through the FSOC and OLA, merely provides a mechanism for the FDIC to perform future bailouts. The Act explicitly states that, in no uncertain terms, upon its appointment as receiver, the FDIC may make funds available for the orderly liquidation of a covered financial company[113]. The act vests discretionary authority in the FDIC as receiver to make loans, purchase any debt obligations, purchase or guarantee against loss of assets in a covered financial company, covered subsidiary or through an entity established by the FDIC, assume or guarantee obligations, and take a lien on any or all assets[114].

Additionally, the FDIC may take steps to mitigate the potential serious adverse effects to the financial system[115] and provide preferential treatment to certain

[105] 12 U.S.C.A. § 5382(a)(1)(A)(iv).
[106] *Id*. at § 5382(a)(1)(A)(v).
[107] *Id*. at § 5382(a)(1)(A)(v)(I)-(III).
[108] Hearn, *supra* note 33, p. 238, *citing* Bankruptcy Code, Chapter 11 (11 U.S.C. §§ 363(b), 1107, 1108 (2010)).
[109] 12 U.S.C.A. § 5390(a)(1)(A)(i).
[110] *Id.* at § 5390(a)(1)(B).
[111] *Id.* at § 5390(a)(1)(B)(iv).
[112] *Id.* at. § 5390(b)(5).
[113] *Id.* at § 5384(d).
[114] *Id.* at § 5384(d)(1)-(4).
[115] Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too Big to Fail Problem*, Or. L. Rev. (Issue 89, 2011), pp. 951, 997.

creditors if the FDIC determines it is necessary to maximize the value of a failed institution's assets or to preserve its essential operations[116]. In a forthcoming FDIC-promulgated rule, the FDIC may provide preferential treatment to certain creditors in order to continue key operations, services, and transactions that will maximize the value of the failed institutions assets and avoid a disorderly collapse in the marketplace[117]. Holders of senior unsecured debt with a term longer than 360 days and holders of unsubordinated debt would be excluded from preferential treatment[118].

Accordingly, this allows the FDIC to provide full protection to short-term, unsecured creditors of failed institutions, if the FDIC determines such protection is essential for a systemic firm's continued operation and orderly liquidation[119]. This FDIC protection will likely extend to commercial paper and securities repurchase agreements because these sorts of liabilities are highly volatile and prone to creditor runs during financially distressed times[120]. Moreover, this rule creates moral hazard in that it provides an implicit subsidy to short-term creditors and will further encourage systemic institutions to rely increasingly more on vulnerable, short-term financing strategies[121]. This will make short-term liabilities more attractive to systemic institutions because their creditors likely will demand much lower yields, in light of the existing implicit government subsidy[122].

Thus, it is indisputable that Dodd-Frank has created a bailout mechanism through the OLA. Accordingly, when the FDIC deems a bailout necessary, funds may be drawn from an Orderly Liquidation Fund (hereinafter, "OLF")[123]. Counter-intuitively, the OLF is not pre-funded, but financed through the FDIC borrowing from the United States Treasury. The FDIC may borrow up to ten percent of a failed systemically important institution's assets, in addition to ninety percent of that institution's fair value[124]. The FDIC's authority to borrow from the United States Treasury provides an immediate source of funding to protect unsecured creditors that are deemed to have systemic significance[125].

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116 12 U.S.C.A. §§ 210(b)(4), (h)(5)(E) (2010).

117 Fed. Deposit Ins. Corp., Notice of Proposed Rulemaking Implementing Certain Orderly Liquidation Authority Provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act, 75 Fed. Reg. 64,173-75 (Oct. 19, 2010).

118 *Id.*

119 Wilmarth, *supra* note 115, p. 998.

120 *Id.*

121 *Id.* at 998-99.

122 *Id.*

123 H.R. 4173 § 201(n).

124 H.R. 4173 § 201(n)(5).

125 Wilmarth, *supra* note 115, p. 999.

Considering that the United States Treasury is funded by taxes levied on United States citizens, there is little room for arguing that Dodd-Frank's liquidation authority, if ever invoked, will amount to an indirectly taxpayer-funded bailout of a systemic financial institution. Moreover, Title II of the Dodd-Frank Act creates moral hazard by encouraging creditors to believe that the FDIC will treat them more favorably than a bankruptcy court[126].

Undoubtedly, a more popular solution than allocating taxpayer money to bailout large firms would be to have all firms that have acquired an FSOC systemic risk designation pay into a systemic liquidation fund[127]. This fund may be thought of as an industry insurance fund of sorts, that doubles as an excise tax that is directly proportional to a firm's size[128]. The TBTF systemically important institutions reap a windfall in the form of moral hazard derived from their size; therefore, it is outright reasonable to tax a systemically important firm proportionally for the dangers it creates to the financial system[129]. In fact, the legislation initially passed by House of Representatives contained a $150 billion Systemic Dissolution Fund, which would have been pre-funded through risk-based assessments on large financial firms; the Systemic Dissolution Fund unfortunately was later stripped from the final version of the bill[130]. Dodd-Frank would have been vastly more effective in reducing moral hazard had the Systemic Dissolution Fund not been stricken or had an excise tax been imposed upon TBTF institutions.

As a result, Dodd-Frank's lack of prefunding may have consequences, which undermine the entire purpose of the legislation itself. As with TARP, the orderly liquidation of a firm with taxpayer dollars will be wildly unpopular, in political terms[131]. Regulators will therefore be hesitant to place troubled firms in receivership, and instead utilize various methods of regulatory forbearance, thereby worsening the firm's financial health over a period of time[132]. When regulators realize that receivership is inevitable, the systemic consequences and contagion may be exponentially worse than if they had originally placed the firm into receivership[133]. Thus, Dodd-Frank's failure to provide a liquidation fund, coupled with its failure to levy an excise tax proportional to an institution's size greatly increases systemic risk, rather than ameliorates it.

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126 Wallison, *supra* note 94.
127 *See generally* Gordon, *supra* note 45.
128 *Id.*
129 *Id.* p. 208.
130 *Id.* p. 193, *citing* H.R. 4173, 111th Cong. § 1609 (2009); S. 3217, 111th Cong. § 210(n) (2010) (Chairman's mark).
131 Gordon, *supra* note 45, p. 193.
132 *Id.*
133 *Id.*

C. Derivatives Regulation: Clearinghouses and the Lincoln Rule

Derivative[134] trading was largely unregulated prior to the 2008 financial crisis[135]. Accordingly, it took the brunt of the blame for the proliferation of contagion during the 2008 financial crisis. As a result, Dodd-Frank's Title VII[136] purports to regulate the derivatives trading market by altering the current scheme of FDIC guarantees for proprietary derivative purchases by banks and other large institutions[137] and by establishing derivative clearinghouses[138] to mitigate the proliferation of risky derivative agreements that facilitated the 2008 financial crisis. However, the success of curbing these types of derivative trades by establishing clearinghouses and altering the current scheme of proprietary derivative purchases is questionable at best, as discussed below.

A review of the Dodd-Frank Act's modifications for derivatives and swaps demonstrate that banks may continue gambling with derivatives, swaps and other complex instruments without significant consequences for many years[139]. Glaringly, a ban on banks or other financial institutions trading specifically dangerous types derivatives does not take effect until at least July 2014, and at most, July 2015[140]. If unchecked derivative trading was at least a minor factor precipitating the 2008 financial crisis, it is somewhat concerning that the Dodd-Frank Act allows for an extended time period to continue conducting these trades, as opposed to an immediate and outright ban.

Proactively, the Dodd-Frank Act has mandated that derivative transactions shall be subjected to clearinghouses[141]. A determination of whether to clear the derivative is made while considering numerous factors, including the liquidity for a given type of derivative, pricing data, and the derivativÈs effect on systemic risk[142]. If no clearinghouse wishes to clear a derivative, then no clearing is necessary and the trade will be completed outside of the clearinghouse[143]. Thus, a relatively costly or highly customized, yet clearly risky set of derivatives will likely not attain clearance, and the derivative trade will still be executed[144]. Likewise, in an attempt to

[134] *See supra,* note 8.

[135] Martin Neil Brady, Aaron Klein, *Its Time for Sensible Regulations of Derivatives*, Yahoo! Finance (Jan. 22, 2013), http://finance.yahoo.com/blogs/the-exchange/time-sensible-derivatives-regulation-012301989.html.

[136] H.R. 4173 § 701 (2010).

[137] *Id.* at § 716(a).

[138] *See Id.* at § 723.

[139] Steven A. Ramirez, *Dodd-Frank as a Maginot Line*, Chap. L. Rev. (Issue 15), pp. 109, 124.

[140] H.R. 4173 § 716(f).

[141] H.R. 4173 § 723(a)(3).

[142] H.R. 4173 § 723(a)(2)(D)(ii).

[143] H.R. 4173 § 723(a)(7)(B).

[144] Ramirez *supra* note 139, p. 125.

mitigate the scope of trading under this exception, the Commodity Futures Trading Commission initially proposed a rule requiring at least five counter-parties in such a derivative trade[145]. However, the final rule proposal has limited the number of counter-parties to two[146]. If ratified, this rule will effectively nullify the Dodd-Frank rule requiring derivatives to be subjected to clearinghouses and enable Wall Street to continue its profitable, but reckless, gambling on derivatives[147].

Furthermore, under the Dodd-Frank Act, these clearinghouses[148] have attained a massive benefit: access to the Federal Reserve Bank's money and no punitive outcome for failure[149]. It is a common misconception that clearinghouses are public utilities; they are, in fact, lucrative enterprises, handling billions of dollars in transactions daily[150]. In fact, eight such enterprises have received a systemically important designation under Dodd-Frank[151]. Fortunately for clearinghouses, their business model does not fall within the definition of a covered financial company, as discussed above, thereby precluding clearinghouses from orderly liquidation[152]. Further, to this day the FDIC has since declined to resolve the ambiguous designation of clearinghouses under Dodd-Frank[153].

Also, the clearinghouse rules permit clearing members to elect to terminate and liquidate their portfolios upon the insolvency of the clearinghouse[154]. Accordingly, most clearing members, if not all, would want to exit, creating a run on the clearinghouse, as the "in-the-money" members would want to terminate in order to collect profits before the clearinghouse runs out of capital, whereas the "out-of-the-money" members would likely terminate to cut their losses and avoid losing their chance to exit before a prolonged bankruptcy proceeding[155]. Therefore, under the current

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[145] Eleazar Melendez, *CFTC Derivatives Proposal Would Weaken Rules Meant to Prevent Another Crisis, Advocates Warn*, Huffington Post (Feb. 28, 2013), http://www.huffingtonpost.com/2013/02/28/cftcderivatives_n_2784947.html?utm_hp_ref=business.

[146] *Id.*

[147] *Id.*

[148] Gretchen Morgenson, *One Safety Net that Needs to Shrink*, N.Y. Times (Nov. 3, 2012), at BU1: Clearinghouses are large, powerful institutions that clear or settle options, bond and derivative trades. They include the Chicago Mercantile Exchange, the Intercontinental Exchange, and the Options Clearing Corporation.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] Julia Lees Allen, *Derivatives Clearinghouses and Systemic Risk: A Bankruptcy and Dodd-Frank Analysis,* Stan. L. Rev. (Issue 64, 2012), pp. 1079, 1094, *citing* LCH Clearnet Limited, General Regulations of the Clearing House 85-86 (2012), available at http://lchclearnet.com/images/general%20regulations_tcm6-43737.pdf.

[155] *Id.*

Dodd-Frank structure, the resulting run on a clearinghouse will ultimately accelerate its failure[156]. Moreover, Dodd-Frank mandates clearing to decrease financial participants' exposure to the risk of counterparty default and consequently decrease systemic risk. However, with respect to a clearinghousÈs insolvency, clearing members' incentives will cause enhanced systemic risk as a result of the run on the clearinghouse[157]. As a result, it is clear that the possibility of one day using taxpayer dollars to bail out a clearinghouse remains very real.

Nevertheless, the Swaps Push-Out Rule[158], commonly known as the Lincoln Rule, attempts in earnest to reign in these trading activities after the 2008 financial crisis. The Lincoln Rule requires TBTF institutions to divest parts of their derivative trading business into separately capitalized subsidiaries[159]. This proviso is crucial to eliminate the TBTF perception, as these separately capitalized subsidiaries are insulated from the institution's commercial banking division, which is backed by insured deposits and taxpayers through the Federal ReservÈs discount window[160]. Accordingly, these separately capitalized subsidiaries are expressly prohibited from receiving assistance from the Federal Reserve, with a few troubling exemptions, discussed below[161].

Especially concerning is the fact that the Dodd-Frank Act has created an exception to the commercial banking derivative trading ban for "*bona fide* hedging and traditional bank activities"[162]. Further, banks may continue engaging in derivative trading through its subsidiaries in compliance with the Federal Reserve[163]. These exceptions would apparently include approximately eighty percent of derivative trades in the corresponding market[164]. Additional concerns arise out of recent bipartisan legislation introduced in both the House of Representatives and the Senate which seeks to allow some commodity, equity and credit derivatives tied to asset backed securities to also take place in the TBTF institution's commercial banking divisions[165]. Similarly disturbing is that the House of Representatives passed legislation that would completely exempt derivatives sold through the nine most popular

156 *Id.*
157 *Id.*
158 Pub. L No. 111-203 § 716.
159 *Id.*
160 *Id.*
161 *Id.*
162 *Id.* at § 716(d).
163 *Id.* at § 716(c).
164 Ramirez *supra* note 139, p. 124, *citing* Orrick, Herrington & Sutcliffe LLP, *Wall Street Transparency and Accountability Act of 2010*, Financial Market Alert (July 21, 2010), http:// www.orrick.com/fileupload/2833.pdf.
165 Ronold D. Orol, *Five Big Dodd-Frank Battles*, Wall Street Journal: Market Watch (April 4, 2013), http://www.marketwatch.com/story/five-big-dodd-frank-battles-2013-04-04.

foreign derivative jurisdictions from United States oversight, gutting the supposed safeguards that clearinghouses were supposed to provide, as discussed below[166].

All of the foregoing are clear examples of exceptions swallowing the rules, as exceptions for commodity, equity and credit derivatives tied to asset backed securities would afford the TBTF institutions the same fundamental latitude to engage in trades that largely caused the 2008 financial crisis. Moreover, exempting the United States from regulating derivative transactions sold abroad would essentially be a backdoor method of killing derivative reform and facilitating additional "London Whale"[167] scenarios to arise[168].

Unfortunately, Dodd-Frank affords entities a vast opportunity to continue undertaking the very same risks that initially manufactured the financial crisis. The legislation had a prime opportunity to regulate derivatives with the same vigor as the SEC regulates securities. Instead, Dodd-Frank carved out numerous exceptions which amount to marginally curbing derivative trading, but do very little to mitigate the contagion that will spread in a future financial crisis.

D. The Volcker Rule

The Volcker Rule[169] is an important legislative component included in the Dodd-Frank Act, as it prohibits TBTF institutions from engaging in proprietary trading[170] after a transitional period, subject to certain exceptions. The Volcker RulÈs proprietary trading provisions seek to limit the types of trades that TBTF institutions are able to make for their own accounts, utilizing depositor money, in an effort to prevent these institutions from relying on the Federal Reserve to assist these institutions in times of crisis[171]. At first glance, the Volcker Rule is grounded in rationality, as it attempts to reduce moral hazard by cleaving and insulating taxpayers from contributing indirectly to bailout financial institutions during times of crisis, much like the Lincoln Rule. However, in a similar way to the one of the mentioned

166 Zach Carter, *GOP Wall Street Bill Would Eviscerate Dodd-Frank,* Huffington Post (July 8, 2013), http://www.huffingtonpost.com/2013/07/08/gop-wall-street-bill_n_3542999.html.

167 *Id.*, The "London Whale" is a reference to a combination of overseas derivative trades that cost JPMorgan Chase more than $6 billion in 2012.

168 *Id.*

169 *See generally* 12 U.S.C. § 1851 (2010).

170 "*Proprietary Trading",* Investopedia (visited July 28, 2013) http://www.investopedia.com/terms/p/proprietarytrading.asp.: Proprietary trading is defined as engaging as a principal for the trading account of the institution seeking profit from investments, rather than traditional commissions from processing trades.

171 R. Rex Chatterjee, *Dictionaries Fail: The Volcker RulÈs Reliance on Definitions Renders it Ineffective and a New Solution is Needed to Adequately Regulate Proprietary Trading,* Int'l L. & Management Rev. (Issue 8, 2010), pp. 33, 41.

Lincoln Rule, the exceptions carved out in the Dodd-Frank Act may swallow the rule, rendering it ineffective in accomplishing its stated purpose.

Chiefly undermining the Volcker Rule, is the "Permitted Activities"[172] section. Permitted Activities within this section include (i) trading in United States Government obligations[173] and in connection with underwriting or market-making-related activities, not to exceed the reasonably expected near term demands of clients, customers, or counterparties[174], (ii) risk-mitigating hedging activities, related to individual or aggregated positions, contracts, or other holdings of a banking entity that are designed to reduce the specific risks to the banking entity in connection with and related to such positions, contracts or other holdings[175], (iii) transacting on behalf of customers[176], and (iv) carrying on and concluding other trading activities that the Federal Reserve, Securities Exchange Commission, and Commodities Futures Trading Commission determine would promote and protect the safety and soundness of the banking entity and the financial stability of the United States[177]. While all of the foregoing well-intentioned exceptions have legitimate business purposes, the ambiguous definitions of such transactions and the regulatory costs of investigating whether a permitted activity falls within these exceptions seriously calls into question the efficacy of the Volcker Rule[178].

A pragmatic reading of these exceptions reveals that a proprietary trading division within a financial institution may simply be disguised as carrying out market-making activities or client transactions, obfuscating any bright-line rule against said proprietary trading[179]. For example, Goldman Sachs has moved much of its proprietary trading staff to its Asset Management division while merely changing the division's name from "Proprietary Trading" to "Client Trading" in accordance with the Volcker Rule provisions[180]. Shortly thereafter, the following situation occurred:

> Several large insurance companies approached Goldman Sachs, looking to bet that the markets would not stay quiet. Goldman gladly took the other side of the trades, but when the markets turned choppy, the firm

[172] 12 U.S.C. § 1851(d)(1)(2010).
[173] *Id.* at § 1851(d)(1)(A).
[174] *Id.* at § 1851(d)(1)(B).
[175] *Id.* at § 1851(d)(1)(C).
[176] *Id.* at § 1851(d)(1)(D).
[177] *Id.* at § 1851(d)(1)(J).
[178] *See generally* Chatterjee, *supra* note 171.
[179] *Id.* p. 53.
[180] *Id.*, *citing* Courtney Comstock, *Gasparino: Goldman Plans to Circumvent the Volcker Rule by Changing the Name from "Prop Trading" to "Client Trading"*, Business Insider (Jul. 27, 2010), http://www.businessinsider.com/gasparino-goldman-plans-to-circumvent-the-volcker-rule-by-changing-the-name-from-prop-trading-to-client-trading-2010-7.

> was caught short and quickly lost $250 million. The "other side" of the bet is what might have been considered proprietary trading. But in this case, Goldman was fulfilling the order of a client, so it can also be classified as a case of the bank acting as a market maker. The question, then, is whether we should be outraged if banks are still able to make bets for their own profit if it is in the context of making a market for a client[181].

Thus, it seems proprietary trading may continue under the market making exemption and the client transaction exemption, so long as another institution initiates the trade. Moreover, traders may also disguise proprietary trading by masking their positions as simple hedges of permitted trades, though in truth, the hedge position is actually the institutions true target position[182].

Recently, a number of alternative solutions have been proposed to mend the loopholes created by the Volcker Rule. The most significant of which is the McCain-Warren Bill, which proposes to reinstate Glass-Steagall era regulations, forbidding banks that accept federally insured deposits from engaging in risky securities trading, as well as barring banks that accept insured deposits from dealing in swaps or otherwise operating hedge funds and private equity enterprises[183]. This legislation would easily force the largest institutions to spin off hundreds of billions of dollars worth of business into independent firms[184].

Unfortunately, any reinstatement of Glass-Steagall era regulation is problematic; it would force the largest financial institutions to divest from highly profitable business ventures in order to comply, thereby compromising their ability to compete internationally because of increased globalization[185]. Consequently, various jurisdictions may engage in an international regulatory competition to best attract financial companies[186]. As a result, there would be profoundly negative effects on the United States macro economy if financial institutions settle abroad in jurisdictions with more lenient regulations[187]. Moreover, a return to Glass-Steagall banking regulation would make the United States Government look foolish because the Government

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[181] *Id., citing* Daniel Indiviglio, *Should We Be Outraged Banks Are Skirting the Volcker Rule?*, The Atlantic (Aug. 26, 2010), http://www.theatlantic.com/business/archive/ 2010/08/should-we-be-outraged-banks-are-skirting-the-volcker-rule/62114).

[182] *Id.*

[183] Zach Carter, *Glass-Steagall Act Would Be Revived in New Bill from Elizabeth Warren, Bipartisan Coalition*, Huffington Post (July 11, 2013), http://www.huffingtonpost.com/ 2013/07/11/glass-steagall-act-elizabeth-warren_n_3580967.html.

[184] *Id.*

[185] Chatterjee, *supra* note 171; *see also* Mark Gongloff, *JPMorgan fires back at Warren-McCain Plan to Reinstate Glass-Steagall*, Huffington Post (July 12, 2013), http://www.huffingtonpost.com/2013/07/12/jpmorgan-chase-glass-steagall_n_3587062.html.

[186] *Id.* p. 40.

[187] *Id.*

had recently engineered both the sale of Merill Lynch to Bank of America and the sale of Bear Sterns to JPMorgan[188]. Illegalizing these combined entities and forcing a subsequent divestiture would expose the Government to a massive loss of credibility and to years of litigation in addition to the prohibitive economic reasons previously stated. As such, the McCain-Warren Bill is not expected to become law[189].

Accordingly, the Volcker Rule represents a Congressional effort in responding to the populist anger at Wall Street banks' risk taking while dealing with the inescapable reality that such entities have grown so powerful and vital that strong-worded regulation of them would perhaps do more harm than good[190]. Like many other provisions of the Dodd-Frank Act, the Volcker Rule is theoretically rooted in good intentions, yet it fails to accomplish its stated goal in practice and further entrenches the TBTF perception.

V. Dodd-Frank's Failure to Force Institutional Downsizing Has Further Entrenched the "Too Big to Fail" Perception

Dodd-Frank's Titles I and II address systemic risk, and reflect an underlying governmental assumption that the continuous existence of systemically threatening firms is inevitable[191]. Accordingly, the legislative response to the financial crisis was not a forced break up of systemically threatening firms, but a system of regulation, which strives to increase transparency and oversight[192].

Accordingly, Dodd-Frank's failure to force a downsizing of the systemically important financial institutions will reinforce a negative power loop enjoyed by the oligarchic Wall Street institutions[193]. In the context of Wall Street, a negative power loop arises as banks and financial institutions accrue immense political power incidental to their economic strength, and then apply that political influence to further entrench themselves in a position of power[194]. The negative power loop is an inevitable result, as systemically important firms will have more routine interaction with regulatory members of various agencies. The heads of these oligarchical institutions and their lobbyists will predictably attempt to influence rulemaking and

188 *Id.*
189 Gongloff, *supra* note *185*
190 *See* Chatterjee, *supra* note 171.
191 Hearn, *supra* note 33, p. 242, *citing* Paul Krugman, *Too Big to Fail?,* N.Y. Times (Jan. 11, 2010), http://krugman.blogs.nytimes.com/2010/01/11/too-big-to-fail-2.
192 *Id.* p. 243.
193 *Id.* p. 245 *citing* Simon Johnson, James Kwak, Bankers: The Wall Street Takeover And The Next Financial Meltdown (2010).
194 *Id.*

policy decisions[195]. Elements of this prophecy have been evidenced to date as the largest banks and their lobbyists have authored countless rules and regulations; for instance, Citigroup lobbyists wrote large sections of the bill concerning exemptions to the Lincoln Amendment discussed above[196]. Likewise, the influence exerted by these institutions' lobbyists extends to regulatory rule crafting by bombarding the regulatory agencies and writing rules under Dodd-Frank, which chip away at the core purpose of each rule[197].

Moreover, this influence inherently exposes regulators to partiality amongst firms, as highly developed relationships between executives and regulators can obfuscate the regulator's theoretically objective evaluations of whether a firm should be labeled as systemically important and whether a firm requires heightened prudential standards and scrutiny. Furthermore, prudential regulation requires a government salaried regulator to have the willingness and support to quash highly profitable activities being conducted by the most powerful financiers in the world, armed with an explanation that the activity could lead to market instability[198]. The plan rings impractical given the history of United States regulatory deference to profit seeking, despite enormous risk[199].

Conversely, the Dodd-Frank imposed an increase in compliance: assessment and reporting requirements create an amplified barrier to entry in favor of the systemic institutions by discouraging competitors from growing large enough to enter the mandatory systemic designation barrier of $50 billion in assets[200]. By discouraging firms from becoming systemically important, Dodd-Frank insulates the banking entities from industry competition, lending them a distinct market advantage to further expand[201]. Moreover, this legislation results in an anti-market effect, whereby smaller firms will be assisted or disadvantaged, depending on whether their business models align with those of the systemic firms, which are able to exert their influence through the regulatory and legislative state[202].

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[195] *Id.* p. 246.

[196] *See* Eric Lipton, *Banks' Lobbyists Help in Drafting Financial Bills*, N.Y. Times Dealbook (May 23, 2013), http://dealbook. nytimes.com/2013/05/23/banks-lobbyists-help-in-drafting-financial-bills/?_r=0.: Citigroup's recommendations were reflected in more than 70 lines of the House of Representatives committeÈs 85-line bill. Two crucial paragraphs, prepared by Citigroup in conjunction with other Wall Street banks, were copied nearly word for word (lawmakers changed two words to make them plural).

[197] *See Id.*

[198] Hearn *supra* note 33*,* pp. 247-248.

[199] *Id.*

[200] *Id.* p. 246.

[201] *Id.*

[202] *Id.* p. 246.

Additionally, Dodd-Frank fails to project and attempt to regulate any future innovations in the financial industry. Invariably, market forces will encourage risk seekers, especially TBTF firms, toward a bastion free of Dodd-Frank restrictions, where the return on investment is plentiful and the transaction costs are minimal[203]. Similar innovations lead to a general deregulation of the finance industry and an offering of financial products that ultimately resulted in the 2008 financial crisis. Thus, the Act's failure to afford regulatory discretion to mitigate systemic risk for future financial products is unquestionably a failure.

As such, the Dodd-Frank Act codifies and further entrenches the existing systemically important firms as TBTF. Dodd-Frank destroys any notion of parity, while preserving and fortifying a select number of Wall Street firms as elite, impervious to any competition created by smaller firms.

VI. The Evisceration of the Bankruptcy Code

As previously discussed, the Dodd-Frank Act, through the OLA and FSOC, has forever changed the way in which large institutions are wound down, if its provisions are ever invoked. The progressive Congressional ambition of mitigating systemic risk to protect the greater American population through the Dodd-Frank Act's tools and mechanisms is to be applauded. This ambition, however, is in direct tension with the Bankruptcy CodÈs overall ambition of providing a collective forum for creditors' redress, thereby both maximizing creditors pro rata distributions and protecting the rights of individual creditors[204]. Inevitably, a question arises: do the costs associated with mitigating systemic risk outweigh a comprehensive trampling of creditors' Constitutional rights? Though the OLA has yet to be invoked, a number of statutory modifications underscore the important distinctions between a traditional Chapter 11 reorganization and a Title II Orderly Liquidation. Each difference corrodes the central purpose of the Bankruptcy Code, unavoidably resulting in a vastly different resolution regime for the largest of institutions with questionable constitutional concerns for the treatment of these institutions' creditors.

Exemplary of these constitutional concerns is *State National Bank of Big Spring, et. al., v. Lew*[205] an action challenging a myriad of provisions contained in the

[203] *Id.* p. 247.

[204] *See generally* Bankruptcy Code, 11 U.S.C. (2006).

[205] Additional plaintiffs include: State of Alabama, State of Georgia, State of Kansas, State of Michigan, State of Montana, State of Nebraska, State of Ohio, State of Oklahoma, State of South Carolina, State of Texas, State of West Virginia, The 60 Plus Association, Inc., The Competitive Enterprise Institute. Additional defendants include, *inter alia*: the U.S. Department of the Treasury, the Consumer Finan-

Dodd-Frank Act's constitutionality, which is currently working its way through the courts. Among the Constitutional challenges levied by *State National Bank* there are the constitutionally impermissible elimination of fundamental checks and balances by an agency[206], an unconstitutional recess appointment without the SenatÈs advice and consent for the Consumer Financial Protection Bureau Director[207], due process violations for both a Financial Stability Oversight Council's "Systemically Important" designation and the Orderly Liquidation Authority's decision to wind down a company for both the company and creditors of the company alike[208], and a challenge to the bankruptcy uniformity clause contained in Article I, Section 8 of the Constitution[209].

The counts of particular interest and relevancy to this note are how the Dodd-Frank Act's mechanisms violate due process and bankruptcy uniformity. As discussed *supra*, Title II of the Dodd-Frank Act delegates effectively unlimited power to determine that a company should be liquidated under the OLA, and to the FDIC to choose favorites among similarly situated creditors in carrying out that liquidation[210]. Additionally, meaningful judicial review of a liquidation decision is subject to draconian limitations, as is the case of a 24-hour proceeding available for a company contesting its own liquidation, or is prohibited altogether in the case of a shareholder's derivative claim and for the company's creditors[211].

In fact, this 24-hour proceeding is so onerous for the court that the District Court for the District of Columbia, which has original jurisdiction for judicial review of the liquidation petition, has promulgated a local rule instructing the Treasury Secretary to give the court 48-hours notice, under seal, before filing the case[212]. Ironically, this local rule is in direct tension with the Dodd-Frank Act, as criminal penalties await anyone who discloses the Treasury Secretary's liquidation determination prior to filing its petition with the district court[213]. However, this local rule gives no similar consideration to the troubled financial company[214]. Shockingly, the district court's local rules suggest that the case may proceed without the company receiving actual

cial Protection Bureau, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Financial Stability Oversight Council. *See generally* Second Amended Complaint for Declaratory and Injunctive Relief, *State National Bank of Big Spring v. Lew*, Civil Action No. 12-1032, PACER (D.C. August 8, 2013).

[206] *Id.* p. 30.

[207] *Id.* p. 33.

[208] *Id.* p. 56.

[209] *Id.* p. 57.

[210] *Id.* p. 56.

[211] *Id.*

[212] District Court for the District of Columbia, Local Cv. R. 85(b).

[213] Pub. L. No. 111-203 § 202(a)(1)(C).

[214] District Court for the District of Columbia, Local Cv. R. 85(c).

notice that the case has begun: in commencing the case, the Treasury Secretary must certify either that the company received actual notice of its petition to the court, or that he made "efforts […] to give such notice and furnish such copies" of the petition[215]. Thus, Title II fails to provide both companies facing liquidation and their creditors, all of whom are likely to have their property taken during the course of liquidation, the notice and a meaningful opportunity to be heard that is the core of due process[216].

Moreover, Article I, § 8 of the United States Constitution vests Congress with the power to ordain "uniform laws on the subject of bankruptcy". However, Dodd-Frank's § 210(b)(4) grants the FDIC blanket authority to take any action it chooses to treat similarly-situated creditors differently, to maximize the value of the liquidated company's assets, to maximize the present value return from the sale or other disposition of the assets of the covered financial company, or to minimize the amount of any loss realized upon the sale or other disposition of the liquidated company's assets. The Supreme Court has previously found any action which involves the adjustment of a potentially failing debtor's obligations, includes the power to discharge the debtor from his contractual and legal liabilities and governs the relations between a potentially insolvent debtor and his creditors as a bankruptcy proceeding[217]. Thus, the Orderly Liquidation Authority constitutes an exercise of Congress's power under the Bankruptcy clause.

This exercise is in direct violation of the uniformity provision of Article I, § 8 of the Constitution, as there cannot exist differing bankruptcy laws for different classes of individuals, pursuant to this Constitutional provision. The natural counter-argument would be that Congress has permissibly exercised its power to modify its uniform laws on the subject of bankruptcy and that the Dodd-Frank Act is a mere abrogation of the prior bankruptcy law of the land. This argument is a fallacy, however, as "uniform laws on the subject of bankruptcy" cannot subject the bankruptcy estate to differing treatment based on its asset accumulation. The stratification of available bankruptcy proceedings based on an entity's holdings is, by its nature, depriving the very definition of "uniform". An additional counter argument may be that the Bankruptcy Code, itself, creates different bankruptcy proceedings through its Chapter 7 liquidation[218] and its Chapter 11 reorganiza-

[215] *Id.*

[216] Second Amended Complaint for Declaratory and Injunctive Relief, *State National Bank of Big Spring v. Lew*, Civil Action No. 12-1032, Pacer (D.C. August 8, 2013), *citing LaChance v. Erickson*, 522 U.S. 262, 266 (1998).

[217] *Id.* p. 42, *citing Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 466 (1982).

[218] *See generally* 11 U.S.C. § 700 (2006).

tion[219]. Again, this is easily distinguished, as both Chapter 7 and Chapter 11 do not require an asset floor for availability of proceedings to businesses, nor do they restrict the transferability of proceedings between Chapters 7 and 11, as Title II of the Dodd-Frank Act limits the financial institution's choice of proceedings to only a Title II orderly liquidation[220].

Nevertheless, as of this writing, Dodd-Frank is the law of the land. Accordingly, a number of key differences between Chapter 11 reorganization and a Title II orderly liquidation should be highlighted. At the outset, a Bankruptcy Judge, whose non-core decisions are subject to an Article III district court judgÈs approval, oversees a Chapter 11 reorganization with the debtor-in-possession (or trustee) able to take a major role in decision making[221]. Conversely, under Title II Orderly Liquidation, the FDIC has dictatorial powers over fundamental issues such as the sale of business assets and the treatment of claims[222]. With respect to the sale of business assets, the Bankruptcy Code allows for notice and an opportunity to be heard for creditors and parties in interest[223], whereas under Title II, the FDIC has nearly unfettered discretion to sell the company or its assets on terms dictated by the FDIC[224].

Likewise, with respect to the treatment of claims, the Bankruptcy Code restricts the debtor-in-possession's preferential treatment of certain claims[225], whereas under Title II, the FDIC can favor certain claims over others or disaffirm claims altogether, so long as the FDIC can demonstrate that the favoritism is consistent with the maximization of the value of the assets in the context of the orderly liquidation[226]. This favoritism allows for a severe prejudice against creditors as the FDIC would likely grant preferential treatment to claims on commercial paper and securities repurchase agreements because those types of liabilities proved to be highly volatile and prone to creditors runs during the financial crisis[227]. Additionally, Title II effectively reverses the burden of proof in resolving creditor's claims, as a claim is deemed allowed unless a party in interest object to the claim under the Bankruptcy

[219] *See generally* 11 U.S.C. § 1100 (2006).
[220] *See* 11 U.S.C. § 706(a) (2006); 11 U.S.C. § 1112(b)(1) (2006).
[221] Brent J. Horton, *When Does a Non-Bank Financial Company Pose a "Systemic Risk"? A Proposal for Clarifying Dodd-Frank*, J. Corp. L. (Issue 37, 2012), pp. 815, 834.
[222] *Id.*
[223] 11 U.S.C. § 363 (2006).
[224] Horton, *supra* note 221 p. 835.
[225] 11 U.S.C. § 547 (2006).
[226] *See* Horton, *supra* note 221 p. 835, *citing* Pub. L. No. 11-203 § 210.
[227] *See* Horton, *supra* note 221 p. 835, *citing* Arthur Wilmarth, *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too Big to Fail Problem*, Or. L. Rev. (Issue 89, 2011), pp. 951, 998.

Code[228], whereas under Title II, the burden falls upon the creditor to prove the claim to the satisfaction of the FDIC, which is an ambiguous standard of statutory construction to say the least[229].

Moreover, with respect to the treatment of financial instruments, the Bankruptcy Code provides a safe harbor exception to the automatic stay for financial contracts[230], whereas under Title II, a one-day stay on financial instruments is imposed, during which financial regulators are expected to arrange for the transfer of the failed institution's entire derivative book[231]. Unfortunately, such a transfer seems impractical, as a financial regulator will likely be unable to clear an institution's entire derivative book; Lehman Brothers was a party to approximately 1.5 million transactions with over 8,000 counterparties upon its Chapter 11 filing and as such, clearing 1.5 million transactions would be a mammoth task for one office to complete, to say the least[232]. This is especially problematic as Title II's failure to establish a longer automatic stay may tear apart a financial institution through thousands of counterparties rushing to sell collateral and re-hedge positions exposed by the institution's default[233].

Further, this rush is likely to undermine investor confidence, thereby fostering market instability, contagion and the like[234]. To date, no such rule or amendment has been promulgated which instructs what is to happen beyond the twenty-four hour period if an institution's entire derivative book cannot be cleared. Ultimately, this situation would likely be resolved by the Federal Government, through the OLA in its capacity as a receiver to broker deals with the largest institutions, selling off the remaining derivative positions at vastly below market rates, allowing for arbitrage and large profits for these institutions. The Dodd-Frank Act was enacted to circumvent this exact predicament from arising, yet, another one of its flaws contribute to codify moral hazard for the largest financial institutions.

Unfortunately, the legal theories presented in *State National Bank of Big Spring* are currently unable to be adjudicated on its merits, as the District Court was persuaded that the claims are not yet ripe, and has accordingly, granted the Govern-

[228] 11 U.S.C. § 502(a) (2006).
[229] Dodd-Frank § 210(a)(3)(D)(i).
[230] 11 U.S.C. § 362(b)(17) (2006).
[231] S*ee* Horton, *supra* note 221 p. 836, *citing* Edward Morrison*, Is the Bankruptcy Code an Adequate Mechanism for Resolving the Distress of Systemically Important Institutions*, Temp. L. Rev. (Issue 82, 2009), pp. 449, 450-452.
[232] *Id., citing* Douglass G. Baird, Edward Morrison, *Dodd-Frank for Bankruptcy Lawyers* Colum. L. & Econ., (Issue 20, 2011), papers.ssrn.com/sol3/papers.cfm?abstract_id=1895692.
[233] *Id.*
[234] *Id.*

ment's Motion to Dismiss[235]. Though there is an appeal to the circuit court pending in *State National Bank of Big Spring,* the most problematic and inopportune time to test the theories presented would be when the OLA's liquidation tools would need to be invoked: upon the brink of an insolvency which would threaten the financial stability of the United States. Accordingly, this case should be appealed, up to the Supreme Court if needed, and its merits should be decided in a time of financial relative calm, rather than in a time of crisis when due process and other constitutional rights may indeed be trampled for the greater good.

VII. Conclusion

As the old adage warns, we must always learn from our mistakes, or we are doomed to repeat them. The 2008 financial crisis opened the eyes of the American public to the Wall Street practice of worshipping the almighty dollar, with disregard for any consequences. The continual pursuit of higher revenues resulted in a lack of fiscal responsibility and decreased risk-aversion. Unfortunately, the collateral damage was vast and largely felt by those who had zero culpability for creating the crisis.

It appears as if President Obama's remarks at Dodd-Frank's signing were indeed shrouded in optimism. The Congressional response to such injustice and Wall Street recklessness resulted in ambitious, well-intentioned legislation that unfortunately is fatally flawed. The loopholes for derivative clearinghouses glaringly exemplify this proposition, as do the Volcker Rule exceptions for proprietary trading. Moreover, the FSOC has its merits in terms of imposing heightened prudential standards, stress tests and living wills. However, their efforts may ultimately be undermined by the act's preservation and codification of moral hazard and susceptibility to a negative power loop. Likewise, the OLA, as currently constituted, is better situated to assist in deterring the magnitude of a future financial crisis. However, it does little to actually prevent one. Furthermore, its chief authority is a mechanism for a *de facto* taxpayer-funded bailout, which in turn, increases moral hazard and defies its stated purpose. The OLA's efficacy would be greatly increased by an amendment allowing for the conception of an industry-funded liquidation reserve. Additionally, Dodd-Frank's gutting of the Bankruptcy Code is equally troubling as it allows critics for unconstitutional due process violations and divergent bankruptcy laws to arise, which tend to favor large institutions at the cost of disadvantaging common creditors.

[235] *State National Bank of Big Spring v. Lew*, Civil Action No. 12-1032, Pacer (D.C. August 8, 2013).

Summing up, the Dodd-Frank Act has failed to end bailouts and the TBTF problem, eviscerated our Bankruptcy Code, and increased the moral hazard risks that ensue by helping to dangerously consolidate the financial industry's wealth concentrations into a few select institutions. There is little doubt that large swaths of Dodd-Frank will need to be replaced with tougher legislation, drafted without banks and their lobbyists interference, which contains many less loopholes and exceptions in order for a true solution to come about for the problems discussed herein.

Considerazioni sui nuovi poteri dell'agcm ai sensi dell'art. 21-bis della legge n. 287/

di Andrea Bozza e Andrea Zulli

I. Premessa

L'art. 35 del decreto legge 6 dicembre 2011 n. 201, convertito con modificazioni in legge 22 dicembre 2011 n. 214, ha introdotto l'art. 21-bis della legge 10 ottobre 1990 n. 287 (nel prosieguo, "art. 21-bis"), prevedendo che:

> L'Autorità garante della concorrenza e del mercato è legittimata ad agire in giudizio contro gli atti amministrativi generali, i regolamenti ed i provvedimenti di qualsiasi amministrazione pubblica che violino le norme a tutela della concorrenza e del mercato
> L'Autorità garante della concorrenza e del mercato, se ritiene che una pubblica amministrazione abbia emanato un atto in violazione delle norme a tutela della concorrenza e del mercato, emette, entro sessanta giorni, un parere motivato, nel quale indica gli specifici profili delle violazioni riscontrate. Se la pubblica amministrazione non si conforma nei sessanta giorni successivi alla comunicazione del parere, l'Autorità può presentare, tramite l'Avvocatura dello Stato, il ricorso, entro i successivi trenta giorni
> Ai giudizi instaurati ai sensi del comma 1 si applica la disciplina di cui al Libro IV, Titolo V, del decreto legislativo 2 luglio 2010, n. 104.

Come traluce dal dato testuale, la previsione *de qua* riconosce all'Autorità Garante della Concorrenza e del Mercato (nel prosieguo, "AGCM" o "Autorità") nuovi importanti poteri di intervento in relazione ad atti amministrativi generali,

regolamenti e provvedimenti emanati da qualsiasi amministrazione pubblica che violino le "*norme a tutela della concorrenza e del mercato*". In particolare, laddove sussistano ragioni per ritenere che una pubblica amministrazione abbia adottato un atto in contrasto con la suddetta normativa, l'AGCM, che può agire di propria iniziativa o su sollecitazione di terzi (a mezzo di esposti, denunce o segnalazioni), è oggi legittimata ad agire in giudizio avverso tale atto, previa l'emissione di un parere motivato destinato alla stessa pubblica amministrazione.

Si tratta invero, come si dirà, di una novità di non poca rilevanza nel quadro delle attribuzioni dell'Autorità rispetto alle fattispecie restrittive della concorrenza e del corretto funzionamento dei mercati poste in essere dai pubblici poteri (in aggiunta a quelle attuate dai privati), sino a ieri confinate in un impianto normativo ruotante, sostanzialmente, intorno ai poteri di segnalazione - per il tramite di un parere non vincolante - in merito a norme di legge, regolamenti o provvedimenti amministrativi di carattere generale suscettibili di determinare distorsioni della concorrenza o del corretto funzionamento del mercato e non giustificati da esigenze di interesse generale, nonché ai poteri consultivi in merito a specifiche iniziative legislative o regolamentari (artt. 21 e 22 della legge n. 287/90), e oggi esondate verso la configurazione di un ruolo addizionale, che certamente è figlio di quell'impulso al valore-concorrenza che il legislatore va calando, con sempre maggiore vigore, all'interno del nostro ordinamento. Ciò rilevando, gli autori intendono sin d'ora smarcarsi - per limiti oggettivi di indagine - dalle pur meritevoli disquisizioni sulla emersione di una sorta di Pubblico Ministero nel processo amministrativo per la realizzazione dell'interesse generale alla concorrenza[1], se non di un fenomeno di "polverizzazione" della classica collocazione delle attribuzioni dell'Autorità "nel" mercato e non "per" il mercato, con corrispondente apertura allo svolgimento di un ruolo regolativo dell'accesso al mercato stesso[2].

Peraltro, come puntualmente segnalato già all'interno dei primi commenti alla norma[3], tale ampliamento dei poteri in capo all'Autorità non può certo essere considerato come una novità del tutto inaspettata all'interno del nostro ordinamento, se solo si pensa a quanto già nel 2010 la stessa AGCM andava auspicando nel senso di un'attribuzione "*all'Autorità, laddove essa ritenga che un atto della pubblica amministrazione di particolare rilevanza economica sia illegittimo per violazione delle norme*

[1] Vedi P. Quinto, *Un pubblico ministero nel processo amministrativo?*, in GiustAmm, 2012.

[2] Vedi R. Politi, *Ricadute processuali a fronte dell'esercizio dei nuovi poteri rimessi all'AGCM ex art. 21-bis della l. 287/1990. Legittimazione al ricorso ed individuazione dell'interesse alla sollecitazione del sindacato. Ovvero: prime riflessioni sul nuovo protagonismo processuale dell'Autorità Antitrust tra il Minosse di Dante ed il giudice di De Andrè*, in www.federalismi.it, 2012.

[3] R. Cifarelli, *Verso un nuovo protagonismo delle Autorità indipendenti? Spunti di riflessione intorno all'art. 21-bis della legge n. 287 del 1990*, in www.amministrazioneincammino.luiss.it, 2012.

comunitarie e nazionali a tutela della concorrenza, la legittimazione ad impugnarlo davanti agli organi della giustizia amministrativa, avvalendosi dell'Avvocatura dello Stato. L'attribuzione di una tale legittimazione, e il suo successivo esercizio nel tempo da parte dell'Autorità, garantirebbero già nel medio termine un forte incentivo alla piena adozione, da parte delle pubbliche amministrazioni, di procedure di affidamento rispondenti a criteri realmente competitivi, ottenendosi così concreti risultati di miglioramento del funzionamento dell'economia nel suo complesso"[4].

Alla luce di tali premesse alla materia oggetto d'esame, l'ottica selettiva che connota il presente contributo vede gli autori proporsi il duplice obiettivo di fornire una sintetica descrizione degli aspetti della disposizione in oggetto che rivestono una più immediata e diretta rilevanza *antitrust* (anche solo a livello processuale) e di svolgere, sia pure in coda ad un dibattito da tempo fervente in dottrina[5] e al netto di ogni riscontro che il futuro scrutinio giurisprudenziale saprà certamente fornire, una serie di considerazioni e riflessioni di carattere sistematico. Tali spunti sono proposti secondo un ordine tematico, al fine di meglio inquadrare, ove possibile, portata e contenuti di una norma che, come molte altre scaturite da una legislazione d'emergenza, per una ragione o per l'altra, è apparsa già di primo acchito peccare di scarsa chiarezza, in chiave "lessicale" se non anche sistematica e costituzionale, tale da rendere auspicabili futuri interventi chiarificatori.

II. Considerazioni sul primo comma dell'Art. 21-bis

A. Una legittimazione ad agire al vaglio di costituzionalità

Ebbene, come poc'anzi menzionato, il potere attribuito all'Autorità ai sensi del primo comma dell'art. 21-bis, a differenza delle tradizionali funzioni di controllo

[4] AGCM, AS659 – Proposte di riforma concorrenziale ai fini della legge annuale per il mercato e la concorrenza, 2010, 10.

[5] F. Arena, *Atti amministrativi e restrizioni della concorrenza: i nuovi poteri dell'autorità antitrust italiana*, contributo per la X edizione del Convegno "Antitrust fra Diritto Nazionale e Diritto dell'Unione Europea", Treviso, 17-18 maggio 2012; F. Cintioli, *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e del mercato (art. 21 bis della legge n. 287 del 1990)*, in www.federalismi.it, 2012; R. Cifarelli, *Verso un nuovo protagonismo delle Autorità indipendenti? Spunti di riflessione intorno all'art. 21-bis della legge n. 287 del 1990*, *cit.*; R. Giovagnoli, *Atti amministrativi e tutela della concorrenza. Il potere di legittimazione a ricorrere dell'AGCM nell'art. 21-bis legge n. 287/1990*, in www.giustamm.it,2012; R. Politi, *Ricadute processuali a fronte dell'esercizio dei nuovi poteri rimessi all'AGCM ex art. 21-bis della l. 287/1990. Legittimazione al ricorso ed individuazione dell'interesse alla sollecitazione del sindacato. Ovvero: prime riflessioni sul nuovo protagonismo processuale dell'Autorità Antitrust tra il Minosse di Dante ed il giudice di De Andrè*, *cit.*; M.A. Sandulli, *Introduzione a un dibattito sul nuovo potere di legittimazione al ricorso dell'AGCM nell'art. 21 bis l. n. 287 del 1990*, in www.federalismi.it, 2012; P. Quinto, *Un pubblico ministero nel processo amministrativo?*, *cit.*;

previste *ex* artt. 21 e 22 della legge n. 287/90, si configura primariamente come un nuovo potere di legittimazione processuale, che viene in rilievo per il suo potenziale di determinare una conseguenza diretta sull'atto censurato attraverso l'instaurazione di un procedimento giurisdizionale innanzi al giudice amministrativo.

Come prevedibile, allora, una prima questione che l'art. 21-bis ha immediatamente innescato nel dibattito dottrinale si risolve nel valutare se esso attribuisca all'AGCM una speciale forma di legittimazione attiva all'interno del processo amministrativo (nella misura in cui tale legittimazione attiva risulterebbe svincolata dalla titolarità di una posizione qualificata e differenziata nel contesto di una sorta di giurisdizione oggettiva[6]), ovvero se la norma si proponga, diversamente, di individuare una situazione soggettiva giuridicamente rilevante ai fini del processo amministrativo, nella forma dell'interesse alla tutela della concorrenza e del mercato configurabile come interesse legittimo (un interesse collettivo rispetto al quale, è stato rilevato, l'AGCM diventerebbe una specie di ente esponenziale, secondo il modello dei c.d. interessi diffusi[7]). In sostanza, il nodo della questione diventa quello di accertare se l'art. 21-bis sia finalizzato a dare vita ad una particolare forma di giurisdizione di diritto oggettivo (laddove attraverso il ricorso si richiederebbe la tutela di un interesse generale e non di una situazione soggettiva giuridicamente rilevante sulla base di una posizione qualificata e differenziata) o se, invece, tale nuova forma di legittimazione ad agire, e con esso il ricorso, sia pur sempre riconducibile nell'alveo della tutela di situazioni soggettive giuridicamente qualificate e differenziate, sostanzialmente compatibili con l'enunciato dell'art. 103 Cost., sebbene in questo caso affidate alla cura di un'autorità indipendente[8].

Sul piano dei decisivi riflessi pratici del tema appena evidenziato, in maniera assorbente, rileva la stretta connessione tra la tesi della giurisdizione di tipo oggettivo e la dubbia tenuta costituzionale della disposizione *de qua* ai sensi dell'art. 103 Cost., per il quale il Consiglio di Stato e gli altri organi della giustizia amministrativa hanno giurisdizione per la (sola) tutela "*nei confronti della pubblica amministrazione degli interessi legittimi e, nelle particolari materie indicate dalla legge, dei diritti soggettivi*". In effetti, come già segnalato da autorevole dottrina [9], l'interpretazione della suddetta norma costituzionale potrebbe coinvolgere una sostanziale preclusione nei confronti di misure legislative aventi ad oggetto l'introduzione di ipotesi di pura giurisdizione di diritto oggettivo (ovvero della possibilità - sia pure nelle vesti

[6] Cfr. R. Giovagnoli, *Atti amministrativi e tutela della concorrenza. Il potere di legittimazione a ricorrere dell'AGCM nell'art. 21-bis legge n. 287/1990*, *cit.*, pp. 2 e ss..

[7] *Ibidem.*

[8] *Ibidem.*

[9] F. Cintioli, *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e del mercato (art. 21 bis della legge n. 287 del 1990)*, *cit*., pp. 4 e ss..

di soggetto qualificato, quale l'AGCM - di ricorrere alla giustizia amministrativa prescindendo dalla titolarità di una posizione differenziata e qualificata, per la sola protezione dell'interesse generale al rispetto della legge)[10].

Stando ad una prima posizione[11], tale potere dell'Autorità andrebbe inquadrato come azione a tutela di una situazione giuridica differenziata e qualificata. Assumerebbe specifico valore, a tale riguardo, l'interesse "*alla migliore attuazione del valore "concorrenza"*"[12], che secondo tale ricostruzione non andrebbe ricondotto ad una declinazione del mero interesse generale al rispetto della legge, quanto piuttosto ad un interesse particolare e differenziato di cui l'Autorità sarebbe diretta portatrice; una declinazione di interesse legittimo soggettivizzato in capo all'Autorità medesima e per la cui tutela essa risulterebbe legittimata *ex lege* a rivolgersi al giudice amministrativo[13]. Tra i molteplici percorsi argomentativi avanzati per sostenere tale prospettazione, anche al di là del richiamo alla nozione di interesse diffuso che diventa interesse collettivo (*ergo* interesse legittimo) nel momento in cui il legislatore ne affida la cura all'AGCM[14], figura il rimando a quell'orientamento dottrinale[15] che propende per l'introduzione nell'ordinamento nazionale di uno strumento di controllo sulla legittimità dell'azione amministrativa, analogo al modello comunitario previsto per la c.d. procedura di infrazione. Secondo tale posizione, esattamente come la Commissione europea è intitolata a ricorrere al Giudice europeo ai fini

[10] Sul punto, si veda *ex multis* R. Cifarelli, *Verso un nuovo protagonismo delle Autorità indipendenti? Spunti di riflessione intorno all'art. 21-bis della legge n. 287 del 1990, cit.*, p. 5, secondo il quale "*una lettura del tipo di quella appena descritta non può che suscitare alcune perplessità, anche con specifico riferimento ai parametri costituzionali (artt. 24, 100, 103 e 113 Cost.). Ed infatti, come ripetutamente sostenuto in dottrina e dalla giurisprudenza (seppur con qualche oscillazione), la giurisdizione amministrativa ha avuto sino ad oggi il compito di tutelare i cittadini che siano titolari di situazioni giuridiche soggettive vere e proprie, si è ispirata al principio dispositivo e ed è proprio grazie a questo dato di partenza che si è sviluppata in modo da raggiungere una tutela effettiva di dette situazioni. Il compito immediato della giustizia amministrativa non è, insomma, quello di assicurare obiettivi generali di giustizia, legalità o miglior cura dell'interesse generale. Il suo compito è invece quello di assicurare la protezione dei diritti ed interessi dei singoli quando tali interessi abbiano raggiunto la soglia della situazione soggettiva tutelabile e quando, dunque, abbiano quei connotati giuridici cui è ancorata la legittimazione*".

[11] Cfr. su tutti M.A. Sandulli, *Introduzione a un dibattito sul nuovo potere di legittimazione al ricorso dell'AGCM nell'art. 21 bis l. n. 287 del 1990*, *cit.*, p. 9.

[12] *Ibidem.*

[13] *Ibidem.*

[14] Come evidenziato da R. Giovagnoli, *Atti amministrativi e tutela della concorrenza. Il potere di legittimazione a ricorrere dell'AGCM nell'art. 21-bis legge n. 287/1990*, *cit.*, p. 2, "*lo schema è,* mutatis mutandis*, analogo a quello che ha portato al riconoscimento della legittimazione in capo agli enti esponenziali che, dotati dei necessari requisiti di rappresentatività, hanno come finalità istituzionale la cura di determinati interessi diffusi: l'unica particolarità deriverebbe dal fatto che, in questo caso, la natura di ente esponenziale è direttamente conferita dalla legge ad un soggetto pubblico qualificato*".

[15] G. Greco, *Il modello comunitario della procedura di infrazione e il deficit di sindacato di legittimità dell'azione amministrativa in Italia,* in Riv. it. dir. pubbl. comun., 2010.

dell'accertamento della violazione degli obblighi comunitari da parte degli Stati membri, del pari dovrebbe ritenersi ammissibile che pure l'ordinamento nazionale possa riconoscere a ciascuna autorità pubblica una legittimazione (ovvero un interesse personale, specifico e qualificato) a ricorrere al giudice amministrativo al fine di far accertare la violazione, anche da parte di altre pubbliche amministrazioni, di quelle norme che ne sanciscono poteri ed ambiti di competenza rispetto a uno specifico interesse pubblico.

A risultati radicalmente opposti perviene, invece, la tesi di chi evidenzia come la norma si sostanzi in una previsione di pura giurisdizione di diritto oggettivo, ovvero di una possibilità di azione riconosciuta non a tutela di un interesse particolare, qualificato e differenziato, bensì per la sola protezione dell'interesse generale al rispetto della legge; tale ipotesi interpretativa esclude che "*l'Autorità, in quanto tale, sia titolare di un interesse legittimo in senso proprio, potendo (e dovendo) attivarsi per la tutela e realizzazione di un interesse generale alla concorrenza che, per un verso, finisce per coincidere con una sommatoria di interessi di mero fatto ascrivibili alla collettività e, per altro verso, restando così generico, non soddisfa di certo i caratteri di una situazione soggettiva imputabile ad un soggetto di diritto*"[16]. Secondo tale interpretazione, dunque, l'Autorità non sarebbe parte del rapporto con l'amministrazione, né sarebbe portatrice di situazioni soggettive proprie; inoltre, essendo come le altre autorità indipendenti ricompresa "*nello Stato-comunità anziché nello Stato-apparato*", non potrebbe vantare la *suitas* di uno specifico interesse pubblico né potrebbe "*corrispondentemente sostenere una peculiare e individuale posizione di interesse*"[17].

Sennonché, nel dare atto della cornice appena delineata, si dovrà altresì dar conto del recente ricorso in via principale alla Corte Costituzionale da parte della Regione Veneto, con il quale, in modo a dir poco tempestivo, quest'ultima ha lamentato come, da una parte, la disposizione in commento reintroduca un controllo generalizzato su iniziativa di un'autorità statale, tendenzialmente analogo a quella forma di controllo del previgente art. 125 Cost., abrogato con la legge costituzionale n. 3 del 2001, mentre, dall'altra, l'attribuzione all'Autorità di una generale legittimazione processuale a ricorrere avverso gli atti amministrativi contrari alla normativa a tutela della concorrenza e del mercato configuri una "*surrettizia introduzione della figura del Pubblico Ministero nel processo amministrativo, contrastante con la sua natura strutturale di giurisdizione soggettiva*" e, in particolare, "*con l'art. 113, I comma della Costituzione, dove si prevede che sia la titolarità di una posizione giuridica*

[16] F. Cintioli, *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e del mercato (art. 21 bis della legge n. 287 del 1990)*, *cit*. p. 16.
[17] *Ibidem.*

sostanziale e la lesione della stessa ad opera del potere amministrativo, la condizione generale per agire innanzi al giudice amministrativo"[18].

Con la sentenza n. 20/2013, la Corte Costituzionale ha dichiarato inammissibili tutte le questioni di legittimità costituzionale proposte (per genericità delle censure, difetto di motivazione, difetto di legittimazione in capo al ricorrente).

Non essendosi la Consulta pronunciata in maniera completa sul merito delle censure di incostituzionalità prospettate, limitati risultano essere gli spunti di interesse della sentenza. Pur tuttavia, in merito alla censura secondo la quale l'art. 21-bis "*finirebbe col sottoporre gli atti regolamentari ed amministrativi regionali ad un nuovo e generalizzato controllo di legittimità, su iniziativa di un'autorità statale*", la Corte Costituzione ha rilevato che è inesatto parlare di nuovo e generalizzato controllo di legittimità, "*là dove la norma – integrando i poteri conoscitivi e consultivi già attribuiti all'Autorità garante dagli artt. 21 e seguenti della legge n. 287 del 1990 – prevede un potere di iniziativa finalizzato a contribuire ad una più completa tutela della concorrenza e del corretto funzionamento del mercato (art. 21, comma 1, della legge citata) e, comunque, certamente non generalizzato, perché operante soltanto in ordine agli atti amministrativi «che violino le norme a tutela della concorrenza e del mercato»*". Ad avviso della Corte Costituzionale, pertanto, l'art. 21-bis ha un perimetro ben individuato (quello, per l'appunto, della concorrenza), compreso in una materia appartenente alla competenza legislativa esclusiva dello Stato. Quanto, invece, alla censura concernente una presunta surrettizia introduzione, per il tramite dell'art. 21-bis, della figura del pubblico ministero nel processo amministrativo, la Corte Costituzionale si è limitata, incidentalmente, a considerare come "non pertinente" il richiamo effettuato alla figura del pubblico ministero.

Rispetto a tali questioni, infine, si segnala l'intervenuta sentenza del TAR Lazio n. 2720 del 15 marzo 2013, che rappresenta la prima presa di posizione della giurisprudenza di merito in relazione ad alcuni profili dell'art. 21-bis, tra cui proprio la sua legittimità costituzionale[19]. Ebbene, con la sentenza in parola il TAR Lazio, allineandosi a quanto sancito dalla Corte Costituzionale, ha considerato infondata la questione di legittimità costituzionale sollevata in relazione alla norma. In particolare, è stato rilevato che l'art. 21-bis, lungi dall'introdurre un'ipotesi eccezionale di giurisdizione amministrativa di diritto oggettivo, delinea piuttosto un ordinario

[18] Ricorso della Regione Veneto per illegittimità costituzionale del 23.2.2012, in G.U. n. 12 del 21.3.2012.

[19] La vicenda processuale origina dal ricorso presentato dall'AGCM per l'annullamento di una serie di provvedimenti ministeriali in materia di costi minimi per l'autotrasporto. Con la sentenza non definitiva in parola, il TAR Lazio ha sospeso il giudizio di merito, disponendo il rinvio pregiudiziale alla Corte di Giustizia UE circa la compatibilità del regime di fissazione dei costi minimi di esercizio nel settore dell'autotrasporto (introdotto in Italia con l'art. 83 bis del d.l. 112/2008 e ss. modificazioni, ed attuato con i provvedimenti impugnati) con gli artt. 4(3) TUE, 101 TFUE, 49 e 56 TFUE, e 96 TFUE.

potere di azione, riconducibile alla giurisdizione a tutela di situazioni giuridiche individuali qualificate e differenziate, benché soggettivamente riferite ad un'autorità pubblica. L'interesse sostanziale, alla cui tutela l'azione prevista dall'art. 21-bis in capo all'AGCM è finalizzata, assume i connotati dell'interesse ad un bene della vita: il corretto funzionamento del mercato, come luogo nel quale trova esplicazione la libertà di iniziativa economica privata. L'interesse di cui l'Autorità è portatrice è interesse pubblico, benché individuale e differenziato rispetto all'interesse generale o all'interesse diffuso in maniera indistinta sulla collettività e si specifica come interesse pubblico alla promozione della concorrenza e alla garanzia del corretto esplicarsi delle dinamiche competitive, come condizione e strumento per il benessere sociale.

In conclusione, ad avviso del TAR Lazio, il nuovo potere dell'AGCM, più che potere di azione nell'interesse generale della legge in uno specifico settore, effettivamente di difficile riconducibilità all'interesse legittimo, diventa, per scelta del legislatore, uno degli strumenti volti a garantire l'attuazione dell'interesse pubblico, ma pur sempre particolare e differenziato, alla migliore attuazione del valore "concorrenza", di cui è specifica affidataria l'Autorità. L'art. 21-bis, dunque, implementa il ruolo dell'AGCM, trasformandola da mera interveniente che svolge osservazioni a parte processuale che agisce in giudizio, per poter così assicurare la piena effettività delle regole preordinate alla tutela della concorrenza.

Ecco dunque come, rispetto alle problematicità sollevate dal modello di giudizio in parola, le pronunce appena richiamate si pongono quali prime risposte alle criticità incamerate nel dibattito di cui si è voluto fornire una breve ricognizione in questa sede.

B. Portata applicativa della norma sul versante soggettivo ed oggettivo (i.e. legittimazione passiva ed atti impugnabili)

Sul piano della disamina della disciplina positiva, un tema certamente meritevole di approfondimento è costituito dall'ambito di applicazione del nuovo potere, che, per l'ampia ed imprecisata locuzione normativa, è tale da interessare, da una parte, l'emanazione di atti da parte di "*qualsiasi amministrazione pubblica*" (ambito oggettivo di applicazione), e dall'altra, tutti gli atti - generali, ma anche a contenuto particolare - emanati dalle amministrazioni pubbliche e suscettibili di violare la normativa posta a tutela della concorrenza e del mercato (ambito soggettivo di applicazione).

Sotto il primo profilo, il vasto raggio segnato dall'art. 21-bis, facente ricorso - pur in assenza di una definizione generale di pubblica amministrazione - ad una nozione

di pubblica amministrazione in senso lato[20] (seppure con qualche possibile temperamento, diffusamente dibattuto nei primi commenti alla norma[21]) per delimitare il campo dei soggetti passivamente legittimati, si ritiene meritevole di pregio la tesi di chi invita a superare le difficoltà interpretative utilizzando una nozione "funzionale" di pubblica amministrazione (sulle orme di un modello già sperimentato in sede comunitaria) e a "*ritenere, quindi, che, ai fini di questa norma, sia pubblica amministrazione ogni soggetto, ancorché formalmente privato, che, da un lato, eserciti*

[20] Laddove per "pubbliche amministrazioni" paiono potersi pacificamente intendere, sulla scia dell'art. 7 c.p.a., anche i soggetti ad esse equiparati o comunque tenuti al rispetto dei principi del procedimento amministrativo, quali ad esempio le aziende partecipate da soggetti pubblici. Tale interpretazione troverebbe conferma nella primissima prassi dell'AGCM, come ad esempio nel parere reso a Cotral S.p.A. (il cui azionista di maggioranza è la Regione Lazio e gli altri azionisti sono la Provincia di Roma, la Provincia di Rieti, la Provincia di Viterbo ed il Comune di Roma) in AS908, *Cotral SpA - Documentazione di gara relativa all'affidamento della fornitura di ricambi di carrozzeria originali - manutenzione di autobus Fiat-IVECO-Irisbus*, del 23 gennaio 2012. Sulla nozione di pubblica amministrazione riferibile alla norma in commento, si ritiene che essa includa altresì gli organismi di diritto pubblico, anche sulla base di consolidata giurisprudenza nazionale e comunitaria; cfr. *ex multis* Consiglio di Stato, sentenza del 30 giugno 2011, n. 3892, e Corte di Giustizia, sentenza del 10 novembre 1998 nella causa C-360/96, *Gemeente Arnhem*.

[21] Per un approfondimento a livello dottrinale, si veda R. Politi, *Ricadute processuali a fronte dell'esercizio dei nuovi poteri rimessi all'AGCM ex art. 21-bis della l. 287/1990. Legittimazione al ricorso ed individuazione dell'interesse alla sollecitazione del sindacato. Ovvero: prime riflessioni sul nuovo protagonismo processuale dell'Autorità Antitrust tra il Minosse di Dante ed il giudice di De Andrè*, *cit.*, p. 7, il quale suggerisce che i soggetti passivamente coinvolti dal controllo siano perlomeno identificabili nella nota declaratoria di cui al comma 2 dell'art. 1 del D. Lgs. n. 165 del 30 marzo 2001 (alla stregua del quale, "*per amministrazioni pubbliche si intendono tutte le amministrazioni dello Stato, ivi compresi gli istituti e scuole di ogni ordine e grado e le istituzioni educative, le aziende ed amministrazioni dello Stato ad ordinamento autonomo, le Regioni, le Province, i Comuni, le Comunità montane, e loro consorzi e associazioni, le istituzioni universitarie, gli Istituti autonomi case popolari, le Camere di commercio, industria, artigianato e agricoltura e loro associazioni, tutti gli enti pubblici non economici nazionali, regionali e locali, le amministrazioni, le aziende e gli enti del Servizio sanitario nazionale, l'Agenzia per la rappresentanza negoziale delle pubbliche amministrazioni (ARAN) e le Agenzie di cui al decreto legislativo 30 luglio 1999, n. 300. Fino alla revisione organica della disciplina di settore, le disposizioni di cui al presente decreto continuano ad applicarsi anche al CONI*"). In senso più restrittivo e contrario, cfr. M.A. Sandulli, *Introduzione a un dibattito sul nuovo potere di legittimazione al ricorso dell'AGCM nell'art. 21 bis l. n. 287 del 1990*, *cit.*., p. 17, per la quale "*la regola, in quanto eccezionale, non trova dunque applicazione alle imprese pubbliche* [sulla peculiare natura delle imprese pubbliche e sui limiti della loro assimilabilità alle pubbliche amministrazioni cfr. Cons. Stato, Ad. Plen, n. 16 del 2011 e Cass. SS.UU., ord. n. 8511 del 2012] *e, secondo la più recente giurisprudenza della Corte di cassazione* [il riferimento è alla sentenza 22 dicembre 2011, n. 28329, con cui le SS.UU. hanno affermato la giurisdizione del g.o. sulle controversie relative alla procedura indetta dalla RAI per la selezione di alcuni giornalisti]*, agli organismi di diritto pubblico, che, se sono equiparabili ed equiparati alle pubbliche amministrazioni ad alcuni fini, non sono però perfettamente identificabili con le medesime. Si esclude pertanto il ricorso diretto contro le decisioni dei soggetti diversi dalle pubbliche amministrazioni di cui all'art. 1 comma 2 del d.lgs. n. 165 del 2001 (penso alle società pubbliche, ai consorzi istituzionali ecc.) che pongano in essere comportamenti anticoncorrenziali*".

funzioni amministrative e, dall'altro, è sottoposto, dal legislatore nazionale od europeo, ad obblighi finalizzati alla tutela della concorrenza e del mercato"[22], sempre che, si basi, sussista alla base la giurisdizione in capo al giudice amministrativo.

Sul punto, peraltro, se da un lato sembra ormai risolvibile in senso affermativo l'interrogativo circa la possibilità di ricondurre nella sfera soggettiva di applicazione della disposizione in parola anche tutte le altre autorità amministrative indipendenti (ed infatti, come autorevolmente evidenziato *aliunde*, "*nonostante le peculiarità funzionali ed organizzative da cui sono connotate, è ormai difficile negare che anche le Autorità amministrative indipendenti siano pubbliche amministrazioni e che, in tale veste, adottino sia atti amministrativi che regolamenti, rientrando, quindi, a pieno titolo nella disposizione*"[23]), dall'altro, in ragione delle possibili (e affatto improbabili[24]) "interferenze" (di cui la vicenda sottesa alla sentenza dell'Adunanza Plenaria 11 maggio 2012, n. 11, rappresenta una decisiva esemplificazione[25]) tra tutela della

[22] R. Giovagnoli, *Atti amministrativi e tutela della concorrenza. Il potere di legittimazione a ricorrere dell'AGCM nell'art. 21-bis legge n. 287/1990*, *cit*., p. 11, secondo cui, in quest'ottica, "*non sembrano esservi dubbi sul fatto che, ad esempio, in materia di appalti, saranno impugnabili anche eventuali atti discorsivi emanati dall'organismo di diritto pubblico e, nei c.d. settori speciali, anche dall'impresa pubblica*".

[23] *Ibidem*, p. 12.

[24] Come acutamente rilevato da R. Politi, *Ricadute processuali a fronte dell'esercizio dei nuovi poteri rimessi all'AGCM ex art. 21-bis della l. 287/1990. Legittimazione al ricorso ed individuazione dell'interesse alla sollecitazione del sindacato. Ovvero: prime riflessioni sul nuovo protagonismo processuale dell'Autorità Antitrust tra il Minosse di Dante ed il giudice di De Andrè*, *cit*., p. 10, l'AGCM, nell'esercizio dei poteri di cui all'articolo 21 della legge 10 ottobre 1990, n. 287, nella sua adunanza del 22 febbraio 2012 ha formulato alcune osservazioni in merito ai possibili effetti distorsivi della concorrenza dell'articolo 7 della legge della Regione Lombardia n. 11 dell'11 maggio 2001 recante "Norme sulla protezione ambientale dall'esposizione a campi elettromagnetici indotti da impianti fissi per le telecomunicazioni e per la radiotelevisione". Nel rilevare che "*gli oneri introdotti dalla L.R. Lombardia n. 11/2001 per l'installazione e la modifica degli impianti di telecomunicazione e radiodiffusione, incidendo sui costi sottostanti l'attività degli operatori che gestiscono reti di telefonia mobile e reti di radiodiffusione televisiva e sonora, sono idonei a determinare un'alterazione della parità del confronto competitivo nei relativi mercati, sia su base nazionale che locale*", l'AGCM ha auspicato che l'Amministrazione destinataria del suddetto avviso "*voglia tener conto nelle proprie determinazioni di quanto sopra esposto, procedendo rapidamente ad adeguare le disposizioni in parola alla … giurisprudenza della Corte Costituzionale"* ed ha chiesto alla medesima *"di comunicare … le iniziative assunte in seguito al presente parere, facendo presente che questa Autorità può contestare gli atti esecutivi della citata normativa regionale con le modalità di cui all'articolo 21-bis della Legge n. 287/90*".

[25] Cfr. Cons. Stato, Adunanza Plenaria, 11 maggio 2012, nn. 11, 12, 13, 15 e 16. In particolare, come riportato sul sito istituzionale dell'AGCOM (http://www.agcom.it/Default.aspx?message=contenuto&DCId=648), "*l'Adunanza Plenaria del Consiglio di Stato, con cinque sentenze, si è espressa sulla delicata questione della perimetrazione delle sfere di competenza delle distinte Autorità (AGCM e AGCOM) nella materia di tutela del consumatore (regolamentare e sanzionatoria) nei servizi di comunicazione elettronica. In tale ambito, il Supremo Consesso ha accolto la tesi che nega la esistenza di una competenza di AGCM, con conseguente riforma delle sentenze di primo grado. Le pratiche commerciali in materia di comunicazioni elettroniche, infatti, sono oggetto di un'autonoma e completa disciplina settoriale, posta a protezione dell'utente-consumatore di tali servizi, dettata principalmente dal d.lgs. 1 agosto 2003 n.*

concorrenza e attività di regolazione dei mercati, appare quanto mai pregnante il richiamo[26] alla circostanza che il decreto legge n. 201 del 2011, nella misura in cui tale strumento legislativo non individua forme di interazione *ad hoc* tra l'AGCM e le altre autorità indipendenti (*e.g.* l'Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture), non solo lascia irrisolto il problema dei conflitti di competenza tra autorità, ma soprattutto - nel riconoscere all'AGCM una speciale legittimazione pubblica all'azione - pone in essere in pratica una "*disparità di trattamento*" tra le autorità rispetto ai poteri di intervento per la tutela degli interessi pubblici loro affidati, mettendo così a repentaglio quella "*equiordinazione dei poteri di intervento per la realizzazione degli obiettivi per i quali tali Autorità sono state istituite*"[27]. In quest'ottica, sarebbe, pertanto, auspicabile la pronta attivazione di appositi e adeguati strumenti di collaborazione (*e.g.* scambio di informazioni, stipulazione di protocolli di intesa, ecc.) dell'AGCM con le altre autorità indipendenti[28].

259 (Codice delle comunicazioni elettroniche) e dal relativo regolamento attuativo adottato con delibera del 23 novembre 2006 n. 664/06 di AGCom, la cui applicazione è demandata a quest'ultima Autorità, titolare anche di potestà sanzionatoria in materia. Di conseguenza, la presenza di un'articolata normativa di ordine speciale, con relativi poteri sanzionatori in capo ad AGCOM, esclude, in ossequio al principio di specialità, la contemporanea applicazione, da parte di AGCM, della disciplina generale relativa alle pratiche commerciali scorrette di cui al Codice del consumo.In definitiva, la disciplina comunitaria e nazionale sulle comunicazioni elettroniche configura un vero e proprio ordinamento settoriale, con attribuzione in via esclusiva ad AGCom non solo dei poteri di vigilanza e regolazione, ma anche inibitori e sanzionatori".

[26] R. Cifarelli, *Verso un nuovo protagonismo delle Autorità indipendenti? Spunti di riflessione intorno all'art. 21-bis della legge n. 287 del 1990*, *cit.*, p. 7.

[27] P. Quinto, *L'art. 35 del decreto Monti e il Codice del processo amministrativo*, in www.giustiziaamministrativa.it, 2011.

[28] Sul punto, si noti come da ultimo, in data 25 settembre 2012, l'AGCM abbia concluso un protocollo d'intesa con l'Autorità per la vigilanza sui contratti pubblici di lavori, servizi e forniture ("AVCP") (pubblicato in Bollettino n. 42 del 5 novembre 2012), finalizzato specificamente a dare migliore attuazione all'art. 21-bis, in particolare attraverso (a) la definizione di programmi di attività comune, (b) la definizione di momenti di collaborazione e confronto per approfondire questioni di interesse comune al fine di proporre e/o segnalare agli organismi competenti interventi nei settori di interesse, (c) l'effettuazione, anche attraverso la condivisione di dati e informazioni, di azioni di rilevazione e monitoraggio sul mercato e sulle imprese, nel rispetto delle rispettive attribuzioni e di quanto previsto dalla normativa sulla protezione dei dati personali, (d) strumenti di collaborazione e azione comune volte a stimolare lo sviluppo e la crescita per l'economia, anche attraverso la predisposizione di segnalazioni congiunte al Parlamento ed al Governo in ordine agli interventi normativi ritenuti utili per tali finalità, ed (e) forme di collaborazione nella gestione amministrativa dell'attività istituzionale, anche mediante l'attivazione di sinergie nello svolgimento delle rispettive funzioni e nella realizzazione di servizi in comune, con il fine di ridurre gli oneri amministrativi ed accrescere l'efficienza complessiva dell'azione amministrativa. Ai sensi di tale protocollo, inoltre, si prevede che l'AVCP segnali all'Autorità, ai sensi dell'art. 21-bis, gli atti ritenuti rilevanti ai fini dell'applicazione del Codice dei contratti pubblici che possano comportare una violazione delle norme a tutela della concorrenza e del mercato, nonché che l'AGCM, in relazione agli atti violativi del Codice dei contratti pubblici, invii all'AVCP il parere motivato al fine di ottenere l'eventuale avviso dell'AVCP sulla violazione ipotizzata e sull'instaurazione del giudizio ai sensi del medesimo articolo.

Per quanto riguarda, invece, l'estensione oggettiva del campo di applicazione dell'art. 21-bis, si ritiene che oggetto di intervento possa essere una molteplicità di atti amministrativi differenti, siano essi a contenuto generale o particolare, solo alcuni dei quali in passato sottoposti al generico potere di segnalazione ed emissione di un parere da parte dell'AGCM. In questo ampio novero di atti dovrebbero, *inter alia*, rientrare:

_ i bandi di gara per l'aggiudicazione di contratti pubblici (ove il controllo dell'Autorità investirebbe non già la conformità di tali atti a tutte le norme e principi che riguardino l'evidenza pubblica esterna, ma esclusivamente il rispetto della normativa posta a tutela della concorrenza e del mercato intesa *lato sensu* (come si illustrerà di seguito), ivi inclusa la disciplina di cui alle direttive 2004/17/CE e 2004/18/CE, nonché al Codice dei Contratti Pubblici di cui al D.Lgs. n. 163/2006), con il conseguente superamento dei paletti posti dalla giurisprudenza amministrativa in tema di legittimazione all'impugnazione degli atti di gara e degli oneri gravosi di accesso alla giustizia[29];
– i provvedimenti che reintroducano vincoli amministrativi tali da restringere la concorrenza, ovvero introducano barriere all'ingresso oppure impongano oneri economici in contrasto con le norme che prevedono la destinazione al libero mercato per quelle attività tradizionalmente sottoposte ad una gestione mediante atti concessori; ed infine
– più in generale, la vasta gamma degli interventi amministrativi (come appena detto, possibilmente anche da parte di altre autorità indipendenti) di regolamentazione di settori economici e promozione della concorrenza e del mercato, non solo ai fini dei processi di privatizzazione dei mercati, ma anche a sostegno dei programmi di liberalizzazione degli stessi[30].

In particolare, in tema di servizi pubblici, è opportuno segnalare come il potere attribuito all'Autorità - in un'ottica di deciso superamento rispetto ai limitati e (in assenza di impulso di terzi) spesso inefficaci poteri di vigilanza e di emanazione di pareri obbligatori ma non vincolanti *ex* art. 23-bis del decreto legge n. 112/2008 - appaia destinato a dispiegarsi pienamente ad esempio (ma non solo) nei confronti di quegli atti con i quali gli enti locali, disattendendo gli indirizzi del legislatore

[29] Cfr. M.A. SANDULLI, *Introduzione a un dibattito sul nuovo potere di legittimazione al ricorso dell'AGCM nell'art. 21 bis l. n. 287 del 1990*, *cit.*, p. 13.
[30] Cfr. F. CINTIOLI, *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e del mercato (art. 21 bis della legge n. 287 del 1990)*, *cit.*, p. 29.

nazionale, confermino gli affidamenti "*in house*" delle concessioni per la gestione dei servizi pubblici di rilevanza economica[31].

Pare utile ricordare, inoltre, come, in tema di assunzione dei servizi pubblici locali, i poteri di cui all'art. 21-bis assumano oggi una portata sostanzialmente "compensativa e riparatrice" a livello ordinamentale, posta la declaratoria di incostituzionalità che ha colpito l'art. 4 del decreto legge 13 agosto 2011, n. 138[32], ovvero quella norma che introduceva un parere preventivo da parte dell'AGCM sulle delibere di verifica delle condizioni del singolo servizio pubblico locale da parte degli enti competenti (la cui iniziale coesistenza con l'art. 21-bis risultava compatibile, sotto il profilo sistematico, nella misura in cui si prospettava in prima battuta "*in prima battuta il parere ex art. 4 citato e, solo dopo l'eventuale insistenza dell'amministrazione, il secondo parere ex art. 21 bis preordinato all'impugnazione*"[33]).

Sempre sul piano dell'ambito oggettivo della norma, sembra altresì ragionevole anticiparne un'utile applicazione in relazione agli atti amministrativi che violino il divieto di aiuti di Stato di cui agli artt. 107 e ss. del TFUE[34]. Sebbene, infatti, la competenza sulla dichiarazione di compatibilità di un aiuto con i principi di libera concorrenza e buon funzionamento del mercato sia radicata in capo alla Commissione europea (non essendo disponibile quel tipo di decentramento di *enforcement* tipico dei "classici" illeciti *antitrust* ai sensi del Regolamento 1/2003), i poteri di cui all'art. 21-bis ben potrebbero riguardare quelle fattispecie in cui l'incompatibilità dell'aiuto sia stata già accertata dalla Commissione europea, e nonostante questo siano intervenuti degli atti amministrativi contrastanti (ad esempio in tema di recupero dell'aiuto) con quanto deciso dalla Commissione stessa. Se l'utilità di questo tipo di intervento rischia di assumere un carattere marginale, posto il principio secondo cui un provvedimento amministrativo di tal sorta non può comunque produrre un effetto stabile che impedisca il recupero dell'aiuto, molto più pervasiva potrebbe essere l'attività di controllo dell'AGCM (specie su sollecitazione di terzi interessati) avverso quegli atti amministrativi che diano esecuzione ad aiuti illegali, in quanto non notificati alla Commissione europea ovvero notificati ma implementati nonostante la permanenza degli obblighi di *standstill* di cui all'art. 108, paragrafo 3,

[31] *Ibidem,* p. 28

[32] Cfr. sentenza 17 luglio 2012, n. 199, della Corte Costituzionale.

[33] Cfr. F. Cintioli, *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e del mercato (art. 21 bis della legge n. 287 del 1990)*, *cit*., p. 28.

[34] Sul punto, si aderisce pienamente alla tesi propugnata da F. Cintioli, *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e de mercato e sulla legittimazione a ricorrere delle autorità indipendenti*, *cit.*, pp. 21 e ss..

del TFUE (la cui disciplina è pacificamente considerata direttamente applicabile a livello nazionale[35]).

III. Considerazioni sul secondo comma dell'Art. 21-bis

A. Aspetti procedurali

Venendo alla disamina dei contenuti del secondo comma dell'art. 21-bis, viene innanzitutto in rilievo il tema della scansione delle fasi procedimentali che l'Autorità è tenuta a seguire *ex lege* al fine di una legittima proposizione del ricorso davanti al giudice amministrativo.

In una primissima ricostruzione "a caldo", tale scansione parrebbe sostanziarsi nell'emanazione di un iniziale parere motivato nel quale sono esplicitati "*gli specifici profili delle violazioni riscontrate*"; solo ove l'amministrazione interessata - e quindi obbligata ad aprire un procedimento - non si conformi a tale parere entro sessanta giorni, l'AGCM potrebbe agire direttamente in giudizio impugnando l'atto amministrativo in questione entro i trenta giorni successivi.

Sennonché, da un punto di vista interpretativo, per l'incerta formulazione adottata, non appare del tutto chiara la definizione della sequenza procedimentale da osservare per l'utile impugnazione innanzi al giudice amministrativo, e, in particolare, se l'Autorità possa ricorrere immediatamente contro gli atti amministrativi ritenuti lesivi del principio di tutela della concorrenza e del mercato, ovvero se, nel caso essa ritenga un atto amministrativo viziato nel senso appena descritto, debba necessariamente rivolgere all'amministrazione interessata il parere motivato per poi agire dinanzi al TAR, solo se e nei limiti in cui l'amministrazione interessata non si sia conformata a detto parere.

Nel contesto delle tesi emerse sul punto, secondo quella prevalente[36] il parere motivato (ed il conseguente decorso del termine a disposizione dell'amministrazione interessata) andrebbe qualificato, in una lettura sistematica della norma, quale presupposto di procedibilità o di ammissibilità del ricorso. A favore di questa soluzione - la preferita dagli autori, specie in un'ottica di valorizzazione della fase

[35] Cfr. la Comunicazione della Commissione relative all'applicazione delle norme sugli aiuti di Stato da parte dei giudici nazionali, 2009/C 85/01.

[36] Cfr. F. ARENA, *Atti amministrativi e restrizioni della concorrenza: i nuovi poteri dell'autorità antitrust italiana*, *cit.*, p. 13, F. CINTIOLI, *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e del mercato (art. 21 bis della legge n. 287 del 1990)*, *cit.*, p. 14, e M.A. SANDULLI, *Introduzione a un dibattito sul nuovo potere di legittimazione al ricorso dell'AGCM nell'art. 21 bis l. n. 287 del 1990*, *cit.*, p. 3.

"genetica" della norma, nata nel segno di un parere "preliminare"[37] - milita, da un parte, "*l'opportunità di una interlocuzione preventiva da parte dell'Autorità con l'amministrazione che ha emesso l'atto "sospetto" di recare distorsioni alla concorrenza ed al mercato, ben potendo l'amministrazione destinataria del parere, fare emergere profili tenuti in considerazione al momento dell'adozione dell'atto "incriminato", non noti all'Autorità in sede di redazione del parere e che ben potrebbero essere ritenuti idonei a sorreggere la statuizione assunta, con conseguente decisione di non adire il giudice amministrativo*"[38], dall'altra, trattandosi di un ricorso proposto da un'amministrazione contro un'altra, quel dovere di "leale collaborazione" tra soggetti pubblici e, quindi, l'opportunità che il ricorso sia preceduto da un "dialogo"[39]. Infine, anche il tenore del dato testuale proprio della disposizione (pur oggettivamente non risolutivo, essendo plausibile anche l'interpretazione contraria), la quale prevede che l'Autorità emetta (ossia, in termini di locuzione normativa, "debba emettere") un parere, orienterebbe a ritenere il passaggio del parere quale momento necessario per il completamento della procedura. La suddetta soluzione, quindi, risulterebbe fedele a (i) una più piana ricostruzione di una norma il cui primo comma attribuisce in generale una legittimazione processuale all'AGCM, con

[37] Tale interpretazione appare infatti confermata anche alla luce delle considerazioni espresse nelle Schede di Lettura predisposte dal Servizio Studi della Camera dei Deputati, in cui, nel ripercorrere la previsione in commento si afferma che "[p]*reliminarmente* [all'azione in giudizio]*, l'Autorità deve indirizzare all'Amministrazione che ha adottato l'atto un parere motivato* […]", Servizio Studi della Camera dei Deputati, Disegno di legge A.C. n. 4829, Schede di Lettura, disponibili all'indirizzo http://www.camera.it/126?PDL=4829&leg=16&tab=6.

[38] Così F. Arena, *Atti amministrativi e restrizioni della concorrenza: i nuovi poteri dell'autorità antitrust italiana*, *cit.*, p. 13, il quale non trascura altresì come tale interpretazione risulti più coerente rispetto al dovere di "leale cooperazione" tra amministrazioni. In tal senso anche F. Cintioli, *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e del mercato (art. 21 bis della legge n. 287 del 1990)*, *cit*., p. 14, il quale sottolinea come in mancanza di attivazione della fase procedimentale preliminare (emissione del parere), "*il relativo ricorso sarebbe inammissibile, per carenza di un vero e proprio presupposto processuale*".

[39] Come sottolineato da F. Cintioli, *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e del mercato (art. 21 bis della legge n. 287 del 1990)*, *cit*., p. 14, tale ricostruzione pare ben rispondere alla logica dell'invito all'autotutela di cui alla disciplina sui contratti pubblici, atteso che "*[i] l fatto che dal parere di AGCM nasca, come detto, in capo alla p.a. un obbligo di provvedere e quindi di aprire un procedimento amministrativo volto a decidere sulla possibilità di pronunciare un annullamento d'ufficio, è una circostanza inedita, dato che l'avvio del potere di autotutela decisorio non è obbligatorio per la presentazione di una istanza esterna. Proprio per questo deve escludersi che il privato possa, magari accostando la sua iniziativa a quella dell'Autorità, anch'egli denunciare la violazione di norme sulla concorrenza provocando l'obbligo di pronunciarsi della p.a. e magari per questa via garantirsi una impropria riapertura del termine di impugnazione che fosse già scaduto, imbastendo una azione contro il silenzio. L'obbligo di pronunciarsi e di valutare i presupposti per l'autotutela amministrativa riguarda perciò solo il rapporto tra p.a. ed AGCM, la quale potrà allora dirsi, per questo limitato profilo, titolare di una pretesa tutelata a che la prima si esprima sulla vicenda*".

il secondo comma specificante le modalità e l'ambito di proposizione del ricorso (e con il terzo comma teso invece, pur con qualche criticità[40], ad individuare il rito applicabile)[41], e (ii) un lineare inquadramento del termine per ricorrere, previsto dal secondo comma nella misura di trenta giorni, che pare giustificarsi "*proprio in considerazione del fatto che l'AGCM ha già avuto sessanta giorni per formulare, nel*

[40] Non risulta del tutto chiaro, ad esempio, se il rito applicabile (e quindi la relativa procedura) sia uniformato alla disciplina specifica degli appalti *ex* art. 120 c.p.a. (permeato sulla tutela dell'interesse specifico fatto valere in giudizio) o piuttosto a quella comune del rito abbreviato *ex* art. 119 c.p.a. (tarato invece sul presupposto dell'impugnazione di provvedimenti adottati in ossequio ad interessi generali, con un processo attento alla natura del soggetto resistente). Per un approfondimento sul tema (qui non trattabile per limiti di ambito d'indagine), si rimanda integralmente alle lucide considerazioni svolte da M.A. SANDULLI, *Introduzione a un dibattito sul nuovo potere di legittimazione al ricorso dell'AGCM nell'art. 21 bis l. n. 287 del 1990*, *cit.*, p. 3, secondo cui "*la disposizione è in questi termini assolutamente criptica: il titolo V si occupa invero tanto, all'art. 119, del "rito speciale comune a particolari materie" considerate economicamente o politicamente più "sensibili", tra cui, in particolare le controversie sugli atti delle autorità amministrative indipendenti (essenzialmente caratterizzato dalla dimidiazione dei termini processuali diversi dalla proposizione dei ricorsi di primo grado e da un maggiore rigore nella concessione delle misure cautelari), quanto, agli artt. 120 ss., del rito super speciale per le controversie sugli atti di affidamento di lavori, servizi e forniture. La novella non chiarisce tuttavia quale dei due riti trovi effettivamente applicazione ai giudizi* de quibus. *La logica farebbe ritenere che la specialissima disciplina del rito appalti trovi applicazione esclusivamente ai giudizi instaurati dall'AGCM in questa materia, valendo in ogni altro caso le regole meno complesse di cui all'art. 119. A prescindere dall'anomalia dell'applicazione di un regime cautelare più rigido per i ricorsi proposti da un organo titolare di un potere pubblico nell'interesse al migliore rispetto delle norme sulla concorrenza, sarà poi in ogni caso necessario stabilire gli opportuni adattamenti delle regole di cui agli artt. 120 ss. (improntate al rapporto tra impresa e stazione appaltante ed eventuali aggiudicatari, in una logica di bilanciamento dei diversi interessi, anche ai fini della tutela del contraente e dell'eventuale risarcimento per equivalente) al nuovo giudizio. A ciò si aggiunge il silenzio della legge sull'individuazione del giudice competente, che non consente di estendere ai giudizi* de quibus*, la competenza funzionale del TAR del Lazio, nel quale sono invece concentrate a norma dell'art. 135 c.p.a. le controversie contro i provvedimenti delle Autorità per la concorrenza, per i contratti e per le telecomunicazioni, evidentemente in considerazione dell'esigenza di riunire di fronte ad un unico giudice le questioni attinenti alle determinazioni tecnico-giuridiche assunte da tali particolari organismi in nome dei primari interessi economici ad essi affidati. Il generico richiamo al titolo V del libro IV, comprensivo, come si è visto, anche del rito sugli appalti, giustifica invero la mancata previsione di una riserva di competenza nel TAR capitolino anche dei giudizi azionati dall'Antitrust in* subiecta materia, *magari confluenti con quelli proposti contro i medesimi provvedimenti dagli operatori economici direttamente lesi: sicché non sarebbe corretto spostare la competenza in funzione della natura di uno dei soggetti ricorrenti. Il criterio di prevalenza della competenza funzionale previsto dall'art. 14 potrebbe peraltro far pensare anche ad una diversa soluzione. In ogni caso, il tema è delicato e necessita di un sollecito chiarimento in ambito legislativo*".

[41] Cfr. F. ARENA, *Atti amministrativi e restrizioni della concorrenza: i nuovi poteri dell'autorità antitrust italiana*, *cit.,* p. 16, per il quale - a ragione a nostro avviso - "[a]*ltre questioni, pur agitate, relative alla possibilità di intervento da parte dell'Autorità in giudizi incardinati da altri soggetti ovvero aventi ad oggetto la questione dell'appellabilità di sentenze emesse ad esito di giudizi di primo grado delle quali l'Autorità non è stata parte,* […] *debbano essere risolte alla luce della straordinarietà dello strumento disciplinato dall'art. 21 bis e vadano, pertanto, escluse*". Su questi punti, cfr. M. LIBERTINI, *I nuovi poteri dell'Autorità antitrust*, in www.federalismi.it, p. 2, e F. CINTIOLI, *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e del mercato (art. 21 bis della legge n. 287 del 1990)*, *cit*., p. 11.

parere, le specifiche contestazioni in ordine alle violazioni concorrenziali e che altri sessanta giorni sono trascorsi in attesa della risposta dell'Amministrazione"[42].

In senso divergente alla tesi appena illustrata, si è richiamata una certa esigenza di elasticità che l'art. 21-bis potrebbe soddisfare laddove si consentisse all'AGCM di ricorrere direttamente, specie al fine di facilitare, nei casi di maggiore consistenza e gravità, un'immediata pronuncia in sede cautelare[43]. Ad ulteriore sostegno di questa seconda posizione, si è evidenziato come anche il dato letterale della norma potrebbe prestarsi, almeno in astratto, a riconoscere la possibilità di ricorrere al giudice amministrativo in assenza di un parere motivato (con il primo comma che potrebbe essere interpretato come attribuzione all'Autorità della legittimazione a ricorrere, anche immediatamente, e con il secondo comma che prevedrebbe una mera possibilità alternativa di procedere, attraverso il previo invio del parere motivato e, ad esito della risposta ricevuta da parte della pubblica amministrazione, il ricorso in giudizio).

Le prime indicazioni giurisprudenziali sul tema tendono a valorizzare l'accoglimento dell'interpretazione del parere quale condizione di procedibilità del ricorso, come si evince dalla sentenza del TAR Lazio n. 2720 del 15 marzo 2013, laddove si evidenzia che non sussisterebbero argomenti letterali atti a ritenere che l'art. 21-bis abbia inteso introdurre due modalità alternative di procedere (*i.e.* un generale potere di impugnativa, ed un potere di impugnativa previo parere all'Amministrazione interessata). Ad avviso del giudice amministrativo, infatti, l'art. 21-bis, nel condizionare il ricorso giurisdizionale al previo espletamento della procedura di consultazione con l'Amministrazione interessata, è funzionale a "*stimolare uno spontaneo adeguamento della fattispecie ai principi in materia di libertà di concorrenza*". In altre parole, il ricorso giurisdizionale dell'AGCM si pone come *extrema ratio*.

Tanto considerato, l'esito del dibattito non appare comunque del tutto scontato, anche alla luce del silenzio della disposizione *de qua* circa le conseguenze in termini di inammissibilità o improcedibilità del ricorso in assenza di parere dell'Autorità[44].

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[42] Così R. Giovagnoli, *Atti amministrativi e tutela della concorrenza. Il potere di legittimazione a ricorrere dell'AGCM nell'art. 21-bis legge n. 287/1990*, *cit*., p. 11.

[43] Sul punto, cfr. M. Libertini, *I nuovi poteri dell'Autorità antitrust*, *cit.*, p. 2, secondo il quale per l'Autorità sarebbe possibile proporre in via diretta (ovvero senza previo parere ai sensi del secondo comma della norma) ricorso avverso l'atto distorsivo della concorrenza e del mercato. Questa impostazione darebbe conto della possibilità, da parte della stessa Autorità, di proporre, al pari di ogni altro ricorrente, un'istanza cautelare sospensiva dell'atto ritenuto lesivo della concorrenza; una possibilità che, ritenendo invece necessario il previo parere, sarebbe di fatto vanificata, posto che "*l'emissione di questo parere non ha un effetto sospensivo sull'atto in questione, che, nei tempi tecnici (3 mesi) previsti per la procedura disciplinata dal secondo comma del nuovo art. 35, potrebbe essere stato già eseguito*".

[44] Sul punto, cfr. R. Giovagnoli, *Atti amministrativi e tutela della concorrenza. Il potere di legittimazione a ricorrere dell'AGCM nell'art. 21-bis legge n. 287/1990*, *cit*., p. 11, nella parte in cui l'Autore, in ragione del fatto che "*la legittimazione dell'AGCM potrebbe essere ricondotta, sia pure con i dovuti distin-*

B. Contenuto del ricorso

Quanto al contenuto del ricorso, a fronte del dato testuale dell'art. 21-bis, che circoscrive la legittimazione dell'Autorità (evidentemente sotto pena di inammissibilità) alla possibilità di dedurre il vizio-motivo di atti amministrativi "*che violino le norme a tutela della concorrenza e del mercato*", si dibatte se il vizio-motivo denunciabile debba essere sempre e soltanto confinato alla violazione di "legge" (con la precisa individuazione della norma violata), e non anche estendersi alla violazione dei principi generali in tema di concorrenza (*rectius*: promozione della concorrenza).

Sul punto, si ritiene condivisibile riconoscere che l'Autorità possa porre a fondamento delle censure articolate non solo la violazione delle norme volte alla tutela della concorrenza[45] (ad esempio, nel caso di controllo "anticipato", ai sensi della norma in esame, su disposizioni regolatorie afferenti ambiti e situazioni suscettibili di essere valutati autonomamente ed *ex post* dall'Autorità come in contrasto con gli artt. 101 e 102 del TFUE, ovvero con le equivalenti disposizioni dell'ordinamento interno), ma anche la violazione della disciplina regolatoria volta a promuovere ed instaurare la concorrenza, delle norme a tutela del mercato, ed in generale della vasta area delle disposizioni dell'ordinamento positivo effettivamente dirette alla tutela della concorrenza e del mercato, nonché dei principi di promozione della concorrenza[46] - ma, si conviene, "*senza potersi spingere ad abbracciare, seguendo un approccio economico-sostanzialista, ogni astratta lesione del benessere del consumatore (troppo legata a parametri di tipo soggettivo e dunque pericolosamente arbitrari)*"[47] - atteso che tale ricostruzione interpretativa traspare anche dall'obiettivo dichiarato dal legislatore nei lavori preparatori e nel dibattito che ha fatto da cornice alla presente novità legislativa[48].

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guo, alla legittimazione degli enti esponenziali di interessi diffusi", ritiene ancora più arduo "*sottoporre tale ricorso a condizioni di ammissibilità che, oltre a non essere espressamente contemplate, andrebbero poi a discriminare questa particolare forma di iniziativa giurisdizionale da tutte le altre proposte da enti esponenziali di natura privatistica*".

[45] F. Cintioli, *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e del mercato (art. 21 bis della legge n. 287 del 1990)*, *cit*., p. 27, e F. Arena, *Atti amministrativi e restrizioni della concorrenza: i nuovi poteri dell'autorità antitrust italiana*, *cit.*, pp. 14-15.

[46] Ivi inclusi, salvo riconoscere un'area di contiguità con il controllo degli atti amministrativi mediante eccesso di potere, i principi di proporzionalità e ragionevolezza, posti alla radice del valore-concorrenza.

[47] Cfr. M.A. Sandulli, *Introduzione a un dibattito sul nuovo potere di legittimazione al ricorso dell'AGCM nell'art. 21 bis l. n. 287 del 1990*, *cit.* p. 15.

[48] In questo senso, dunque, l'azione dell'AGCM avrà la possibilità di contribuire efficacemente all'interno del processo di apertura dei mercati, potendo questa impugnare "*tutte quelle determinazioni di conferma di affidamenti "in house", o comunque in esclusiva pur in carenza dei presupposti contenuti negli ultimi interventi normativi, dei servizi pubblici locali, e, più in generale, di tutti quegli atti amministrativi che, in violazione delle indicazioni provenienti anche dalla giurisprudenza comunitaria consolidata,*

C. Termini (ed implicazioni pratiche)

In relazione alla mancata indicazione nella norma del *dies a quo* per l'esercizio del potere *de quo*, la maggior lacuna dell'intervento del legislatore, tale *vacuum* appare preliminarmente potersi risolvere alla luce dell'art. 41, comma 2, del c.p.a. e del principio di certezza del diritto. In tale prospettiva, che sembra collimare con la primissima impostazione data dalla prassi dell'Autorità e del giudice amministrativo[49], il termine decorrerà dalla piena conoscenza dell'atto oggetto di impugnazione[50], ovvero (i) nel caso di atti sottoposti per legge a pubblicazione, dalla scadenza del periodo di pubblicazione, e (ii) in mancanza di pubblicazione, dalla comunicazione all'Autorità ovvero dalla piena conoscenza dell'atto, comunque acquisita.

Per altro verso, a fronte di un rischio di potenziale censurabilità *sine die* degli atti amministrativi, si è posta la questione relativa alla sussistenza, o meno, di forme di temperamento al potere di impugnazione dell'AGCM e ai criteri sopra enucleati, specie al fine di "compensare" il fatto che, non essendo definito il *dies a quo* del termine per l'emanazione del parere, vi sarebbe il rischio - in occasione di quelle fattispecie in cui l'Autorità pervenga alla piena conoscenza dell'atto una volta decorso un termine "ragionevole" - di annullare atti adottati da tempo risalente ed in grado, per tale motivo, di aver creato un affidamento giuridicamente rilevante in capo ai terzi beneficiari dell'atto stesso.

Come autorevolmente richiamato in dottrina[51], tale interrogativo assume una particolare rilevanza pratica, con implicazioni dirette sulla demarcazione degli spazi di manovra delle amministrazioni pubbliche e del *thema decidendum* del ricorso innanzi al giudice amministrativo.

Se, infatti, come si ritiene, il potere sollecitato dal parere dell'AGCM va necessariamente ricondotto alla categoria dell'autotutela decisoria (con l'obiettivo ultimo dell'annullamento d'ufficio dell'atto ritenuto illegittimo), per l'amministrazione "sollecitata" resterebbe allora sempre aperta la strada di decidere nel senso di non

introducano o mantengano ingiustificate o non proporzionate restrizioni al libero svolgimento dell'attività economica privata"; così F. Arena, *Atti amministrativi e restrizioni della concorrenza: i nuovi poteri dell'autorità antitrust italiana*, *cit.*, p. 15, il quale prospetta un utilizzo dello strumento in esame al fine di sollevare innanzi al giudice la questione di legittimità costituzionale di quelle norme primarie che dovessero essere richiamate a supporto degli atti amministrativi viziati, ovvero al fine di chiedere al giudice la disapplicazione della norma di diritto interno che sia in contrasto con una norma di diritto europeo, laddove l'amministrazione interessata dovesse contestare la possibilità di disapplicare la norma interna.

[49] Cfr. sentenza del TAR Lazio n. 2720 del 15 marzo 2013, laddove si riconosce che il decorso del termine di 60 giorni per l'emissione del parere è riferito alla conoscenza dello specifico atto, ritenuto anticoncorrenziale, e che sarà oggetto dell'eventuale ricorso giurisdizionale all'esito della fase precontenziosa.

[50] Cfr. Cons. Stato, 21 maggio 2007, n. 2543, e 3 ottobre 2007, n. 5116, dove si precisa che la piena conoscenza va ricondotta alla contezza dell'esistenza dell'atto e del suo contenuto essenziale.

[51] R. Giovagnoli, *Atti amministrativi e tutela della concorrenza. Il potere di legittimazione a ricorrere dell'AGCM nell'art. 21-bis legge n. 287/1990*, *cit*., p. 9.

rimuovere l'atto o di non modificarlo. E ciò non tanto e non solo perché l'amministrazione può (o meno) non accettare l'ipotesi di aver infranto la normativa a tutela della concorrenza e del mercato, quanto piuttosto perché - ed in senso risolutivo - questa può considerare non sussistere le altre condizioni che, oltre al vizio d'illegittimità, devono essere soddisfatte per giungere all'annullamento d'ufficio *ex* art. 21-nonies della legge n. 241/1990, norma che, invero, fa riferimento a una serie di parametri di valutazione:

– la data di emanazione dell'atto, con ogni conseguenza nel senso del "termine ragionevole";
– gli effetti che l'atto abbia prodotto;
– il coinvolgimento delle posizioni soggettive dei terzi;
– l'affidamento che sia stato originato dall'atto;
– l'interesse pubblico in rilievo; e
– in generale, "*quell'insieme di valutazioni, guidate sul sentiero della ragionevolezza, che possono essere ancor oggi sintetizzate nella formula tradizionale della necessaria ponderazione dell'interesse pubblico attuale e concreto ad annullare)*"[52].

In questa prospettiva, dunque, l'amministrazione interessata dovrà appurare, al di là della richiesta proveniente dall'Autorità, se esistono oppure no i requisiti prescritti dall'art. 21-nonies della legge n. 241/1990 per un legittimo esercizio dei poteri di annullamento d'ufficio. Qualora tali requisiti non sussistano, ad esempio perché si ritiene che il tempo trascorso sia ormai troppo e l'affidamento ingenerato in capo ai privati sia meritevole di particolare apprezzamento[53], la pubblica amministrazione non si conformerà, sempre salvo l'obbligo di pronunciarsi motivatamente.

Nell'accogliere questa soluzione[54] - ovvero ritenendo che il parere dell'Autorità si configuri come volto a sollecitare l'esercizio di un potere di annullamento d'uf-

[52] F. Cintioli, *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e del mercato (art. 21 bis della legge n. 287 del 1990)*, *cit*., p. 11.

[53] Cfr. F. Arena, *Atti amministrativi e restrizioni della concorrenza: i nuovi poteri dell'autorità antitrust italiana*, *cit.*, p. 16, e F. Cintioli, *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e del mercato (art. 21 bis della legge n. 287 del 1990)*, *cit*., p. 12.

[54] In senso diametralmente opposto, si veda, su tutti, R. Giovagnoli, *Atti amministrativi e tutela della concorrenza. Il potere di legittimazione a ricorrere dell'AGCM nell'art. 21-bis legge n. 287/1990*, *cit*., pp. 9-10, per il quale tale tesi, pur motivata da un'apprezzabile esigenza di certezza del diritto, non appare condivisibile, anzitutto, per il presupposto da cui essa muove, ovvero che non via sia termine di decadenza per emettere il parere (e che, dunque, serva, con funzione compensativa, il "termine ragionevole" dell'annullamento d'ufficio). Afferma l'Autore: "*il termine di decadenza per emettere il parere in realtà c'è ed è di sessanta giorni. È vero che la norma, purtroppo, non indica da quando decorrono i sessanta giorni, ma sul punto, trattandosi di un parere che ha una marcata funzione "processuale" (essendo il preludio del ricorso giurisdizionale: tanto che deve già contenere gli specifici profili di violazione che l'AGCM intenderà portare in sede giurisdizionale), sembra debbano soccorrere i principi generali in materia di termine di*

ficio in autotutela[55] - si accetta altresì l'idea che il *thema decidendum* nel giudizio instaurato dall'Autorità involva non solo l'accertamento della possibile illegittimità dell'atto in questione perché in violazione della normativa a tutela della concorrenza e del mercato, ma anche (e, a questo punto, soprattutto) la verifica della legittimità della motivazione a supporto della possibile decisione (a prescindere da ogni am-

decadenza per l'impugnazione degli atti amministrativi. In base, all'art. 41, comma 2, c.p.a., il termine per ricorrere decorre dalla notificazione, comunicazione o piena conoscenza, ovvero, per gli atti di cui non sia richiesta la notificazione individuale, dal giorno in cui sia scaduto il termine della pubblicazione se questa sia prevista dalla legge o in base alla legge. [..] *In caso di atti sottoposti per legge a pubblicazione, pertanto, il termine per il parere decorrerebbe dalla scadenza del periodo di pubblicazione. In mancanza, dalla comunicazione o piena conoscenza dell'atto, comunque acquisita. Muovendo da tale presupposto non vi è allora l'esigenza di sostituire il termine di decadenza con il termine ragionevole dell'annullamento d'ufficio ed ipotizzare che il ricorso si indirizzi avverso l'atto emanato in sede di autotutela. Al contrario, sembra piuttosto chiaro che il ricorso abbia per oggetto l'atto che si assume lesivo della concorrenza. Ciò emerge chiaramente dal primo comma dell'art. 21-bis che attribuisce all'AGCM proprio il potere di impugnare "gli atti amministrativi generali, i regolamenti e i provvedimenti di qualsiasi pubblica amministrazione che violino le norme a tutela della concorrenza e del mercato". E contro questi atti, quindi, che il ricorso si indirizza, non contro il mancato esercizio del potere di autotutela. Il secondo comma, che fa riferimento al parere e concede all'Amministrazione uno* spatium deliberandi *per adeguarsi ad esso, non individua l'oggetto del giudizio, ma fissa soltanto le modalità procedimentali (con l'ulteriore problema, fra l'altro, di capire se tali modalità sono necessarie o facoltative) per l'esercizio del descritto potere di azione. Deve, di conseguenza, parimenti escludersi che l'Amministrazione compulsata dal parere possa – pur condividendo l'illegittimità dell'atto – rifiutarsi di modificarlo o rimuoverlo evocando la mancanza dei presupposti per l'annullamento d'ufficio. Quello che l'Amministrazione sollecitata dal parere esercita ai sensi dell'art. 21-bis è difficilmente riconducibile al potere di autotutela, è un potere "speciale" di ritornare sui propri atti, ove dall'AGCM ritenuti lesivi di norme a tutela della concorrenza e del mercato, anche a prescindere dai presupposti dell'autotutela decisoria. Ciò assume rilievo in caso di impugnazione dell'atto che recepisce il parere ad opera di eventuali terzi contro interessati: questi potranno contestare che non vi era violazione della concorrenza (e, che, quindi, i rilievi dell'AGCM recepiti dall'Amministrazione erano infondati), ma non la mancata sussistenza dei presupposti per l'annullamento d'ufficio ai sensi dell'art. 21-nonies legge n. 241/1990*".

[55] Si veda *contra* quanto affermato dal TAR Lazio nella sentenza n. 2720 del 15 marzo 2013, laddove si sostiene che le determinazioni che l'Amministrazione viene ad assumere, a seguito dell'interlocuzione con l'AGCM, sia nel senso della conformazione al parere (con conseguente ritiro o modifica dell'atto), sia nel senso della conferma della soluzione originaria, non costituiscono estrinsecazione di un potere di autotutela *strictu sensu* inteso, non implicando alcun apprezzamento di natura tipicamente discrezionale orientato secondo i parametri tradizionali dell'autotutela. In particolare, in ossequio alla primazia della tutela della libertà di concorrenza, espressione di valori costituzionali e comunitari e strumento di attuazione del benessere sociale, ove l'Amministrazione ravvisi l'effettività o la fondatezza dei rilievi di cui al parere dell'Autorità, ha l'obbligo di conformare la propria azione alla salvaguardia dei principi in materia di concorrenza, non potendosi certo ipotizzare che, secondo i parametri propri dell'autotutela, rifiuti di modificare o ritirare l'atto lesivo della libertà di concorrenza solo per la mancanza dei presupposti dell'annullamento d'ufficio.

missione di illegittimità dell'atto sotto il profilo che qui ci occupa) di non annullare/modificare l'atto per ragioni di ragionevolezza e legittimo affidamento[56].

In questo senso, conclusivamente, si concorda - a dispetto delle prime indicazioni giurisprudenziali[57] - con l'osservazione che vede nel "termine ragionevole" per l'annullamento d'ufficio un forte temperamento - o quantomeno una compensazione - a fronte della (grave, si ribadisce) lacuna normativa relativa alla definizione del *dies a quo* del termine di decadenza per emettere il parere.

In ultima battuta, sempre sul fronte dei risvolti pratici, ogni possibile incertezza circa l'impugnabilità da parte dell'AGCM del "silenzio" della pubblica amministrazione a seguito del parere motivato sembra superabile, anche per ragioni di congruenza sistematica sotto il profilo di diritto processuale, attraverso la possibilità di ricorrere direttamente (e solo, come recentemente confermato dalla giurisprudenza rilevante[58]) nei confronti dell'atto amministrativo avverso il quale si sia innescato il parere stesso, fermo restando che in tal caso sarà necessario il decorso del termine di centoventi giorni (*i.e.* i sessanta giorni per l'emissione del parere ed i successivi sessanta giorni a disposizione della pubblica amministrazione per conformarsi) ai

[56] Sul punto, si rimanda alle pregnanti argomentazioni di F. CINTIOLI, *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e del mercato (art. 21 bis della legge n. 287 del 1990)*, *cit.*, p. 12. Secondo l'Autore, infatti, è opportuno domandarsi se il ricorso possa essere accolto anche ove la valutazione dell'amministrazione interessata circa la sussistenza dei requisiti previsti dall'art. 21-nonies sia stata negativa, appositamente motivata e soprattutto fondata. Sostiene l'Autore: "*la risposta che sembra preferibile è che in tal caso il ricorso non possa trovare accoglimento, quand'anche vi sia stata, a suo tempo, una violazione delle predette norme. Se infatti classifichiamo il conformarsi dell'amministrazione destinataria del parere di AGCM come un fenomeno di autotutela decisoria, avremo che, una volta accertato che non esistono i presupposti di legge per il suo esercizio, anche il potere di ricorso di AGCM dovrà arrestarsi di fronte a questo dato. Altrimenti, avremmo riconosciuto alla speciale legittimazione dell'Autorità una forza che nessun'altra forma di ricorso possiede e che oltretutto sarebbe in evidente distonia con irrinunciabili esigenze di interpretazione sistematica. Pertanto, quando la p.a. decida di non conformarsi e lo faccia con una motivazione nella quale ponga in rilievo la carenza dei presupposti ex art. 21 nonies, l'Autorità potrà evidentemente agire, ma il giudice, quando ritenga fondata una tale valutazione amministrativa, dovrà rigettare il ricorso. È chiaro in proposito che l'interesse pubblico attuale e concreto che l'amministrazione avesse posto a base della sua decisione ben potrebbe essere (e molto probabilmente sarà) diverso da quello alla tutela della concorrenza. Ma questa circostanza non smentisce affatto il ragionamento, a meno di accettare l'originale idea che l'ordinamento voglia dare a tale ultimo interesse una sorta di inedito primato su tutti gli altri interessi generali nel sistema*".

[57] Cfr. sentenza del TAR Lazio n. 2720 del 15 marzo 2013, laddove si esplicita come non sembri potersi ritenere, in mancanza di espressa previsione normativa, che l'eventuale tardività del parere rispetto alla scadenza del termine di sessanta giorni previsto possa implicare la decadenza del potere di azione e la conseguente inammissibilità del ricorso giurisdizionale proposto direttamente avverso l'atto anticoncorrenziale.

[58] *Ibidem*. Nel delimitare l'ambito oggettivo del ricorso ex art. 21-bis, il TAR Lazio, infatti ha affermato che atto impugnabile è l'atto ritenuto lesivo della concorrenza, e non l'atto successivo con il quale l'Amministrazione decida di non conformarsi al parere interlocutorio dell'Autorità (e quindi, in caso d'interzia, il silenzio).

sensi della disposizione in esame[59]. Certo è che la sollecitazione della tutela attraverso il rimedio giurisdizionale dovrebbe, in tal senso, esclusivamente concernere i soli profili asseritamente inficianti evidenziati con il parere nei confronti dell'amministrazione emanante[60], al fine di "*scongiurare, laddove venissero a ritenersi proponibili in giudizio motivi non dedotti con il gravame gerarchico, una pratica elusione del termine di decadenza ai fini dell'impugnativa in sede giurisdizionale*"[61].

D. L'interesse al ricorso

Appurato che l'Autorità è preposta a tutelare la concorrenza in quanto tale, e che pertanto l'interesse al ricorso (quale presupposto processuale e condizione dell'azione) ai sensi dell'art. 21-bis deve necessariamente essere ricondotto all'interesse a rimuovere la lesione della concorrenza (e gli atti a tale lesione sottesi), giacché è questa la sola finalità che l'Autorità persegue con questo ricorso, è interessante soffermarsi su quelle circostanze che potrebbero, in tale tipo di giudizio, fare cessare l'interesse al ricorso.

In questo senso, a titolo esemplificativo, appaiono assumere rilievo le ipotesi di seguito annoverate:

– l'atto impugnato viene annullato ad esito del giudizio promosso dal privato direttamente leso;
– l'atto viene ritirato dall'autorità che lo ha adottato (ad esempio nel caso in cui questa, non essendosi conformata al parere dell'AGCM, decida di provvedere all'annullamento in autotutela una volta chiamata in giudizio);
– l'amministrazione interessata adotta un nuovo atto, non impugnato dall'AGCM, che dà luogo a, o reitera, la medesima violazione della normativa a tutela della concorrenza e del mercato.

[59] *Ibidem*. Il TAR Lazio ritiene che il termine di trenta giorni decorra solo dalla scadenza del termine di sessanta giorni che segna la conclusione della fase precontenziosa. Pertanto, anche in caso di determinazione negativa dell'Amministrazione rispetto alle indicazioni espresse nel parere dell'AGCM intervenuta nel corso dei sessanta giorni decorrenti dall'emissione del parere, la comunicazione/conoscenza di tale determinazione non comporterebbe la decorrenza del termine di trenta giorni gravante sull'AGCM per la presentazione del ricorso.

[60] Si veda l'esaustiva ricostruzione offerta da R. POLITI, *Ricadute processuali a fronte dell'esercizio dei nuovi poteri rimessi all'AGCM ex art. 21-bis della l. 287/1990. Legittimazione al ricorso ed individuazione dell'interesse alla sollecitazione del sindacato. Ovvero: prime riflessioni sul nuovo protagonismo processuale dell'Autorità Antitrust tra il Minosse di Dante ed il giudice di De Andrè*, *cit.*, p. 27, secondo cui "*in altri termini, un ampliamento del* thema decidendum *rispetto alle considerazioni rassegnate con il parere verrebbe ad investire l'adito organo di giustizia dell'esame di profili di interesse (ancorché parzialmente) nuovi e/o diversi: i quali, in quanto non preventivamente addotti all'attenzione dell'Amministrazione emanante, non possono aver formato, da parte di quest'ultima, oggetto di esame*".

[61] *Ibidem.* Cfr., *ex multis*, Cons. Stato, sez. IV, 11 aprile 2007 n. 1603, TAR Lazio, sez. III-bis, 22 maggio 2008 n. 4804, e TAR Lazio, Latina, 26 luglio 2005 n. 629.

Come sostenuto in dottrina[62], se per le prime due ipotesi la declaratoria di improcedibilità per cessazione della materia del contendere sembrerebbe l'esito processuale più plausibile, più complesso risulta il ragionamento intorno all'ultima ipotesi[63].

Sennonché, in ragione dello specifico (qualificato e differenziato) interesse ad agire in capo all'Autorità, appare plausibile riconoscere la sopravvivenza di tale interesse, atteso che (a) un "*regolamento, infatti, per la sua natura generale e astratta è suscettibile (finché è in vigore) di infinite applicazioni, il che implica che permane l'interesse dell'AGCM ad eliminarlo anche se un'applicazione anticoncorrenziale si è già definitivamente consolidata, a causa della mancata impugnazione del provvedimento attuativo*"[64], e (b) anche rispetto alla situazione degli atti amministrativi generali (*e.g.* il bando di gara) ai sensi dei quali l'atto consequenziale (*e.g.* l'aggiudicazione) non impugnato abbia ormai "chiuso il cerchio" della questione amministrativa definita dall'atto presupposto generale, l'Autorità ben potrebbe continuare ad avere interesse, questa volta ai fini di una tutela della concorrenza a scopo deterrente, ad una declaratoria di illegittimità dell'atto presupposto generale (tale soluzione, inoltre, per ragioni di economicità ed efficienza nell'azione dell'AGCM, appare senza dubbio preferibile rispetto all'alternativa che valorizza la possibilità per l'AGCM, in caso di riedizione di un bando illegittimo, di proporre un nuovo ricorso contro quest'ultimo).

E. Discrezionalità nell'esercizio del potere e sollecitazione dei terzi

Resta fermo che la norma sembra essere ispirata nel senso di riconoscere all'Autorità, rispetto a questo nuovo potere di intervento, un ambito di discrezionalità per decidere se, anche a fronte di segnalazione da parte di terze parti, (i) emettere o meno il parere motivato, e/o (ii) intervenire o meno proponendo ricorso, in base ad una selezione delle fattispecie considerate di immediato interesse (per gravità e consistenza), tenuto conto delle (pur sempre limitate) risorse disponibili.

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[62] R. Giovagnoli, *Atti amministrativi e tutela della concorrenza. Il potere di legittimazione a ricorrere dell'AGCM nell'art. 21-bis legge n. 287/1990*, *cit*. pp. 6-7.

[63] *Ibidem*. In particolare, l'Autore cita l'esempio in cui, nel contesto di un giudizio avente ad oggetto un atto generale o un regolamento, l'amministrazione resistente emani un provvedimento applicativo non ritualmente impugnato dall'AGCM (*e.g.* l'impugnazione del bando non seguita dall'impugnazione dell'aggiudicazione avvenuta sulla base di tale bando). In questo caso, la questione centrale diventa quella di verificare se, nella prospettiva della tutela della concorrenza e del mercato, l'eliminazione dell'atto presupposto possa essere ancora utilmente richiesta nonostante la mancata impugnazione dell'atto applicativo (il che è pacificamente escluso per le controversie azionate dai privati, in base al principio secondo cui l'annullamento del bando, non avendo effetto automaticamente caducante sull'aggiudicazione non impugnata, non risulterebbe più utile per il ricorrente).

[64] *Ibidem*, p. 7.

A tale riguardo, pena la salvaguardia dell'effettività dei poteri di cui all'art. 21-bis, sembra potersi scartare la possibilità per i terzi segnalanti di fare utilmente ricorso avverso una decisone dell'Autorità di non intervenire a fronte della propria segnalazione, posta la difficile configurabilità di un bene della vita tutelabile in sede giurisdizionale, e dunque "*la configurazione di una ordinaria legittimazione ad agire del singolo e la previa e necessaria configurazione di una posizione soggettiva nella sua titolarità*"[65].

Per queste ipotesi, infatti, il terzo sarà con ogni ragione rappresentato da un soggetto già leso dall'atto astrattamente in violazione della normativa a tutela della concorrenza. E allora questi, in un secondo momento, potrà intentare ricorso diretto avverso tale atto per violazione di legge (rendendosi non più necessaria un'impugnazione contro l'archiviazione dell'Autorità), salvo se impossibilitato dal termine di decadenza. In tale ultimo caso, tuttavia, si conviene che non sia pensabile che l'ordinamento possa consentire "*una impropria rimessione in termini mediante l'impugnazione dell'archiviazione dell'Autorità e col fine di rimettere in moto, per volontà del giudice, tutto il meccanismo di cui all'art. 21-bis*"[66].

Alla medesima conclusione conducono, infine, ulteriori considerazioni pratiche. Si pensi all'ipotesi di una segnalazione di un terzo in relazione ad un atto amministrativo astrattamente lesivo della concorrenza, cui l'Autorità non voglia dar riscontro mediante l'emissione di un parere, seguita da un'impugnazione vittoriosa del terzo innanzi al TAR: in tal caso, l'Autorità non avrebbe più le condizioni per utilmente emettere il proprio parere avverso l'atto amministrativo in questione, stante tra l'altro il decorso dei sessanta giorni a norma di legge.

F. Impugnabilità autonoma del parere

L'ultimo spunto di riflessione, ai fini del presente contributo, si riferisce alla questione, peraltro già emersa nella primissima fase applicativa della norma *de qua*, se il parere dell'Autorità ai sensi dell'art. 21-bis sia un atto autonomamente impugnabile, sia con riguardo alla posizione assumibile da parte dall'amministrazione destinataria del parere, sia da parte di eventuali terzi cointeressati rispetto all'amministrazione emanante l'atto in questione (si pensi, a titolo esemplificativo, all'impresa beneficiaria di un atto amministrativo ritenuto contrastante con normativa posta a tutela della concorrenza e del mercato).

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[65] Così F. Cintioli, *Osservazioni sul ricorso giurisdizionale dell'Autorità garante della concorrenza e del mercato (art. 21 bis della legge n. 287 del 1990)*, *cit*., p. 15.

[66] *Ibidem*. Secondo l'Autore, inoltre, se poi si trattasse di un atto amministrativo presupposto non ancora lesivo per la mancanza di un atto applicativo, il terzo privato interessato potrebbe invece "serenamente" attendere l'atto applicativo ed impugnare, a quel tempo, entrambi gli atti.

Come poc'anzi menzionato, la problematica qui in discorso avrà presto modo di trovare una prima definizione nel contesto di un ricorso pendente innanzi al TAR Lazio, intentato da una trattoria di Lucca e dalla Federazione Italiana Pubblici Esercizi, avverso il parere *ex* art. 21-bis con cui l'Autorità ha evidenziato profili di illegittimità nei confronti di un Regolamento adottato dal Comune di Lucca nel quale veniva disposto che "*arredi degli esercizi di vicinato non possono coincidere con le attrezzature tradizionalmente utilizzate negli esercizi di somministrazione, ossia tavoli e qualsiasi tipo di seduta*"[67]. Nel parere reso al Comune di Lucca, l'Autorità, considerando tale regolamento - che limitava l'esercizio delle attività economiche degli esercizi di vicinato in assenza di un espresso divieto posto da una norma di legge - in grado di determinare un ingiustificato svantaggio competitivo a danno di tale tipologia di esercizi commerciali, ha quindi richiesto la modifica di tale atto amministrativo con il parere oggetto di gravame.

Sul punto, una serie di considerazioni di carattere logico-sistematico fanno propendere per la tesi, già autorevolmente sostenuta in dottrina[68], che esclude senza esitazione l'immediata e autonoma impugnabilità del parere, posto che (i) come appena considerato, il parere deve assumere la valenza di atto meramente presupposto e non già immediatamente lesivo in assenza di un atto consequenziale, (essendo la conformazione dell'amministrazione interessata al parere una circostanza ipotetica), specie in considerazione del fatto che l'amministrazione ben potrebbe ignorare la sollecitazione avanzata dall'AGCM nel parere e così mantenere in vita l'atto contestato, con ogni ricaduta in termini di assenza di concreta lesività del parere (come segnalato in dottrina, infatti, "*semmai, gli eventuali terzi interessati alla conservazione dell'atto potranno intervenire* ad opponendum *nel giudizio di annullamento iniziato dall'AGCM*"[69]), e (ii) qualora l'amministrazione interessata si conformi al parere con una modifica od un annullamento dell'atto, il ricorso potrà agevolmente indirizzarsi contro l'atto modificato ovvero contro l'atto di annullamento, eventualmente impugnando il primo insieme al parere reso dall'AGCM[70].

[67] Si veda parere AS900 - *Comune di Lucca - Regolamento comunale sugli esercizi di somministrazione di alimenti e bevande*, del 4 gennaio 2012.

[68] R. Politi, *Ricadute processuali a fronte dell'esercizio dei nuovi poteri rimessi all'AGCM ex art. 21-bis della l. 287/1990. Legittimazione al ricorso ed individuazione dell'interesse alla sollecitazione del sindacato. Ovvero: prime riflessioni sul nuovo protagonismo processuale dell'Autorità Antitrust tra il Minosse di Dante ed il giudice di De Andrè*, *cit.*, pp. 17 e ss..

[69] R. Giovagnoli, *Atti amministrativi e tutela della concorrenza. Il potere di legittimazione a ricorrere dell'AGCM nell'art. 21-bis legge n. 287/1990*, *cit.*, p. 9.

[70] *Ibidem*.

IV. Conclusioni

Nel voler tracciare qualche riflessione conclusiva alla luce della - pur sempre sommaria e parziale - analisi dei contenuti sostanziali e processuali di immediata rilevanza, così come emergenti dall'art. 21-bis, è inevitabile operare un distinguo tra una valutazione dei fini e dei mezzi sottesi alla disposizione in rassegna.

L'introduzione dell'art. 21-bis nel corpo della legge n. 287/90 è da accogliere con favore, sia per l'integrazione significativa rispetto alle tradizionali attribuzioni dell'Autorità quale "guardiana" della libera concorrenza, sia per il lodevole intento di dotare il nostro ordinamento di un ulteriore e significativo strumento di controllo giurisdizionale di legalità dell'agire amministrativo. È pertanto certamente auspicabile che l'introduzione del nuovo potere dell'Autorità abbia l'effetto di aumentare il livello di attenzione posta dalle pubbliche amministrazioni ai profili potenzialmente lesivi della concorrenza e del mercato fin dal momento dell'emissione dei propri atti, senza peraltro trascurare come la norma in commento ben si coniughi con il ruolo di presidio attribuito all'Autorità rispetto al nuovo corso che il legislatore ha inteso marcare nell'ambito dell'attività amministrativa e con riferimento all'apertura dell'accesso e dell'esercizio delle attività economiche alla libera concorrenza.

Per contro, non appare meritevole di considerazioni altrettanto lusinghiere il corrispondente esercizio di traduzione dei fini proposti nei mezzi prescelti dal legislatore, stante l'enucleazione in concreto dei contenuti della norma; una norma che, come visto, si espone a diversi profili oscuri e (già concretamente) forieri di incertezza - coerenti creature di una decretazione d'emergenza - che reclamano *ictu oculi* un intervento chiarificatore da parte della giurisprudenza (ivi inclusa, con i possibili risvolti del caso, quella di rango costituzionale), nell'eventualità in cui questo non giungesse da parte del legislatore stesso.

"Liborgate": the requisite of unlawfulness for purposes of civil liability from a competition law perspective, and a comparison of the Libor scandal with the Tobacco Master Settlement Agreement of 1999

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I. The Context

The BBA Libor rates garnered interest from The Wall Street Journal in 2008, which published a then controversial report on alleged fixing of the interest-rate submissions by the contributor banks in order to favour their own trading positions.[1]

The London Inter-Bank Offered Rate (Libor) is the inter-quartile average borrowing rate compiled everyday by the British Bankers Association (BBA) by consulting a set panel of contributor banks with regards to ten different currencies over fifteen maturities.[2] It is used as a benchmark indexing rate for an estimated excess of 450 trillion USD worldwide; as such, the rate has enormous relevance for financial institutions, mortgage lenders and credit card companies worldwide, as the profitability of their credit portfolio varies proportionally to the indexing rate.[3]

Since May 2012, the BBA Libor USD reference panel of contributor banks has been composed of eighteen global-scale banks, including Bank of America, Bar-

[1] *Cfr.* (Mollenkamp & Whitehouse, 2008)
[2] *Cfr.* (British Bankers Association, 2012)
[3] *Cfr.* (United States Department of Justice, Criminal Division, Fraud Section, 2012, pp. 1, n. 1)

clays Bank, BNP Paribas, Citibank, Credit Agricole, Credit Suisse, Deutsche Bank, HSBC and JP Morgan Chase.[4]

Suspicious emails exchanged between traders at various contributor banks have found their way to the public, with the help of whistle-blowers cooperating with some of the specialized press.[5,6]

Following regulatory investigations in the U.S.A. and in the U.K., in June 2012 Barclays Bank was fined in those two jurisdictions a total of approximately 450 million USD in a criminal settlement, in which it officially agreed that "the manipulation of the submissions affected the fixed rates on some occasions", dating as far back as 2005.[7]

As such, it is difficult to imagine that Barclays Bank engaged alone in these manipulations, and authorities in at least seven jurisdictions have already opened investigations into the fixing of BBA Libor submissions, involving a reported number of twenty banks.[8,9,10]

The findings of these administrative and criminal investigations may lead to prosecution of the involved companies and individuals, and give rise to more public-nature settlements or sanctions being imposed by regulators on the involved parties.

The present work focuses on analysing the requisite of unlawfulness of these facts for purposes of private civil liability procedures, and to compare the Libor manipulation scandal with the "Big Tobacco cases" (or "Tobacco Master Settlement Agreement") of November 1998 in search of relevant indicators as to the recoverability of the damages suffered by competitors of the contributor banks.

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[4] Full list on the website (British Bankers Association, 2012)

[5] "When a trader asks a colleague to submit false information in order to boost his profits, the correct answer is not 'done...for you big boy'" (R.D., 2012)

[6] "Promises of Bollinger, coffees and affectionately dubbing a banker 'big boy' are among a series of jaw-dropping emails uncovered as part of the FSA investigation into rate-manipulation at Barclays" (Grierson, 2012)

[7] *Cfr.* (United States Department of Justice, Criminal Division, Fraud Section, 2012, pp. 13, n. 30)

[8] *Cfr.* (The Economist, 2012); (Enrich & Cimilucca, 2012)

[9] "Investigations regarding LIBOR are ongoing in the United States, Switzerland, Japan, United Kingdom, Canada, the European Union, and Singapore by nine different governmental agencies, including the DOJ, the SEC, and the CFTC." *In* (Subramanian, et al., 2012, pp. 22, n. 139)

[10] "In March 2012, the Monetary Authority of Singapore disclosed that it has been approached by regulators in other countries to help in investigations over the possible manipulation of interbank interest rates." *In* (Subramanian, et al., 2012, pp. 25, n. 169)

II. Unlawfulness (*reus*) as a cornerstone requirement for civil liability

The traditional civil systematization divides civil liability,[11] into two main different types of liability, dependent on whether or not what was violated had the nature of a *negotium* between the parties. Essentially, if the parties were bound by a contract, and a party or group of parties wish to claim damages arising from the other parties' failure to perform or the deficient performance, this would be the domain of contractual liability.[12]

In cases where no such *negotium* between the parties sets out the conventional rules to manage their relation (working, between them, as a real *lex privata*) this would be the domain of extra-contractual or "delictual" civil liability.[13,14] The term extra-contractual liability is preferred over delictual liability for two main reasons: the first is a positivist one. As the previous examples show, civil legislators in most European jurisdictions use extra-contractual rather than delictual liability; it seems appropriate that the doctrinal concept matches – if possible – the *de lege lata* concept. The second reason is that the word delict means a violation of the law, but implies a rather negative tone as to a judgment of reproach of the agent, which should not always be the case, for reasons of objective or faultless liability which will discussed below.

Whatever one may prefer to call this concept – extra-contractual liability, delictual liability or tort law – the dominant legal traditions concur with the generic axiology of the principle. In fact, the idea that whoever illegally violates somebody elsÈs right or legal statute designed to protect other's interests, and in doing so causes damage, shall be obliged to compensate the victim for the losses resulting

[11] *Responsabilité civile* in French, *responsabilidad civil* in Spanish, *responsabilidade civil* in Portuguese and *responsabilità civile* in Italian.

[12] *Responsabilité contractuelle* in French (art. 1147 CCiv.), *responsabilidad contractual* in Spanish (art. 1101 CCiv.), *responsabilidade contratual* in Portuguese (art. 798 CCiv.), *responsabilità contrattuale* in Italian (art. 1218 CCiv.).

[13] The Civil Law: *Responsabilité extra-contractuelle* in French (art. 1382 CCiv.), *responsabilidad extra-contractual* in Spanish (art. 1902 CCiv.), *responsabilidade extra-contratual* in Portuguese (art. 483 CCiv.), *responsabilità extracontrattuale* in Italian (art. 2043 CCiv). See also art. 823 of the German Civil Code (or BGB). In the Common Law, the principle has been established in the case law, e.g. "in order to be liable for the loss of someone else, the act or ommision of the defendant must have been wrongful and negligent and have caused the loss."; "policy considerations must dictate that the plaintiff should be entitled to be recompensated by the defendant for the loss suffered" in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* SA 2006 (1) 461 (SCA) (Bloemfontein, South Africa).

[14] The traditional dichotomy or *summa divisio* between contractual and extra-contractual liabilities in civil jurisdictions does not go not without criticism, and some authors discuss the existence of a *tertium genus* or third way; an intermediate way between contractual and extra-contractual liabilities. That discussion, however, is beyond the scope of this work. See generally Markesinis *et al*, *Compensation for personal injury in English, German and Italian Law*, 86-87.

from the violation dates back to 286 b.C. with the first known Roman statute on the matter (Lex Aquilia de damno).

One of the traditional requisites for civil liability is unlawfulness of the fact (*actus reus*): which is to say, conversely, that – in principle – somebody who acts within the boundaries of the Law cannot be expected to pay compensation, even if that person's actions infringe upon somebody elsÈs legally recognized rights and cause injuries. Moreover certain circumstances which would otherwise attract liability may have a legally relevant justification, which would exclude unlawfulness (e.g. direct action, consent, *force majeure*, state of necessity).

Unlawfulness, as a requisite of civil liability for illicit facts consists in the violation of a legal duty.[15] Usually two forms of unlawfulness are distinguished: firstly, the violation of third party's subjective rights; secondly, the violation of a juridical duty aimed at protecting third party's legal interests or a duty.

The unlawful act implies the breach of a juridical duty. As such, it implies the existence of such legal duty; the existence of a command to intelligent and free human beings that have completeness of vision and ability to form and execute a decision; it entails the voluntary practice of a conduct different than the one commanded or prescribed in terms of the Law.

In other terms, there is a double-requisite for a fact to be unlawful: (i) it was not adopted in the precise terms of the norm; (ii) the end or goal of that normative imposition is to safeguard a third party or an interest of a third party.

Since we have to discuss whether competitor banks had a legally protected interest – and if, conversely, contributor banks adopted facts which weren't consistent with the precise terms of the applicable norms – these questions raise issues which are to be resolved predominantly within the domain of Competition Law, not under Civil Law.

[15] In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) 461 (SCA) (Harms, Cameron, Van Heerden, Mlambo, & Cachalia, 2006), the Supreme Court of South Africa concluded that the violation of a duty – "even a legal duty" – "not to err negligently (…) does not mean that (…) acted wrongfully". We disagree, and are not persuaded by this argument. In fact, it is widely accepted that the violation of a legal duty not to err negligently necessarily implies the agent acted wrongfully: in negligence. But we do agree with the court in ruling, in the same case, that a failure to arrive at a decision without negligence does not create a *prima facie* obligation to compensate. It seems the court is confusing two concepts: negligence is a form of *culpa* – or disconformity of the agent's action with the general legal conviction of the community – but *culpa* is not the only requisite of liability. The agent will not be liable only because s/he acted with *culpa*; all other requisites – namely unlawfulness, damage, causation – still have to be cumulatively verified. In *Telematrix*, the court doesn't seem particularly concerned about verifying the other requisites in extensive detail, as one would expect; this gives rise – in regard to this case – to questions of judicial technique, and the conclusion reached in this case doesn't seem the most correct.

III. The BBA Libor as an industry standard

According to the BBA Libor's official website,[16] the BBA Libor interest rate "is the primary benchmark for short term interest rates globally. It is written into standard derivative and loan documentation such as the ISDA[17] terms, and is used for an increasing range of retail products such as mortgages and college loans."

The repeated use of the term "primary benchmark" by the BBA itself is revealing as to the breadth and scope of the rates: a benchmark in this sense might be defined as a "predetermined set of securities, used for comparison purposes. Such sets may be based on published indexes […]."[18] The BBA Libor would be one of such published indexes, and, according to its own website, the "primary", i.e. most relevant for international money markets;

More technically, a benchmark interest rate would be "the minimum interest rate investors will accept for investing in a non-Treasury security;"[19] according to the BBA itself, "the cost of unsecured borrowing in the London interbank market".

A benchmark is, then, a point of reference for a measurement. In the case of the BBA Libor, this is a point of reference for the measurement of the perceived cost of unsecured borrowing in the London interbank market.

In becoming members of contributor panels, banks are indisputably fully aware of the nature of BBA Libor as "the primary benchmark" for money markets worldwide, and its importance "as a barometer to measure strain in money markets and as a gauge of market expectation for future central bank interest rates."[20]

Not only was the BBA Libor designed precisely to serve as an impartial basis for calculating interest on syndicated loans,[21] it became the worldwide reference for benchmark interest rates. As such, "the integrity of […] Libor […] is therefore of fundamental importance to both UK and international financial markets."[22]

The BBA is not a club of banks engaging in dealings only with each other, and Libor is not a rate set for the exclusive use and enjoyment of its members. It is

[16] (British Bankers Association, 2012)

[17] ISDA: the International Swaps and Derivatives Association, headquartered in New York.

[18] American Capital, Ltd.

[19] Investor Words, 2012

[20] British Bankers Association, 2012

[21] "In 1984 UK banks asked the BBA to develop a calculation that could be used as an impartial basis for calculating interest on syndicated loans. This led to the creation of "BBAIRS" – the BBA Interest Rate Settlement in 1985, which in 1986 became bbalibor. The objectivity and accuracy of the rates allowed derivatives to be created based on the data as a reference, and is now widely used in the City of London and worldwide." (British Bankers Association, 2012)

[22] UK Financial Services Authority, 2012, pp. 2, n. 6

purposely calculated and published to serve as the "primary benchmark for short term interest rates globally."[23]

As such, the argument that the BBA Libor rates are an "industry standard" seems persuasive: Libor effects reach far beyond the mutual dealings of the contributor banks and of the BBA members.[24] It also seems convincing that contributor banks were fully aware of these facts and of the high importance that Libor contributions and processes meet the necessary regulatory obligations and observe the highest standards in ensuring the accuracy of the rate.

Having submitted contributions based on "inappropriate" motivations, Barclays Bank was found in violation of the UK Financial Services Authority's Principles for Business 2, 3 and 5, and agreed to pay significant administrative penalties. This confessed wrongdoing is merely instrumental for establishing unlawfulness from a civil perspective, which leads to the issue of whether besides regulatory implications these confessed violations might additionally entail any private implications with regards to claims for damages.

Which is equal to asking, as per the previous definitions: were the contributor banks bound by a normative imposition whose purpose is to safeguard a third party or a legally protected interest of a third party?

The nature of the facts seems to meet the requisite of unlawfulness: interest rate submissions by contributor banks were not always adopted in the precise terms of the applicable norms, and the administrative settlements with British and American authorities are an indication of this.[25] However, this only solves part of the problem.

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[23] The BBA has been quoted as saying it "calculates and produces BBA Libor at the request of our members for the good of the market." (Vaughan & Westbrook, 2012)

[24] According to *The Wall Street Journal*, the reliability of LIBOR "matters, because the rate system plays a vital role in the economy." (Mollenkamp & Whitehouse, 2008)

[25] In fact, the question of the effect of government victory in subsequent private suit is dealt with by Areeda and Hovenkamp in a homonym heading: "Clayton Act §5(a) allows subsequent private plaintiffs to make prima facie use of findings adverse to a defendant in a prior government suit. […] [It] was of considerable value to private plaintiffs who wish to 'tag along' on earlier government suits." (Areeda, Hovenkamp, & Blair, 2000, pp. 200-201). We are unsure whether extensive interpretation of this provision would allow for the 'tagging along' in facts uncovered or confessed by defendants in government *settlements* rather than in government suits. The *external efficacy* of a government settlement does not seem to raise *prima facie* issues why it shouldn't be accepted, for example in respect of the safeguarding of the fundamental rights of the settling parties, though we affirm this with a relevant degree of precaution. There are interactions between §5(a) and a collateral estoppel, better addressed by the cited authors in pp. 204; similar precaution – with regards to the *external efficacy* of prior government suits, is adopted by the U.S. Supreme Court, in acknowledging that "§5(a) involved a more 'delicate area in which a judgment secured in an action between two parties may be used by a third'" *In* (Areeda, Hovenkamp, & Blair, 2000, p. 201).

The question remains with regards to the nature of the normative impositions that were violated, i.e. whether or not their objective was to safeguard a third party or a legally protected interest of a third party.

The purpose of financial services regulation is not unitary: it aims simultaneously at protecting depositors, the supply of credit, the stability of the financial system as a whole, the solidity of the financial institutions within it, and the overall confidence in the financial system. As such, financial services regulation aims primarily at ensuring the financial marketplace is a safe "ecosystem" for all its "inhabitants", who share a common interest in overall transparency and stability. The mandate of supervisors is to regulate and supervise the behaviour of financial institutions within the whole market, and enforce compliance in the interest of overall transparency and stability of that particular market venue.

In no country taxpayers are funding very expensive regulatory and supervisory activities in financial markets for their recreational satisfaction. On the contrary, they understand the benefits of a healthy financial system, and conversely the high risks of an unregulated financial marketplace, which comes at an even highest cost for the economy.

Unlike most other industries, a turmoil in the financial industry tends to send shockwaves through the whole economy. This leads to our own adaptation of a very famous concept on the issue of chaos theory: does the manipulation of an interest rate in London set off a worldwide credit crunch?[26]

While the adapted version is not as poetic as the original butterfly metaphor, it still comes a great way to illustrate the potentially worldwide consequences of any manipulations in money markets, which are inherently global. Hence, the primary mandate of financial supervision is not to protect consumers, but a more ample one: its objective is the behaviour of financial institutions *in the mutual and reciprocal interests of the all the intervenients in money markets* and of the general public.

On the matter of whether or not the objective of the norms that regulate the behaviour of financial institutions was to safeguard a third party or a legally protected interest of a third party, it is reasonably convincing, in face of these arguments, that the answer is affirmative.

In this light, it could be argued that the manipulation of the submissions should be deemed a fact with legal relevance in violation of another person's legally protected *interest*, which satisfies our definition of *actus reus*.

[26] "Butterfly effect", coined by Edward Lorenz: "does the flap of a butterfly's wings in Brazil set off a tornado in Texas?"

However, there are alternative theoretical paths to come to this conclusion, especially with regards to the protection potentially awarded to the competitors who may have suffered losses.

When a very small group of banks controls the principal benchmark index for interest rates worldwide, what they are effectively doing is setting the *price of money*, or at least *the minimum price of unsecured borrowing in the London interbank market* – which is the primary marketplace for these types of mutual dealings in the world, and so the conclusion is the same.

The idea of *minimum prices* in an industry resonates well in the domain of competition law and it is one of its traditional objects.

However, there seems to be a fundamental contradiction in this scenario: in the vast majority of markets, the higher the minimum prices established by the market leader or leaders, the better off all competitors would be, since overall prices would increase for everyone, albeit artificially,[27] at the illegitimate expense of the clients and the consumers *and* at the expense of the overall competitive process.

Generally, the interests of competitors are parallel and in the same direction. As such, an action by the market leaders to reduce the minimum prices would probably be deemed as a capitulation to the competitive process[28] that forces a price reduction upon the leaders.

Since the manipulations of the interest rates consisted, more often than not, in submitting lower figures than the accurate, what happened – curiously – was that in some situations the price of money was actually set at a *lower* figure than what would have resulted of a normal process.[29]

This impacted enormous amounts of financial deals around the world, making it actually less expensive to borrow money than it would have been as a result of a well-functioning process.

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[27] Not as a result of competitive market dynamics.

[28] Surrender to Adam Smith's "invisible hand"?

[29] "Throughout the Class Period, Defendants conspired to suppress LIBOR below the levels it would have been set had Defendants accurately reported their borrowing costs to the BBA. […]Defendants each had substantial financial incentives to suppress LIBOR. First, Defendants were motivated, particularly given investors' serious concerns over the stability of the market in the wake of the financial crisis that emerged in 2007, to understate their borrowing costs—and thus the level of risk associated with the banks. […] Second, by artificially suppressing LIBOR, Defendants paid lower interest rates on LIBOR-based financial instruments they sold to investors during the Class Period. Illustrating Defendants' motive to artificially depress LIBOR, in 2009 Citibank reported it would make $936 million in net interest revenue if rates would fall by 25 bps per quarter over the next year and $1.935 billion if they fell 1% instantaneously. JPMorgan Chase likewise reported significant exposure to interest rates in 2009. The bank stated that if interest rates increased by 1%, it would lose over $500 million." *In Metzler Investment GmbH (and others) v Bank of America Corp. (and others)* MDL No. 2262, 11 Civ. 2613 (Complaint Filed by Counsel for Plaintiffs, 2012, pp. 12-14, ns. 45-47)

From the perspective of the average private consumer and company – who tends to borrow more money from the bank than lend to it[30] – the benchmark rate being set at a lower value than what would have otherwise been, resulted in the overall loan bill being less expensive.

However, one man's income is another man's cost: in this case, the savings achieved by those which benefited from these practices come at the expense of the profitability of the credit portfolio of virtually *all banks in the world*, or anybody who pegged securities to the BBA Libor interest rates.

As such, a particular worry for banks involved in the manipulations is that they face an asymmetric risk: for every person who may have lost, another will probably have gained. Yet only those who have lost could eventually seek compensation,[31] and the banks will be unable to claim back the unjust gains made by the others. This argument deals with the issue of the recoverability of pure economic loss, and would deserve a commentary of its own.[32]

However, it should be noted that the traditional business of banking is precisely the intermediation of risk through the interposition in the exchanges of money, and risks, between lenders and borrowers. For this activity they charge a price:[33] usually

[30] Even if this was not the case, which we cannot support with scientific evidence, practice shows us that loans tend to react more/faster to changes in the indexing rate than deposits and other savings instruments.

[31] At least two class actions in the United States have already tried to: (1) "Plaintiffs now seek relief for the damages they have suffered as a result of Defendants' violations of federal and state law." *in Metzler Investment GmbH (and others) v Bank of America Corp.* (and others) MDL No. 2262, 11 Civ. 2613 (Complaint Filed by Counsel for Plaintiffs, 2012, pp. 8, n. 16) and (2) "Defendants' manipulation of LIBOR allowed them to pay unduly low interest rates to investors, including Baltimore Plaintiffs, on LIBOR-based financial instruments during the Class Period. Accordingly, the Baltimore Plaintiffs seek relief for the damages they have suffered as a result of Defendants' violations of federal law. Baltimore Plaintiffs assert claims under the Sherman Act, 15 U.S.C. §§ 1, *et seq.* and the Clayton Act, 15 U.S.C. §§ 12, *et seq.*" *in Mayor and City Council of Baltimore (and others) v Credit Suisse Group AG (and others)* 2012 WL 1522306 (S.D.N.Y.) (Subramanian, et al., 2012, pp. 2-3, n. 8)

[32] The so-called fear of unlimited liability is one of the traditional problems regarding the recovery of pure economic loss. This broad category of injuries is generally treated differently than losses arising directly out of physical loss. See generally Palmer, V. V., & Bussani, M. (2007, December). *Pure Economic Loss: The Ways to Recovery*, Dari-Mattiacci, G., & Schaefer, H.-B. (2007). *The core of pure economic loss*.

[33] [33]Typically, the price is set per currency unit lent, for a specific maturity (i.e. "USD Libor 3-months + x %" per year). According to one of the complaints "For example, market participants commonly set the interest rate on floating-rate notes as a spread against LIBOR (*e.g.*, "LIBOR + [X] basis points") and use LIBOR as a basis to determine the correct rate of return on short-term fixed-rate notes (by comparing the offered rate to LIBOR)" *in in* Metzler Investment GmbH (and others) v Bank of America Corp. (and others) MDL No. 2262, 11 Civ. 2613 (Complaint Filed by Counsel for Plaintiffs, 2012, pp. 6, n. 11)

the sum of the benchmark interest rate[34] and a commercial margin ("*spread*"[35]); conversely, for the resources that the bank itself borrows to finance its credit activities it pays a price: whether paying interest on deposits, promissory notes, bonds or other securities, or from borrowing money through the interbank market.[36]

In the mere theoretical scenario that banks weren't required to keep minimum capital reserves to preserve solvability ratios, and assuming they could finance their whole credit portfolio through the interbank market, it could probably be successfully argued that a variation on the indexing rate wouldn't affect their margin, because any variation of the costs of borrowing in the interbank market would immediately be passed on to the debtors, either increasing or decreasing their interest payments.

In practice this is not true, firstly because whilst most credit activities have fluctuating rates, the banks' financing outside of the interbank market[37] is generally less responsive to variations in the indexing rate, as these instruments are not usually immediately pegged to them.[38]

Secondly, because the imposition on banks of minimum capital[39] requirements means that the return on shareholders' funds[40] is very much dependent on the evolution of the benchmark indexing rates, in the sense that the profitability of the bank's assets[41] is more sensitive to the evolution of the rates than its funding costs.

In this scenario, it seems very likely that a decrease of the benchmark rates would negatively affect the profitability of most banks' credit portfolio, since their debtors would generally have to pay less interest on their indexed contracts. However, the bank's funding costs wouldn't decrease in the same proportion at the same speed, which would mean that a decrease in the benchmark interest rates, such as the BBA Libor, would negatively affect the profits of the "average bank".

If this is the result of a legitimate decrease in the benchmark interest rate, the banks who voluntarily committed to it as the indexing for their credit portfolio

[34] Of which the BBA Libor is the biggest example, but others exist, such as EURIBOR, TIBOR, etc.
[35] The *spread* is the sum of credit risk, operational costs, and profit.
[36] In these cases, the "interbank offered rates" for unsecured lending (such as the BBA Libor) are the determinant measure for the cost of borrowing.
[37] Through deposits, promissory notes, bonds and other securities.
[38] Of course a radical change in market conditions (inflation, solvency, competition, fiscal policy, to name but a few of these market conditions) will ultimately lead to depositors requiring a higher rate, or inversely, being satisfied with a lower rate – to give a simple example – but either way the effect is not as immediate as a variation in the benchmark rate would have for debtors.
[39] In this sense, and in short, the sum of shareholders' funds or equity with the bank's deposits with central or reserve banks.
[40] The "Return on Equity", in simple terms.
[41] Of which, the more relevant for this purpose would be its credit portfolio.

would obviously have to bear the costs of the decrease, as they would conversely benefit in the case of an increase in the benchmark interest rates.

However, in a situation where the movement in the interest rates was not legitimate, i.e. in the case it was not the result of the relevant market forces at play in accordance with the prescribed set of rules, in the light of competition law, it doesn't seem acceptable that presumably honest players be negatively affected by their competitors' illegal actions.[42] This leads directly to the objective of competition law, and what its main purpose might be.

A parallel can be established between competition regulation and financial services regulation for the purpose of comparing their objectives: both are manifestations of the power of the State. It has previously been concluded that financial services regulation does not have a unitary mandate to protect consumers but to protect *all intervenients in money markets with regards to their mutual and reciprocal interests* and of the general public.[43] So the question of what the purpose of competition law might be is also of central importance.

In line with the previous positions, it seems quite easy to understand that it would seem far too narrow for competition law to have the sole purpose of protecting consumers. It seems to fit better within the system's logic that competition law, for a variety of reasons, is not primarily directed at protecting consumers, but at a rather wider objective: to promote competition as a process through which more efficient allocation of resources in an economy would be achieved.[44,45,46]

[42] *Cfr.* "During the Class Period, as explained above, Defendants and their co-conspirators engaged in a continuing agreement, understanding, or conspiracy in restraint of trade to artificially fix, maintain, suppress and stabilize LIBOR and thus the prices and rates of return on LIBOR-Based Derivatives sold by them. In formulating and effectuating the contract, combination, or conspiracy, Defendants and their co-conspirators engaged in anticompetitive activities, the purpose and effect of which were to fix, maintain, suppress and otherwise make artificial the price of LIBOR-Based Derivatives." *in Mayor and City Council of Baltimore (and others) v Credit Suisse Group AG (and others)* 2012 WL 1522306 (S.D.N.Y.) (Subramanian, et al., 2012, pp. 34, ns. 217-218)

[43] Of course this is not the only purpose of competition law, and many jurisdictions also attribute to competition law a mission of "economic transformation". Two primary examples of this "transformative" mission would be, in the European Union competition law has been used to achieve greater economic integration of the member states into a single "internal market", and in South Africa competition law has been used to favour economic empowerment of "formerly disadvantaged people".

[44] The concept of allocative efficiency is very familiar in Competition Law, and is one of the lasting contributions of Chicago-school thinking in competition law. Sutherland and Kemp discuss allocative efficiency as a "deeper reason often sought for promoting competiveness". (Sutherland & Kemp, 2010, p. 3-12).

[45] "A competition culture contributes to better allocation of resources, greater economic efficiency, increased innovation and lower prices" (Commission of the European Communities, 2008)

[46] "Many saw competition as the guardian of equal opportunity and the common right of each individual to choose and pursue a calling unmolested by those more successful, more ambitious, or more powerful than they." (Areeda, Hovenkamp, & Blair, 2000, p. 4)

As such, competition law's primary objective is to ensure that competitors are competing in the marketplace on their merits, rather than on anything else.[47] Sutherland and Kemp contend that competition law aims to protect the integrity of the marketplace – what they call "the competitive process" (p. 3-25) – rather than the egoistic interests of individual participants in it, be they consumers or competitors: on one hand, the former could, in theory, even benefit from anti-competitive practices[48] and in any case are protected by their own, homonym law discipline; on the other hand, it is easy to imagine that "the interests of particular rivals frequently will be protected by competition law but this will happen coincidentally."[49]

That is the traditional argument for imposing administrative fines on anti-competitive practices. Only time will tell if the competition authorities in the various jurisdictions who are investigating the BBA Libor interest rates manipulations by some contributor banks will find contraventions of their respective competition statutes, as up to now only administrative settlements with financial supervisors have been made public. It is not clear at this stage if any traditional anti-competitive practices actually took place. They are usually broadly defined as horizontal restrictions,[50,51] but that possibility must not be ruled out in principle. At least two

[47] Sutherland and Kemp, in their *Competition Law of South Africa* contend that "unlawfulness, for the purpose of unlawful competition, should be determined by ascertaining whether competition is taking place on merit." And that "competition on merit should generally be allowed, whereas competition that does not fall into this category may be labeled unlawful." (Sutherland & Kemp, 2010, p. 3-25)

[48] Dumping can be considered as the prime example of an anti-competitive practice that benefits consumers, among others.

[49] Sutherland and Kemp "Competition law operates globally. It is primarily concerned with the protection of the competitive process, and not the rivals in that process. The interests of particular rivals frequently will be protected by competition law but this will happen coincidentally." (Sutherland & Kemp, 2010, p. 3-25)

[50] Defining the output, price, margins or market shares between the competitors. "Horizontal restrictive practices enable a number of competitive firms to act like monopolist. Restrictive horizontal practices occur where competitors co-operate rather than compete. They constitute archetypal anti-competitive acts." (Sutherland & Kemp, 2010, p. 5-4). Horizontal restrictive practices are prohibited in the USA by section 1 of the Sherman Act, art. 101 of the TFEU in the EU, and chapter 2 of the South African Act.

[51] *"Bloomberg* […] reported that European Union antitrust regulators are also investigating whether banks effectively formed a global cartel and coordinated how to report borrowing costs between 2006 and 2008." *in Mayor and City Council of Baltimore (and others) v Credit Suisse Group AG (and others)* 2012 WL 1522306 (S.D.N.Y.) (Subramanian, et al., 2012, pp. 25, n. 168)

class action complaints have so far been filed in respect of this issue with the U.S. District Court for the Southern District of New York.[52,53,54]

Should it not be accepted that violations of financial regulations may give rise – apart from administrative fines – to private enforcement of damages on the same grounds, which, in any case, is not the present position, it can surely be agreed upon that the violation of competition law regulations does give rise to an increasing number of private enforcement opportunities, in various jurisdictions.[55,56,57]

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[52] In fact, a class action complaint, filed with the U.S. District Court of the Southern District of New York by seven plaintiffs in name of a potential class, argues that "Throughout the Class Period, Defendants betrayed investors' confidence in LIBOR, as these financial institutions conspired to, and did, manipulate LIBOR by underreporting to the BBA the actual interest rates at which the Defendant banks expected they could borrow unsecured funds in the London interbank market – *i.e.*, their true costs of borrowing – on a daily basis. The BBA then relied on the false information Defendants provided to set LIBOR. By acting together and in concert to knowingly understate their true borrowing costs, Defendants caused LIBOR to be set artificially low." *In Metzler Investment GmbH (and others) v Bank of America Corp. (and others)* MDL No. 2262, 11 Civ. 2613 (Complaint Filed by Counsel for Plaintiffs, 2012, pp. 7, n. 13)

[53] A second class action complaint filed with the same court contends that "Throughout the Class Period, Defendants conspired to, and did, manipulate LIBOR by misreporting the actual interest rates at which they expected they could borrow funds--*i.e.,* their true costs of borrowing--on a daily basis. By acting together and in concert to knowingly understate their true borrowing costs, Defendants caused LIBOR to be calculated or suppressed artificially low, reaping hundreds of millions, if not billions, of dollars in ill-gotten gains." *in Mayor and City Council of Baltimore (and others) v Credit Suisse Group AG (and others)* 2012 WL 1522306 (S.D.N.Y.) (Subramanian, et al., 2012, pp. 2, n. 6)

[54] "The BBA's activities in setting LIBOR for various currencies reflect a global rate-setting cartel. As one commentator has noted, "LIBOR is not a real market rate of interest and is instead set by a cartel of mostly foreign banks operating in London with little or no oversight and no transparency...."" *in Mayor and City Council of Baltimore (and others) v Credit Suisse Group AG (and others)* 2012 WL 1522306 (S.D.N.Y.) (Subramanian, et al., 2012, pp. 8, n. 50)

[55] In the same direction, Sutherland and Kemp: "The major remedy provided by the Clayton Act is a claim for damages. The idea behind this is that private parties should assist in the enforcement of antitrust laws by instituting, on their own initiative, claims for damages. Section 4 allows any person who is injured by a breach of the antitrust laws (which include the Sherman Act) to bring a claim for treble damages as well as cost of suit against a person who breaches these laws". (Sutherland & Kemp, 2010). Treble damages were claimed at least in the Baltimore plaintiffs' complaint under the Sherman act: "Defendants' conspiracy is a per se violation of the federal antitrust laws and is, in any event, an unreasonable and unlawful restraint of trade and commerce. […] The Baltimore Plaintiffs and members of the Class are each entitled to treble damages for the violations of the Sherman Act alleged herein." *in Mayor and City Council of Baltimore (and others) v Credit Suisse Group AG (and others)* 2012 WL 1522306 (S.D.N.Y.) (Subramanian, et al., 2012, pp. 35, ns. 223-226)

[56] "Facilitating damages claims for breach of antitrust law will not only make it easier for consumers and firms who have suffered damages arising from an infringement of antitrust rules to recover their losses from the infringer but also strengthen the enforcement of antitrust law." (Commission of the European Communities, 2005, p. 3).

[57] "Private as well as public enforcement of antitrust law is an important tool to create and sustain a competitive economy", (Commission of the European Communities, 2005, p. 3)

What seems to be determinant in establishing unlawfulness, in this perspective, is the fact that contributor banks submitted the figures in full knowledge of their *purpose*: what they had been designed for and what they were going to be used across the market for.[58]

When they agreed to participate in the BBA Libor contributor panel, they accepted a duty of honesty and transparency that was not forced upon them. When agreeing to commit to a position of particular importance within their industry, contributor banks accepted the code of practice which came along with the position. From an administrative perspective, Barclays Bank paid a hefty price for not living up to the required standard. But when deciding to abuse that position of particular trust within its industry to favour egoistic interests, Barclays Bank unacceptably violated norms that were designed to legally protect other peoplÈs interests.[59,60]

This is why this kind of unacceptable behaviour must be susceptible of private enforcement. In light of the arguments put forward in this paper, the requisite of unlawfulness seems verified through two different theoretical paths.[61]

Additionally, not allowing private enforcement of these claims on the basis that these actions were not unlawful would send the wrong kind of message through

[58] The situation would have been completely different if some banks had engaged in a pegging of their credit portfolio to something that is not directly related to banking and whose purpose was not to serve as a benchmark for interest rates: i.e. the average number of goals in the previous week's UEFA Champions League matches, or the previous week's winning lottery number.

[59] In *Minister van Polisie v. Ewels* 1975(3) SA 590 A, quoted copiously in South African jurisprudence, "a defendant's conduct, including an omission, is regarded as unlawful when the circumstances of the case are of such a nature that it not only incites moral indignation but also that the legal convictions of the community demand that it ought to be regarded as unlawful and that the damage suffered by the plaintiff ought to be made good by the defendant." *In Minister van Polisie v Ewels* 1975(3) SA 590 A (Hefer, Nestadt, Nienaber, van den Heever, & Harms, 1975)

[60] The U.S. class action complaints stress the anticompetitive nature of the practices as the main unlawful element, not making use of the evidence in the administrative settlements for this purpose. E.g.: "Defendants and their unnamed co-conspirators entered into and engaged in a conspiracy in unreasonable restraint of trade in violation of Section 1 of the Sherman Act and Section 4 of the Clayton Act." *In Mayor and City Council of Baltimore (and others) v Credit Suisse Group AG (and others)* 2012 WL 1522306 (S.D.N.Y.) (Subramanian, et al., 2012, pp. 35, n. 221). We are not entirely persuaded that arguing the anticompetitive nature of the practices is the only possible way. We have previously raised the issue of private claims with respect to violations of financial supervision, which seem less challenging to prove than restraint of trade. Considering that the cited class action complaint dates earlier than Barclays Bank's settlements with the U.S. and U.K. authorities, we can only speculate if the arguments put forth in the complaints wouldn't have been different if counsel for the plaintiffs knew, at that date, the outcome of the administrative cases.

[61] The two paths being: (i) unlawful violation of financial regulation statutory obligations and; (ii) unlawful violation of antitrust statutory obligations for horizontal restrictions/restraint of trade. Though a certain degree of caution should be exercised with regards to the issue which we called "*external efficacy*" of prior settlements, and which we have previously mentioned (*Cfr.* footnote n. 39).

the financial system and ultimately to every company in a position to dominate key variables within its industry.[62,63]

Even though it seems an imperative that these practices be met with determined response by the injured parties, there may be an issue of "prosecutability". This deals with the ability of private parties to enforce or obtain compensation by legal process given the nature of this case, even if all material requisites are verified, and is intimately related to the issue of the recoverability of pure economic loss; an important subject for further studies.

IV. The demystification of comparisons with the "Big Tobacco" cases of the 1990s

According to The Economist: «"This is the banking industry's tobacco moment," says the chief executive of an unnamed multinational bank, referring to the lawsuits and settlements that cost America's tobacco industry more than $200 billion in 1998. "It's that big," he says.»[64] The BBA Libor rate-fixing scandal has drawn many such comparisons with the "Big Tobacco" cases, and it seems a valuable exercise to analyse whether or not they are truly parallel.

The present case apparently has an element of similarity with the so-called "Big Tobacco cases"[65] or "Tobacco Master Settlement Agreement" of November 1998 (TMSA) in which the four largest American tobacco companies[66] entered into a common settlement with 46 U.S. States. Considering the amounts potentially involved in settlements with the banks should it continue to evolve in that direction, it could well prove to be "Big Money's Big Tobacco moment". As such, this comparison is not completely deprived of merit.

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[62] Sutherland and Kemp contend that "the role of honesty, fairness, morals and business ethics in competition law is controversial but these factors always have been of considerable importance in determining unlawfulness in the law of unlawful competition." (Sutherland & Kemp, 2010, p. 3-25)

[63] "Improving compensatory justice would therefore inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules", (Commission of the European Communities, 2008, p. 5)

[64] (The Economist, 2012)

[65] "The lawsuits brought against various tobacco manufacturers, attempting to hold them responsible for wrongful death, injury, or medical expenses related to cigarette smoking and other tobacco use. Cases have been brought both by individual plaintiffs and by government officials, including U.S. State Attorney General. Punitive damages for the plaintiff have often been awarded as a result of a successful litigation. However, the vast majority of court decisions have been in favor of the defendant tobacco companies." (Wikipedia, 2012)

[66] Philip Morris, Inc; R. J. Reynolds; Brown & Williamson; Lorillard; collectively referred to in the settlement as the *original participating manufacturers* and informally as "Big Tobacco" (Wikipedia, 2012)

But analyzing it from close enough, the similarities – at least at this early stage – may only result to be of symbolic nature: with the TMSA, the signatory states essentially did two things: (i) they settled their Medicaid lawsuits against the tobacco industry for recovery of their tobacco-related health-care costs, and also (ii) enacted legislation that exempted the companies from private civil liability regarding harm caused by tobacco use.[67]

It seems that the U.S. states, concerned with the increasing costs of treating patients with tobacco-related diseases, effectively "sold" Big Tobacco protection from private claims for civil liability in the form of special legislation, in exchange for very considerable payments in form of a settlement of all litigation from States' public health bodies.

This has obviously raised some controversy: Robert Levy, a fellow with the libertarian think tank Cato Institute,[68] argues that the TMSA created an unconstitutional cartel arrangement that benefited both the government and Big Tobacco:

> "For 40 years, tobacco companies had not been held liable for cigarette-related illnesses. Then, beginning in 1994, led by Florida, states across the country sued big tobacco to recover public outlays for medical expenses due to smoking. By changing the law to guarantee they would win in court, the states extorted a quarter-trillion-dollar settlement, which was passed along in higher cigarette prices. Basically, the tobacco companies had money; the states and their hired-gun attorneys wanted money; so the companies paid and the states collected. Then sick smokers got stuck with the bill."

In the same direction, a 2000 Policy Analysis[69] by the Cato Institute stated that "the [T]MSA is essentially a contract for the purchase by the tobacco companies of a license to restrain trade." A restraint of trade would be illegal under the Sherman Act,[70] and the policy analysis continued to state "the [T]MSA appears to violate the Sherman Act in exquisite detail."

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[67] The U.S. States Medicaid lawsuits against the tobacco industry for recovery of their tobacco-related health-care costs seem a classic example of *pure economic loss*, which will be discussed later. In the case of Medicaid lawsuits, without having investigated into the details of the cases, it seems logical that the compensation claims were not based in the violation of statutory duties. In such cases, it would seem very difficult to obtain reparation under U.S. Law. The recoverability of government medical schemes' costs that result from the products/conduct of private parties poses very complex policy questions at first sight, but seems a very interesting topic for further study.

[68] The Cato Institute is a libertarian think tank founded in 1974 in Washington, D.C., which, according to the 2011 Global Go To Think Tank Index, is the 6th most influential US based think tank, ranking 3rd in Economic Policy and 2nd in Social Policy.

[69] (O'Brien, 2000, p. 3)

[70] Sutherland and Kemp seem to agree: "Agreements that are against public policy for being in restraint of trade are automatically unenforceable" (Sutherland & Kemp, 2010)

However, the argument the TMSA created a cartel of major U.S. tobacco producers which effectively allowed them to charge supra-competitive prices was rejected by U.S. Court of Appeals for the Ninth Circuit in 2007 in *Sanders v Brown*.[71] The court did not conclude that the TMSA and two related state laws violated the Sherman Act.

The merit of the TMSA and the arguments specific to that case far exceed the scope of the present work, but one very important conclusion can be drawn from the tobacco cases: "these details deserve a close look, if only because it's likely that the 'tobacco model' will be replicated in other cases where government eyes some line of business as a source of revenue."[72]

The TMSA was a coordinated, cross-jurisdiction settlement with very particular characteristics – to say the least – hence its controversial consequences and nature. Despite some indication that it might lay the model for other cases in which government sought to levy a disguised tax or excise on a specific business activity in a particularly creative fashion,[73] it seems, surprisingly, that this model was not adopted – at least not yet – in the case of the BBA Libor rate-fixing.[74]

In fact, if this was "the banking industry's tobacco moment," one could make the argument that governments – either individually or collectively – could have settled their investigations against the contributor banks at a hefty price, exempting them in more or less sophisticated forms from private claims on the basis of civil liability regarding damages caused by the manipulation of the rates.

The only two settlements already reached, by only one bank – Barclays Bank – with both UK and USA supervisors do not point in the direction of the "tobacco model", for two reasons: the degree of cross-jurisdictional collaboration that was a central premise of the TMSA was not verified in the Barclays settlements,[75] but most importantly, the settlements reached do not seem to exempt the banks from civil liability for private claims for damages, neither compensatory or punitive.

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[71] *Cfr. Sanders v Brown* 05-15676, 504 F.4d 903; 2007 U.S. App. LEXIS 22723 (Scalia, et al., 2007)
[72] (Olson, 2000)
[73] As suggested by O'Brien, Thomas C. in (O'Brien, 2000, p. 2)
[74] Counsel for Baltimore plaintiffs argues that "the investigation represents an unprecedented joint investigation by both the criminal and antitrust divisions of the DOJ." *In Mayor and City Council of Baltimore (and others) v Credit Suisse Group AG (and others)* 2012 WL 1522306 (S.D.N.Y.) (Subramanian, et al., 2012, pp. 22, n. 139) Even though there is no supporting evidence to disagree with this conclusion, it doesn't seem to be coordination in the same nature, reach or scope than with the TMSA. A significant difference between factual scenarios is the completely different degree of cross-jurisdictional collaboration.
[75] Which might be explained by the fact that, in the USA, financial supervision is a federal matter, whilst compensation for increased health-care costs were pursued by the individual states, since health-care is a state issue, in the American federal and state distribution of jurisdictions and competences.

This second reason brings us back to the issue that first inspired the comparison between "Big Money" and "Big Tobacco" for the present purpose: whilst the tobacco companies effectively bought legal protection from private claims for liability,[76] the banks did not, and this is of key relevance. In the past, it might have been wondered if authorities simply did not contemplate the issue of private claims for damages. The merit of the comparison of the present case with the tobacco cases is that after the tobacco precedent, it is certain that the omission in respect of the issue of private claims for damages in the settlements was not entirely innocent.

In the tobacco cases, even though all requisites of extra-contractual civil liability might have been verified, the would-be defendants were protected by special laws which according to some credible accounts previously cited were "sold" to them by U.S. states, however outrageous this might seem. There was an effective *prosecutability barrier* against private claims for injuries.[77,78]

[76] Raising relevant constitutional and competition issues in the USA. But whether or not the TMSA was in contravention of the Sherman Act, the fact is most of the private claims for injuries after the TMSA were unsuccessful.

[77] A *prosecutability barrier* against private claims for injuries could well result from the granting, by Competition Authorities, of protection under corporate leniency programs. It has discreetly surfaced that some contributor banks have discreetly applied for those. It should be noted that the effect of corporate leniency programs in respect of private claims for damages is not uncontroverted. However, "In a Form 6-K filed with the SEC on July 26, 2011, UBS disclosed that it had 'been granted conditional leniency or conditional immunity from authorities in certain jurisdictions, including the Antitrust Division of the DOJ, in connection with potential antitrust or competition law violations related to submissions for Yen LIBOR and Euroyen TIBOR (Tokyo Interbank Offered Rate).' Accordingly, the company continued, it would "not be subject to prosecutions, fines or other sanctions for antitrust or competition law violations in connection with the matters [UBS] reported to those authorities, subject to [UBS's] continuing cooperation." The conditional leniency UBS received derives from the Antitrust Criminal Penalties Enhancement and Reform Act and the DOJ's Corporate Leniency Policy, under which the DOJ only grants leniency to corporations reporting *actual illegal activity.* UBS later disclosed (on February 7, 2012) that the Swiss Competition Commission had granted the bank conditional immunity regarding submissions for Yen LIBOR, TIBOR, and Swiss franc LIBOR." *In Mayor and City Council of Baltimore (and others) v Credit Suisse Group AG (and others)* 2012 WL 1522306 (S.D.N.Y.) (Subramanian, et al., 2012, pp. 23-24, n. 153)

[78] Areeda & Hovenkamp cast some light on the issue of the private effect of public non-prosecution, though not explicitly in regards of corporate leniency programs: "Such a clearance [the Justice Department's] cannot bind a court, a private plaintiff or the Federal Trade Commission, although a court might choose to give it weight in the same way it can consider enforcement guidelines." *In* (Areeda, Hovenkamp, & Blair, 2000, p. 159). However, if a clearance from the Justice Department in the U.S. "lacks the power to immunize transactions", it would seem reasonable that, similarly, Competition Commissions in different jurisdictions – in the cases where national competition statutes were silent on the private effect of corporate leniency – should not be able to immunize transactions or conducts, following a principle that "the only enforcement conduct these agencies can restrain is their own", thus not precluding private claims even in cases where the government decided not to start the proceedings. (Areeda, Hovenkamp, & Blair, 2000, p. 158)

As long as the "tobacco model" is not adopted in any other jurisdiction in the BBA Libor rate-fixing cases, it seems that no such barriers on the ability of private parties to enforce or obtain compensation by legal action would exist. In fact, given the precedent laid out by the tobacco settlements, it can only be concluded that protection from private claims was purposely left outside of the settlements, thus effectively inviting private enforcement. This would seem the most compatible solution with the various interests at stake, and with the increasingly important role of private enforcement of regulations.

Therefore, in trying to draw a parallel between the manipulations of the BBA Libor rates to other factual scenarios that could serve as valuable comparisons, the tobacco cases of the late 1990s have a double-merit: they apparently resolve the issue of prosecutability by private parties, though silently, and lay down a potential model – of debatable merit – that may well be adopted in jurisdictions who might want to "trade" with banks using the tool of legal protection against a nightmare of litigation in exchange for hefty administrative "settlements".

V. Justification and exclusion of unlawfulness

A final issue regarding unlawfulness is the analysis of eventual causes that could justify the facts, specifically excluding unlawfulness. It has previously been stated that the violation of a third party's subjective right, or violation of a norm directed to the protection of a third party's interest constitutes, as a general rule, an unlawful act. But it may occur that the violation or offense is covered by a motive or cause, which would legally justify the fact and void the otherwise apparent unlawfulness of the act.

The act of exercising a right, even though it may cause injuries to a third party, is a lawful act, provided some conditions: it must be exercised in good faith and consistently with the economic and social end of the right. As a general rule, the legal owner of a specific right does not commit an unlawful act by exercising it, even though it might cause a third party an injury.

The causes of exclusion of unlawfulness, which consist of a typified set or *numerus clausus* contained in statutes or in the case law, usually share three common elements: (i) pre-emptive character: which means that the law exceptionally accepts private enforcement of rights to avoid the violation of a rights, not to react repressively as a retaliation against a violation already committed; (ii) subsidiary nature: it is only licit to act privately, when it is not possible to obtain a solution, in due time, through the normal and public means; (iii) proportionality: the act is only licit if causes a lower injury than the predictable injury which it plans to avoid.

Different jurisdictions accept different causes that exclude unlawfulness, but the four main, commonly accepted are: direct action, legitimate defence, *force majeure* and consent. Going into the detail of each one far exceeds the scope of the present work, since it doesn't seem probable or plausible, in the present case, that any contributor bank invokes any such circumstances in its defence. It seems reasonable to affirm that no material causes that exclude unlawfulness were present.

VI. Conclusion

The present work focused only on discussing the requisite of unlawfulness in civil liability claims and its verification in the particular case of the ongoing BBA Libor manipulation scandal. While it is argued that unlawfulness is verified through various theoretical paths, it is important to bear in mind that litigation opportunities depend on the verification of other requisites, especially the nature of the damages as purely economic. However, in light of the current findings, it seems quite clear that there is a panoply of arguments favourable to claiming compensation from the banks involved in the manipulations, although important caveats remain with regards to the recoverability of pure economic loss.

The only two class action complaints, which, as far as research revealed, have been submitted to the judiciary failed to address convincingly the issue of the traditional difficulties regarding the recoverability of pure economic loss – as does much of the literature surrounding private claims for anticompetitive actions – although they provide valuable contributions to the current issue of unlawfulness.

There is extensive consensus in the doctrinal sources hereby analysed that injuries caused by the violation of statutory obligations should pose no controversies with regards to their recoverability. This is quite an exciting conclusion: the right issue does not seem to be whether, but how can these injuries be effectively repaired. It seems reasonably convincing that – with careful arguing – there are private enforcement opportunities.

In more generic terms, it is possible to foresee growing private enforcement opportunities of competition law in Europe. These are directly connected to the vigour and impulse of the EC Commission. The U.S.A. seems a typical destination for this type of claims, with the promise of treble damages in terms of the Clayton Act, class actions, and wide jurisdictional competence.

Profili evolutivi del diritto della crisi d'impresa

di Vincenzo De Sensi

Sommario: I. Considerazioni introduttive: dalla disciplina della patologia dell'impresa a quella del supporto alle scelte strategiche sull'impresa in crisi; II. Il concordato preventivo con riserva; III. Segue. I vantaggi del concordato preventivo con riserva; IV. Il concordato preventivo con continuità aziendale; V. Segue. Contenuto del piano di concordato preventivo con continuità aziendale; VI. Finanza "ponte" e finanza "interinale; VII. Conclusioni.

I. Considerazioni introduttive: dalla disciplina della patologia dell'impresa a quella del supporto alle scelte strategiche sull'impresa in crisi

Fino a qualche decennio fa il diritto fallimentare – oggi più comunemente definito, anche in ambito accademico, diritto della crisi d'impresa – era considerato come un insieme di norme volte a dare disciplina a un momento patologico della vita dell'impresa: la sua insolvenza.

Oggi, anche sulla spinta della crisi finanziaria in atto e delle complesse dinamiche che essa ha generato nello spostamento di ricchezza verso i Paesi emergenti, assistiamo a una profonda rivisitazione di questa disciplina quale diretta conseguenza del modo di concepire le crisi di impresa. Si afferma, infatti, che le c.d. *special situations* in cui un'impresa può trovarsi sono manifestazione del rischio imprenditoriale, sicché il sistema di norme che ne disciplina la gestione diviene un momento di supporto a scelte di strategia imprenditoriale.[1]

[1] Su questa nuova visione del diritto della crisi d'impresa: Wessels, Bob - Markell, Bruce A. - Kilborn, Jason J., "International cooperation in bankruptcy and insolvency matters", *Oxford University Press*, 2009, p. 1: "As far as businesses are concerned, insolvency law is essential for the support of modern economic processes based on competition, as inefficient businesses must be given a way to change structurally, rehabilitate themselves, or exit in an orderly way from the market."; più in generale sul perseguimento di finalità ulteriori rispetto alla tutela dei creditori: Luttikhuis, Karin, "A dual law for companies in financial distress", in *The intersection of insolvency and company laws*, Insol Europe, Academic Forum, Paris, 2009, p. 28: "In the course of the years, in addition to its original function, maximisation of the proceeds for the joint creditors, the insolvency procedure has been given several

Questa nuova e moderna concezione emerge in più punti della legge fallimentare.

Ne citiamo alcuni: la forte attenuazione della dimensione punitiva e sanzionatoria della procedura fallimentare; l'abolizione del requisito della meritevolezza nel concordato preventivo con evidente distinzione tra le eventuali responsabilità dell'imprenditore commerciale e la sua impresa, intesa quale organismo produttivo che può ancora rimanere sul mercato; l'apertura contenutistica e funzionale del concordato preventivo a realizzare operazioni di razionalizzazione produttiva attraverso fusioni o scissioni societarie; la possibilità data all'imprenditore di chiedere al Tribunale lo scioglimento da contratti pendenti nel concordato preventivo ove questo sia funzionale alla migliore realizzazione del piano di risanamento; la possibilità di ricorrere al concordato con riserva al fine di individuare la migliore strategia percorribile per risolvere la crisi dell'impresa; la sospensione delle norme sull'effettività del capitale sociale in caso di concordato preventivo al fine di dar modo alla società di poter rimanere attiva senza necessità di dover transitare in uno stato di liquidazione, etc.

Potremmo ancora citare altri esempi significativi. Già questi comprovano quanto detto e sollecitano dunque il giurista a riparametrare i propri criteri di orientamento in questa branca del diritto commerciale.

Volendo continuare dunque in questa riflessione introduttiva, ci sembra opportuno porre in rilievo tre nuove dimensioni del diritto della crisi d'impresa, che riguardano in particolare: la funzione della concorsualità, ovvero di quel sistema normativo sotto il quale sono raggruppate le procedure concorsuali; l'evoluzione del concetto di risanamento (*rescue*); le dinamiche del sostegno finanziario alla soluzione delle crisi.

Quale funzione oggi riconoscere alla concorsualità? Per rispondere a tale interrogativo occorre in primo luogo partire dalla constatazione che la crisi dell'impresa genera un c.d. *common pool problem* ossia la necessità da parte dei creditori di trarre risorse da una situazione economico-patrimoniale tendenzialmente incapiente.[2] Tale

social functions, such as preservation of business and employment, combating the abuse of insolvency law and perhaps in the future also combating insolvency fraud." Sul rapporto tra impostazione di mercato ed impostazione amministrativizzata nella gestione della crisi di impresa, ved. Sarra, Janis, "Creditor Rights and the Public Interest", *University of Toronto Press*, 2003, p. 34: "Market forces, not the government, should decide how to maximize creditor return and determine whether a corporation should be liquidated or restructured. (…) These scholars generally suggest that public law should not intervene to rescue companies and compromise creditors' claim. Such strategies add transaction costs without creating efficiencies."

[2] Cfr. Jackson, Thomas H., *The logic and limits of bankruptcy law,* Washington, BeardBooks, 2001, il quale affronta le tematiche connesse alla ricostruzione della *bankruptcy law* come fonte di diciplina di una *collective and compulsary proceeding* in rapporto al *common pool problem.*

situazione investe tutti i creditori come tali anche se in misura diversa a seconda della loro posizione, quale ipotecari, privilegiati o semplicemente chirografari. La concorsualità, quindi, attraverso una serie di norme sostanziali e processuali, consente di dare ordine a tale situazione di conflitto trasformandolo in concorso, ovvero nella partecipazione al momento satisfattivo della procedura.

Non solo, è anche emersa sotto questo profilo la considerazione di quelle posizioni definite quali *holdout*, ovvero di quei creditori che rimangono su posizioni dissenzienti, non acconsentendo a forme negoziali di gestione della crisi.

Anche sotto questo profilo la funzione della concorsualità diviene fondamentale attraverso un sistema che orienta i creditori verso la negozialità. Pensiamo, per esempio, al sistema del *cram down*[3] nel concordato preventivo. Attraverso questo istituto il tribunale può comunque omologare un concordato, nonostante l'opposizione di un creditore dissenziente, quando verifica che questi non ha alternative concretamente praticabili più vantaggiose di quelle oggetto dello stesso concordato.

In tal modo quindi la posizione di *holdout* viene neutralizzata nella e dalla concorsualità che in questo caso consente di respingere un'opposizione nella sostanza meramente ostruzionistica.

Si può notare dunque un più sofisticato livello di esplicazione della concorsualità non più legato a una tradizionale funzione liquidatoria e distributiva, ma anche volto a orientare il conflitto tra i creditori verso eque forme negoziali di sistemazione della crisi e dell'indebitamento.

Dicevamo che un secondo profilo attiene al concetto di risanamento dell'impresa. Cosa si intende oggi per risanamento dell'impresa ? Per un verso si ritiene che il risanamento si sostanzi in una serie di interventi strategici volti a evitare la crisi dell'impresa. Che quest'accezione sia generica quanto approssimativa è dimostrato dal fatto che, a ben vedere, l'attività del *management* di un'azienda si traduce di per sé in una serie di interventi per evitare la crisi. In altri termini, secondo quest'accezione generale il concetto di risanamento rientra nelle regole di buona amministrazione del *management* non assumendo quindi un più pregnante e specifico significato.[4]

[3] Va detto che nel sistema statunitense il *cram down* è declinato anche sotto il profilo del *best interest test* e della *absolute priority rule*. Inoltre occorre precisare che: "Confirmation of a plan, notwithstanding one or more nonassenting classes is commonly referred to as a *cram down*. This term does not appear in section 1129 (b). While section 1129 (b) does not use the term *cram down*, it does use two other terms (…): *not discriminate unfairly* and *fair and equitable*, così Epstein, David G. – Nickles, Steve H., *Principles of bankruptcy law,* Thomson West, 2007, p. 103.

[4] Belcher, Alice, *Corporate Rescue*, London, Sweet & Maxwell, 1997, p. 12: " (…) if rescue is defined simply as the avoidance of distress and failure, all management activity can be thought as constant and repeated rescue attempts (…)"; sulla stessa questione: Omar, Paul, "Reimagining rescue: whither insolvency law?" in *Eurofenix, The journal of Insol Europe*, Autumn 2013, p. 38, secondo il quale "(…)

D'altro canto, si afferma pure che l'idea di risanamento si associ con quella della conservazione dei posti di lavoro e con il mantenimento dei livelli produttivi, e più in generale con il perseguimento di un obiettivo di benessere sociale.[5]

Ma a fronte di tutto ciò, è venuto maturando nel tempo un orientamento molto più approfondito sul tema del risanamento che ha portato a considerare se la massimizzazione del valore di un'impresa in crisi sia raggiunta solo laddove si mantengano i beni nell'organismo produttivo o non piuttosto reinserendoli nel sistema produttivo attraverso una loro, seppur programmata e coordinata, vendita sul mercato.

Ne è derivato dunque un concetto di risanamento che va oltre la tradizionale distinzione tra mantenimento in attività dell'impresa e liquidazione dei beni, in quanto si è potuto constatare che anche una liquidazione del complesso produttivo possa attingere un obiettivo di risanamento.[6]

Questo peraltro emerge oggi anche nella nuova versione della legge fallimentare ed, in particolare, nella possibilità di avere un concordato preventivo con assuntore o nella vendita o conferimento dell'azienda da parte del curatore fallimentare.

Ed infine una terza dimensione, che sempre di più emerge, è quella di stimolare il finanziamento della impresa in crisi. Il legislatore italiano, sull'onda peraltro dell'impostazione della riforma del diritto societario del 2003, ha ampliato le possibilità di finanziamento dell'impresa in crisi. Ha infatti previsto il beneficio della prededuzione a favore di quei crediti nati da finanziamenti erogati non solo in esecuzione di un concordato preventivo, ma anche in funzione della sua presentazione o in funzione del mantenimento in attività dell'azienda nel concordato con continuità aziendale.

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rescue can now take very different meanings and has even crossed the traditional divide between so-called rescue and liquidation (…)".

[5] Le riflessioni in Italia su queste tematiche risalgono ai primi anni '80: Piepoli, Gaetano, *Interessi individuali ed interessi collettivi nel risanamento della grande impresa,* Milano, Giuffrè, 1983, p. 146, il quale, guardando anche al diritto concorsuale tedesco, metteva in luce che: "Lo sviluppo ed il progressivo arricchimento di questo dibattito hanno delle ragioni precise, individuate nella crisi definitiva del vigente Insolvenzrecht. La perdita di funzione delle procedure concorsuali tradizionali appare infatti inconfutabile. All'aumento vertiginoso delle insolvenze si contrappone l'ormai più volte declamato "Konkurs des Konkurses" caratterizzato da una sempre più radicale Masselosigkeit, correlativa allo svuotamento completo della par condicio creditorum." Ed ancora, citando Flessner, questo Autore rileva che "(…) le tecniche giuridiche finalizzate alla Sanierung di una impresa in crisi debbono attestare la propria efficacia soprattutto allorquando vien messa in discussione la permanenza o la eliminazione di una Großunternehmen. E questo per diverse ragioni: da un lato la dimensione e la complessità di quest'ultima materia rendono particolarmente impegnativo il suo governo giuridico; dall'altro i risultati derivanti dall'utilizzazione di tali tecniche in questo specifico ambito hanno un'ampia ed articolata rilevanza sociale."

[6] Tutto ciò si riversa anche sui doveri degli amministratori nelle *special situations*: Rordorf, Renato, *Doveri e responsabilità degli amministratori di società di capitali in crisi*, in Le Società, 2013, p. 669.

I superiori cenni dimostrano dunque una significativa evoluzione del diritto della crisi di impresa dovuta principalmente al fatto che il legislatore fa emergere, nel tessuto della relativa disciplina, l'impresa quale organismo produttivo da gestire, da mantenere sul mercato o da vendere a seconda della migliore prospettiva realizzabile per il ceto creditorio e per il tessuto produttivo del Paese.

Fatte queste considerazioni introduttive, la presente analisi vuole soffermarsi in particolare sui recenti interventi normativi di novellazione del concordato preventivo, con particolare riguardo al: concordato con riserva; concordato con continuità aziendale; ed alle innovative forme di finanziamento dell'impresa in crisi.

II. Il concordato preventivo con riserva

L'art. 161, comma 6, l. fall. così come novellato da ultimo dal d.l. 21.06.2013, n. 69 convertito dalla legge 09.08.2013, n. 98, prevede che il debitore possa con ricorso chiedere al Tribunale di essere ammesso alla procedura di concordato preventivo, allegando i bilanci degli ultimi tre esercizi e l'elenco nominativo dei creditori con l'indicazione dei rispettivi crediti, riservandosi di presentare la proposta ed il piano in un termine fissato dal Tribunale compreso fra sessanta e centoventi giorni, e prorogabile di non oltre sessanta giorni in presenza di giustificati motivi.[7]

Si tratta di uno strumento del tutto nuovo nel nostro panorama concorsuale caratterizzato proprio dal fatto che il debitore chiede in un primo tempo l'ammissione al concordato ed in un secondo momento espone ai creditori la propria proposta ed il relativo piano concordatario. Da qui la locuzione descrittiva di concordato "in bianco", "prenotativo" o "con riserva" a seconda della sensibilità dei diversi commentatori che hanno messo di più l'accento sulla mancanza della proposta o sull'effetto per così dire prenotativo della domanda.

Nel termine fissato dal tribunale, il debitore potrà dunque presentare un piano di concordato, oppure l'omologazione di un accordo di ristrutturazione, ai sensi dell'art. 182-*bis* l. fall. Lo sbocco dunque del periodo di attesa può essere duplice: o il concordato, con il suo variegato contenuto di cui all'art. 160 l. fall. o gli accordi di ristrutturazione che si presentano molto più snelli essendo accordi raggiunti con il 60% dei crediti ed omologati dal tribunale.

Con il decreto che fissa il termine, il tribunale può nominare un commissario giudiziale e deve in ogni caso fissare gli obblighi informativi in capo al debitore

[7] Su questo nuovo istituto come primissime riflessioni: Vella, Paola, "Il controllo giudiziale sulla domanda di concordato preventivo con riserva", in *Fall.*, 2013, p. 82 ed ivi ampi richiami di giurisprudenza; Balestra, Luigi, "Gli obblighi informativi periodici nel c.d. preconcordato", in *Fall.*, 2013, p. 106.

relativi alla gestione finanziaria dell'impresa ed all'attività compiuta ai fini della predisposizione del piano e della proposta. Quando poi risulta che l'attività del debitore è manifestamente inidonea alla predisposizione della proposta e del piano, il tribunale anche d'ufficio, sentito il debitore ed il commissario se nominato, abbrevia il termine fissato inizialmente.[8]

Questo innovativo istituto è stato introdotto dal nostro legislatore ispirandosi al modello del *Chapter 11* del *Bankruptcy Code* statunitense. Va detto però che rispetto a questo istituto sono maggiori i punti di divergenza che di somiglianza. Vediamoli in una visione di carattere generale.

In primo luogo, il *Chapter 11* può essere chiesto dallo stesso debitore (*voluntary petition*) ma anche dai suoi creditori (*involuntary petition*). Non solo, ma a questa procedura può fare ricorso anche chi non è imprenditore commerciale (*individual*) per sistemare il proprio sovraindebitamento.

Nella *voluntary petition* il debitore presenta il piano oppure manifesta l'intenzione di presentarlo entro un termine di 120 giorni decorrenti dalla data della *petition*. Sotto questo profilo emerge dunque la somiglianza con il nostro concordato con riserva, atteso che in questo caso il debitore preannuncia la presentazione del piano ed a tal fine usufruisce del relativo termine.

Unitamente al piano il debitore deve inoltre presentare il c.d. *disclosure statement* ovvero un documento contenente una serie dettagliata di informazioni riguardanti i beni, l'ammontare dei debiti, l'andamento finanziario dell'attività e comunque ogni informazione volta a garantire un consenso informato da parte dei creditori chiamati ad approvare il piano. Nel caso in cui si tratti di uno *small business case* non è necessario presentare un *disclosure statement* laddove la Corte ritenga che adeguate informazioni siano contenute nel piano.

Una volta presentata la richiesta di ammissione alla procedura, il debitore ha dunque 120 giorni per produrre il piano: periodo che può essere prorogato o abbreviato dalla Corte. In ogni caso non è possibile superare i 18 mesi. Nel caso in cui il periodo spiri senza la presentazione del piano, questo può essere presentato dai creditori del debitore[9].

Questa breve descrizione pone in evidenza una differenza di fondo. L'incentivo per il debitore di presentare il piano non è dato tanto dalla prospettiva del

[8] Tra le prime applicazioni dell'istituto si segnalano: T. Roma, 14 novembre 2012; T. Napoli, 31 ottobre 2012; T. Pistoia, 30 ottobre 2012; T. Salerno, 25 ottobre 2012; T. La Spezia, 25 ottobre 2012; T. Milano, 24 ottobre 2012, tutte in *Fall.*, 2013, p. 73-78.

[9] Sul Chapter 11: Baird, Douglas, *The Elements of Bankruptcy,* New York, 2006; Epstein, David G., *Bankruptcy and related law in a nutshell,* Thomson West, 2007; Epstein, David G., – Nickles, Steve H., *Principles of Bankruptcy Law,* Thomson West, 2007; Lerner, Stephen et al.,*Chapter 11 Bankruptcy and Restructuring Strategies,* Boston, Aspatore, 2012.

fallimento, come invece per il nostro concordato con riserva, quanto dal fatto che spirato il termine, la parola passa al ceto creditorio che può presentare un proprio piano, prospettando possibili soluzioni che probabilmente porteranno alla perdita dell'azienda da parte del debitore.

Nel nostro concordato in bianco invece non abbiamo questo effetto di passaggio della legittimazione ai creditori. La prospettiva che si pone, una volta trascorso il termine, è la dichiarazione d'inammissibilità del concordato con possibile dichiarazione di fallimento se il PM o uno o più creditori l'hanno richiesto.

Nel diritto statunitense la filosofia della procedura è dunque del tutto diversa e presuppone come premessa la convinzione che il mercato sia in grado di dare una risposta alla crisi di impresa più efficiente laddove il debitore non sia più in grado di farlo. La contendibilità dell'azienda, qualora abbia un residuo valore, è dunque maggiormente assicurata e, di fronte alla prospettiva di perdere l'azienda, il debitore sarà incentivato a trovare la migliore soluzione possibile nel frangente in cui si trova.

Perciò, se da un lato il nostro legislatore italiano si è ispirato al *Chapter 11* per configurare la disciplina del concordato con riserva, dall'altro però le differenze sostanziali evidenziate provano che tra i due istituti sussiste una profonda differenza che può essere colta già sul piano del ruolo del mercato nella sistemazione delle c.d. *special situations*.

A ciò inoltre va aggiunta che l'attivazione del *Chapter 11* non presuppone necessariamente uno stato di crisi, come per il nostro concordato. Questo conferma ancora di più quanto sia consolidata nel diritto statunitense l'idea che questo strumento concorsuale rientri nella realizzazione delle strategie imprenditoriali e nelle modalità di circolazione delle aziende nel mercato. Infatti, la procedura di cui al *Chapter 11* viene individuata semplicemente come volta a riorganizzare l'impresa (*to reorganize a business*) e non a risolvere necessariamente uno stato di insolvenza. Per tale ragione, non è l'autorità che in un certo senso sanziona con la dichiarazione di fallimento l'insuccesso del debitore, ma è il mercato che, con il ruolo concorrente riconosciuto ai creditori, rende contendibile i beni aziendali.

Detto ciò, il concordato con riserva aiuta a meglio comprendere una distinzione fondamentale tra proposta e piano concordatario. Infatti nel momento in cui il legislatore riconosce la possibilità di ottenere un termine per la presentazione della proposta e del piano, riconosce esplicitamente la differenza sussistente tra questi due atti.

Mentre la proposta contiene gli elementi sostanziali della sistemazione negoziale dell'indebitamento e della sua ristrutturazione, il piano è invece lo strumento di realizzazione della proposta, contenendo la programmazione di quegli interventi la cui esecuzione, una volta intervenuta l'omologazione, consente la realizzazione concreta della proposta.

Questi due atti quindi si trovano tra di loro in un rapporto interdipendente: la proposta, definendo i contorni della ristrutturazione, condiziona il contenuto del piano; così come il piano, funzionale alla proposta, rende questa concretamente realizzabile.

Orbene, l'avere dato rilievo a questa interdipendenza orienta la nostra riflessione nel senso che il concordato con riserva, per rispondere in modo efficiente alla sua funzione, non può risolversi in una prospettazione al buio, dovendo il debitore preannunciare, seppure per grandi linee ed in una versione ancora abbozzata e generica, l'obiettivo verso cui tende la sua richiesta. Per meglio dire, il debitore non può limitarsi a chiedere solo il termine per la presentazione della proposta e del piano, ma nel chiedere tale termine prospetta le soluzioni che, quantomeno in astratto, si configurano come percorribili.

Questa chiave di lettura del concordato con riserva ci sembra che abbia una sua pregnanza sicuramente nel caso in cui a chiedere tale tipologia di concordato sia una società di capitali, in ragione del dovere di agire in modo informato che l'art. 2381 c.c. pone in capo agli amministratori.[10] Sarebbe infatti contraddittorio non ritenere sussistente tale dovere nel momento della ristrutturazione dell'indebitamento, non potendosi il *management* aziendale trincerarsi dietro la giustificazione di non avere ancora una visione aggiornata della crisi. Il dovere di agire in modo informato, che si riflette sulla richiesta del concordato con riserva, è diretta conseguenza della portata applicativa dell'art. 152 l. fall. che assegna agli amministratori appunto, salva diversa previsione statutaria, la competenza a decidere sulla presentazione del ricorso.

Tirando dunque le fila della nostra riflessione, risulta che il ricorso per il concordato con riserva non può risolversi in una mera richiesta di un termine, dovendosi prospettare seppure per linee generali le soluzioni astrattamente realizzabili. Ciò alla luce della duplice ragione dell'interdipendenza tra proposta e piano, da un lato, e della rilevanza del dovere di agire in modo informato degli amministratori nelle società di capitali, dall'altro.

[10] Si ritiene che tale disposizione sia applicabile anche agli amministratori di srl: De Angelis, Lorenzo, "Amministrazione e controllo nelle società a responsabilità limitata", in *Riv. soc.*, 2003, p. 479. Sui doveri degli amministratori: AA.VV., *Diritto delle Società*, Milano, Giuffrè, 2012, p. 214. Sulla rilevanza della dimensione organizzativa: Angelici, Carlo, *Attività ed organizzazione,* Torino, Giappichelli, 2007, p. 166, il quale in relazione al dovere di informazione osserva che "L'investitore è un soggetto il quale, a qualunque tipo appartenga, opera a fini esclusivamente economici ed il quale, se deve essere tutelato, solo per questi aspetti richiede tutela e non certo per un coinvolgimento della sua personalità: sicché, a differenza di quanto può avvenire il atri contesti, l'informazione non assume per lui un valore in quanto tale e di per sé, ma semplicemente strumentale a quei fini economici." Ved. anche: Tombari, Umberto, "Crisi di impresa e doveri di corretta gestione societaria ed imprenditoriale della società capogruppo", in *Riv. dir. comm.*, 2011, I, p. 631; Montalenti, Paolo "La gestione dell'impresa di fronte alla crisi tra diritto societario e diritto concorsuale", in *Riv. dir. soc.,* 2011, p. 820; Rordorf, Renato, "La responsabilità degli amministratori di spa per operazioni successive alla perdita del capitale", in *Fall.*, 2009, p. 277.

III. Segue. I vantaggi del concordato preventivo con riserva

È indubbio che questo istituto abbia importanti vantaggi che è opportuno evidenziare.

In primo luogo, esso consente di superare i problemi connessi alla posizione dei creditori *holdout,* ovvero di quei creditori dissenzienti rispetto alle opzioni di ristrutturazione del debitore. Le posizioni *holdout* sono di sicuro l'aspetto problematico dei *workout agreements,* ossia gli accordi che l'imprenditore cerca di realizzare in via stragiudiziale.

Difatti, la via stragiudiziale alla soluzione della crisi d'impresa vede di per sé la configurazione delle posizioni creditorie non certo convergenti nel c.d. *common pool problem*. Al contrario in questi frangenti – come spiega a livello della teoria dei giochi il c.d. *dilemma del prigioniero* – la tendenza è che ogni creditore spinga individualmente per la massimizzazione della realizzazione del proprio credito, piuttosto che cooperare con gli altri creditori e con l'imprenditore per la soluzione della crisi.

Il concordato con riserva consente dunque di stemperare le posizioni *holdout* e, con il blocco delle azioni esecutive individuali già nella fase anticipata della pubblicazione nel registro delle imprese della domanda di concordato, orienta i creditori verso forme concordate di soluzione della crisi.[11]

Un secondo vantaggio è dato dal fatto che questa forma di concordato genera un incentivo a far emergere lo stato di crisi in anticipo e non quando questo è già declinabile in termini di irreversibile insolvenza. Nella realtà sta appunto accadendo che l'imprenditore consente ai suoi professionisti un intervento tendenzialmente più tempestivo che in passato e questo in ragione del fatto che non si attribuisce a questo strumento una connotazione negativa di consegna della propria azienda al Tribunale.

In altri termini, l'imprenditore si persuade più facilmente di farsi coadiuvare nella soluzione della crisi usufruendo del blocco delle azioni esecutive e di un ragionevole lasso di tempo per individuare il percorso realizzabile nella ristrutturazione dell'indebitamento.

[11] Cfr. Gudgeon, Martin – Riddell, David – Joshi, Shirish, "The anatomy of a restructuring process – an advisor's perspective", in *Global Insolvency and Restructuring Review*, 2009, 10, p. 25 "The length and complexity of any nagotiation is a function of numerous factors including the need for new capital, valuation, the degree of organisation and level of aggressiveness of each of the stakeholders, the jurisdiction of the company, the size of the insolvency delta and the level of distress facing the company. Each of these factors needs to be understood in detail not only by themselves, but also in the context of each other." Ed ancora "Sometimes, there are certain advantages to pre-agreeing a transaction on a consensual out of court basis, but implementing the transaction through a formal pre-packaged insolvency process."

Occorre che quest'opportunità sia ben utilizzata proprio in funzione della prevenzione di situazioni irreversibili di insolvenza, nelle quali difficilmente è possibile pensare e realizzare forme di sistemazione dell'indebitamento diverse da quelle meramente liquidatorie.

Last but not least, il blocco delle azioni esecutive conseguente, come detto, alla pubblicazione della domanda nel registro delle imprese, può avere effetti positivi sul ripristino degli ordinari canali di finanziamento dell'impresa.

Spesso, infatti, accade che i pignoramenti eseguiti dai creditori sui conti correnti dell'imprenditore, su cui operano forme di finanziamento dell'attività produttiva o commerciale corrente – quali aperture di credito o sconto fatture – blocchino l'operatività dei conti e dunque quel flusso di denaro che viene normalmente anticipato dalla banca. Molto spesso, infatti, l'attività ordinaria è finanziata a breve e questo consente di liquidare gli ordinativi prima dell'incasso delle relative fatturazioni.

Con il blocco delle azioni esecutive, e quindi dei pignoramenti sui conti, è possibile attingere il duplice effetto positivo di ripristinare i flussi di denaro ordinari, da un lato, e dall'altro di stimolare la banca a concedere nuova finanza con la copertura della prededuzione.[12] In tal modo risulta che il concordato con riserva – ripetiamo, se ben usato – possa diventare un significativo strumento di anticipazione degli interventi in vista della realizzazione di soluzioni volte alla continuità aziendale.

IV. Il concordato preventivo con continuità aziendale

L'art. 186-*bis* l. fall. prevede il concordato con continuità aziendale che si presenta quale istituto di grande rilevanza in tutti i casi in cui si persegua l'obiettivo di preservare il c.d. *going - concern value* dell'impresa, ovvero la sua capacità di produrre ricchezza sul mercato. Questo dato di fondo emerge con chiarezza dalla portata letterale della norma in commento.

Occorre però precisare che l'obiettivo di preservare il *going - concern value* non si presenta in termini assoluti, quanto piuttosto relativi e funzionali. In altri termini

[12] Come vedremo in seguito l'art. 182-*quater* consente di chiedere al Tribunale autorizzazione a contrarre finanziamenti prededucibili; mentre l'art. 182-*quinquies* consente di pagare debiti per la continuazione di determinate forniture o servizi nel caso di concordato di continuità. Si tratta di provvedimenti che si ispirano ai c.d. *first day motions* del Chapter 11. Scheler, Brad E., *Chapter 11 First Day Orders,* Southeastern Bankruptcy Law Institute, 2004, p. 1: "On the first day of a chapter 11 case "first-day motions" are typically filed by the debtor to assist in case stabilization. Debtors typically argue that only through entry of orders approving of these first day motions, can they stabilize their work force, maintain critical relations with the vendor community, and take steps to ensure that their cash management systems and operations in general are as normalized as possible."

la continuità aziendale deve risultare funzionale al miglior soddisfacimento dei creditori.

Possiamo quindi affermare che mentre il mantenimento della continuità è il mezzo, il fine rimane il miglior soddisfacimento del ceto creditorio.[13]

Questa relazione funzionale trova inoltre conferma nel fatto che l'art. 186-*bis* si incentra sul piano del concordato e non sulla proposta. Recita infatti il primo comma dell'articolo in commento: "Quando il piano di concordato di cui all'art. 161, secondo comma, lettera e) prevede la prosecuzione dell'attività di impresa da parte del debitore, la cessione dell'azienda in esercizio in una o più società, anche di nuova costituzione, si applicano le disposizione del presente articolo. Il piano può prevedere anche la liquidazione dei beni non funzionali all'esercizio dell'impresa".

È dunque il piano al centro della disposizione. Per cui, mentre la proposta è volta al soddisfacimento dei creditori, il piano di prosecuzione dell'attività assume una posizione funzionale rispetto a tale obiettivo.

Infatti, il professionista chiamato ad attestare il piano ha il compito di confermare tale funzionalità attraverso la propria relazione che illustrerà il percorso logico delle sue conclusioni ed esporrà gli elementi economico-finanziari che depongono a sostegno di tale attestazione. Uno dei punti di riferimento non potrà che essere il valore della produzione che se rimane in una marginalità positiva, sottratti i costi di produzione, sarà un indice rivelatore della bontà dell'opzione della continuità aziendale.

L'aumento dunque della sofisticatezza degli strumenti a disposizione dell'imprenditore porta inevitabilmente a una più approfondita analisi della crisi aziendale da risolvere. Sappiamo che, da un punto di vista economico, le crisi possono avere eziologie diverse: crisi da inefficienza, da rigidità produttiva e gestionale, da decadimento dei prodotti, da carenza di programmazione ed innovazione, da squilibrio finanziario, etc.

Individuare dunque in questa molteplicità di contesti la strada percorribile ed in particolare la sostenibilità della continuità aziendale presuppone un'approfondita

[13] L'idea di preservare ove possibile la continuità aziendale e l'avviamento risponde probabilmente ai postulati della "Teoria del valore". Sul punto Bertoli, Giuseppe, *Crisi di impresa, ristrutturazione e ritorno al valore,* Milano, Egea, 2000, p. 14, nota 6, il quale cita testualmente le riflessioni di Guatri e Vicari: "La finalità che possiamo attribuire all'impresa, l'unica finalità che abbia senso, è la continuazione dell'esistenza attraverso la capacità di autogenerarsi nel tempo, che avviene mediante la continua creazione di valore economico. Solo in questo senso si può parlare di finalità dell'impresa (…). Ciò che caratterizza e qualifica l'impresa è (…) la qualità di poter esistere solo in virtù della sua capacità di creare valore economico. Il senso stesso dell'esistenza dell'impresa è dato unicamente dalla creazione di valore." Nel momento in cui si manifesta una crisi di impresa, questo obiettivo, per cosi dire ontologico, va coordinato con la finalità del soddisfacimento del ceto creditorio.

analisi delle condizioni dell'impresa e la loro evidenziazione nella relazione dell'attestatore.

Le considerazioni che precedono portano a ritenere che il concordato con continuità aziendale non sia una semplice riedizione aggiornata della ormai abrogata amministrazione controllata. Le opzioni infatti che possono essere perseguite con il concordato in continuità sono molto più ampie, prevedendosi ad esempio anche possibili soluzioni parzialmente liquidatorie di quei rami d'azienda o di quei beni che non sono funzionali alla continuità aziendale. Non assistiamo quindi a un mero controllo della gestione dell'imprenditore, affinché questi recuperi una ordinaria capacità di adempimento, ma alla programmazione di scelte gestionali che possono anche incentrarsi su operazioni di *turn around* e di riassetto dell'organizzazione aziendale. Sotto questo profilo dunque cogliamo la prova di quanto sostenuto, ovvero dell'attitudine della moderna disciplina fallimentare a supportare le scelte gestionali dell'imprenditore nel momento della crisi.[14]

V. Segue. Contenuto del piano di concordato preventivo con continuità aziendale

La formulazione della norma di cui all'art. 186-*bis* consente innanzitutto di distinguere due fattispecie di continuità: quella diretta e quella indiretta. La prima si configura laddove l'impresa continua a essere esercitata dall'imprenditore; la seconda laddove l'azienda è oggetto di cessione o di conferimento in una *newco* o in una società preesistente.

La continuità indiretta presenta profili più complessi determinando un'interferenza con la disciplina societaria. Infatti laddove la continuità indiretta prenda la forma del conferimento dell'azienda vengono in rilievo gli articoli 2343 e 2441 c.c. per le società per azioni e l'art. 2465 c.c. per le società a responsabilità limitata.

Soffermandoci sul conferimento eseguito in una società per azioni, la fattispecie si articola in più momenti ed in particolare: quello dell'esclusione del diritto di opzione degli altri soci al fine appunto di consentire il conferimento dell'azienda, ai

[14] Chi scrive si riconosce molto nel pensiero di quella dottrina che vede la crisi di impresa come crisi dell'organizzazione imprenditoriale, inserendo nel concetto di organizzazione anche quello gestionale. Del resto lo stesso concetto di concorsualità è un riflesso dell'unità e complessità dell'organizzazione imprenditoriale. Ved. Rossi, Serenella, *Le crisi di impresa*, in AA. VV., *Diritto Fallimentare*, Milano, Giuffrè, 2008, p. 4: "L'incapacità del patrimonio dell'imprenditore di fare fronte al proprio indebitamento è infatti normalmente l'esito ultimo di un graduale processo di alterazione e degenerazione delle corrette funzioni organizzative e gestionali dell'attività imprenditoriale e quando l'impresa versa in una simile condizione essa può già dirsi in crisi."

sensi dell'art. 2441, comma 4, e quello della verifica da parte degli amministratori della congruità tra il valore dell'azienda conferita ed il capitale sottoscritto, ai sensi dell'art. 2343, comma 3, c.c.

Questa interferenza di norme dice che operazioni di questo tipo implicano una pianificazione approfondita ed attenta, in ragione dei pericoli che sono insiti in essa, sia sotto il profilo della tutela dei soci della società conferitaria che del capitale di questa. Basti osservare, a titolo di esempio, che sino a quando gli amministratori della società per azioni non abbiano verificato la congruità del valore di conferimento le relative azioni non sono alienabili.[15] Così come pure un eventuale contenzioso endosocietario sull'esclusione del diritto di opzione potrebbe avere effetti negativi sullo stesso conferimento.[16]

Rimanendo sempre nell'analisi del contenuto del concordato con continuità si scorge anche la configurazione dei c.d. *concordati misti* laddove accanto alla continuità aziendale è prevista la liquidazione di beni non funzionali all'esercizio dell'impresa. L'impostazione strategica del concordato sotto questo profilo è molto evidente. L'imprenditore valuta l'opportunità o meno di liquidare determinati *assets* nell'ambito dell'economia generale del concordato. La liquidazione infatti può divenire il mezzo attraverso il quale attingere nuove risorse finanziarie per sostenere l'onere concordatario e consentire la continuità aziendale.

Del resto il piano concordatario si presenta come un vero e proprio piano finanziario. Al riguardo l'art. 186-*bis*, comma 2, lett. a), prevede che "il piano di cui all'art. 161, secondo comma, lettera e), deve contenere anche un'analitica indicazione dei costi e dei ricavi attesi dalla prosecuzione dell'attività di impresa prevista dal piano di concordato, delle risorse finanziarie necessarie e delle relative modalità di copertura."

Il piano ha quindi un duplice contenuto obbligatorio. Un contenuto previsionale, relativo ai costi e ai ricavi attesi dalla prosecuzione; ed un contenuto programmatico, relativo all'indicazione del fabbisogno finanziario e delle relative fonti di copertura.

Assistiamo dunque a un'evidente emersione della gestione finanziaria dell'impresa nello strumento concordatario e conseguente affinamento delle tecniche di piani-

[15] Sul punto l'art. 2343, comma 3, c.c. prevede che tale revisione debba avvenire nei centottanta giorni successivi alla iscrizione della delibera nel registro delle imprese. Per tutto tale periodo le relative azioni sono inalienabili.

[16] Per una riflessione di carattere istituzionale: Notari, Mario, *Le società azionarie*, *Disposizioni Generali. Conferimenti. Azioni*, in AA. VV., *Diritto delle Società,* Milano, Giuffrè, 2012, p. 131 : "I conferimenti e la formazione del capitale nella società per azioni sono circondati da cautele maggiori di quanto avviene nelle società di persone ed in parte anche nella srl. Tali cautele riguardano essenzialmente tre aspetti: la tipologia dei beni conferibili, i tempi e modi di esecuzione dei conferimenti, nonché la valutazione dei beni conferiti alla società."

ficazione finanziaria nel delicato momento della gestione della crisi. Pianificazione finanziaria che deve raccordarsi con la pianificazione riguardante la continuità industriale dell'azienda, il suo andamento futuro, il suo generale riassetto produttivo.

A conferma di ciò, l'art. 182-*quinquies* l. fall. disciplina i finanziamenti nel caso appunto della continuità aziendale. Possono quindi configurarsi due diverse fonti di finanziamento: una per così dire *ad intra,* nel caso in cui il finanziamento derivi dalla dismissione di *assets* non funzionali alla prosecuzione, essendo ormai rami secchi dell'azienda; un'altra *ad extra,* nel caso in cui l'imprenditore ricorra all'indebitamento esterno per approvvigionarsi di risorse finanziarie.

Occorre poi precisare che il piano concordatario - che come abbiamo visto deve contenere un *business plan*[17] - assume una duplice rilevanza, sia per la circolazione delle informazioni a favore del ceto creditorio, sia per consentire a terzi investitori di valutare la redditività dell'investimento.

Infatti, valorizzando la dimensione programmatica del piano concordatario come un vero e proprio *business plan*, risulta che il suo contenuto è complesso dovendosi prevedere tra l'altro: la descrizione generale del progetto industriale; lo studio del mercato di riferimento; gli schemi di fattibilità economico-finanziaria dell'investimento; e soprattutto, nel caso di investitori esterni, l'indicazione della loro partecipazione al concordato e la redditività attesa per l'investimento eseguito.

Si tratta di informazioni di primissimo ordine che consentono al terzo investitore di poter valutare il proprio coinvolgimento nel concordato e di verificare che effettivamente sussistano margini di redditività tali da giustificare l'impegno finanziario.

Osservando inoltre il piano concordatario in relazione ai terzi, vengono in risalto due disposizioni normative relative al trattamento dei creditori assistiti da cause legittime di prelazione ed alla possibilità di scioglimento dei contratti pendenti.

a. In relazione ai creditori assistiti da cause legittime di prelazione, l'art. 186-*bis,* secondo comma, lett. c) dispone che il piano, fermo quanto disposto dall'art. 160, secondo comma, l. fall. possa prevedere una moratoria sino ad un anno dall'omologazione per il pagamento dei creditori muniti di privilegio, pegno o ipoteca, salvo che sia prevista la liquidazione dei beni sui quali insiste la relativa garanzia. In tal caso, i creditori muniti di cause di prelazione non hanno diritto al voto.

[17] Sul contenuto e la funzione del *business plan* e delle componenti economico e finanziarie: Bastia, Paolo *Il budget d'impresa,* Bologna, 2001, p. 61 - 73: "Il budget economico si ottiene attraverso il consolidamento dei vari budget di sintesi (budget dei costi e ricavi, budget della produzione, budget dei costi amministrativi e commerciali, etc.) ed assume la forma di un conto economico, di solito scalare, dal quale si evince il reddito programmato, oltre a diversi indicatori intermedi (…). Il budget finanziario è uno strumento fondamentale per l'attività di programmazione e controllo relativa alla gestione delle risorse finanziarie. Il suo scopo è quello di predeterminare i fabbisogni finanziari relativamente all'esercizio di budget e di stabilire in anticipo le opportune modalità di copertura di tali fabbisogni, cioè i finanziamenti da reperire."

La norma in esame ci dice in primo luogo che i creditori titolari di cause legittime di prelazione possono essere pagati con una moratoria sino a un anno dall'omologazione del concordato ed in questo caso non hanno diritto al voto. Ovviamente questa moratoria non potrà essere prevista nel caso in cui venga liquidato il bene sul quale insiste la garanzia. In questo frangente dunque il creditore garantito dovrà essere pagato non appena sarà omologato il concordato.

Nell'applicazione concreta della norma si pone una serie di questioni. Innanzitutto, ci si chiede se il creditore garantito abbia o meno diritto agli interessi per il periodo di moratoria; ed in caso di risposta affermativa se questi saranno moratori o semplicemente legali ai sensi dell'art. 1282 c.c.

L'impostazione più condivisibile è che al creditore garantito debbano essere riconosciuti gli interessi nella misura legale ai sensi dell'art. 1282 c.c. e questo in ragione del fatto che la moratoria rientra in un'opzione prevista dal legislatore e non è di per sé riconducibile a un inadempimento del debitore. Gli interessi quindi sarebbero manifestazione della naturale attitudine dei crediti liquidi ed esigibili a produrre interessi, e non già una forma di ristoro del creditore per la sopportazione dell'inadempimento del debitore.

La seconda questione è l'ambito di estensione dell'esclusione del diritto di voto del creditore privilegiato. In particolare si pone la questione se sia legittima una moratoria superiore al periodo di un anno dall'omologazione e se in questo caso al creditore debba essere riconosciuto il diritto di voto. La risposta che sembra più convincente è quella di ritenere che sia legittima una moratoria superiore a un anno e che in questo caso, in ragione della maggiore compressione del diritto di garanzia, debba essere riconosciuto il diritto di voto al creditore privilegiato.

Questa tesi trova conforto nell'impostazione letterale dell'art. 186-*bis* nella parte in cui dispone che "In tal caso, i creditori muniti di prelazione di cui al periodo precedente non hanno diritto al voto". Il che implica, *a contrario*, che al di fuori di questo caso – ovvero nel caso di una moratoria più lunga di un anno – i creditori privilegiati hanno diritto di voto nel concordato con continuità.[18]

b. La seconda disposizione che ci interessa considerare è contenuta nell'art. 169-*bis* l. fall. che riguarda la disciplina dei contratti in corso di esecuzione. Abbiamo

[18] Su tali questioni: Fabiani, Massimo, *Riflessioni precoci sull'evoluzione della disciplina della regolazione concordataria della crisi di impresa,* in www.ilcaso.it; Arato, Marco, *Il concordato con continuità aziendale*, in www.ilfallimentarista.it; Ambrosini, Stefano, *Appunti in tema di concordato con continuità aziendale*, in www.ilcaso.it. Per completezza di esposizione va precisato che l'art. 186-*bis* fa salva l'applicazione dell'art. 160, comma secondo, che prevede che i creditori privilegiati possano essere pagati non integralmente laddove il relativo bene, su cui insiste la garanzia, abbia un valore di mercato – attestato dal professionista – inferiore al valore nominale del credito. In questo caso, ai sensi dell'art. 177 l. fall., i creditori privilegiati sono equiparati ai creditori chirografari per la differenza e quindi per tale misura eserciteranno il diritto di voto.

più volte sottolineato che il concordato con continuità si caratterizza proprio in ragione del proseguimento dell'attività di impresa: attività che si esplica non solo da un punto di vista commerciale ed industriale, ma prima ancora giuridico attraverso l'organizzazione della finanza e l'esercizio dell'autonomia privata contrattuale.

È dunque evidente che in questo caso i contratti pendenti alla data della presentazione del concordato continuino; intendendosi per contratti pendenti quelli in cui una o entrambe le parti non hanno ancora completamente eseguito le relative prestazioni dedotte in contratto.

La norma in commento consente al debitore, previa autorizzazione del tribunale o del giudice delegato – a seconda che questa sia chiesta al momento della presentazione del ricorso per il concordato oppure nel corso della procedura – di sciogliersi dai contratti in corso di esecuzione. Un'opzione alternativa prevista dalla norma è che si chieda la sospensione dei contratti per non più di sessanta giorni prorogabili una sola volta.

Si tratta di una norma che conferisce al debitore una facoltà particolarmente dirompente sull'assetto contrattuale dell'impresa, non solo perché è in grado di alterare determinati equilibri contrattuali, ma anche perché inserisce nell'economia funzionale del concordato un'opzione gestionale il cui esercizio, al di fuori del concordato, esporrebbe l'imprenditore a responsabilità contrattuale.

Se è vero che il secondo comma dell'art. 169-*bis* prevede che in questo caso il contraente non inadempiente ha diritto a un indennizzo equivalente al risarcimento del danno contrattuale, è altrettanto vero però che tale credito non è trattato come credito prededucibile – ovvero da pagare per intero e prima degli altri al di fuori del riparto – ma come credito anteriore al concordato e quindi assoggettato alla relativa falcidia concordataria, ex art. 184 l. fall. secondo il quale il concordato omologato è obbligatorio per tutti i creditori anteriori alla pubblicazione del ricorso nel registro delle imprese.

L'unica remora che potrebbe avere l'imprenditore a chiedere una tale autorizzazione potrebbe essere quella che il relativo credito da indennizzo, derivante dallo scioglimento o dalla sospensione, possa incidere sugli equilibri di voto del concordato e quindi indurre per tale ragione l'imprenditore a non perseguire l'opzione di scioglimento o sospensione.

Così come, d'altro canto, è da ritenere che il tribunale o il giudice delegato non possano semplicemente assecondare la richiesta del debitore, dovendo piuttosto esigere che questa abbia una sua giustificazione nell'ambito del piano di concordato secondo criteri opzionali proporzionati e ragionevoli.

Non può sfuggire infatti la portata dirompente della norma in esame, capace appunto di rendere incerti i rapporti contrattuali pendenti. La certezza dei rapporti giuridici è un valore che il legislatore ha tenuto molto presente, ad esempio, quando

ha proceduto nel 2005 alla novellazione dell'art. 67 l. fall. di disciplina della revocatoria fallimentare. All'epoca si era sostenuto che la revocatoria fallimentare, così come prevista dal legislatore del 1942, era troppo sbilanciata verso la tutela della *par condicio creditorum* a discapito della certezza dei rapporti giuridici d'impresa che necessitavano, soprattutto al fine di garantire i finanziamenti stranieri, di stabilità.

Oggi, *mutatis mutandis*, la stessa problematica si ripropone sotto l'applicazione dell'art. 169-*bis* ma in termini invertiti, in quanto il legislatore sembra ritenere il valore della stabilità dei rapporti pendenti recessivo rispetto a quello della continuità aziendale e del soddisfacimento del ceto creditorio.

Occorre dunque equilibrio nell'applicazione della norma che, per le implicazioni da essa derivanti, deve essere invocata all'interno di una coerente pianificazione concordataria.[19]

VI. Finanza "ponte" e finanza "interinale"

L'impresa è un fenomeno essenzialmente finanziario. L'organizzazione della dimensione finanziaria è essenziale per assicurare la continuità produttiva.[20] Del resto, ogni qual volta la giurisprudenza si è trovata a dover affrontare casi dubbi di assoggettamento o meno al fallimento, anche con riguardo ad esempio all'attività agricola industrializzata, ha sempre dato risalto all'organizzazione finanziaria dell'impresa quale sicuro indice di commercialità.

Ricordiamo questo in quanto, nel momento della crisi, l'esigenza della finanza è ancora più forte ed impellente, dipendendo il buon esito delle operazioni di ristrutturazione dell'indebitamento e di riavvio o continuazione dell'attività dal sostegno finanziario al piano concordatario.

[19] A dimostrazione della pervasività e rilevanza dell'art. 186-*bis* occorre ricordare che la norma ivi contenuta prevede anche che, salvo l'art. 169-*bis*, i contratti in corso di esecuzione alla data di deposito del ricorso, anche stipulati con pubbliche amministrazioni, non si risolvono per effetto dell'apertura della procedura e che la loro continuazione è ammessa laddove il professionista ha attestato la ragionevole capacità di adempimento. È previsto inoltre che l'impresa in concordato di continuità possa partecipare a procedure di assegnazione di contratti pubblici. In ragione di tale previsione è stato modificato l'art. 38, comma 1, del d.lgs. n. 163/2006, il c.d. Codice dei Contratti Pubblici, che fa salva proprio l'applicazione dell'art. 186-*bis* l. fall.

[20] Sul punto Visentini, Gustavo, *Diritto Commerciale*, vol. II, Padova, Cedam, 2011, p. 24: "Indichiamo con industriale la qualità capitalistica dell'organizzazione della produzione, che caratterizza l'impresa commerciale in tutte le sue diverse manifestazioni: industria e commercio in senso stretto, banca, assicurazione, trasporto, etc. L'imprenditore, in quanto titolare del capitale, organizza i fattori della produzione mediante atti di scambio: gli strumenti giuridici a sua disposizione sono la proprietà ed i contratti. La qualità industriale dell'impresa è nelle dimensioni del capitale e nella complessità degli investimenti".

Il legislatore che ha novellato la legge fallimentare nel 2010 e nel 2012 ha previsto al riguardo due norme fondamentali che vogliamo esaminare. L'art. 182-*quater* sulla c.d. finanza ponte e l'art. 182-*quinquies* sulla c.d. finanza interinale.

Prima di vedere nello specifico l'assetto di disciplina, occorre svolgere una premessa chiarificatrice.

Le norme richiamate, a diverse condizioni che esamineremo, riconoscono a favore del creditore finanziatore la natura prededucibile del relativo credito. Ai sensi dell'art. 111 l. fall. i crediti prededucibili vengono pagati prima delle altre posizioni creditorie ed al di fuori del riparto in quanto giustificati dall'essere stati strumentali, in qualche modo, alla procedura, in occasione della quale o in funzione della quale sono sorti.

Orbene, sul punto va detto che di per sé la prededuzione non garantisce in assoluto un pagamento preferenziale ed integrale. Infatti l'art. 111-*bis*, ultimo comma, l. fall., prevede che, se l'attivo non è sufficiente, la distribuzione deve avvenire secondo i criteri della graduazione e della proporzionalità, conformemente all'ordine assegnato dalla legge.

Ne deriva quindi che, laddove l'attivo nel successivo fallimento non permetta il pagamento di tutti i prededucibili, occorrerà procedere a una loro graduazione con evidente prevalenza di quei crediti prededucibili che a loro volta sono assistiti da cause legittime di prelazione.[21]

Detto questo, la prima norma che viene in rilievo è l'art. 182-*quater*. Per rendere più intellegibile la norma analizzeremo: a. i finanziamenti erogati in esecuzione di un concordato preventivo o di un accordo di ristrutturazione dei debiti omologato; b. i finanziamenti erogati in funzione della presentazione della domanda di concor-

[21] In effetti va detto che in giurisprudenza e dottrina si discute se la prededuzione operi all'interno del concordato o nel successivo fallimento. Nel senso che essa opera nel successivo fallimento Inzitari, Bruno, *Gli accordi di ristrutturazione ex art. 182-bis l. fall.: natura, profili funzionali e limiti dell'opposizione degli estranei e dei terzi,* in www.ilcaso.it, sez. II, Dottrina e Opinioni, 12 settembre 2011, doc. 263/11; Vella, Paola, *Autorizzazioni, finanziamenti e prededuzione nel nuovo concordato preventivo,* in Fall. 2013, p. 657. La questione interpretativa assai delicata nasce anche dalla diversa formulazione letterale degli artt. 182-*quater* e 182-*quinquies* l.fall.: mentre la prima norma riconosce la prededuzione "*ai sensi e per gli effetti dell'art. 111 l.fall.*" con ciò volendo dire che essa opera nel successivo fallimento; al contrario, la seconda norma riconosce la prededuzione "*ai sensi dell'art. 111 l.fall.*" con ciò volendo probabilmente dire che essa opera all'interno del concordato. Si veda anche D'Amora, Raffaele, *La prededuzione nell'anno di grazia 2013,* in www.osservatorio-oci.org.

Ora, al di là del dibattitto su questo punto, ciò che rende perplessi è che l'elevato livello di incertezza e di complessità della materia rischia di determinare al contrario un grave disincentivo ai finanziamenti. La normativa statunitense sul punto è, ad esempio, molto semplice e chiara. La *section* 726 del *Bankruptcy Code* prevede che le c.d. *administrative expenses* di cui alla *Section* 507, ovvero le spese sorte nella procedura di *reorganization,* sono prededucibili nella successiva procedura di liquidazione.

dato preventivo o di omologazione di accordi di ristrutturazione; c. i finanziamenti erogati dai soci in esecuzione di un concordato omologato o di accordi di ristrutturazione, o in funzione della domanda di concordato preventivo o di omologazione di accordi di ristrutturazione.

a. Venendo alla prima fattispecie, disciplinata dalla norma in commento, questa si configura nei casi in cui il finanziamento sia previsto nel piano concordatario e venga erogato in esecuzione di questo. Il finanziamento, in questo frangente, si configura quindi come una delle modalità di esecuzione del piano e dunque si presenta funzionale alla realizzazione di quell'assetto di interessi programmato in sede concordataria. Come dicevamo nelle valutazioni preliminari, il legislatore intende agevolare tali finanziamenti riconoscendo a essi la natura prededucibile laddove, ad esempio a seguito di risoluzione o annullamento del concordato, si dovesse pervenire alla dichiarazione di fallimento.

Il finanziamento in esecuzione genera dunque un credito successivo al concordato che va poi rimborsato dal debitore, o anche dal terzo che dovesse accollarsi in tutto o in parte l'onere concordatario, o che fornisce garanzie per la sua corretta esecuzione e che, come visto, in caso di fallimento usufruisce del rango prededucibile. Essendo un credito successivo, il suo rimborso avverrà dopo il pagamento dell'onere concordatario, per cui si tratta di una postergazione concordataria compensata dalla prededuzione in caso di successivo fallimento.[22]

b. La seconda ipotesi è quella dei finanziamenti c.d. "*ponte*" ovvero erogati in funzione della presentazione della domanda di concordato preventivo o di omologazione di un accordo di ristrutturazione dei debiti. In questo caso l'art. 186-*quater*, comma 2, l. fall. prevede una duplice condizione per l'operatività della prededuzione: i finanziamenti devono essere previsti dal piano o dall'accordo; la prededuzione deve essere riconosciuta dal Tribunale con il decreto con cui accoglie la domanda di concordato o con cui omologa gli accordi di ristrutturazione dei debiti. Rispetto a questa fattispecie il dubbio se la prededuzione operi nel concordato ovvero solo nel caso di successivo fallimento è più forte che nella fattispecie di cui al punto a) e questo in ragione del fatto che, a differenza della fattispecie di cui al punto a), questi finanziamenti sono anteriori o comunque concomitanti alla domanda di concordato o di omologa dell'accordo di ristrutturazione. In questo caso sarebbe dunque preferibile un'opzione interpretativa nel senso che la prededuzione operi già nel concordato preventivo, di guisa che il

[22] In questo senso sono condivisibili le affermazione di Vella, Paola, *op. cit.,* p. 671.

piano deve farsi carico di specificare le risorse finanziare utilizzabili per il relativo rimborso in prededuzione.[23]

c. Terza ipotesi prevista dall'art. 182-*quater* è quella dei finanziamenti dei soci erogati in esecuzione o in funzione di un concordato o di un accordo di ristrutturazione dei debiti. L'articolo in parola prevede che, in deroga agli artt. 2467 e 2497-*quinquies* c.c., questi finanziamenti sono prededucibili nella misura dell'80%. Questo significa dunque che nel caso in cui un socio di una srl o di una spa,[24] oppure la società che esercita attività di direzione e coordinamento nei confronti di un'altra, eroghino un finanziamento per le finalità e nei momenti indicati nell'art. 186-*quater* si configura una deroga vistosa al regime della postergazione prevista nella disciplina codicistica. Questa, infatti, ci dice che queste tipologie di finanziamenti, erogati nel momento in cui la società presenta un eccessivo squilibrio tra indebitamento ed attivo patrimoniale, ovvero quando era ragionevole procedere ad un aumento di capitale, sono postergati rispetto agli altri creditori della società.

Dall'analisi di questo complesso sistema normativo emerge dunque che il concordato o gli accordi di ristrutturazione presentano l'attitudine, per la loro incidenza sull'impresa e sulla ristrutturazione dell'indebitamento, a collocare tali finanziamenti in un ambito operativo che segna una distinzione rispetto a quello presupposto dalle norme codicistiche, consentendo dunque di derogare al regime della postergazione. In altri termini, mentre le norme codicistiche guardano alla fattispecie dei finanziamenti dei soci dall'angolo visuale del capitale (il cui rimborso sappiamo essere postergato rispetto ai debiti della società), quella fallimentare invece dà rilevanza all'angolo visuale del patrimonio su cui incide la debitoria e che tali finanziamenti consentono di gestire nella forme concordatarie o degli accordi di ristrutturazione. Da qui dunque la *ratio* della deroga.

Se dunque, sotto questo profilo, si configura un'equiparazione dei finanziamenti dei soci a quelli erogati da altri soggetti e se il contesto in cui ciò avviene è del tutto differente rispetto a quello presupposto dalle norme codicistiche, in ragione dell'utilizzo del concordato o degli accordi di ristrutturazione, allora si può sostenere che il restante 20%, non coperto dalla prededuzione, non diventi in realtà postergato

[23] In senso contrario invece Vella, Paola, *op. cit.,* p. 670, secondo la quale "…i finanziamenti effettuati in funzione (lett. a-b), durante il corso (lett. c) o in esecuzione (lett. h –i) del concordato, per il cui rimborso è sostenibile che la prededuzione sia destinata a essere fatta valere non già subito – con prevalenza rispetto alla soddisfazione dei crediti concorsuali che quegli stessi finanziamenti erano diretti a consentire ma solo in caso di insuccesso del piano, e dunque successivamente nell'eventuale sede fallimentare."

[24] L'applicazione transtipica dell'art. 2467 c.c. anche alla spa è ormai pacifica. Su tali problematiche si rimanda alle approfondite riflessioni di Terranova, Giuseppe, *Finanziamenti dei soci,* in Società di Capitali, Commentario, a cura di Niccolini e Stagno d'Alcontres, Napoli, Jovene, 2004, p. 1449. Si rimanda anche a Simeon, "La postergazione dei finanziamenti dei soci nella spa*",* in *Giur. comm.,* 2007, I, p. 69.

ma vada trattato come un normale credito chirografario che concorrerà con gli altri creditori .

Accanto alla finanza "ponte" sin qui esaminata, il legislatore all'art. 182-*quinquies* prevede la disciplina della c.d. finanza "interinale" ovvero erogata nel corso del concordato. La questione che subito si pone al riguardo è se il concordato debba essere di continuità oppure no ai fini del riconoscimento della prededuzione.[25] Per rispondere a tale interrogativo di fondo – che ancora una volta ci fa capire quanto articolata e complessa sia la relativa disciplina forse troppo casistica – occorre considerare nel dettaglio il contenuto dell'articolo in esame.

Esso prevede in primo luogo che i finanziamenti erogati nel corso della procedura di concordato preventivo – e quindi dalla domanda di concordato alla sua omologa – o nel corso degli accordi di ristrutturazione dei debiti siano prededucibili se: il Tribunale espressamente autorizza il debitore a contrarli; e se un professionista, in possesso dei requisiti di cui all'art. 67, terzo comma, lett. d), verificato il complessivo fabbisogno finanziario dell'impresa sino all'omologazione, attesta che tali finanziamenti sono funzionali alla migliore soddisfazione dei creditori.

Al secondo comma dello stesso articolo è poi previsto che il debitore - questa volta la norma specifica nel concordato con continuità aziendale – possa chiedere al Tribunale di essere autorizzato a pagare debiti preesistenti per prestazioni di beni e servizi, sempre che un professionista attesti che tali pagamenti sono funzionali al miglior soddisfacimento dei creditori. La stessa previsione vale per gli accordi di ristrutturazione.

Orbene, confrontando il primo e il secondo comma risulta che entrambi hanno in comune l'obiettivo del miglior soddisfacimento dei creditori, differenziandosi invece per il fatto che il primo comma parla genericamente di concordato o accordi di ristrutturazione, mentre il secondo di concordato con continuità aziendale.

Alla luce della constatazione di questa – a un tempo sussistente - somiglianza e differenza, riteniamo si possa sostenere che l'autorizzazione a contrarre finanziamenti interinali prededucibili non sia vincolata al solo caso del concordato con continuità aziendale, sempre che sia rispettato il requisito teleologico e funzionale del miglior soddisfacimento dei creditori. Ed infatti potrebbe accadere che il concordato sia misto – di continuità e di liquidazione - o addirittura solo liquidatorio, ma con la prospettiva di un soddisfacimento del ceto creditorio – al netto del rimborso del finanziamento prededucibile - migliore di quello realizzabile in sede

[25] Su questa tematica: Penta, Andrea "Il concordato preventivo con continuità aziendale: luci ed ombre", in *Dir. fall.*, 2012, I, p. 679; Munari, Alessandro, *Crisi di impresa ed autonomia contrattuale nei piani attestati e negli accordi di ristrutturazione*, Milano, Giuffrè, 2012, p. 220; Ambrosini, Stefano, "I finanziamenti bancari alle imprese in crisi dopo la riforma del 2012", *Dir. fall.,* 2012, I, p. 469; Stanghellini, Lorenzo, "Finanziamenti – ponte e finanziamenti alla ristrutturazione", in *Fall.*, 2010, p. 1345.

fallimentare, proprio in virtù del finanziamento che consente di sopperire al fabbisogno finanziario interinale.

VII. Conclusioni

Tirando le file della trama di considerazioni sin qui svolte, ci sembra che si possano orientare le conclusioni secondo tre ordini di riferimento.

Il primo è che l'insolvenza, intesa in senso ampio come momento di crisi dell'impresa, è manifestazione ultima del rischio tipico dell'attività imprenditoriale. L'attività d'impresa è organizzata non solo in ragione della limitatezza delle risorse da impiegare, ma anche al fine di gestire il rischio insito nell'attività. Rischio che poi si declina in vari profili: finanziario, di mercato, produttivo, industriale, ambientale, etc.

Se dunque si parte dall'idea che l'insolvenza non è di per sé un momento fraudolento, ma rientra, secondo i moderni postulati, nel rischio tipico dell'attività, ne deriva una radicale rivisitazione dell'impostazione della disciplina legale della crisi che, come visto, punta a supportare scelte strategiche per un suo superamento. In questo contesto anche i creditori assumeranno un nuovo ruolo: non più spettatori delle vicende liquidatorie dei valori patrimoniali in vista di un loro soddisfacimento, ma soggetti attivi interessati a partecipare ai momenti decisori e gestionali dell'impresa in crisi, soprattutto di grandi dimensioni.

Il secondo ordine è che non esiste un percorso predefinito per la gestione delle crisi. Ogni vicenda ha una sua eziologia specifica. Da qui la de-tipizzazione del contenuto del concordato preventivo che appunto non è indicato in astratto dal legislatore, essendo piuttosto la risultante dell'"anamnesi" sulle vicende dell'impresa, sulla sua reale condizione economico-finanziaria, sulle prospettive realisticamente percorribili, che porta poi l'imprenditore, con l'ausilio dei suoi professionisti, a elaborare il piano concordatario nella sua duplice veste industriale e finanziaria.

Infine, il terzo ordine di idee conclusive è che il reperimento di nuova finanza nelle situazioni di crisi è lo snodo cruciale per un buon funzionamento degli istituti che abbiamo esaminato. Sotto questo profilo la nostra realtà è più penalizzata rispetto alle altre moderne economie, in ragione della scarsa presenza di fondi di *turn around* o di *venture capital* in grado di supportare l'imprenditore nelle *special situations.* Non solo, ma la loro auspicabile maggiore presenza sul mercato italiano consentirebbe di dare evidenza alle crisi in tempi anticipati rispetto all'irreversibile ed irrecuperabile declino aziendale.

Ex uno plura. How "unilateral" fatca may contribute to reshaping administrative cooperation in tax matters along multilateral lines

di Alessandro Turina

Sommario: I. Introduction; II. Taxonomy of different forms of exchange of information on tax matters; III. The First Incarnation of the International Tax Standard; IV. The Shift towards automatic exchange of information; A. Background; B. The Peculiar Role of Tax Intermediation; V. The leverage of a new Standard? FATCA in Context; A. Historical background; B. The Mechanics of FATCA; VI. The Inter-Governmental Agreements and FATCA as a vector for the propagation of a standard based on automatic exchange of information; A. FATCA and "new old" pathways towards the implementation of a multilateral system of automatic exchange of information.

I. Introduction

With an apt simile, an influential author has compared the developments in the area of administrative co-operation in tax matters to the evolutionary dynamics of fossil history, as both show to be characterised by long periods of stasis punctuated by brief periods of rapid change[1]. In such a perspective, the last five years have been marked by major and rapid change. Symbolically, the grand opening of this period of change is identified in the G20 Summit, which took place in London in April 2009. Upon a closer observation, as it will be further analysed in this paper, this five-year period can be divided in two phases: a first phase coincided with the enucleation of some fundamental standards of transparency and exchange of information from the OECD Model provisions and their propagation as the "international tax standard" to be met by all jurisdictions and to be monitored by an international task force, the Global Forum, through a system of peer review; for the

[1] See Itai Grinberg, 'Beyond FATCA: An Evolutionary Moment for the International Tax System', Working Paper, Georgetown Law Scholarly Commons, 2012, 1, citing Niles Eldridge, Stephen J. Gould, 'Punctuated Equilibria: An Alternative to Phyletic Gradualism', in (T.J.M. Schopf, ed.) *Models in Paleobiology*, 82

purposes of the earlier mentioned juxtaposition, such an international standard was centred on exchange of information upon request. In a later phase, arguably starting in 2012, a shift has been observed in incorporating into the international tax standard automatic exchange of information. In the latter respect, the introduction of a piece of US legislation, FATCA (Foreign Accounts Tax Compliance Act) appears having ignited a snowball effect[2], coalescing all the different streams of initiatives pointing towards the enactment of automatic exchange of information that had in the meanwhile emerged in the international tax policy arena.

II. Taxonomy of different forms of exchange of information on tax matters

The OECD Commentary to Art. 26 of the Model Tax Convention (hereinafter also referred as "OECD Model Convention") is responsible for the introduction of a classification that has influenced most of the initiatives dealing with exchange of information, as well as national tax practice and tax scholars. It is then due to report and clarify this land-marking distinction.

Exchange of information on tax matters – although there seems to be no reason to assume that such categories would only be relevant for tax purposes - may either be qualified as "exchange of information on request" or "automatic exchange of information" or, thirdly, as "spontaneous exchange of information".

The different implications of this classification should by no means be considered exhaustive, either because these three different approaches can be mixed or because brand new systems are also admissible even according to the Commentary to Art. 26 of the OECD Model Convention[3]; nonetheless, the policy debate on the forms of exchange of information currently focuses on the alleged dichotomy between exchange of information upon request and automatic exchange of information. As such, great emphasis could be perceived when the "international tax standard" (i.e., the standard upheld by the Global Forum on Transparency and Exchange of Information for Tax Purposes as the "best practice" benchmark in the area of transparency and exchange of information) was formalised in late 2009[4] with regard to its exclusive encompassing of "exchange of information" upon request.

The notion of exchange of information upon request comes out as fairly intuitive and appears to have been historically linked to the traditional judicial practice of

[2] At the Inaugural Lecture at the Institute for Austrian and International Tax Law of 18th May 2012, Professor Tracy A. Kaye vividly referred in the same sense to the "snowball effect" generated by FATCA through the spreading of Intergovernmental Agreements.

[3] See Para. 9.1 of the Commentary on Article 26 concerning the Exchange of Information.

[4] See the Background Information Briefs periodically published by the Global Forum.

sending letter rogatories from one Court to another foreign Court in order to ask for specific items of judicial assistance.

Due to the controversial nature of the specific element of the international standard represented by the "on request" mode of exchange of information, even though its genesis can be fairly easily outlined, it could in the definitive be argued whether such a mode is a "good old habit" or just an old one.

In this respect, it could actually be stated that most detractors of the current international standard of exchange of information are actually pointing out more at the need to introduce forms of automatic exchange of information rather than at some inherent flaws of exchange of information upon request; it then seems utterly misleading to depict any kind of dichotomy between exchange of information upon request and automatic exchange of information. Then, as an international administrative co-operation in tax matters currently stands, the real question is whether exchange of information upon request can be deemed as *sufficient* in filling the "international tax information gap", that is, the amount of information that would be necessary for tax administrations to properly enforce the worldwide taxation principle that is typically applied to tax residents of a given Country. No sound answer based on a functional efficiency criterion, - i.e., on the balance between the efforts (direct and indirect costs) put in the cooperation process and the tax revenue that can be recovered by the requesting State[5] - can be set forth in the absence of comprehensive statistics, as it is currently the case. Such statistics would also prove particularly difficult to design as the correlation between an inherently qualitative phenomenon, such as the gathering of information and the possibly resulting tax audits, on the one hand, and the quantitative dimension of tax collection, on the other hand, seems particularly hard to grasp.

Conversely, it has been remarked how exchange of information upon request may be more manageable not only, more obviously, for the State providing information but also for the State receiving said information, in particular whereas the latter is a developing Countries or a Country whose Tax Administration has a limited capacity. As a matter of fact, information resulting from exchange of information upon request would result in being more targeted and easier to streamline. Such a conclusion would seem to be consistent with a recent shift in other areas of international regulation, such as money laundering control, where emphasis has been transferred from an *ex ante* rule based approach to a risk-based approach.[6]

[5] See Jan de Goede.'Efficiency of Mutual Assistance in Tax Matters; What is in a Name?' in Roman Seer and Isabel Gabert (eds), *Mutual Assistance and Information Exchange*, (IBFD 2010),129.

[6] Such a policy dilemma is shared by other areas of international economic law with reference to the optimal approach to the supervision of compliance. A very relevant parallel field in this regard is represented by anti-money laundering control. In such a context, a debate between proponents of "ex ante"

In conclusion, as far as the standard is concerned, the real issue is not about which method should be adopted, - each method featuring its own advantages and specifying objectives - , but, rather, which is the optimum mix between the two and other alternative forms of exchange of information, such as spontaneous exchange of information.

It may be argued that, at least with reference to items of investment income, the kind of *ex ante* observation that would be allowed by automatic exchange of information would probably outweigh, at least when assuming that the receiving end of the information flow would be occupied by Countries with a developed tax system, the earlier mentioned inconveniences, in terms of "informational overload" that may otherwise derive therefrom. Such a conclusion would appear to be corroborated by the circumstance that, at least with regard to items of investment income (or partitions thereof), both the European Union, with its Interest Savings Directive, and the United States, with its Foreign Accounts Tax Compliance Act (hereinafter, abbreviated as FATCA) have taken the road of enhancing the possibilities for automatic exchange of information.

The following sections of this paper will then attempt at singling out how the two different forms of exchange of tax information, upon request and automatic, may likely interact in the future and which role such an interaction may place in the revision of what is currently defined as the international tax standard (of exchange of information). Following such a policy analysis, the paper will focus on introducing and analyzing the innovative import of the earlier cited FATCA legislation and the way in which it may prove essential for the further propagation of a revised set of standards encompassing automatic exchange of information and in its propagation of such standards along the line of a bundle of reciprocal reporting arrangements involving the United States, a number of very diverse jurisdictions and, not least, financial institutions.

and "ex post" monitoring has also emerged; however, it is interesting to remark that the direction would seem to shift in the opposite way than that proposed in international tax policy circles as the European approach to monitoring gradually shifts from an ex ante to an ex post approach. In this regard, see Marco Arnone, Leonardo Borlini, 'International Anti-Money Laundering Programs: Empirical Assessment and Issues of Criminal Regulation', (2010, 2) Journal of Anti-Money Laundering Control, 226. See also Jean Spreutels, Caty Grijsels, 'Interaction Between Money Laundering and Tax Evasion: Belgian and International Measures in the Fight against Money Laundering', (2001,1) EC Tax Review, 3.

III. The First Incarnation of the International Tax Standard

The OECD and OECD promoted *fora* have historically positioned themselves as the "market leader(s) in developing tax standards and guidelines"[7]. Despite such an alleged trendsetting role in many areas, at least in the previous decade, the OECD showed little interest in promoting a more effective and pervasive administrative cooperation between Tax Administrations, especially in the form of exchange of information. Model provisions governing exchange of information, not unlike other general provisions of the OECD Model Convention as well as the related Commentary, remained virtually unchanged for more than two decades.

Interest for the practice of information exchange raised only when lack thereof was individuated as one of the key drivers of harmful tax competition; as a result, new more pervasive rules were introduced in the OECD Model Convention and in its Commentary at the turn of the third millennium.

The end of the 20th Century also saw the attempt to create an inclusive platform for discussion aimed at tackling the phenomenon of "harmful tax competition". Consequently, the Global Forum on Taxation was set up, incorporating both OECD economies and non-member economies, in particular, offshore financial centers and other Countries traditionally labeled as tax havens.

The lack of effective exchange of information was individuated as one of the key components of harmful tax competition and the main stepping stone on the way to a level playing field between tax jurisdictions.

The Global Forum on Taxation was instrumental to the drafting of a new model treaty, the OECD Model Agreement on Exchange of Information on Tax Matters (hereinafter, OECD Model T.I.E.A.) aimed at ensuring that an agreement concerning at least information exchange be reached between OECD economies and the other members of the Global Forum, as well as other jurisdictions normally cut off from mainstream tax treaty networks.

The substantive contents of the OECD Model Tax Information Exchange Agreement (hereinafter, OECD Model T.I.E.A.), released in 2002, represented a major leap forward *per se,* with regard to the heightening of the standards of administrative tax cooperation aimed at contrasting taxpayers' behaviours tantamount to (or amounting to) tax evasion achieved by leveraging on some common specific features of offshore jurisdictions. To be more specific, the standard of co-operation brought by the OECD Model T.I.E.A. was particularly notable in addressing the issue of banking and fiduciary secret, identifying them as non-suitable grounds for refusing a request for assistance. Such a statement found no parallel in the already

[7] OECD, *Current Tax Agenda* 2011, at 74

existing binding or non-binding legal instruments dealing with information exchange. On the other hand, since the very text of the OECD Model T.I.E.A. was the outcome of joint negotiations between OECD economies and the most "politically conscious" off-shore jurisdictions, some other limitations where set forth. For instance, while Contracting Parties were now meant to exchange information whereas "*foreseeably relevant to the administration and enforcement of the domestic laws of the Contracting Parties concerning taxes covered by the Agreement*"[8] instead of whereas "*necessary*"[9], the OECD Model T.I.E.A. introduced in its Commentary the controversial notion of "fishing expedition" and the prohibition thereof. Moreover, whereas the Commentary to Art. 26 of the OECD Model Convention tended at a plurality of forms of assistance, such as automatic and spontaneous exchange of information, the OECD Model T.I.E.A. only focused on exchange of information upon request.

In addition, Art. 26[10] of the OECD Model Convention and the related Commentary were then amended in a way consistent with the OECD Model T.I.E.A. thus setting forth the creation of a homogeneous exchange of information standard. Nonetheless, Countries of key relevance for the international financial industry, such as Austria, Switzerland and Belgium, appointed reservations to the new amendments. Furthermore , the OECD Model T.I.E.A. appeared as a fairly languishing model as only a limited number of OECD inspired tax information exchange agreements were signed. The limited engagement of most off-shore jurisdictions at the time was mirrored by the circumstance that the list of un-cooperative tax havens drafted in 2002 did not show a significant shrinking. However , some gradual progress was registered on the head of some non – OECD Member Countries and documented in the annual "Towards a Level Playing Field" Reports issued by the Global Forum since 2006.

At the beginning of 2009, despite a substantially renewed set of rules, the existence of a specific body such as the Global Forum on Taxation and the developments showed in some jurisdictions, it seemed that the new framework developed from 2002 onwards had been welcomed by everyone except its main addressees, i.e., the main off-shore financial centres.

According to the usual vulgate, the position[11] taken by G20 members in the midst of the soaring financial crisis and in the recent aftermath of some very high

[8] Art. 1, OECD Model T.I.E.A.

[9] As foreseen by the coeval version of Art. 26 of the OECD Model Convention.

[10] The model provision included in the OECD Model Tax Convention which presides over exchange of information of the Competent Authorities of two contracting States.

[11] Said position is generally summarised in the following declaration rendered at the end of the April 2009 London Meeting of the G20: "*We are ready to take action against non-cooperative jurisdictions, in-*

profile tax evasion cases, somehow catalysed a strong political will to address the topic of a lack of co-operation by some jurisdictions.

The immediate developments following to the aforementioned stance were mirrored in the "Progress Reports" dividing jurisdictions in three categories:

- a "white list" of jurisdictions considered to have substantially implemented the OECD standard by having concluded at least twelve agreements compliant with said standard;
- a "grey list" of jurisdictions which had committed to the OECD standard but had not yet substantially implemented it;
- a "black list" of jurisdictions not yet committed to the OECD standard.

The most visible outcome of such a process was that in a very short lapse of time, the number of tax information exchange agreements inspired by the OECD Model T.I.E.A. skyrocketed[12]. As a result, most jurisdictions were in a position to ascend to a higher status, to the extent that, nowadays, the so-called "black list" is empty and the grey list contains only two jurisdictions[13].

The more far reaching outcome of this process is however the emergence of a globally agreed standard of transparency and information exchange[14], that is, the systemic effect of the overall advancements registered by single jurisdictions. The international standard of transparency and information exchange (also known as the international tax standard) constitutes one of the pillars on which the level playing field currently in crystallization is posed.

However, the existence of a standard is not in itself a guarantee for its survival and propagation, especially when the emergence of the standard is based on mere commitment or on the reaching of a reasonably low threshold, such as the conclusion of a circumscribed number of tax information exchange agreements. In this respect, what seems to really count is the long term commitment of all the parties involved and the actual implementation of the international standard.

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cluding tax havens. We stand ready to deploy sanctions to protect our public finances and financial systems. The era of banking secrecy is over. We note that the OECD has today published a list of countries assessed by the Global Forum against the international standard for exchange of tax information."

[12] The most impressive spree was observed between the G20 London Summit of 2 April 2009 and the 2010 G20 Summit held in Toronto on 26th June 2010. Between these two dates, 459 agreements were signed and the absolute numbers of concluded (regardless of whether in force or not) OECD2 compliant T.I.E.A.s passed from 65 in April 2009 to 524 in June 2010. As of June 2013, 820 T.I.E.A.s had been signed.

[13] In particular, Nauru and Niue.

[14] See OECD, *Promoting Transparency and Exchange of Information for Tax Purposes',* September 2010, retrievable on www.oecd.org/dataoecd/32/45/43757434.pdf.

The main problem the OECD and the Global Forum (in the meanwhile renamed as "Global Forum on Transparency and Exchange of Information for Tax Purposes") were confronted with was then to introduce an effective system of monitoring. Such system on the one hand could put jurisdictions to test with regard to the actual meeting of the international standard and on the other hand could foster further commitment and could allow jurisdictions to correct themselves immersed in a co-operative climate.

The solution was eventually individuated in the adoption of a "peer review" mechanism extended to all members of the Global Forum and open also to non-member jurisdictions.

Based on the preliminary work carried out by the Global Forum as well as by the outline to be found in the "background information briefs" contemporary to peer reviews, the standard of transparency and exchange of information, which the Global Forum committed to monitor in its peer review, consisted of the following five items[15]:

1) ensuring that reliable information is available upon request and that the competent authorities have the power to enter in possession thereof;
2) implementation of exchange of information on request where it is foreseeably relevant to the administration and enforcement of the domestic laws of the treaty partner, without incurring in "fishing expeditions";
3) elimination of the restrictions on information exchange based upon the need to preserve banking secrecy or on the absence of a domestic tax interest in the requested information or on the non-fulfillment of the dual criminality test in case the information required is needed in order to tackle tax fraud;
4) confidential treatment of the information exchanged;
5) safeguard of taxpayers' rights. [16]

[15] See *Background Information Brief*, 2nd May 2011, 3 and *Background Information Brief*, 21st June 2011, 17

[16] In this respect, it is possible to trace each of the above five items to the language found in certain model provisions of the OECD Model T.I.E.A. or of Art. 26. In particular, items No. 2 to 4 of the Standard are all covered by different Paragraphs of Art. 26 of the OECD Model; in particular, item No. 2 is directly derived from Para. 1 of Art. 26 of the OECD Model; item No. 3 is drawn from Para. 4 and 5 of the OECD Model; item No. 4 is drawn from Para. 3 of Art. 26. On the contrary, item No. 1 has been derived from the work of the Joint Group on Accounts. Item No. 5, at least in the perspective of the Global Forum, as reflected in its Terms of Reference, should merely consist in respecting the limitations to exchange of information set forth by Para. 3.b. of Art. 26 of the OECD Model and Art. 7 of the Model T.I.E.A.

For benchmarking purposes, the above five standards have been broken up into ten "Terms of Reference" which can in turn be reconnected to one or more items in the standard and have been aggregated into three areas:

a) availability of information;
a) access to bank, ownership, identity and accounting information;[17]
a) exchange of information.

The Peer Review activity has been arranged in two distinct phases:

- Phase 1, which addresses the legal and regulatory framework for transparency and exchange of information for tax purposes;
- Phase 2, which addresses how the above defined standards are implemented in practice.

The assessed jurisdictions have had the chance to opt for a combined Phase 1 and Phase 2 review, whereas both the legal and regulatory framework and the implementation of the standards in practice are addressed. To date, the joining of phase 1 and phase 2 reviews has typically been opted for by OECD Member jurisdictions, while non OECD Members have typically preferred to handle the two phases separately, subjecting themselves at first only to Phase 1 reviews.[18] In the time span between 2010 and the beginning of 2013, the Global Forum has engaged in ambitious schedule of peer reviews that has resulted in the release of more than ninety peer review reports. In 2013, the Global Forum has, by contrast, started devoting resources to the more complex Phase 2 reviews, a process which is currently still ongoing.

IV. The Shift towards automatic exchange of information

A. Background

While the perceived importance and topicality of the need to enhancing administrative co-operation in tax matters through exchange of information was perceived across all actors and constituencies, the path undertaken by the major international organisations and epitomised by the peer review activity conducted by the Global Forum had attracted some degree of scepticism in terms of effectiveness

[17] In the light of the assessment of the term "transparency" we could say that areas a) and b) are to be included into such an umbrella term.

[18] A few notable exceptions to this general rule can be found, for instance, the Isle of Man and Mauritius opted for being subjected to a combined Phase 1 – Phase 2 Review while Belgium has so far subjected itself only to a Phase 1 Review.

and choice of priorities by some segments of scholarship[19] as well as by some for a of civil society.[20] However, in more recent times, as it will be addressed in further detail hereafter, a promising convergence can be perceived on this plan, with the major international fora and organisations having shifted towards the proposal of incorporating automatic exchange of information into the international standards of exchange of information.

In particular, the G20 Leaders' Declaration of June 19 2012, set forth at the conclusion of the G20 summit which took place in Los Cabos (Mexico), addressed the need of endorsing automatic exchange of information.[21] More recently, the 2013 Summit of the G20, held in Saint Petersburg, set forth, inter alia, a Declaration demanding that a global standard be presented by June 2014 (which, probably not by chance, substantially coincides with the final implementation deadlines for FATCA) and setting forth the commitment of initiating automatic exchange of information between its members on a reciprocal basis.[22] These calls signal a clear political will to update the current international standard of transparency and exchange of information and to incorporate therein automatic exchange of information.

The implementation of exercises of automatic exchange of information had been lagging behind compared to other forms of administrative assistance in tax matters. In this respect, despite the more recent international developments appear to be propelled, as it will be spelled out in further detail by other actors, the seminal role played by the European Union in this specific area of international tax policy should not be underestimated. In many respects, the European Union qualifies as a pioneer in the implementation of a system of automatic exchange of information relying on the intervention of financial intermediaries: reference is hereby made to the interest

[19] See, in particular, Michael McIntyre, 'How to End the Charade of Information Exchange', (2009) Tax Notes International, 255.

[20] Since April 2009, a growing number of NGOs have called for automatic exchange of tax information to address concerns related to the ongoing threat to the financial resources of States, developed and developing alike, posed by the phenomenon of international tax evasion, with great visibility attributed, also in the aftermath of some major scandals to evasion involving offshore bank accounts. The most prominent voice in this regard is that of the Tax Justice Network, due to the depth of the underlying analysis, that indeed goes well beyond the understandable but somewhat sterile indignation that characterises other similar fora. See <www.taxjustice.net> retrieved on 4th November 2013.

[21] *See* G20, Leaders' Declaration—Los Cabos Summit para. 14 (June 19, 2012), available at www.g20.org/documents/index_4.html#p4. accessed 5th November 2013.

[22] The G20, which has been meeting since 2008, is composed of 19 countries and the European Union. G20 members represent approximately 90% of world GDP; 80% of international global trade; two-thirds of the world's population is resident in G20 countries; 84% of all fossil fuel emissions are produced by G20 countries. The first G20 Leaders' Summit took place on November 14-15, 2008, in Washington, D.C. The Leaders developed an action plan to stabilize the global economy and prevent future crises, resulting in the current name and significance of the forum. See G20, 'What is the G20', <www.g20.org/docs/about/about_G20 > accessed 5th November 2013.

Savings Directive[23]. Despite its remarkably innovative features, the Interest Savings Directive has proven to suffer from flaws, chiefly deriving from its limited objective scope of application, extending only to interest income.

On the other hand, automatic exchange of information, while technically foreseen under the broader Directive on Mutual Administrative Assistance of 1977,[24] was not fully operational as no memorandum of understanding, otherwise required for its implementation, was stipulated between member States. The new Directive on Administrative Cooperation, adopted in 2011,[25] foresaw, inter alia, the automatic exchange of information on five categories of income,[26] to become operational, in case the items of information are available, from 1 January 2015.

On 12th June 2013, the European Commission presented a proposal to amend the Administrative Cooperation Directive[27] aimed at broadening the scope of application of automatic exchange of information to other categories of income; in particular, dividend, capital gains, any other income generated with respect to the assets held in a financial account, any amount which respect to which the financial institutions is the obligor or debtor including redemption payments as well as account balances. These categories of income would be subject to automatic exchange of information provided that they are paid, secured or held by a financial institution.

While acknowledging the all-important role played by the EU in making automatic exchange of information a workable standard of administrative co-operation in tax matters, it shall also be recognised that the political determination to upgrade this form of co-operation into a global standard possibly traces its roots into facts and policy decisions developed in other settings. In this specific regard, it may be argued that, even though the earliest developments in the recent history of administrative co-operation appears to be an interesting case study in the area of multi-actor global governance, the most outstanding topical issues in the current tax policy agenda could be seen, by contrast, as the by-product of the confrontation (and the consequent ascent, on the one hand and demise, on the other hand) of two policy initiatives unilaterally promoted by the two very Countries that somewhat ignited

[23] Council Directive (EC) 48/2003 on taxation of savings income in the form of interest payments (EC Interest Savings Directive) [2003] OJ L157/38

[24] Council Directive (EEC) 799/77 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (Mutual Assistance Directive) [1977] OJ L336/15.

[25] Council Directive (EU) 16/2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (Administrative Cooperation Directive) [2011] OJ L64/1.

[26] Namely, income from employment, director's fees, life insurance products, pensions, and immovable property

[27] European Commission, Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation, Brussels, 12.6.2013, COM(2013) 348 final

the original sparkle of the current phase of dramatic developments in this area of international tax policy.

In 2010, across the Atlantic, a set of provisions included in the "H.I.R.E." (Hiring Incentives for Restoring Employment" Act of March 18th 2010[28]) introduced "FATCA.". In a nutshell, the new provisions called for engaging foreign financial institutions (hereinafter, also abbreviated as FFFIs") in reporting financial information about accounts held by specified United States persons under the threat of being subject to a punitive withholding tax in case of non-compliance.

It is important to remark at this stage that, despite the marked heterogony of ends that characterised this statutory initiative and that will be addressed in the core of this paper, FATCA started out as an exquisitely domestic and unilateral piece of domestic US legislation, although projecting extraterritorial effect. The transition from a paradigm characterised by a unilateral approach and by exclusive reliance on domestic legal instruments to one centred upon multilateralism and the recourse to multilateral administrative agreements appear to signal a story of success.

Less than two years afterwards, on the other side of the Atlantic, in an apparently unrelated move, Switzerland unilaterally set forth a treaty policy initiative, directed at its major European partners and which aimed at reconciling the tackling of international tax evasion deriving from offshore investments, which had become even more topical in the aftermath of the UBS affaire, with what Switzerland perceived as a priority of its financial sector, namely the preservation of bank secrecy: the outcome of this effort was unofficially (yet, influentially) baptised as "Rubik" agreements[29]. "Rubik agreements" rested on a basic model but were geared towards individual partner Countries and each differed in some of its key substantial terms. In particular, negotiations for Rubik Agreements had so far been conducted with Germany,[30] United Kingdom[31] and Austria[32]. In a nutshell, leaving aside issues concerning the regularisation of past situation, the Rubik Model relies on a system of anonymous withholding tax, at a rate set by the Country of residence of the investor so to equal onshore taxation, to be applied by Swiss financial institutions acting as paying agents on the items of income deriving from the relevant assets covered by

[28] Subtitle A of Title V of the Hiring Incentives to Restore Employment Act (HIRE) of 2010, 124 Stat. 97-117.

[29] This definition was coined by the President of the Association of Foreign Banks in Switzerland, Mr. Alfredo Gysi, and, by making reference to the famous Rubik's cube, highlighted the underlying puzzle that the agreements tried to solve.

[30] Albeit subject to later amendments, the original agreement was concluded on 21st September 2011.

[31] Concluded on 6th October 2011.

[32] Concluded on 13th April 2012.

the objective scope of application of the agreements[33] and the subsequent transfer of the proceeds of the withholding tax to the Fisc of the State of residence of the investor. Not unlike FATCA, Rubik sparkled lively debate in tax policy circles, especially in Europe; however, while FATCA has in the meanwhile been on the rise, Rubik, despite the conclusion and ratification of said agreements with Austria, appears to having received a major blow, in terms of chances of further propagation, from the failure of the German Bundesrat to ratify the agreement.[34] While it seems reasonable to assume that "Rubik-type" agreements might continue to be observed by those Countries that have so far decided to ratify them, their potential for propagation appears severely limited; on the other hand, not unlike what happened with FATCA, a curious heterogony of ends has occurred, since by their early popularisation and subsequent striking down, they have probably further polarised the international tax policy debate in favour of automatic exchange of information.

B. The Peculiar Role of Tax Intermediation

The relationship between finance and States pursuing sovereign functions is certainly not new. It may be sufficient to recall the role played by Italian bankers from the 13th Century onwards in lending to sovereigns (especially those of France, England and Spain), in exchange for the control of goods of primary importance (which could be produced or traded only under royal license) to the extent that the emergence of a "privatisation" of some governmental functions (e.g. a direct pledge on the tax revenues of the State) started to take shape.[35]

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[33] In this respect, the agreements vary in scope but a certain consistency can be observed in this specific respect: relevant assets can be identified as all forms of bankable assets booked or deposited with a Swiss paying agent including, but not limited to cash accounts and precious metals accounts; bankable assets held by a Swiss paying agent acting as a fiduciary agent; all forms of stocks, shares and securities; options, debts and forward contracts;
other structured products traded by the banks such as certificates and convertibles.

[34] The resolution took place on 23rd November 2012. While the impact of scholarship on policy makers typically occurs in the long run, in this instance, qualified anecdotal evidence suggests that a major source of influence towards this decision derived from the testimony of Professor Itai Grinberg before the Finance Committee of the Bundestag. The testimony emphasised the possible adverse consequences of anonymous withholding in terms of implications on tax fairness as well as the impact that the enactment of the Rubik agreement by Germany may have exerted on the global tax policy compass, weakening the case for a system of global automatic exchange of tax information. See, Itai Grinberg, 'Anonymous Withholding Agreements And The Future Of International
Cooperation In Taxing Foreign Financial Accounts' (Testimony before the Finance Committee of the German Bundestag, 24 September 2012) http://www.bundestag.de/bundestag/ausschuesse17/a07/anhoerungen/2012/098/Stellungnahmen/09_-_Grinberg.pdf accessed 4 november 2012.

[35] See Lorenzo Cuocolo, Valentina Miscia, 'Time for Sovereignty: Sovereign Wealth Funds and Sovereign Ratings', (2012) The Journal of Regulation <www.thejournalofregulation.com/I-1-44-Time-for-Sovereignty.html>, accessed 5th November 2013.

What is new in the current dynamics, at least for the purposes relevant to this analysis, is that the relationship between States and banks (to epitomise also other financial intermediaries) has been characterised not by the latter's role of sources of financial resources but rather as sources of a monitoring and regulatory leverage essential to the well-functioning of the mass oriented tax systems typical of developed fiscal States.

While the recent push towards extending the tax intermediation role, which has characterised financial institutions also in cross-border situations, has more visibly focused on the setting up of possible mechanisms for administering automatic exchange of information, the more traditional role of acting as withholding agents has also mirrored a recent controversial - yet, for the time being, short lived, - come back in the earlier cited Rubik Agreements. At the same time, as acutely pointed out, both cross-border information exchange and anonymous cross-border withholding have one thing in common: they require financial institutions to act as cross-border tax intermediaries.[36]

V. The leverage of a new Standard? FATCA in Context

A. Historical background

FATCA legislation has introduced some innovative features to the previous landscape of withholding and reporting mechanism and it could be argued to serve as a complement and upgrade of a system defined as "Q.I." ("Qualified Intermediaries"), which also relied on foreign tax intermediaries but only foresaw the transmission of information relating to certain accounts in bulk form. Moreover, the purpose of the Q.I. system was chiefly geared towards ensuring a correct application of tax treaty relief provision rather than at addressing issues of international tax evasion, as the FATCA system currently does.

The historical context into which the new FATCA regime developed is one rife with various financial scandals and high profile offshore tax evasion cases. During the 1999–2003 period, two events occurred that are particularly worth noting in order to understand the background in which FATCA developed.

First, the IRS started to have some success pursuing offshore accounts when it obtained credit card information from John Doe summons; later, in 2003, the IRS offered its first offshore voluntary compliance initiative (O.V.C.I.). The 2003 O.V.C.I. resulted in approximately 1,300 individuals identifying themselves to the

[36] Itai Grinberg, 'The Battle over Taxing Offshore Accounts', (2012) UCLA Law Review, 311.

IRS with approximately $75 million collected through July 2003.[37] In this climate, US tax policy makers realised that the Q.I. system in place since 2001 offered no tools to monitor the following situations.

In May 2008 an even bigger scandal erupted when the US arrested a former UBS private banker, who subsequently pleaded guilty one month later to helping US taxpayers evade US tax through the use of offshore accounts.

As a result, also on the grounds of additional information retrieved from the suspect, on June 30, 2008, the IRS filed a John Doe summons with the Southern District Court of Florida requesting that UBS disclose to the IRS all its US customers that had potentially been avoiding US tax. However, UBS refused to comply with the summons claiming that under Swiss bank secrecy law, they were not allowed to disclose customer information.

Following an initially recalcitrant behavior by UBS, instead of allowing the Court to decide the conflict of laws issue between US and Swiss law, the IRS and UBS ultimately settled the John Doe summons in August 2009. The result was that UBS agreed to disclose information on approximately 4,450 US customers, selected in order to shed light on what appeared as the largest and potentially most abusive accounts.[38]

Based on the circumstance that the UBS was among the first financial institutions to sign in to the Q.I. system, there was general agreement among senior IRS officials that something had to be done to fill up the loopholes and inadequacies of the latter system. The whole FATCA project then originally started out as an attempt to upgrade the Q.I. system in the wake of some major international scandals and with the need to develop a system that should in particular entail:

- the reporting of both US and foreign source income for US taxpayers;
- the determination whether US taxpayers are the beneficial owners of foreign shell entities;
- the review of all customer accounts within the affiliated group to identify US taxpayers.

Subsequently, following the 2009 President's Fiscal Budget and the 2010 Fiscal Green Book, legislation was ultimately introduced in October 2009, modified again in December 2009, and finally adopted in March 2010 as part of the earlier cited H.I.R.E. Act.

[37] See Richard Harvey, 'Offshore Accounts: Insider's Summary of FATCA and its Potential Future', *Villanova Law/Public Policy Research Paper No. 2011-24, 10.*
[38] Ibidem

B. The Mechanics of FATCA

The principal goal of the FATCA provisions is to "detect, deter and discourage"[39] evasion of U.S. taxes through the use of foreign accounts and investment vehicles.[40] In this respect, there seems to be a symmetry with other pieces of US legislation, that directly address the holding of foreign accounts by US taxpayers.[41] In this respect, it is worthy to mention that the definition of US taxpayers is particularly broad as, unique among advanced tax systems, the United States do not discharge of their worldwide tax obligations US citizens even when they reside abroad. Such a situation creates remarkable enforcement problems as attempts to enhance tax compliance by non-resident US citizens have typically proven to require disproportionate efforts. At the same time, the chief policy preoccupation of FATCA would seem to rest on offshore accounts held by US taxpayers residing in the US Territory rather than on foreign residents.

It can be argued that FATCA serves the purpose of enabling the IRS to carry out *ex ante* observation. In this regard, FATCA does not appear to be meant to substitute exchange of information based on general tax treaties and T.I.E.A.s but, rather, on the one hand to act on a different plan and, on the other hand, to serve as a prodromic activity to the filing of requests for information, also bearing in mind the need to avoid incurring in fishing expeditions.

In addition to aiding observation, FATCA seeks to deter future evasion of U.S. taxes. Thus, one of FATCA's primary goals is to aid in early detection of offshore tax evasion by introducing a conflict of interest between financial institutions and potentially non-cooperative (so called "recalcitrant") clients, so that scenarios such as those disclosed by the UBS case should not materialise anymore.

Unlike other analogous systems, these objectives are not pursued by providing to the involved financial intermediaries an incentive to report but, rather, by giving them a *disincentive* for *failure* to report on their U.S. account holders.

Although the requirements on financial intermediaries adhering to the FATCA system are extremely complex, the relevant core items can be summarised as follows.

[39] Melissa Dizdarevic, 'The FATCA Provisions of the Hire Act: Boldly Going Where No Withholding Has Gone Before', (2012) Fordham Law Review, 2984.

[40] Ibidem

[41] Namely, FATCA would provide monitoring possibilities in relation to the US regime of foreign financial asset disclosure: such a regime does not extend to all foreign assets but only to foreign financial accounts with an aggregate values of $10,000, in relation to which reporting on a specific form, the FBAR ("Foreign Bank and Financial Accounts") form, is required. This obligation is foreseen under I.R.C. §§ 5311–5314e

First of all, the scope of application of the system involves any US-owned accounts maintained both by F.F.I.s and, in general terms,[42] by foreign financial intermediaries who are members of the same "expanded affiliated group", i.e., an affiliated group where, as a general rule, there is a common ownership of more than 50%. A partnership or any other entity that is not a corporation is treated as a member of an expanded affiliated group if the entity is controlled by members of the group.

On the one hand, pursuant to the above policy orientation of providing a "disincentive" to non-compliance, FATCA foresees an obligation to apply a 30% withholding tax on all foreign financial intermediaries in relation to all "withholdable payments", that is, any payment of interest (including original issue discount), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments and other fixed or determinable annual or periodical gains, profits and income from sources within the United States, interest paid on deposits by non-US branches of US banks as well as gross proceeds from the sale or other disposition of US stocks and securities.[43]

The above reported obligation to apply a withholding tax is waived if the foreign financial intermediary enters into an agreement with the IRS to be treated as a qualified foreign financial intermediary.

The above mentioned agreement generates an obligation on the head of the qualified foreign financial intermediary to comply with certain verification and due diligence procedures with respect to the identification of US-owned accounts as well as annually reporting certain information with respect to any identified US-owned account. In this regard, the notion of "US-account" as defined by FATCA is very broad as it comprises any financial account held by one or more specified US persons or US-owned foreign entities. On the other hand, the notion of "financial account", ordinarily includes any depository account maintained by the foreign financial intermediary as well as any custodial account maintained by the foreign financial intermediary. The objective scope of application of FATCA would also extend to any non-publicly traded debt or equity interest in the same foreign financial intermediary.

[42] The following extension of the scope of application of the provision to the expanded affiliated group would not apply in case the affiliated foreign financial intermediary concludes its own agreement with the IRS.

[43] A possible critical issue appears to be the interaction of the 30% withholding with existing tax treaty rules, that typically provide for lower maximum tax treaty rates on investment income. While the matter is, by its very nature, Country specific, there is the general understanding that the 30% withholding should be refundable or creditable under tax treaty provisions where the FFI is not the beneficiary owner of the payments on which the withholding is applied. See I.R.C. § 1474(b)(2)(A).

In order to determine whether an account is US-owned, a foreign financial institution could rely on a certification provided by the same account holder as well as identification details retrievable from applicable due diligence procedures.

The FATCA mechanism however goes one step further in requesting qualified foreign financial intermediaries to act as "guardians" to the same system by ostracising and penalising financial intermediaries that are not compliant with FATCA by means of a "viral" withholding tax. In particular, qualified foreign financial intermediaries would firstly be required to apply a 30% withholding tax on any "passthru payments" to a recalcitrant account holder, that is, an account holder which:

- fails to comply with reasonable requests for information necessary to determine if the account is a US owned account;
- fails to provide the name, address, and tax identification number of each specified US person and each substantial US owner of a US-owned foreign entity; or
- fails to provide a waiver of any foreign law that would prevent the qualified foreign financial intermediary from reporting any requisite information.

Even more remarkable from a policy perspective in relation to the design of the system, is the obligation to apply an analogous withholding tax also to a non-qualified foreign financial intermediary or even to a qualified foreign financial intermediary which has elected to undergo the 30% withholding tax, in relation to the portion of payments directed to persons or intermediary that are outside the perimeter of the FATCA system, such as a recalcitrant account holder or a non-qualified foreign financial intermediary.

A further, rather critical, feature of the FATCA system is that it requires qualified foreign financial intermediaries to attempt to obtain a waiver in any case in which any foreign law would otherwise prevent the reporting of the information required with respect to any US-owned account maintained by the same intermediary. It is also foreseen that, in case no waiver is granted, the concerned qualified foreign financial intermediary should proceed to close the account.

The "steep penalty" of thirty percent withholding for nondisclosure seems also to hold a signaling function on top of merely serving as a proverbial "stick" (as opposed to the carrot embedded for instance in the Q.I. arrangements) to promote compliance, namely the heftiness of the penalty has been especially designed to discourage financial institutions from engaging in the kind of evasion-aiding behavior which caused such an outrage in the aftermath of the earlier referred UBS affair.

As anticipated, the first enactment of FATCA legislation dates back to 2010; however, also based on requests set forth by the financial industry constituencies, its implementation dates have been postponed several times. As the situation currently stands, actual implementation shall start on July 1st 2014, even though its

application should take place over progressive instalments over the subsequent three-year period.[44]

Understandably, the complex organisational implications of FATCA raised many interpretive and implementation issues that necessarily required guidance by the US Tax Administration. After the issuance of Proposed Regulations on February 8th 2012, actual FATCA Regulations have been officially finalised on January 23rd 2013.[45] The Regulations address most outstanding issues in excruciating detail and, at the same time, appear to having been markedly influenced by the requests of the various financial constituencies prospectively impacted by its application.

VI. The Inter-Governmental Agreements and FATCA as a vector for the propagation of a standard based on automatic exchange of information

The system set forth by the Foreign Accounts Tax Compliance Act is a peculiar piece of legislation with regard to its policy implications. Namely, on the one hand, the FATCA project started out as an exquisitely unilateral action by the US intended to ultimately provide transparency surrounding offshore accounts of US taxpayers. At the same time, recent developments would seem to suggest that the actual sustainability of the FATCA system is dependent upon the ability of the United States to reach out to other States and to convince them to set up systems analogous to FATCA or, more likely, to develop either a multilateral platform for FATCA or at least a network of bilateral agreements implementing FATCA.

Leaving aside the tricky question of the extraterritoriality of the law, the main concerns arise with the conflict between FATCA and the national data protection laws as well as the civil laws with regard to the requirements to terminate certain customer relationships on the head of the so-called recalcitrant account holders. While a comprehensive comparative survey on a global level and even across Europe would be extremely burdensome, it is possible to anticipate some possible points of friction between what qualified financial intermediaries operating in Europe would be required to do and what European law would provide. For instance,

[44] See I.R.S. Notice 2013-43 of July 12th 2013.

[45] See Regulations Relating to Information Reporting by Foreign Financial Institutions and Withholding on Certain Payments to Foreign Financial Institutions on Other Foreign Entities, 78 Fed. Reg. 5874, of 28th January 2013.

Directive 95/46/EC66 bars from transferring personal data to other entities without the explicit consent of the client.[46]

It appears clear that a solution to such a conflict could only stem from some form of coordination between States. This finding is central to the sympathetic view of FATCA held in this paper: had not been for this very difficulty, the US would probably not have had any incentive to transpose such a unilateral effort onto the plan of international co-operation: this demonstrates the impossibility, even for the single jurisdiction with possibly the strongest contractual leverage to co-opt foreign financial intermediaries, to act on merely unilateral terms. In the light of these concerns, the Treasury and the IRS have considered, in consultation with foreign governments, an alternative or intergovernmental approach to FATCA, addressed to solve the compliance legal impediments, and to simplify practical implementation as well as reduce costs.

The original structure of FATCA was changed substantially by a Joint Statement published on 8th February 2012 by the Government of the United States, and five foreign Governments: France, Germany, Italy, Spain and the United Kingdom.

Within the framework of the Joint Statement, the partner Countries agreed, on the one hand, to modify their legislation to compel FFIs in the respective jurisdictions to collect the FATCA required information and to apply the necessary diligence to identify US accounts. On the other hand, the Partner Countries foresaw that information be collected by local FFI but it would be processed and transferred to the United States on an automatic basis under their responsibility.

This commitment would be more consistent with the overall design of international tax information sharing. Such an inter-governmental approach would also ensure that domestic Tax Authorities will have the same information that is being provided to the IRS on domestic taxpayers.

In pursuance of the agreement, FFIs would not be required to terminate the account of a recalcitrant account holder nor to apply passthru payment withholding on payments to these recalcitrant account holders or on others FFIs in its Country or other FATCA partner Countries.

The United States, in turn, will eliminate the obligation of each FFI established in the FATCA partner to enter into a separate comprehensive FFI agreement directly with the IRS and also will eliminate the withholding on payments to FFIs established in such Countries.

[46] European Parliament and European Council Directive (EC) 46/95 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (EC Data Protection Directive) OJ L281/95.

In brief, it could be said that the Joint Statement changes the unilateral nature of FATCA, which will become an instrument for US bilateral automatic exchange of information.

On a different level, the Joint Statement would also appear to include synallagmatic "checks and balances" in a system that, in the perspective of the involved financial intermediaries as well as of that of their County of residence, would otherwise appear as merely "extractive". In particular, agreements concluded in pursuance of the Joint Statement would, on the one hand, downplay some very burdensome and penalising implications for foreign financial intermediaries while, at the same time, ensuring that possible impediments to the implementation of the mechanism be removed.

The concrete policy implication of the Joint Statement has somewhat reduced the emphasis of the FATCA system on a new emerging role of financial intermediaries as tax intermediaries dealing not only with the collection of information but also with its transmission. With some exceptions - that will be illustrated further in this Paragraph – tax intermediaries have been relegated to the more consolidated function of acting as information-gathering agents; this implies that in such an alternative incarnation, FATCA would closely resemble the design of the EU Interest Savings Directive.

From a legal perspective, such an involvement of the Tax Administrations of the concerned jurisdictions would be ensured by the conclusion of an "Intergovernmental Agreement" (I.G.A.) to which the Joint Statement operates a *renvoi* as far as implementation is concerned.

In this regard, in July 2012 a Model I.G.A. has been published. From a legal and policy perspective, it could be argued that the Model I.G.A. would transform the net of bilateral contractual relations between the relevant financial intermediaries operating in a given jurisdiction into a legal obligation sanctioned by the same jurisdiction and binding on local financial intermediaries to identify and report information on US account holders. Tied to this it would be the waiver of any Country-specific confidentiality legislation that would prevent the collection of information as per FATCA requirements.[47]

[47] In the latter respect, an asymmetry between the way different kinds of institutions are treated may be observed. As anticipated, FATCA creates the heaviest burden of compliance obligations upon entities that would qualify as FFIs but some of its effects would reverberate also on other foreign entities that do not qualify as FFIs, the so-called NFFEs. Despite this circumstance, the model IGAs do not appear to address the position of NFFEs. While this circumstance may theoretically appear problematic in ensuring that NFFEs are placed in an equal position with FFIs vis-à-vis the substantive compliance with FATCA requirements, it may be argued that the kind of information that NFFEs are required to provide concerns their body of shareholder, so that they should be in a position to voluntarily waive confidentiality obligations, where applicable, without incurring in penalties; moreover, as IGAs directly

On the other hand, the conclusion of an I.G.A. would carry along two important systemic implications for the financial sector of the contracting jurisdiction. In particular, it would waive the obligation to apply the 30% withholding tax on "pass thru payments" as well as that of closing the accounts of recalcitrant account holders.

The Model I.G.A. has been published in two versions, a "reciprocal" and a "non-reciprocal" one.

Under the reciprocal version of the Model I.G.A., the United States will provide information to the tax authorities of the FATCA partner jurisdiction on a reciprocal basis with respect to accounts of nationals of the FATCA Partner in the United States. In particular, the US will be expected to collect and forward to the partner jurisdiction, the same kind of information about IGA partner residents whose collection and transmission FATCA imposes upon FFIs.[48] By contrast, the non-reciprocal version of the Model I.G.A. would not involve any provision of information by the United States to the FATCA Partner jurisdiction.

The reciprocal version of the I.G.A. would be accessible only with regard to those jurisdictions bound to the United States by an international agreement, such as a double taxation convention incorporating and exchange of information clause or a T.I.E.A. and in relation to whom the Treasury Department determined, on a case-by-case basis, that the recipient government has in place robust protections and practices to ensure that the information remains confidential and that it is used solely for tax purposes.[49]

It is interesting to remark that the Model I.G.A. does not set up additional channels for exchanging information but rather refers to existing legal instruments, that actually constitute a pre-requisite to the exchange. This remark extends to the

affect the local legal environment in which foreign entities operate, it may be argued that NFFEs would indirectly benefit therefrom even though they are not expressly mentioned in the inter-governmental agreements. In any case, considering that the Model IGAs only provide for mere "model provisions", it appears likely that peculiar Country-specific situations will be addressed in actual IGAs upon their negotiation.

[48] Article 6(1) of the reciprocal Model 1 IGA provides as follows: "Reciprocity. *The Government of the United States acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange with [FATCA Partner]. The Government of the United States is committed to further improve transparency and enhance the exchange relationship with [FATCA Partner] by pursuing the adoption of regulations and advocating and supporting relevant legislation to achieve such equivalent levels of reciprocal automatic information exchange.*"

[49] It is interesting to remark that a strict requirement of a "tax-only" use of the exchanged information would seem to be at odds with the more recent amendment made to Art. 26 of the OECD Model which would go in the direction of enabling, upon an explicit consent of the supplying jurisdiction, other authorities in the recipient State to access the information exchanged by virtue of the same treaty provision.

peculiar mode of co-operation of choice, centered upon automatic exchange of information: in this regard, the identified instrument would consist in an ad hoc Memorandum of Understanding, anchored to the existing treaty-based exchange of information provisions.

At the same time, from a policy perspective, it can be noted that the seeds of a potentially fruitful cross-pollination with other initiatives in the area of automatic exchange of information can be found. In this regard, the fourth Paragraph of Art. 6 of the Model I.G.A. calls for the commitment of the involved parties to working with other partners, in particular, the OECD and the European Union, on adapting the terms of the I.G.A. to a common model for automatic exchange of information, including the development of reporting and due diligence standards for financial institutions. In this regard, the importance of the Model I.G.A. from a policy perspective cannot be underestimated, not much for its specific contribution to making the FATCA system, which in itself could also appear as rather questionable, especially whereas it is not mitigated by some form of reciprocity, but rather because it would fall in the broader paradigm of what has been defined as the "snowball effect" that FATCA could potentially start.[50]

From an implementation perspective, the Model I.G.A. would introduce a significant mitigation of the obligations deriving from the FATCA framework.

First of all, with regard to timing and effective dates, the model I.G.A. would provide an additional six months (until 31 December 2013) in which to have new procedures in place that comply with the FATCA requirements.[51] As for the branches of financial institutions, the Model I.G.A. provides that branches of financial institutions will report to the Tax Authority in the jurisdiction where the branch is located and not where the company is incorporated.

The approach to the monitoring and sanctioning of the FATCA regime is twofold and depends on the entity of the recorded non-compliance. Namely, if there has been a minor or administrative error that leads to incorrect or incomplete information reporting IRS may directly contact the concerned FFI located in the partner Country. Conversely , in the event of significant non-compliance, the responsibility to apply domestic law and penalties to non-compliant institutions located in their jurisdiction lies directly on the Tax Authorities of the concerned jurisdiction. Whereas the enforcement actions do not resolve the non-compliance within eighteen months from notification, the IRS will treat the institution as a non-participating FFI with all the earlier exposed consequences.

[50] See *supra* note 2.

[51] Such a feature however appears to having lost significance after the Department of Treasury unilaterally decided to postpone the application date to July 1st 2014.

Financial institutions that are resident in a partner jurisdiction and that comply with the registration, due diligence and reporting requirements of the Model I.G.A. will be considered by default as complying with FATCA and will not be subject to FATCA withholding on US-source income paid to them. Such FFIs will not be required to withhold upon payments made to recalcitrant account holders, nor will they be required to close accounts of recalcitrant account holders.

FATCA partner financial institutions are requested to withhold 30% of any US-source withholdable payments made to non-participating FFIs. Other FATCA partner financial institutions that are acting as intermediaries with respect to payments to non-participating FFIs are to provide information to the payers for purposes of FATCA withholding and reporting with respect to the payment.

For pre-existing accounts, taxpayer identification numbers will only be required to be reported if such numbers are in the financial institution's files. However, the Model I.G.A. provides that procedures to gather such numbers will be required to be adopted by 1st January 2017.

Generally, information will be exchanged between the tax authorities within nine months after the end of the calendar year to which the information relates. However, an additional year's time has been granted with respect to the timeline for the exchange of information for 2013, extending the deadline for that year to 30th September 2015.

The due diligence requirements applicable to FATCA Partner financial institutions are set forth in Annex I of the Model I.G.A.. The diligence requirements distinguish between pre-existing and new accounts and between individual accounts and entity accounts. For all accounts, financial institutions may not rely on certifications or documentary evidence if the financial institution (or, in the case of certain high-value accounts, a relationship manager) knows or has reason to know the certification or documentary evidence is incorrect or unreliable.

The due diligence requirements for pre-existing individual accounts set forth in Annex I of the Model I.G.A. provide some additional time and therefore will allow for better planning for compliance. The Model I.G.A. defines pre-existing accounts as accounts that are maintained as of 31 December 2013.

The Model I.G.A. distinguishes between high-value accounts (over $1 million in value on 31 December 2013, or the last day of any subsequent year) and lower-value accounts.

For pre-existing, lower-value accounts, an electronic search alone may be relied upon until there is a change in circumstances that results in US indicia being associated with the account.

For pre-existing, high-value accounts, a paper records search and a relationship manager inquiry are also required. However, the paper records search is limited to

the preceding five years. Moreover, such a search is not required if the electronic file contains sufficient information in electronically searchable format to cover all indicia.

For pre-existing accounts, if US indicia are found after the required review, the financial institution will be required to treat the account as a United States account unless it elects the option of soliciting documentary evidence to rebut US status. This approach, which differs from the procedure under the Proposed Regulations, may help reduce the compliance burden for P.F.F.I.s.

Once the review outlined above is complete, no further action will be required until there is a change of circumstances.

For new individual accounts (other than accounts eligible for the de minimis rule), the Model I.G.A. requires the financial institution to obtain a self-certification that allows the institution to determine whether the account holder is a US citizen or resident. The financial institution must then confirm the reasonableness of the self-certification based on the information obtained in connection with the opening of the account, including any documentation collected pursuant to applicable know-your-client procedures. Once the review has been completed, no further action is required until there is a change of circumstances.

For entity accounts, the Model I.G.A. focuses on entity classification and relies heavily on self-certification and information, also in this case, such as those collected for local know-your-client procedures.

The above described Model I.G.A., in its reciprocal version, constitutes the faithful basis of the Agreement concluded by the United States and the United Kingdom on 12th September 2012. The conclusion of the agreement represents an important precedent which, according to the US Department of Treasury, should be followed up in the near feature with the conclusion of other I.G.A.s even with Countries outside the fold of the signatory of the 2012 "Joint Statement".

Besides the approach depicted so-far, which, basically, on the one hand, makes FATCA requirements endogenous to the legal framework where financial intermediaries are called to operate, and, on the other hand, mitigates the foreseen requirements and institutionalizes the automatic exchange procedure by entrusting it to the Tax Administration of the State of establishment of the foreign financial intermediary, another approach to I.G.A.s can be foreseen.

In this regard, besides the "Treasury Model I" (which is the model encompassed by the above discussed Model I.G.A.), a "Treasury Model II" can be distinguished.

An anticipation of the "Treasury Model II" approach can be derived from the Joint Statement signed by the US, Japan and Switzerland on June 21st 2012. A Model I.G.A. based on the "Treasury Model II" approach has very recently been released by the Department of Treasury on November 15th 2012.

Under the "Treasury Model II" approach, the original focus on the role of financial foreign intermediaries also on transmitting information is maintained. In particular, within such a framework, financial institutions will provide information directly to the IRS, while the national Tax Administrations will conclude I.G.A.s encompassing exchange of information upon request in relation to additional items. The Model II IGA may appear not much unlike the Model 1 IGA but it is actually much closer to the pattern that had originally being conceived for FATCA, as it is less concerned with administrative co-operation than with fundamentally allowing FFI of the other Contracting State to comply with FATCA requirements and to forward the required information directly to the IRS, without any mediation of the Tax Administration of the other Contracting State and without incurring in an infraction of the locally applicable confidentiality laws, an issue that may be particularly critical in Countries like Switzerland, that, probably not by coincidence, was the first Country to stipulate a Model II IGA with the United States.

On the other hand, despite their practical relevance, the contribution of Model II IGAs is probably less interesting in the specific policy perspective of this study as it seems to fail to serve the propagation of new standards of automatic exchange of information even though it shares with other forms of implementation of FATCA[52] the centrality of financial institutions in serving the function of transnational tax intermediaries.

While in a situation of compliance, the results achieved by a Model II IGA would not be very different from those deriving from a Model I IGA, except for the degree of involvement of the FFIs in the routing of the information, a different scenario would be envisaged in relation to cases where account holders are recalcitrant. In this case, information on the recalcitrant account holders would only be provided in aggregate form, not unlike what happened under the "Qualified Intermediary" system. It is foreseen that such a default mechanism be supplemented, within certain limits, by the possibility of obtaining client-specific information concerning the pool of recalcitrant account holders through exchange of information upon request.

Thus, despite the heavier reliance of Model II IGAs on transnational tax intermediaries, situations concerning recalcitrant account holders will necessarily directly involve the Tax Authorities of the other Contracting State. At the same time however, due to the fact that I.G.A.s are not, *per se*, tax information exchange agreements but rely on a separate international legal instrument between the two Countries for the latter purpose, the actual effectiveness of this complementary pillar depends on the terms of the background information exchange agreement. In

[52] And, for that matter, of other international arrangements such as the Q.I. agreements, the EU Interest Savings Directive or the now almost defunct "Rubik Agreements".

concrete terms, this poses some possible difficulties whereas it may be expected that the jurisdictions more likely to conclude a Model II IGA are those that have been experiencing more trouble in upgrading their tax information treaty network up to the international tax standard.[53]

The Model II IGA may carries along a mixed blessing as, on the one hand, it has signaled the co-opting of Switzerland, the very Country that had coined the antagonistic policy option embodied in the so-called "Rubik Agreements"; on the other, as it is possible to notice, the Model II IGA somewhat detracts pervasiveness from the kind of automatic information that is carried out, as the latter would only be performed on an aggregate basis. At the same time, the momentum of the FATCA withholding as an instrument of compulsion would largely be diminished as, even, in the case of recalcitrant account holders, it could be lifted in favor of the carrying out of exchange of information upon request, whose effectiveness, in turn, would depend on the quality of exchange of information agreement in place, which, due to the 2009 Protocol not being effective, is somewhat subpar as far as the relationship between Switzerland and the United States is concerned.

The US has so far signed an IGA with nine Countries[54] while negotiations are open with 80 jurisdictions[55] In particular, it has been reported[56] that additional jurisdictions with which Treasury is in the process of finalizing an intergovernmental agreement and with which Treasury hopes to conclude negotiations by year end include France, Italy, Canada, Finland, Guernsey, Ireland, Isle of Man, Jersey and the Netherlands. Jurisdictions with which Treasury is actively engaged in a dialogue towards concluding an intergovernmental agreements include Argentina,

[53] A somewhat peculiar situation can be observed in relation to Switzerland. Namely, the supplemental exchange of information upon request would, by express *renvoi* of Art. 5 of the concerned IGA, rely upon the 1996 tax treaty between Switzerland and the United States as amended, with regard to the exchange of information provision, by a Protocol concluded in 2009; such a latter protocol however, does not appear to be effective to date; unless the ratification procedure, including the exchange of ratification instruments, is concluded swiftly, the IGA between Switzerland and the United States may result deprived of an essential component. On the other hand, it is worthy to mention that a new course with reference to the relations in the area of administrative tax co-operation between the United States and Switzerland, appears to be signaled by the publication of a Joint Statement of Tax Evasion Investigations. See Press Release, U.S. Department of Justice, 'United States and Switzerland Issue Joint Statement Regarding Tax Evasion Investigations' (29 August 2013) </www.justice.gov/opa/pr/2013/August/13-tax-975.html> accessed 5 November 2013.

[54] Namely, with Switzerland, Denmark, Germany, Ireland, Mexico, Norway, Spain, Switzerland and the United Kingdom.

[55] *See* US Department of the Treasury, 'Treasury Engaging with More than 80 Countries to Combat Offshore Tax Evasion and Improve Global Tax Compliance' (Press Release 12 July 2013) www.treasury.gov/press-center/press-releases/Pages/jl2012.aspx, accessed 5 November 2013.

[56] See the Treasury Department press release of 8th November 2012, retrievable at the following website: http://www.treasury.gov/press-center/press-releases/Pages/tg1759.aspx

Australia, Belgium, the Cayman Islands, Cyprus, Estonia, Hungary, Israel, Korea, Liechtenstein, Malaysia, Malta, New Zealand, the Slovak Republic, Singapore, and Sweden. Treasury expects to be able to conclude negotiations with several of these jurisdictions by year end. The inter-governmental agreements concluded so-far also contain as appendixes[57] *ad hoc* enumerations of entities and accounts to which FATCA would not apply.[58] It seems however that the orientation of the US Treasury Department goes in the direction of limiting such derogations to very specific circumstances.[59]

At the same time, possible alternative models may emerge in relation to other Countries, in particular, emerging and developing ones such as Brazil, Chile, India, Lebanon, Romania, Russia, Seychelles and South Africa.[60] Another common denominator of these Countries is that they are not tied to the United States by tax treaties encompassing exchange of information provisions (or, in some instances, such as Brazil, by no tax treaties at all). The solution set forth by the Treasury Department in this respect would be the conclusion of what have been defined as "free-standing" IGAs.[61] A "free-standing" IGA should likely take the form of either a Model I IGA or a Model II as, while exchange of information between tax authorities constitutes a staple, under its automatic form, of Model I Agreements, Model II Agreements also imply, besides the direct forwarding of information on a routine basis from FFIs to the IRS, which in itself would not postulate an international administrative agreement in order to be implemented, the possibility of engaging in exchange of information upon request which, in turn, would require that an agreements binding the Competent Authorities of the two partner jurisdictions be in place. It should be mentioned that many of the above mentioned Countries have also started negotiations with the United States in order to conclude tax treaties or, most likely, T.I.E.A.s; the "free-standing" IGA would still maintain a certain relevance as the swifter way to ensure smooth implementation of FATCA before the foreseen starting date of July 1st 2014.

[57] Under the Model I I.G.A. these exceptions would be dealt with under Annex II.

[58] The list varies, necessarily, from partner Country to Partner Country but, it could be held that the underlying rationale would be to carve out typologies of entities and accounts that present a low-risk profile in terms of non-reporting, such as, for instance, Government-sponsored retirement plans that, despite such characteristics would have failed to qualify for FATCA-exemption under the US FATCA Regulations. See, in this regard the Annex II of the IGA with the UK.

[59] See Lydia Beyoud, 'Annex II Modified to Reduce Listing of FATCA-Exempt Entities, Official Says', (June 2013) Daily Tax Report, 106.

[60] Ibidem.

[61] Kristen Parillo & Jaime Arora, 'Treasury Official Explains FATCA Agreement Options for Countries Without U.S. Treaty or TIEA', (2012) 67, Tax Notes International, 603.

The legal status of I.G.A.s had been a matter of debate since the onset. From a US perspective, it has now been affirmed by the Treasury Department that I.G.A.s are considered "executive agreements" and not treaties[62]. Such a qualification possibly provides for greater flexibility as, unlike treaties, executive agreements do not require the approval of the US Senate[63] , this should make the whole ratification procedure much swifter, especially for those IGAs that incorporate a reciprocity requirement for the United States, which in turn, could likely be met with some opposition by certain segments of the Senate, regardless of the circumstance that "the original FATCA" had been approved by a bipartisan majority, since, as anticipated, FATCA was not originally meant to generate international obligations for the United States.

A. FATCA and "new old" pathways towards the implementation of a multilateral system of automatic exchange of information

FATCA is unique in many ways as it benefits from the leverage represented by the 30% withholding threat, which, in case of non-compliance, could only be avoided by keeping out of reach of the US financial markets and their ramifications. As such, it is a mechanism that other Countries would find hard to replicate. At the same time, shall the reciprocal version of the Model I IGA achieve popularity, the kind of reporting obligations envisaged by FATCA could be duplicated to suit the benefits and the needs of the various partner Countries. Such a situation may in turn create a proliferation of reporting standards that may generate significant implementation issues on the head of the financial intermediaries that constitute the very leverage through which the FATCA system is going to be administered. It then appears understandable that some of the most representative financial industry associations worldwide have come to advocate the introduction of a "global multilateral solution".[64]

In this respect, it is possible to notice a correspondence between the needs and concerns expressed by the financial industry and the broader policy and governance objectives upheld by the most representative international fora in relation to the issue of international tax evasion.

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[62] *See* Allison Christians, 'The Dubious Legal Pedigree of IGAs (and Why It Matters)', (2013) Tax Notes International, 565.

[63] Article II, section 2, Clause 2 of the U.S. Constitution.

[64] British Bankers' Association, (Notice 2010-60, 29th October 2010) Notice And Request For Comments Regarding Implementation Of Information Reporting And Withholding Under Chapter 4 Of The Code (Oct. 29, available at www.bsmlegal.com/pdfs/fatca_bba_20101029.pdf accessed 5th November 2013.

In this regard, it may be argued that the impending implementation deadlines set forth under FATCA, especially where the system is administered through a Model I IGA, would act as a catalyst in relation to the above mentioned broader policy goals. It may then be concluded that in the present situation, the key elements for a big leap forward such as the one previously experienced after 2009, appear to be present. What seems to be lacking is consensus about the actual platform trough which all the different international (G20), regional (EU) and national (US) initiatives in the field could find a point of contact. To this purpose, it could be said that the most convenient and promising instrument in the OECD/Council of Europe Convention on Mutual Administrative Assistance.[65] This is somewhat ironic as this Convention had been somewhat neglected, since it was first released in 1988, having been ratified by a negligible number of Countries, often with major reservations. The post-2009 thrust towards the enhancement of more effective standards of exchange of information in tax matters has however revived the interest in this instrument and led to the release of an amending protocol, which had the purpose of bringing the Convention in line with the by-then crystallised international standard.

In the hereby relevant perspective, however, the most striking feature of the convention is possibly its requiring signatories "to accept requests from all other signatories with respect to "ascertainable groups or classes of persons."[66] As it has been correctly remarked, this aspect of the protocol indicates a shift in international norms toward multilateral automatic information exchange.[67] At the same time, the Convention on Mutual Administrative Assistance is still not operational as far as automatic exchange of information is concerned, because it requires to this purpose the conclusion of a memorandum by mutual agreement.[68]

A major change set forth by the 2010 Protocol and, possibly, even more relevant from a policy perspective, was, as earlier mentioned, the opening up of the Convention to the signing also by Countries that are not members of the OECD or of the Council of Europe.[69] At the same time, accession to the Convention is conditional upon the approval of the Committee, which is composed of Countries that are already members to the Convention. In this regard, the 2010 Protocol also had the merit of bringing back the Strasbourg Convention to the forefront of the

[65] Council of Europe/OECD, Convention on Mutual Administrative Assistance in Tax Matters, 1988
[66] Explanatory Report to the Convention as Amended by the Protocol, Protocol Amending the Convention on Mutual Administrative Assistance in Tax Matters, May 27, 2010
[67] Itai Grinberg, 'The Battle over Taxing Offshore Accounts', (2012) UCLA Law Review, 311. 371, footnote 228
[68] Art. 6 of the Council of Europe/OECD, Convention on Mutual Administrative Assistance in Tax Matters, 1988.
[69] See Art. 8, Para 5 of the Protocol of 27th May 2010.

administrative co-operation agenda. The new legal instrument was perceived by many jurisdictions as an efficient way to broadening their tax information network, so that the number of signatory States increased by more than 50% in post-2010 period, extending also to many South American Countries and involving most of the so-called "B.R.I.C.S" Countries,[70] although with the notable exception of China. Despite its limits, the Mutual Assistance Convention arguably represents, to date, the only viable instrument to quickly propagate and address, on a multilateral plane, the rising new standard of automatic exchange of information for which FATCA has had the merit to act as a catalyst.

[70] In particular, the most recent signatory Countries are the following: Korea, Japan, Mexico, Moldova, Romania, Slovenia, Spain, Argentina, Russia, Tunisia, Brazil, Canada, Czech Republic, Colombia, New Zealand, South Africa, Turkey and India.

La fiscalità degli accordi di ristrutturazione del debito: tra "vecchie" tematiche e "nuove" (in)certezze

di Giusy Antonelli

I. La composizione concordata della crisi d'impresa nella legislazione fallimentare e tributaria

La c.d. riforma organica della "Legge fallimentare"[1], è stata attuata ridisegnando in modo sostanziale la disciplina del diritto della crisi d'impresa, tradizionalmente di stampo pubblicistico, al fine di addivenire alla c.d. "privatizzazione" delle procedure concorsuali[2], con il conseguente ridimensionamento dell'ingerenza giudiziale nel-

[1] Com'è noto, la c.d. "Legge fallimentare", di cui alla L. del 16 marzo, 1942, n. 267, ha costituito oggetto di profonde modifiche legislative apportate mediante un triplice intervento normativo: il D.L. del 14 marzo 2005, n. 35, ha modificato la disciplina dell'azione revocatoria fallimentare e del concordato preventivo, nonché ha introdotto l'istituto degli accordi di ristrutturazione del debito. A seguire, il D. Lgs. del 9 gennaio 2006, n. 5, ha varato la c.d. riforma organica del diritto fallimentare, pur conservando la struttura originaria del testo legislativo. Infine, con il D. Lgs. del 12 settembre 2007, n. 169, il processo di riforma è stato portato a termine mediante l'approvazione di alcuni "correttivi" finalizzati a coordinare le nuove disposizioni con quelle previgenti.

[2] Il senso della riforma è parso «[…] *principalmente poter essere rintracciabile in una ancora più marcata accentuazione del fenomeno sinteticamente definito come "privatizzazione" della insolvenza*», in Bonfatti, Sido – Panzani, Luciano, La riforma organica delle procedure concorsuali, Milano, Ipsoa, 2008, p. V.

lo svolgimento delle attività gestionali e dei meccanismi di controllo a esse afferenti[3].

A fronte della constatazione dell'inadeguatezza della previgente disciplina a regolamentare un fenomeno, quale quello della crisi d'impresa che, in un mercato attanagliato da un perdurante clima di recessione economica, rappresenta una fase non già patologica, bensì fisiologica della vita delle imprese, il legislatore ha optato per la configurazione di un impianto in cui il rilievo dell'autonomia privata è preponderante nella gestione della crisi d'impresa[4]. L'intento del legislatore della riforma, è stato quello di ridimensionare il ricorso al fallimento per la risoluzione delle crisi d'impresa, relegando detto rimedio a una posizione residuale, nella «[…] *convinzione che l'intervento statale nella soluzione della crisi si debba ridurre al minimo possibile, ampliando, invece l'operatività degli assetti pattizi, delle soluzioni concordate della crisi*»[5].

Gli strumenti volti alla risoluzione concordata della situazione di dissesto in cui versi l'impresa, ossia accordi di ristrutturazione del debito, concordato preventivo e piani attestati di risanamento, costituiscono modalità alternative per addivenire al possibile risanamento, nonché alla conservazione del valore aziendale, al fine di evitare il manifestarsi di una situazione d'insolvenza irreversibile, che imponga di attuare procedure di liquidazione volte al mero riparto del residuo attivo tra i creditori, conducendo alla disgregazione "atomistica" del patrimonio sociale[6]. Ed è proprio nell'ottica di favorire ed "efficientare" l'impiego di istituti volti alla gestione negoziale della crisi d'impresa, che la disciplina in materia è stata incisa da alcuni

[3] A tale riguardo, vedasi Boggio, Luca, *Gli accordi di salvataggio delle imprese in crisi. Ricostruzione di una disciplina*, Milano, Giuffrè, 2007, p. 99 ss., il quale sottolinea la tendenza della riforma a valorizzare il superamento della crisi d'impresa mediante piani predisposti dai privati, con l'effetto di rimettere alla disponibilità delle parti gli stessi interessi creditori.

[4] Il ruolo dell'autonomia privata nella composizione stragiudiziale della crisi, ha consentito di scardinare il "dogma" dell'indisponibilità della gestione dell'insolvenza, così come il fenomeno è stato definito da Roppo, Vincenzo (2008) «Profili strutturali e funzionali dei contratti di "salvataggio" (o di ristrutturazione dei debiti d'impresa) », *Il Diritto fallimentare e delle società commerciali* (3), pp. 364-391.

[5] Così, Pajardi, Piero – Paluchowski, Alida, *Manuale di diritto fallimentare*, Milano, Giuffrè, 2008, p. 807.

[6] Sul punto, Contrino, Angelo, La "questione fiscale" delle soluzioni di concordatarie della crisi e dell'insolvenza d'impresa, con specifico riguardo all'imponibilità delle sopravvenienze attive da riduzione di debiti (anche tributari), in AA.VV., Atti della giornata di studi in onore di Gaspare Falsitta, Padova, Cedam, 2012, p. 664, si sottolinea come le soluzioni negoziate tra il debitore e il ceto creditorio, siano «di norma indirizzate al recupero dell'equilibrio economico-finanziario dell'impresa interessata e al soddisfacimento dei correlati crediti», in quanto, nell'ipotesi in cui l'alternativa negoziale non abbia un buon esito, potrebbe giungersi alla liquidazione dell'impresa. La tesi suesposta, è coerente con quella di Presti, Gaetano (2006) « Gli accordi di ristrutturazione dei debiti », Banca, Borsa e Titoli di credito, 1, pp. 16-44, richiamata dallo stesso Autore.

recenti interventi legislativi[7], finalizzati a evitare l'emersione tardiva del presupposto del fallimento.

La regolamentazione del diritto della crisi d'impresa, che assurge, ormai, a *species* del più ampio *genus* del diritto fallimentare, è espressione, dunque, di un *favor* verso la formazione dell'autonomia negoziale delle parti coinvolte, ossia l'impresa in stato di decozione da un lato, e il ceto creditorio dall'altro.

La riscadenziazione dei debiti, ovvero la rinegoziazione dei termini per il soddisfacimento parziale o integrale delle pretese creditorie che, di fatto, costituiscono il nucleo della regolazione stragiudiziale della crisi d'impresa[8], possono estrinsecarsi nel ricorso a quelle soluzioni negoziali che sono state innovate o disegnate *ex novo* dalla riformata Legge fallimentare e dalle sue successive modifiche: *in primis* il concordato preventivo, di cui agli artt. 160-181, LF., istituto che ne è uscito pienamente "vivificato"[9] e che, idealmente, rappresenta l'alternativa preferibile al fallimento, ogni qualvolta ciò sia possibile, in quanto ritenuto lo strumento più idoneo, nell'ambito delle fattispecie non del tutto avulse dai controlli istituzionali, a conservare la struttura produttiva dell'impresa in crisi[10].

L'autonomia privata nel dirimere la crisi d'impresa, trova piena esplicazione, inoltre, nei piani attestati di risanamento, di cui all'art. 67, comma 3, lett. d), L.F.,

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[7] Si fa riferimento al D.L. del 22 giugno 2012, n. 83 (di seguito "Decreto Sviluppo"), e al D.L. del 21 giugno 2013, n. 82, (di seguito "Decreto del Fare"). Il "Decreto Sviluppo" è stato oggetto di conversione nella L. del 7 agosto 2012, n. 134, che ha sancito il definitivo ingresso all'interno dell'ordinamento delle novità legislative, fallimentari e tributarie, in materia di composizione concordata della crisi d'impresa. Si segnala che, in sede di conversione, il "Decreto Sviluppo" non ha subito alcuna modifica sostanziale, fatta salva la correzione dell'evidente refuso contenuto nella formulazione del periodo che disponeva la detassazione del *bonus* concordatario; nella versione che ha preceduto la legge di conversione, si leggeva che «*la riduzione dei debiti dell'impresa non costituisce non sopravvenienza attiva*». La doppia negazione è stata eliminata, fugando ogni dubbio in merito all'irragionevolezza di una simile formulazione. Per quanto concerne il "Decreto del Fare", invece, si segnala che esso ha introdotto alcuni correttivi alla disciplina della procedura concordataria, al fine di porre un freno alla tendenza di presentare domande di concordato preventivo al solo scopo di creare una "finestra temporale" in cui distrarre il patrimonio dal soddisfacimento delle pretese creditorie.

[8] Gli accordi conclusi con i creditori, infatti, possono assumere la forma di dilazioni di pagamento, della stipulazione di *pacta de non petendo*, di convenzioni bancarie, ovvero, di operazioni di *debt-equity swap*, ossia del c.d. "convertendo" del debito aziendale nella partecipazione al capitale di rischio della società indebitata. Per approfondimenti sul punto, cfr. Lo Cascio, Giovanni (2012) «La composizione delle crisi da sovraindebitamento (introduzione)», *Il Fallimento*, 9, pp. 1021-1028; Macario, Francesco (2012) «Il contenuto dell'accordo», *Il Fallimento*, 9, pp. 1039-1046; Patti, Adriano (2003) «Crisi d'impresa: definizioni stragiudiziali», *Il Fallimento*, 5, pp. 477-487.

[9] Così Pajardi, Piero, - Paluchowski, Alida, op.cit. p. 807.

[10] Ed è in quest'ottica che il "Decreto Sviluppo" ha apportato delle novità rilevanti in tema di concordato con continuità aziendale, disciplinato dal nuovo art. 186-*bis*, L.F., e del cosiddetto "concordato in bianco", ai sensi dell'art. 161, comma 6, L.F. Per ulteriori approfondimenti sul tema, cfr. Circolare Assonime del 7 febbraio 2013, n. 4.

atti unilaterali, mediante i quali l'imprenditore, a prescindere dalla sussistenza del presupposto oggettivo dello stato di crisi o di insolvenza, può proporre un piano finalizzato al «*risanamento della esposizione debitoria dell'impresa e ad assicurare il riequilibrio della sua situazione finanziaria*».

Infine, tra gli istituti per la gestione negoziale della crisi d'impresa, figurano gli accordi di ristrutturazione del debito, disciplinati dall'art. 182-*bis*, L.F, anch'essi incisi in modo significativo dalle modifiche apportate dal "Decreto Sviluppo" che, segnatamente, ha tentato di condurre tale fattispecie su un piano di fungibilità rispetto alla procedura concordataria, definendo il coordinamento con la disciplina del c.d. concordato "in bianco", di cui all'art. 161, comma 6, L.F. Al fine di conferire una maggiore flessibilità nell'implementazione del rimedio negoziale in parola, è stata introdotta la facoltà di depositare una domanda di concordato preventivo senza la documentazione richiesta dalla norma[11], e di beneficiare del termine ordinario previsto per il suo deposito, compreso tra sessanta e centottanta giorni, per richiedere, in alternativa, l'omologazione di un accordo di ristrutturazione dei debiti *ex* art. 182-*bis* mantenendo la garanzia della protezione del patrimonio del debitore sin dal deposito della stessa domanda di concordato.

In ultimo, la competitività dell'istituto è stata incrementata riconoscendo al debitore la facoltà di richiedere, contestualmente alla domanda di omologazione di un accordo di ristrutturazione, ovvero di concordato preventivo, l'accesso alla c.d. "finanza ponte", ossia ai finanziamenti necessari all'impresa per superare lo stato di crisi, garantendo prededucibilità agli stessi ove un professionista in possesso dei requisiti di cui all'art. 67, comma 3, lett. d), attesti che detti finanziamenti sono funzionali alla migliore soddisfazione dei crediti.

La direttrice seguita nell'attuazione del "Decreto Sviluppo", è stata, chiaramente, «*quella di incentivare l'impresa a denunciare per tempo la propria situazione di crisi*»[12], optando a favore del ricorso a strumenti negoziali per dirimere il dissesto.

La portata dell'intervento legislativo in discorso, risiede nell'aver, il legislatore, operato non solo sul piano della disciplina fallimentare, bensì anche sul versante

[11] A seguito delle recenti modifiche apportate dal c.d. "Decreto del fare", la domanda per l'accesso al concordato "in bianco", deve contenere un elenco dei potenziali creditori coinvolti nella procedura. La modifica intervenuta, è finalizzata a consentire la prospettazione, sin dal momento di presentazione della domanda di concordato in bianco, dello "stato di salute" dell'impresa richiedente l'accesso alla procedura.

[12] Nella relazione illustrativa al D.L. n. 83/2012, si legge che «*la proposta è volta a migliorare l'efficienza dei procedimenti di composizione delle crisi d'impresa disciplinati dalla legge fallimentare, superando le criticità emerse in sede applicativa e promuovendo l'emersione anticipata della difficoltà di adempimento dell'imprenditore. In linea con i principi ispiratori delle recenti riforme della disciplina fallimentare, l'opzione di fondo che orienta l'intervento è quella di incentivare l'impresa a denunciare per tempo la propria situazione di crisi, piuttosto che quella di assoggettarla a misure di controllo esterno che la rilevino*».

tributario, mediante una serie di correttivi alle norme di riferimento del D.P.R. del 22 dicembre 1986, n. 917 (di seguito, "Tuir" o anche "Testo Unico"), con lo scopo di rendere, anche sotto il profilo fiscale, più incentivante, *rectius*, non penalizzante, il ricorso agli strumenti volti alla gestione negoziale della crisi d'impresa. Al fine di comprendere le problematiche fiscali che nel contesto ante-riforma erano emerse in relazione agli istituti del concordato preventivo e dell'accordo di ristrutturazione del debito, nonché nell'ottica di cogliere l'impatto delle novità di carattere fiscale apportate dal "Decreto Sviluppo", appare opportuno svolgere un breve *excursus* in merito alla collocazione delle norme tributarie sul tema all'interno del Tuir, e alle modifiche legislative che hanno interessato le medesime.

I profili tributari relativi alle procedure di composizione concordata della crisi d'impresa, sono disciplinati, *in primis*, dagli artt. 86, comma 5 e 88, comma 4 del Tuir, che prendono in esame il trattamento fiscale delle sopravvenienze attive scaturenti dalla riduzione del debito in sede concordataria[13]. A seguito della novella legislativa in commento, l'art. 88, comma 4, è stato integrato al fine di chiarire definitivamente il regime fiscale applicabile al *bonus* da esdebitazione registrato in caso di omologazione di un accordo di ristrutturazione del debito.

L'art. 101, comma 5, del Tuir, considera, invece, la prospettiva speculare a quella dell'impresa in crisi, disponendo la regola della deducibilità automatica delle perdite subite dai creditori, nel caso in cui il debitore sia assoggettato a procedure concorsuali. Tale deducibilità automatica, per effetto della recente azione legislativa, compete anche in caso di conclusione di un accordo di ristrutturazione dei debiti.

La disciplina in parola, dunque, è stata incisa dalla novella apportata dal "Decreto Sviluppo", mirando all'equiparazione sostanziale degli istituti del concordato preventivo e dell'accordo di ristrutturazione del debito[14].

L'intervento in discorso si è quindi estrinsecato in una serie disposizioni che esprimono, in buona sostanza, un *favor* non già nei confronti del ceto creditorio, bensì nei confronti dell'impresa in crisi[15]. In altri termini, nella prospettiva di favorire la risoluzione stragiudiziale della crisi d'impresa, il legislatore ha alleggerito l'onere fiscale gravante sull'impresa che abbia proposto un piano di concordato, ovvero

[13] Nessuna modifica ha interessato, invece, l'art. 86, comma 5, del Tuir, che dispone l'irrilevanza fiscale delle plusvalenze conseguite a fronte della cessione di beni in sede di concordato preventivo.

[14] A tale riguardo, tra i tanti, si veda Pollio Marcello (2013) «Dal Decreto Crescita le norme per evitare il fallimento», *Amministrazione e Finanza*, 1, pp.25-35.

[15] In senso conforme, v. Stevanato, Dario (2012), «Profili fiscali del fallimento e delle altre procedure concorsuali», *Corriere Tributario*, 34, p. 126, ove si chiarisce che le disposizioni in materia di strumenti di composizione concordata della crisi d'impresa sono espressione di «*un favor non tanto (o non solo) verso il ceto creditorio, quanto nei confronti dell'impresa in crisi o in stato d'insolvenza*».

un accordo di ristrutturazione del debito aziendale[16], sancendo la non tassabilità delle plusvalenze realizzate in virtù dell'esdebitazione dell'impresa in stato di crisi[17], nonché la deducibilità automatica delle perdite su crediti registrate dal creditore in caso di conclusione, da parte del debitore, di un accordo di ristrutturazione.

II. Profili fiscali degli accordi di ristrutturazione del debito: il dibattito antecedente l'emanazione del "Decreto Sviluppo"

Il "Decreto Sviluppo" ha definitivamente chiarito i dubbi interpretativi sorti in merito al trattamento fiscale degli accordi di ristrutturazione del debito che, fino all'intervento legislativo in discorso, non costituivano oggetto di una propria disciplina tributaria. In particolar modo, in mancanza di espresse indicazioni legislative, ciò che ha costituito oggetto di animato dibattito, è stato il trattamento fiscale del *bonus* da accordo di ristrutturazione[18], rappresentato dalla differenza tra «*l'importo nominale dei crediti dei soggetti aderenti all'accordo e l'importo risultante dall'accordo omologato*»[19], con la specificazione che, nella determinazione di tale *bonus*, i crediti facenti capo a soggetti rimasti estranei all'accordo, restano, in ogni caso, privi di rilevanza[20].

[16] La *ratio* dell'intassabilità della riduzione di debiti a fronte dell'implementazione di una procedura negoziale per la composizione della crisi d'impresa, nella fase antecedente l'adozione del Testo Unico, è stata spiegata anche evocando un «*interesse generale*» che sospinge ad affermare l'irrilevanza fiscale delle plusvalenze da esdebitazione concordataria; tale interesse, comporta che le passività dell'impresa in stato di crisi, siano soddisfatte rispettando la regola della *par condicio creditorum*, ossia, imponendo all'intero ceto creditorio, senza operare distinzione alcuna tra creditori privati e creditore pubblico, *id est* il Fisco, di subire la medesima falcidia a fronte dell'omologazione di un concordato preventivo. Ciò costituirebbe una valida ragione per escludere la tassabilità dell'insussistente passività che è emersa falcidiando i diritti di tutti i creditori chirografari, in applicazione del principio di uguaglianza. In tal senso, si è espresso Casella, Mario (1983) «Concordato per cessione dei beni e sopravvenienze tassabili», *Il Fallimento*, pp. 294-306.

[17] Si segnala, salvo approfondire la questione nel prosieguo della presente dissertazione, che l'art. 33 del "Decreto Sviluppo", ha modificato l'art. 88, comma 4, del Tuir, disponendo che «*in caso di accordo di ristrutturazione dei debiti omologato ai sensi dell'articolo 182-bis* […] *la riduzione dei debiti dell'impresa non costituisce sopravvenienza attiva per la parte che eccede le perdite, pregresse e di periodo, di cui all'articolo 84*»; non è stata sancita, quindi, la piena irrilevanza fiscale del *bonus* derivante dall'implementazione di un accordo di ristrutturazione.

[18] Potrebbe parlarsi propriamente di *bonus* da riduzione dei debiti soltanto nel caso in cui l'accordo di ristrutturazione assuma un contenuto remissorio e non meramente dilatorio; in tal senso si è espresso Marengo, Federico, *Accordi di ristrutturazione dei debiti*, Torino, Ita, 2008, p. 199.

[19] Così Contrino, Angelo, *La "questione fiscale"*, cit., p. 669.

[20] Ciò è una conseguenza diretta del fatto che, ai sensi dell'art. 182-*bis*, L.F., l'omologazione dell'accordo di ristrutturazione può essere richiesta sulla base di un accordo stipulato con l'assenso di tanti creditori che rappresentino almeno il sessanta percento del totale, fermo restando che, i creditori

Nel contesto ante-riforma, l'incerta portata delle disposizioni tributarie non specificamente afferenti agli accordi di ristrutturazione, nonché la ritrosia dell'Amministrazione Finanziaria nel sancire, da un lato, l'intassabilità di detto *bonus* sulla base dell'*analogia legis* rispetto al trattamento fiscale della sopravvenienza attiva da concordato preventivo sopra esaminato; dall'altro, nel riconoscere l'automatica deducibilità, per il creditore, delle perdite emerse a fronte della sottoposizione del debitore a un accordo di ristrutturazione, hanno significativamente depotenziato le opportunità di impiego dello strumento negoziale nella gestione della crisi d'impresa[21].

Fino al significativo intervento apportato dal "Decreto Sviluppo", la tematica tributaria inerente agli accordi di ristrutturazione del debito è stata ripetutamente trascurata dal legislatore, nonostante la disciplina dell'istituto fosse stata già integrata e revisionata nel 2007 e nel 2010[22], al fine di promuoverne l'utilizzo. L'esonero da tassazione del *bonus* derivante da accordo di ristrutturazione è infatti stato sostenuto adducendo motivazioni attinenti all'identità di *ratio* della disciplina dell'istituto rispetto a quella del concordato preventivo, ma la conferma legislativa è pervenuta soltanto a seguito delle recenti novità introdotte dal legislatore delegato.

Prima di tali chiarimenti, il dibattito sulla tematica fiscale si era sviluppato sulla base di una ragionevole considerazione: la *ratio* dell'esenzione che l'art. 88, comma 4, nella sua previgente formulazione, riconosceva in relazione al *bonus* concordata-

estranei all'accordo, i quali abbiano rifiutato di aderirvi, devono essere integralmente soddisfatti. Ne consegue che, in relazione a detti crediti, che non hanno subito falcidia, l'impresa debitrice, ancorché abbia ottenuto l'omologazione dell'accordo, non realizza alcun *bonus*.

[21] Sul punto, v. Circolare del 13 marzo 2009, n. 8/E, in cui si sottolinea come gli accordi di ristrutturazione del debito, rappresentino uno strumento «*finalizzato a valorizzare il ruolo dell'autonomia privata nella gestione della crisi dell'impresa, mediante la previsione di una procedura semplificata a carattere stragiudiziale sfociante in un accordo, stipulato dal debitore con i creditori rappresentanti almeno il sessanta per cento dei crediti, la cui efficacia è garantita dal provvedimento di omologazione del Tribunale*». Secondo l'Amministrazione Finanziaria, tuttavia, nonostante la finalità dell'istituto tenda a favorire la composizione concordata della crisi d'impresa, la non espressa inclusione della fattispecie all'interno dell'art.101, comma 5, Tuir, in materia di deducibilità di perdite su crediti verso debitori assoggettati a procedure concorsuali, renderebbe inapplicabile, agli accordi di ristrutturazione del debito, la disciplina prevista dagli artt. 86, comma 5 e 88, comma 4, con riferimento al concordato preventivo e alle altre procedure concorsuali.

[22] In particolar modo, il primo intervento correttivo, attuato con D.L. n. 169/2007, ha modificato la disciplina degli accordi di ristrutturazione del debito risultante dalla Legge fallimentare riformata, prevedendo, in relazione agli atti compiuti in esecuzione di accordo omologato ai sensi dell'art. 182-*bis*, l'esenzione da azione revocatoria; inoltre, il Decreto in commento ha stabilito il divieto di azioni esecutive e cautelari, già sancito dall'art. 51, L.F. per il fallimento, e avente a oggetto il patrimonio del debitore, per sessanta giorni a decorrere dalla pubblicazione dell'accordo. Con D.L. n. 78/2010, poi, il blocco delle azioni cautelari o esecutive, è stato esteso anche alla fase delle trattative e precedente alla pubblicazione dell'accordo, durante la quale, su istanza del debitore, può essere chiesta la produzione dell'effetto del c.d. *automatic stay* in via anticipata.

rio, pareva essere quella di evitare che i creditori, i quali, aderendo alla procedura concordataria erano già inevitabilmente soggetti a falcidia, potessero subire un danno ulteriore in conseguenza del fatto che parte delle risorse facenti capo al debitore, fossero distolte dal soddisfacimento dei loro crediti, essendo questi incisi dal gravame di una maggiore imposta[23]. Alla luce di tali considerazioni, si era riscontrata la medesima *ratio* nell'ambito della disciplina degli accordi di ristrutturazione. Di qui, le riflessioni che hanno condotto la Dottrina maggioritaria a sostenere in via interpretativa l'irrilevanza fiscale del *bonus* conseguente all'implementazione di un accordo di ristrutturazione, nonostante la posizione della prassi, salvo qualche sporadico esempio di *revirement*[24], sembrasse improntata a un maggior rigore[25].

È innegabile che il tenore letterale della disposizione, nella sua formulazione previgente, tacendo in ordine al regime fiscale applicabile agli accordi di ristrutturazione del debito, difficilmente avrebbe consentito di pervenire a un esito diverso rispetto a quello della tassabilità della sopravvenienza attiva scaturente dall'omologazione dell'accordo. Ed è proprio sulla lettera della norma che ha fatto leva, in passato, l'orientamento più restrittivo, avallato non solo dall'Amministrazione Finanziaria, ma anche da parte minoritaria della Dottrina[26].

Invero, l'Agenzia delle Entrate, sostanzialmente avversa a riconoscere l'intassabilità del *bonus* da accordi di ristrutturazione, non ha manifestato il proprio dissenso per il tramite di interventi ufficiali e risolutivi sull'argomento. La posizione degli Uffici è emersa, piuttosto, da risposte riportate dalla stampa quotidiana[27]; ciononostante, la tesi della tassabilità delle sopravvenienze da riduzione di debiti a fronte dell'omologazione di un accordo di ristrutturazione, è stata espressa dall'Amministrazione in modo chiaro: l'art. 88, comma 4, disciplinando esclusivamente il

[23] Così AA.VV., «Profili fiscali sugli effetti delle soluzioni negoziali della crisi: le plusvalenze», in AA.VV., AA.VV., *Trattato delle procedure concorsuali*, Torino, Utet, 2012, p. 461.

[24] Con Nota Ministeriale del 7 febbraio 2008, prot. 2008/6579, ad esempio, la Direzione Regionale dell'Agenzia delle Entrate emiliana, in senso contrario a quanto sostenuto in precedenza, ha preso in considerazione la possibilità di ritenere gli accordi di ristrutturazione non già un istituto autonomo, bensì una *species* delle procedure concorsuali, avallando, così, un'interpretazione «*estensiva ed analogica delle norme stabilite per il concordato preventivo; prime fra tutte la norma prevista al quarto comma dell'art. 88 del Tuir che prevede la non imponibilità delle sopravvenienze derivanti da concordato preventivo*».

[25] A tale riguardo, v. la summenzionata Circolare n. 8/E del 2009.

[26] A sostegno di un'interpretazione fedele al dato letterale della norma in commento, v. Zafarana, Cesare, *Manuale tributario del fallimento e delle altre procedure concorsuali*, Milano, Ipsoa, 2010, p. 290, il quale si dichiara contrario a legittimare «*interpretazioni e applicazioni analogiche o estensive in presenza di un dettato legislativo così preciso e diretto*».

[27] In tal senso, cfr. Contrino, Angelo, «La "questione fiscale"», cit., p. 670; Id. (2010) «Il trattamento fiscale dei «*bonus*» concordatari e da accordi di ristrutturazione», *Corriere Tributario*, p. 2338; Id. (2011) «Procedure concordatarie (vecchie e nuove), riduzione di debiti e sopravvenienze attive», *Rassegna Tributaria*, 1, p. 38.

trattamento tributario delle sopravvenienze da concordato, non è applicabile alla differente ipotesi di *bonus* da accordo di ristrutturazione[28]. In altri termini, il dettato normativo dovrebbe essere letto alla luce del principio racchiuso nel brocardo latino "*lex tam dixit, quam voluit*"[29], a significare che, ove il legislatore avesse voluto realizzare un'equiparazione, dal punto di vista fiscale, tra il concordato preventivo e gli accordi di ristrutturazione, avrebbe esplicitamente preso in considerazione quest'ultimo istituto, non lasciando aperti alcuni profili di incertezza sulla portata della norma.

Inoltre, a favore di un'interpretazione restrittiva dell'art. 88, comma 4, deponeva la convinzione che, in virtù dell'accordo di ristrutturazione dei debiti, la sopravvenienza attiva, del cui trattamento fiscale si dibatte, altro non fosse che una sopravvenuta insussistenza di spese, perdite, oneri e passività già iscritti in bilancio negli esercizi precedenti. Come tali, essi avevano, in passato, contribuito a determinare il reddito imponibile, essendo portati in diminuzione delle componenti positive di reddito per il periodo di competenza e, pertanto, avrebbero necessitato di un recupero a tassazione[30].

Giova sottolineare che, sposando la tesi restrittiva, contraria ad applicare l'art. 88, comma 4, in via analogica, anche agli accordi di ristrutturazione, si ammette che le sopravvenienze emerse a seguito dell'omologazione di detti accordi, concorrano alla formazione della materia imponibile e, quindi, del reddito d'impresa di competenza ai sensi dell'art. 109, Tuir[31].

Nonostante l'approccio restrittivo avallato dall'Amministrazione Finanziaria, fedele alla valorizzazione della lettera del dettato normativo, l'orientamento maggioritario ha da sempre sostenuto l'irrilevanza fiscale del *bonus* in questione, per-

[28] L'Amministrazione Finanziaria ha più volte espresso la propria posizione contraria ad ammettere, sulla base di un'interpretazione estensiva dell'art. 88, comma 4, l'intassabilità del *bonus* da accordo di ristrutturazione: i riferimenti in merito, tra le fonti non formalizzate in circolari o risoluzioni, sono: alla risposta fornita alla Videoconferenza Map (Moduli di Aggiornamento Professionale) svoltasi a Torino il 18 maggio 2006, commentata da Gavelli, Giorgio, «Debiti, trattamento critico», *Il Sole 24 Ore*, 8 giugno 2006, in cui si sottolinea come gli Uffici delle Entrate abbiano chiarito che, nell'ambito della ristrutturazione dei debiti, «*eventuali sopravvenienze attive non possono essere considerate neutrali*», pur consapevolmente riconoscendo che le conseguenze tributarie discendenti dalla tesi dell'Amministrazione Finanziaria, avrebbero rischiato di rendere la disciplina dell'istituto lettera morta; alla Nota Ministeriale del 6 marzo 2006, prot. 954-35315, in cui l'Amministrazione Finanziaria si è espressa in modo difforme rispetto all'interpretazione fornita in un'istanza di interpello con la quale si domandava di estendere la regola dell'art. 88, comma 4, anche agli accordi di ristrutturazione del debito.

[29] Così, Marengo, Federico, op. cit., p. 211.

[30] Sul punto, v. Marengo, Federico, op.cit., p. 211.

[31] In tal senso, cfr. Contrino, Angelo, «Il trattamento fiscale dei «*bonus*» concordatari e da accordi di ristrutturazione», cit., p. 2338; Acierno, Rosanna – Cinieri, Saverio, *Aspetti fiscali della riforma fallimentare*, Milano, Ipsoa, 2006, p. 188; Zafarana, Cesare, op. cit, p. 290.

venendo, in via interpretativa, alla medesima soluzione cui il legislatore, mediante l'azione legislativa del "Decreto Sviluppo", è giunto.

In particolar modo, i commentatori, al fine di giustificare un'interpretazione estensiva dell'art. 88, comma 4, nell'ottica di applicare la regola dell'intassabilità delle sopravvenienze attive anche agli accordi di ristrutturazione del debito, si sono interrogati, ancor prima di svolgere considerazioni di carattere sistematico sull'ambito applicativo della norma, sulla natura giuridica di tale istituto, così da chiarire se l'accordo in esame potesse essere considerato un istituto autonomo rispetto al concordato preventivo, ovvero, se esso costituisse una modalità di attuazione dello stesso. La qualificazione giuridica della fattispecie, non è scevra da riflessi fiscali, in quanto, solo classificando detti accordi alla stregua di una forma semplificata di concordato preventivo, si sarebbero rinvenuti i margini per un'interpretazione estensiva della disposizione in commento.

A. Tesi dell'accordo quale procedura sub-concordataria

Al fine di avvalorare la tesi dell'applicabilità in via analogica della regola enunciata dall'art. 88, comma 4, Tuir, anche ai *bonus* da accordo di ristrutturazione, si è tentato di inquadrare l'istituto nell'ambito della fattispecie del concordato preventivo. Tale orientamento sarebbe suffragato da molteplici elementi: *in primis*, un'indicazione in senso conforme si ricaverebbe dalla relazione illustrativa al D.L. n. 35/2005, che ha introdotto la disciplina degli accordi di ristrutturazione del debito, ove si chiarisce che «*il concordato diviene lo strumento attraverso il quale la crisi di impresa può essere risolta anche attraverso accordi stragiudiziali che abbiano ad oggetto la ristrutturazione dell'impresa*». Il passaggio citato, lascerebbe intendere che l'accordo di ristrutturazione rappresenti uno strumento per l'attuazione del concordato e, pertanto, la natura giuridica dei due istituti sarebbe la medesima.

In secondo luogo, la collocazione sistematica dell'art. 182-*bis*, L.F., che disciplina, sul piano civilistico, gli accordi di ristrutturazione del debito, lascerebbe propendere per la considerazione di tali accordi quali una declinazione, ovvero una forma semplificata del concordato preventivo, essendo tale norma inserita nel Titolo III, intitolato "Del concordato preventivo e degli accordi di ristrutturazione"[32].

[32] In tal senso, tra i tanti, cfr. Ferro, Massimo (2005) «I nuovi strumenti di regolazione negoziale dell'insolvenza e la tutela giudiziaria delle intese fra debitore e creditori: storia italiana della timidezza competitiva», *Il Fallimento*, 5, p. 587-600; Sandulli, Michele, «La crisi d'impresa», in AA.VV., *Manuale di diritto commerciale*, Torino, Giappichelli, 2005, p. 1095 ss.; Valensise, Paolo, «Commento all'art. 182-bis», Nigro, Alessandro – Sandulli, Michele, *La riforma della legge fallimentare*, Torino, Giappichelli, 2006, p. 1088 ss.; tali Autori, lasciano intendere che gli accordi di ristrutturazione siano uno strumento di attuazione della domanda di ammissione al concordato preventivo, talvolta impiegato con la finalità eminente di rafforzare il contenuto della stessa proposta di concordato.

Rileva, infine, che l'art. 182-*bis* prevede che l'imprenditore che voglia chiedere l'omologazione di un accordo di ristrutturazione, debba depositare la propria istanza unitamente alla dichiarazione e alla documentazione che l'art. 161 prescrive quali necessarie ai fini dell'ammissione al concordato preventivo. Il fatto di aver inserito nella disciplina degli accordi di ristrutturazione un riferimento alla procedura concordataria, è stato interpretato come un ulteriore argomento a favore della tesi propensa a riconoscere la comune natura giuridica dei due istituti, individuando, in detti accordi, uno strumento di attuazione della procedura concordataria[33].

Le argomentazioni suesposte, hanno il pregio di desumere, a partire dal dato letterale, che gli accordi di ristrutturazione non debbano essere inquadrati, dal punto di vista giuridico, in modo dissimile dal concordato preventivo e, dunque, le conseguenze che, in materia di fiscalità, discendono dal ricorso allo strumento negoziale per la gestione della crisi d'impresa, dovrebbero essere le medesime, a nulla rilevando che il legislatore non abbia espressamente affrontato la questione fiscale con riferimento agli accordi di ristrutturazione.

Al contempo, tuttavia, tale interpretazione sembrerebbe «*forzare le nozioni di concordato preventivo e fallimentare* […] *per tentare di ricomprendervi gli accordi in esame*»[34]. La soluzione inizialmente prospettata dalla Dottrina, pertanto, appare difficilmente condivisibile e inidonea a giustificare una lettura estensiva dell'art. 88, comma 4, Tuir. Non sembrerebbe sufficiente, infatti, a giustificare l'applicazione della norma in via analogica, la mera collocazione topografica della norma all'interno della "Legge fallimentare", né il riferimento alla documentazione contenuta nell'art. 161, posto che l'indicazione fornita dall'art. 182-*bis* parrebbe finalizzata, piuttosto, a indicare l'apparato documentale che, sotto il profilo formale, è necessario al fine di depositare correttamente la domanda di omologazione dell'accordo[35]. Mancherebbero, in altri termini, elementi idonei a rappresentare la volontà legislativa di equiparare, o quanto meno di avvicinare sotto il profilo della loro natura giuridica, i due istituti[36].

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[33] In senso conforme, Ferro, Massimo, op. cit., p. 595, il quale sottolinea come «molteplici fattori fanno propendere per uno strumento rafforzativo della domanda per l'ammissione alla procedura di concordato preventivo, stante la facoltà per il debitore di depositare l'accordo di ristrutturazione esclusivamente con la dichiarazione e la documentazione di cui all'art. 161 e tenuto conto dell'ubicazione stessa dell'art. 182-bis, nell'ambito della procedura di concordato preventivo».

[34] Così Contrino, Angelo, «Procedure concordatarie (vecchie e nuove), riduzione di debiti e sopravvenienze attive», cit., p. 40.

[35] Così Dimundo, Francesco (2007) «Accordi di ristrutturazione dei debiti: la «meno incerta» via italiana alla «reorganization»?», *Il Fallimento*, 6, pp. 703-711; per la Giurisprudenza, cfr. Tribunale di Milano, 11 gennaio 2007, in *Banca Dati BIG Suite*; Tribunale di Milano, 23 gennaio 2007, in *Giurisprudenza Italiana*, 2007, p. 1692 ss.

[36] In tal senso, v. Zanichelli, Vittorio, *La nuova disciplina del fallimento e delle altre procedure concorsuali: dopo il d.lgs. 12.9.2007, n. 169*, Torino, Utet, 2008, p. 352.

B. Tesi dell'accordo quale procedura autonoma

L'orientamento largamente dominante[37], ha preso le distanze dalla posizione espressa dai sostenitori della tesi suesposta, sottolineando che gli accordi di ristrutturazione rappresentano un istituto autonomo, e non una forma semplificata, ovvero una variante del concordato preventivo.

Tale affermazione sarebbe confermata, *in primis*, dalla natura privatistica dell'accordo in commento che, innanzitutto, si perfeziona in sede stragiudiziale con i singoli creditori[38], tanto che la sua omologazione, fase in cui, peraltro, l'autorità giudiziaria interviene espletando una funzione essenzialmente di controllo[39], non compromette il diritto dei creditori rimasti estranei a essere integralmente soddisfatti.

L'accordo di ristrutturazione, infatti, è «*un contratto di diritto privato che può essere concluso tra il debitore e uno o più dei propri creditori regolato non dal principio maggioritario ma da quello dell'unanimità delle parti contraenti*»[40]; esso sarebbe, in altri termini, un negozio bilaterale che, fino al momento dell'omologazione per il tramite dell'organo giudicante, è disciplinato dalle norme del diritto privato con riferimento alle intese raggiunte con i singoli creditori. La formazione del contenuto dell'accordo, che si estrinseca nella rinegoziazione dell'esposizione debitoria, avviene in sede stragiudiziale e costituisce il presupposto dell'omologazione. Nel concordato preventivo, al contrario, l'accordo tra le parti interessate si realizza interamente dinanzi al tribunale, affievolendo il carattere tipicamente negoziale proprio della procedura medesima che, invece, assume rilevanza preponderante nella disciplina degli accordi di ristrutturazione.

Ciò consentirebbe di individuare i tratti distintivi dell'istituto in parola, al fine di discernerlo dal concordato preventivo, sebbene ambedue gli strumenti siano utilizzati quali forme per la composizione della crisi d'impresa. Le due fattispecie,

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[37] Sul punto, tra i tanti, cfr. Ambrosini Stefano, *Il concordato preventivo e gli accordi di ristrutturazione dei debiti*, Padova, Cedam, 2008, p. 162 ss.; Ambrosini Stefano – Demarchi Giovanni, op. cit., p. 184 ss.; E. Frascaroli Santi, Elena, *Gli accordi di ristrutturazione dei debiti: un nuovo procedimento concorsuale*, Padova, Cedam, 2009, p. 86 ss.

[38] A tale riguardo, nella decisione del Tribunale di Milano, del 23 gennaio 2007, in *Giurisprudenza Italiana*, 2007, p. 1692 ss., si sottolinea come nell'ambito degli accordi di ristrutturazione, «[…] *vuoi per l'assenza di un commissario e del comitato dei creditori, vuoi per la assenza di una unitaria rappresentazione al ceto creditorio della situazione economica, patrimoniale e finanziaria della società*», la procedura converge in accordi con ogni singolo creditore, poi riuniti dalla causa comune, ossia quella di evitare di pervenire a una situazione di insolvenza irreversibile.

[39] Gli accordi di ristrutturazione dei debiti constano di due fasi: la prima, stragiudiziale, di rinegoziazione, da parte dell'imprenditore, della propria esposizione debitoria; la successiva, in cui è richiesto l'intervento giudiziale, al fine di attribuire effetti legali all'accordo medesimo mediante il procedimento di omologazione. Così, Ambrosini Stefano – Demarchi Giovanni, op. cit., p. 184.

[40] In Presti, Gaetano (2006) «Gli accordi di ristrutturazione al primo vaglio giurisprudenziale», *Il Fallimento*, 2, pp. 174-175.

alla luce delle evidenti diversità strutturali, sarebbero produttive di effetti tipici e distinti: sarebbe preclusa, pertanto, la configurazione di margini di sovrapposizione nella rispettiva disciplina, ovvero di un rapporto di strumentalità tra le due figure.

La tesi della natura autonoma degli accordi di ristrutturazione, è stata avvalorata, inoltre, dal fatto che l'affermazione contenuta nella relazione illustrativa al D.L. n. 35/2005, riportata nel paragrafo *supra*[41], che da una lettura *prima facie* sembrerebbe individuare negli accordi di ristrutturazione una modalità di attuazione del concordato preventivo, non sarebbe di per sé sufficiente a escludere l'autonomia dell'istituto. Gli accordi in discorso, infatti, sono un negozio bilaterale tra il debitore e ciascun creditore[42] che, anche laddove costituiscano una modalità di esecuzione del concordato preventivo, producono effetti legali esclusivamente nei confronti dei creditori aderenti, a differenza di quanto si verifica nel concordato che, ai sensi dell'art. 177, comma 1, L.F., è approvato con il consenso dei «[…] *creditori che rappresentano la maggioranza dei crediti ammessi al voto. Ove siano previste diverse classi di creditori, il concordato è approvato se tale maggioranza si verifica inoltre nel maggior numero di classi*» ma, una volta che tali maggioranze siano conseguite, la procedura dispiega i propri effetti anche nei riguardi di quei creditori che abbiano manifestato il proprio dissenso[43].

A sostegno dell'orientamento in questione, deporrebbe un ulteriore dato normativo: in materia di esenzione da revocatoria, l'art. 67, comma 3, lett. e), L.F., considera in modo separato gli accordi di ristrutturazione del debito e il concordato preventivo, confermando la differenza tra i due istituti.

Sul piano delle indicazioni legislative in materia, inoltre, il rinvio all'art. 161, L.F., operato dall'art. 182-*bis*, non sarebbe indice di una interconnessione tra i due procedimenti, posto che a essere richiamata è un'unica disposizione in materia di

[41] Si riporta nuovamente, per facilità di lettura, il già citato passo della relazione illustrativa al D.L. n. 35/2005: «*il concordato diviene lo strumento attraverso il quale la crisi di impresa può essere risolta anche attraverso accordi stragiudiziali che abbiano ad oggetto la ristrutturazione dell'impresa*».

[42] La stessa Corte di Cassazione, con sentenza del 18 marzo 1979, n. 1562, in *Giustizia Civile*, 1/1979, p. 951, ha definito come un «*fascio di contratti remissori*» gli accordi di salvataggio che il debitore conclude con ciascun creditore.

[43] In senso conforme, v. Valensise, Paolo, *Gli accordi di ristrutturazione dei debiti nella legge fallimentare*, Torino, Giappichelli, 2012, p. 128 ss., in cui si chiarisce come il concordato preventivo sia una procedura complessa: ciò comporta che, se non è raggiunto il *quorum* il procedimento di concordato si interrompe perché la maggioranza dei creditori ha espresso il proprio dissenso sulla proposta; *a contrario*, con il voto favorevole della maggioranza dei crediti ammessi al voto, il concordato è vincolante nei confronti di tutti i creditori dell'imprenditore in stato di crisi. Diversamente, negli accordi di ristrutturazione, stante il carattere eminentemente negoziale della procedura, il contratto si perfeziona anche solo con uno o più creditori (fermo restando che essi debbono rappresentare almeno il sessanta percento dei crediti, conformemente alla previsione di cui all'art. 182-*bis*) e manca, per tale ragione, finanche l'obbligo di informare e consultare gli altri.

concordato e non già l'intera disciplina applicabile a quest'ultima fattispecie: in altri termini, «*se si trattasse veramente di un concordato semplificato tali richiami sarebbero superflui e, quindi, a contrario, ciò proverebbe che gli accordi ex art. 182-bis non sono un concordato*»[44]. In merito al richiamo presente all'art. 182-*bis*, come chiarito in precedenza, si sottolinea che esso sarebbe volto a regolare esclusivamente i profili formali della documentazione richiesta per il deposito dell'accordo e, quindi, anche quest'ultimo argomento deporrebbe *contra* la tesi che considera gli accordi di ristrutturazione una forma semplificata del concordato preventivo.

Le riflessioni in merito alla natura degli accordi di ristrutturazione del debito, nonché gli argomenti che in passato sono stati addotti a sostegno dell'una o dell'altra tesi, attengono essenzialmente ai profili civilistici dell'istituto e alle peculiarità che esso presenta rispetto al concordato preventivo[45]. Dall'adesione a una delle due tesi suesposte, tuttavia, discende l'opportunità di interpretare estensivamente l'art. 88, comma 4, nella sua formulazione previgente, al fine di chiarire il regime fiscale applicabile alle sopravvenienze attive scaturenti dall'omologazione di un accordo di ristrutturazione del debito. Si ricorda che, solo nel caso in cui tali accordi si reputino alla stregua di una forma semplificata di concordato preventivo, sarebbe possibile sancire l'irrilevanza fiscale del *bonus* da esdebitazione.

Come chiarito in precedenza, tuttavia, la Dottrina e la Giurisprudenza[46] prevalente propendono per la tesi "autonomista" in ordine alla natura dell'istituto, escludendo la sussistenza di un rapporto di strumentalità o di specialità rispetto alla procedura concordataria[47]. Avallando quest'ultimo orientamento, verrebbero a mancare, quanto meno da un primo approccio con la tematica, le ragioni giustificatrici di un'interpretazione estensiva del dettato normativo.

Ciononostante, altri interpreti non si sono arrestati alla lettura rigorosa del dato legislativo, tanto che, prescindendo dalla disamina in merito alla natura degli accor-

[44] Così Valensise, Paolo, *Gli accordi di ristrutturazione dei debiti nella legge fallimentare*, cit., p. 127, richiamando la posizione espressa dal Tribunale di Bari, nella decisione del 21 novembre 2005, in *Foro Italiano*, 2006, p. 263 ss.

[45] Per una dissertazione approfondita in ordine alle argomentazioni di carattere civilistico proposte a sostegno delle tesi propinate per inquadrare e determinare la natura giuridica degli accordi di ristrutturazione del debito, v. Valensise, Paolo, *Gli accordi di ristrutturazione dei debiti nella legge fallimentare*, cit., p. 109- 133.

[46] Oltre alle decisioni già richiamate, cfr. Tribunale di Udine, 22 giugno 2007, in *Il Fallimento*, 2008, p. 701 ss.; Tribunale di Roma, 16 ottobre 2006, in *Il Fallimento*, 2007, p. 187 ss.; Tribunale di Brescia, 22 febbraio 2006, in *Il Fallimento*, 2006, p. 669 ss.

[47] Sul punto, è esplicativa la posizione espressa da Frascaroli Santi, Elena, op. cit., p. 88, la quale, richiamando l'impostazione di Bonsignori, Angelo, «Del Concordato», in *Commentario Scialoja-Branca: Legge Fallimentare*, Bologna, Zanichelli, 1979, p. 128 ss., chiarisce che «*in concreto non esiste un genus concordatario nel quale far confluire tutte le forme di concordato, quello fallimentare, quello preventivo ed eventualmente gli accordi di ristrutturazione ex art. 182-bis e il concordato stragiudiziale*».

di di ristrutturazione, ne è stata proposta un'interpretazione evolutiva onde evitare il configurarsi di un'irragionevole disparità di trattamento fiscale tra due fattispecie, di fatto, accomunate dalla medesima *ratio* di condurre alla cessazione dello stato di crisi e alla conservazione della struttura produttiva dell'impresa.

III. Verso un'interpretazione estensiva dell'art. 88, comma 4, Tuir

Nell'ambito del dibattito antecedente l'emanazione del "Decreto Sviluppo", si è cercato, dunque, di leggere l'art. 88, comma 4, in chiave evolutiva, al fine di sopperire alla lacuna legislativa in merito al trattamento tributario applicabile agli accordi di ristrutturazione, e di sancire l'estensione della regola esplicitamente prevista in materia di sopravvenienze attive conseguenti all'implementazione del concordato preventivo.

Come Autorevole Dottrina[48] ha osservato, l'interpretazione estensiva della norma, non sarebbe preclusa *a priori* dalle «*pur esistenti diversità di disciplina*» tra i due istituti che, peraltro, sono accomunati dalla medesima *ratio* di fornire una soluzione concordata alla crisi d'impresa, nonché di garantire la conservazione e la sopravvivenza dell'organismo produttivo che sarebbero, altrimenti, inficiate dal fallimento[49]. Proprio alla luce della finalità da essi condivisa, la disparità di trattamento, risulterebbe irragionevole e disincentiverebbe, come difatti è accaduto nella fase antecedente al "Decreto Sviluppo", il ricorso allo strumento meno vantaggioso dal punto di vista fiscale, *id est*, l'accordo di ristrutturazione.

In altri termini, l'affinità strutturale sussistente tra i due strumenti, accomunati dalla medesima *ratio legis*, sarebbe in grado di giustificare l'applicazione in via analogica della norma anche alla fattispecie degli accordi di ristrutturazione del debito[50].

Peraltro, ancor prima dei chiarimenti legislativi apportati dal "Decreto Sviluppo", sarebbe stato auspicabile pervenire a un'interpretazione meno rigida della nor-

[48] Si richiama la posizione espressa da Stevanato, Dario, «Profili fiscali del fallimento e delle altre procedure concorsuali», cit., p. 140.

[49] In senso conforme, v. Contrino, Angelo, «La "questione fiscale"», cit., p. 673.

[50] Sul punto si segnala, peraltro, la posizione espressa di recente da Valensise Paolo, *Gli accordi di ristrutturazione dei debiti nella legge fallimentare*, cit., p. 133 ss., il quale, pur a fronte del chiarimento legislativo apportato dal "Decreto Sviluppo", propende a favore della tesi che inquadra gli accordi di ristrutturazione tra le procedure sub-concordatarie. Secondo l'Autore, la modifica legislativa in discorso, avrebbe implicitamente fornito delle indicazioni di carattere normativo a sostegno della natura concordataria degli accordi di ristrutturazione. In particolar modo, sul piano fiscale, l'estensione del meccanismo agevolativo non dipenderebbe da motivazioni legate alle finalità dei due istituti, bensì, dalla riconducibilità degli accordi nel novero delle procedure concorsuali.

ma in questione, non solo alla luce del principio di ragionevolezza, avente il proprio fondamento costituzionale negli artt. 3 e 53 Cost., che richiederebbe di astenersi dal porre in essere una disparità di trattamento ingiustificata in relazione a strumenti affini, bensì anche in considerazione del fatto che la stessa Amministrazione Finanziaria, in materia di riduzione dei debiti da concordato, proprio basandosi sulla finalità sostanzialmente identica perseguita dal fallimento e dall'amministrazione straordinaria, aveva acconsentito ad un'interpretazione estensiva dell'art. 55, comma 4, del "vecchio Tuir"[51], che prevedeva l'intassabilità del *bonus* da concordato preventivo o fallimentare, non disciplinando in modo esplicito, tuttavia, la fattispecie del concordato autorizzato nell'ambito della procedura di amministrazione straordinaria o ai sensi della "Legge fallimentare", ovvero di altre leggi speciali[52].

Inoltre, per ciò che concerne la *ratio* sottostante all'art. 88, comma 4, una volta appurato che la norma in discorso configura una fattispecie di esenzione[53] dal carattere eminentemente agevolativo, in quanto finalizzata a favorire la risoluzione concordata di situazioni di crisi d'impresa embrionali o conclamate, non parrebbero esservi ragioni ostative all'applicabilità della norma anche agli accordi di ristruttu-

[51] Si fa riferimento al testo vigente prima del D.Lgs. 12 dicembre 2003, n. 344, che ha riformato il Testo Unico. La norma è stata trasposta nell'art. 88, del D. Lgs. n. 917/1986, il c.d. "nuovo Tuir".

[52] Sul punto, v. Circolare del 22 marzo 2002, n. 26/E, in cui si chiarisce che «[…] *tutte le tipologie di concordato esaminate sono ispirate alla medesima ratio*», e che «*in sostanza, si può affermare che esiste una piena simmetria tra il concordato disciplinato dall'articolo 124 e seguenti della legge fallimentare e le altre procedure concordatarie contenute nella stessa legge fallimentare e nel d.lgs. 270/99, alle quali si applica la medesima disciplina. Pertanto, si ritiene che la disposizione contenuta nell'art. 55, comma 4, del TUIR sia applicabile a tutte le procedure concordatarie sopra indicate*».

[53] L'orientamento dottrinale prevalente, ritiene che l'art. 88, comma 4 configuri una norma d'esenzione in quanto, essendo l'imponibilità delle sopravvenienze attive una regola generale in materia di reddito d'impresa, la deroga prevista dal legislatore atterrebbe a ragioni extrafiscali che, più specificamente, si sostanziano nell'esigenza di favorire il ricorso a procedure negoziali di composizione della crisi d'impresa. Sul punto, v. Contrino, Angelo, «Il trattamento fiscale dei «*bonus*» concordatari e da accordi di ristrutturazione», cit., p. 2335, il quale ritiene che la norma in commento si caratterizzi per la sua finalità tipicamente agevolativa e che, pertanto, abbia natura di esenzione. In senso conforme, v. Casella, Mario, op. cit., p. 294 ss., spiega la necessità di configurare un'esenzione da imposta per le sopravvenienze generate dalla riduzione del debito in sede concordataria, sottolineando che la generalità dei creditori sarebbe danneggiata dalla tassazione di dette plusvalenze, in quanto la maggiore imposta inciderebbe sulle risorse disponibili dell'impresa in crisi; risorse che, evidentemente, sarebbero sottratte alla destinazione al soddisfacimento delle pretese creditorie. *Contra*, cfr. Andreani, Giulio – Tubelli, Angelo (2006) «La disciplina fiscale degli accordi di ristrutturazione ex art. 182-bis della legge fallimentare», *Il Fisco*, 44, p. 6804 ss., si considera la norma in commento in parte quale un'esclusione, in altra parte quale un'esenzione; più specificamente, gli Autori discernono tra il concordato con cessione di beni, che denoterebbe un'esclusione. A sostegno della qualifica della sopravvenienza in esame quale esclusione, invece, v. Michelutti, Riccardo – Brazzalotto, Alberto (2013) «Determinazione del reddito imponibile nel caso di sopravvenienze attive da ristrutturazione del debito», *Corriere Tributario*, 20, p. 1562 ss.

razione dei debiti[54]. La disposizione in commento, persegue la finalità di sollevare l'impresa in stato di crisi dall'onere impositivo, in virtù del fatto che la stessa è già gravata da una situazione di dissesto finanziario in cui sarebbe comunque poco probabile il soddisfacimento della pretesa tributaria[55]. In queste peculiari condizioni, si ritiene che siano gli stessi creditori ad accordare la remissione, almeno parziale, dei debiti.

Il legislatore, pertanto, nell'ottica di facilitare il realizzarsi di un assetto di composizione consensuale della crisi d'impresa, tale da assicurare maggiori prospettive di risanamento alla stessa, relegando, conseguentemente, il fallimento a una sorta di *extrema ratio* da praticare solo nel caso in cui tali opportunità di risanamento vengano meno; avrebbe introdotto una norma che, pur disponendo espressamente l'irrilevanza del solo *bonus* concordatario, può considerarsi applicabile anche a un istituto che, con il concordato preventivo, condivide un'identità di funzione[56].

IV. Sulla "nuova" fiscalità degli accordi di ristrutturazione del debito

La portata delle novità legislative introdotte con il "Decreto Sviluppo", risiede nell'aver definitivamente chiarito il trattamento fiscale applicabile alle sopravvenienze attive da esdebitamento in caso di accordi di ristrutturazione del debito, giungendo alla medesima conclusione cui Autorevole Dottrina[57] era già pervenuta invocando, a fondamento dell'interpretazione estensiva dell'art. 88, comma 4, Tuir,

[54] Sul punto, v. Bruno, Niccolò A., «I profili fiscali negli accordi di ristrutturazione dei debiti», in AA.VV, *Trattato delle procedure concorsuali*, cit., p. 480, il quale chiarisce che «[…] *la norma di esenzione intende favorire l'attuazione di soluzioni negoziate di situazioni embrionali o conclamate di crisi dell'impresa, sollevando il debitore dall'onere impositivo – e dal conseguente aggravio finanziario- discendente dalla remissione parziale dei debiti che è attuata consensualmente dai creditori dell'impresa in difficoltà*»

[55] Così Contrino, Angelo, «Il trattamento fiscale dei «*bonus*» concordatari e da accordi di ristrutturazione », cit., p. 2338 ss. In senso conforme Bruno, Niccolò A. , op. cit., p. 480 ss.

[56] In senso conforme, v. Stevanato, Dario, «Profili fiscali del fallimento e delle altre procedure concorsuali», cit., p. 141, il quale sottolinea come, pur trattandosi di una norma agevolativa che, in quanto tale, si caratterizza per il proprio «*carattere eccezionale e derogatorio rispetto alle ordinarie regole di tassazione*», l'art. 88, comma 4, possa essere applicato anche a «*istituti contermini a quelli già disciplinati*», in virtù di quella finalità comune che si estrinseca nel superamento dello stato di crisi attraverso un accordo con il ceto creditorio.

[57] Si richiama, in tal proposito, la posizione espressa da alcuni Autori già menzionati in precedenza, ossia, Contrino, Angelo, «Procedure concordatarie (vecchie e nuove) riduzioni di debiti e sopravvenienze attive », cit., p. 36 ss.; Stevanato, Dario, «Profili fiscali del fallimento e delle altre procedure concorsuali», cit., p. 139; Belli Contarini, Edoardo (2010) «La fiscalità degli accordi di ristrutturazione dei debiti di cui all›art. 182-bis della legge fallimentare», *Rivista di Diritto Tributario*, pp. 823-846.

il principio di ragionevolezza, nonché un'argomentazione di natura teleologica, basata sulla *ratio* della disposizione[58].

La direttrice seguita nell'attuazione dell'auspicato intervento legislativo, che ha espressamente stabilito l'irrilevanza fiscale del *bonus* da accordo di ristrutturazione[59], è stata quella di conferire maggiore flessibilità alla disciplina in parola e, al contempo, di integrare quelle disposizioni che non disciplinavano espressamente gli effetti scaturenti, sul piano fiscale, dall'implementazione dell'istituto *de quo*.

L'intento perseguito dal legislatore, è stato quello di favorire il ricorso a soluzioni consensuali di *exit* dalla crisi d'impresa, rendendo la fattispecie degli accordi di ristrutturazione, sul piano sostanziale, equipollente rispetto alla procedura concordataria, così da non rendere la "variabile fiscale" il *discrimen* nella scelta dello strumento da adottare[60].

In passato, infatti, come già rilevato, l'assenza di un dato normativo preciso, cui conseguiva l'impossibilità di affermare con certezza, nonostante gli sforzi interpretativi compiuti dalla Dottrina maggioritaria in tal senso, l'irrilevanza fiscale del *bonus* da accordi di ristrutturazione, aveva di fatto penalizzato l'accesso alla procedura, a fronte dell'ingente costo fiscale della medesima, che avrebbe inevitabilmente ridotto le risorse finalizzate al pagamento dei creditori[61].

Il legislatore, pertanto, coerentemente a quanto chiarito nella relazione illustrativa al Decreto in commento, è intervenuto al fine di promuovere «*l'emersione*

[58] Si segnala che il "Decreto Sviluppo", disattendendo, invero, la relazione di accompagnamento, ha lasciato invariata la formulazione dell'art. 86, comma 5, che sancisce la detassazione delle plusvalenze realizzate in sede di concordato attuato mediante *cessio bonorum*. Resta dubbia, dunque, la sua applicabilità anche alla fattispecie degli accordi di ristrutturazione del debito, se non nella rara ipotesi in cui l'accordo sia eseguito mediante cessione integrale dei beni ai creditori. In senso conforme, cfr. Bruno, Niccolò A., op. cit., p. 483; Dami, Filippo (2012) «Irrilevanza delle sopravvenienze attive per accordi di ristrutturazione del debito e piani attestati», *Corriere Tributario*, 41, p. 3168.

[59] Per completezza, occorre segnalare che il regime di irrilevanza fiscale è stato esteso anche al *bonus* emerso a fronte dell'implementazione di un piano attestato di risanamento, *ex* art. 67, comma 3, lett. d), L.F., a condizione che esso sia pubblicato nel Registro delle imprese.

[60] In senso conforme, v. Andreani, Giulio – Tubelli, Angelo (2012) «Sopravvenienze attive esenti anche negli accordi di ristrutturazione dei debiti», *Corriere Tributario*, 29, p. 2218 ss., in cui gli Autori chiariscono come la novità normativa in commento sia «*da accogliere con pieno favore, perché rende sostanzialmente omogeneo il regime impositivo applicabile, nel settore delle imposte sui redditi, ai diversi strumenti di soluzione negoziale della crisi d'impresa*»; alla luce della nuova disciplina, gli accordi di ristrutturazione dei debiti, sarebbero finalmente idonei a svolgere una funzione centrale per addivenire a una soluzione celere della crisi d'impresa.

[61] Sull'effetto disincentivante della previgente disciplina in materia di accordi di ristrutturazione del debito, cfr. Andreani, Giulio – Tubelli, Angelo (2006) «La disciplina degli accordi di ristrutturazione ex art. 182-bis della legge fallimentare», *Il Fisco*, 44, pp. 6802-6810; Id., «Sopravvenienze attive esenti anche negli accordi di ristrutturazione dei debiti», cit., p. 2218 ss.; Miele, Luca (2010) «Gli accordi di ristrutturazione del debito», in *Corriere Tributario*, 23, pp. 1843-1846.

anticipata della difficoltà di adempimento dell'imprenditore» e di superare le criticità emerse in sede applicativa a causa dell'incerta formulazione delle norme tributarie.

La finalità perseguita nell'attuazione dell'intervento in questione, è chiaramente di tipo agevolativo: operando sul versante tributario, il legislatore ha adottato delle misure volte a incentivare il ricorso a strumenti per la composizione concordata della crisi d'impresa, nell'ottica di ricercare soluzioni tali da favorire il risanamento, e non la mera liquidazione atomistica, del patrimonio aziendale. La variabile fiscale, nel perseguimento di tale obiettivo, assume un ruolo determinate; di qui l'esigenza di estendere la portata applicativa dell'art. 88, comma 4, e, conseguentemente, l'applicabilità dell'esenzione anche alla fattispecie degli accordi di ristrutturazione del debito[62].

A. Profili interpretativi dubbi e aspetti problematici della limitazione del quantum dell'esenzione

Sul piano interpretativo, permangono, peraltro, delle incertezze in ordine alla portata del nuovo art. 88, comma 4, del Tuir, discendenti, essenzialmente dall'aver introdotto, il legislatore, un criterio quantitativo volto a limitare l'irrilevanza fiscale del *bonus* da accordi di ristrutturazione alla sola parte eccedente le perdite pregresse e di periodo[63].

Tale aspetto pone in luce come le modifiche legislative in parola, non abbiano condotto alla mera estensione del trattamento fiscale applicabile al concordato preventivo, bensì abbiano inteso sancire un regime speciale per gli accordi di ristrutturazione del debito, in quanto, sul piano della fiscalità di tale istituto, non è stata realizzata la perfetta equiparazione delle due fattispecie.

[62] A tale riguardo si segnala che l'Assonime, con Circolare del 13 maggio 2013, n. 15, commentando le modifiche normative apportate dal "Decreto Sviluppo", ha sottolineato come la detassazione delle sopravvenienze da accordi di ristrutturazione, debba considerarsi non già alla stregua di un'esenzione, bensì di un'esclusione da imponibilità, ascrivibile alla mancanza del presupposto impositivo riscontrabile nella fattispecie in esame. Favorevoli a rinvenire nella norma in commento un'esclusione, sono anche Michelutti, Riccardo – Brazzalotto, Alberto (2013) «Determinazione del reddito imponibile nel caso di sopravvenienze attive da ristrutturazione del debito», op. cit., p. 1562 ss. *Contra*, si attesta la posizione di Andreani, Giulio – Tubelli, Angelo (2013) «Assonime fa il punto su accordi di ristrutturazione, piani attestati e sopravvenienze da esdebitamento», *Corriere Tributario*, 25, pp. 1983-1990, i quali ritengono che sia preferibile inquadrare la detassazione in discorso nell'ambito delle esenzioni.

[63] Nella sua formulazione vigente, l'art. 88, comma 4, Tuir, recita che « […] *In caso di accordo di ristrutturazione dei debiti omologato ai sensi dell'articolo 182-bis del regio decreto 16 marzo 1942, n. 267, ovvero di un piano attestato ai sensi dell'articolo 67, lettera d), del regio decreto 16 marzo 1942, n. 267, pubblicato nel registro delle imprese, la riduzione dei debiti dell'impresa non costituisce sopravvenienza attiva per la parte che eccede le perdite, pregresse e di periodo, di cui all'articolo 84*».

L'irrilevanza fiscale della sopravvenienza attiva *de qua*, è limitata,dunque, alla parte che eccede le perdite pregresse e di periodo, di cui all'art. 84, del Tuir[64], con la conseguente imponibilità della sola porzione complementare di tale sopravvenienza. La scelta di limitare il *quantum* della detassazione, è stata imputata al timore che l'esenzione accordata potesse tradursi in un duplice beneficio[65], sebbene, in concreto, ciò abbia inciso, riducendola, sull'agevolazione fiscale riconosciuta[66].

Si rileva, infatti, che le imprese che ricorrono a procedure negoziali per porre rimedio alla propria situazione di dissesto economico, tipicamente, già versano in uno stato di crisi che può palesarsi nell'emersione di perdite. Ove si riconoscesse l'esenzione in misura integrale al *bonus* da esdebitazione, si acconsentirebbe, da un lato, all'utilizzo senza limiti di quella perdita generata in astratto dalla stessa sopravvenienza, posto che le due variabili sono intrinsecamente collegate alla luce dello stato di crisi in cui versa l'impresa; al contempo, il meccanismo agevolativo imporrebbe di apportare una variazione in diminuzione dal reddito imponibile in misura pari all'intero ammontare della sopravvenienza.

L'impresa, conseguentemente, beneficerebbe di una doppia agevolazione sul piano fiscale, potendo utilizzare integralmente dette perdite per abbattere il reddito imponibile attuale o prospettico e, al contempo, avvantaggiarsi della non imponibilità, in misura totale, del debito falcidiato.

La scelta di contingentare la detassazione, tuttavia, si pone in contrasto con il carattere proprio delle esenzioni e con la relativa facoltà del legislatore di fissarne discrezionalmente la misura. La nuova regola, infatti, ha commisurato in modo forfetario la quota imponibile della sopravvenienza attiva all'ammontare delle perdite fiscali pregresse o di periodo utilizzabili, così da assorbirne l'ammontare ed evitare di riutilizzare le stesse al fine di abbattere il reddito imponibile.

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[64] Sul punto, v. Contrino, Angelo (2013) «Sulla nuova fiscalità degli «accordi di ristrutturazione del debito»: profili d'irragionevolezza, aspetti problematici e questioni aperte», *Diritto e Pratica Tributaria*, 1, p. 187 ss., il quale sottolinea come la mancata equiparazione tra le due fattispecie, abbia impedito di pervenire a una disciplina omogenea e «*di rendere fiscalmente indifferente il ricorso all'accordo di ristrutturazione e al concordato preventivo*», pur avendo, l'intervento legislativo in commento, inciso sulla competitività, nonché sulle possibilità di un impiego effettivo e diffuso dell'istituto.

[65] Così Andreani, Giulio – Tubelli, Angelo, «Sopravvenienze attive esenti anche negli accordi di ristrutturazione dei debiti», cit., p. 2220.

[66] In tal senso si esprime Contrino, Angelo (2013) «Sulla nuova fiscalità degli «accordi di ristrutturazione del debito»: profili d'irragionevolezza, aspetti problematici e questioni aperte», cit., p.189 ss., il quale sottolinea come il criterio utilizzato dal legislatore abbia chiaramente il fine di limitare il *quantum* dell'esenzione e non quello di evitare una duplicazione del beneficio a fronte di un doppio utilizzo di componenti negativi di reddito. L'Autore, infatti, chiarisce come «*in linea di principio l'agevolazione fiscale, sotto forma di esenzione di un provento imponibile, in tanto può essere effettivamente garantita in quanto si consenta la deduzione dei correlati componenti negativi o l'utilizzo delle perdite fiscali che per l'effetto si formano*».

L'effetto generato dalla norma, costituisce, tuttavia, un ostacolo all'equiparazione sul piano fiscale, e quindi sostanziale, tra gli accordi di ristrutturazione e il concordato preventivo, da cui discende un depotenziamento dell'agevolazione stessa, che si traduce nel non penalizzare il ricorso agli accordi di ristrutturazione, ma non in un vero incentivo all'attuazione di tale rimedio da parte dell'impresa che versi in stato di crisi[67].

A tale riguardo, si menziona la posizione espressa da Autorevole Dottrina[68], la quale ha chiarito come, il trattamento fiscale deteriore riservato agli accordi di ristrutturazione, configuri un'ingiustificata e irragionevole disparità di trattamento tra due fattispecie affini per identità di *ratio* e di struttura. Infatti, posto che il fine dell'agevolazione fiscale sia unitario, e che esso si estrinsechi nel favorire l'impiego di strumenti finalizzati alla gestione concordata della crisi d'impresa, non vi sarebbero ragioni per differenziare il regime fiscale a essi applicabili. Del resto, l'irragionevolezza che connota detta disparità di trattamento, diventa lapalissiana ove si consideri che le norme afferenti alla fiscalità della crisi d'impresa, dovrebbero, in via di principio, essere improntate alla rimozione di eventuali ostacoli derivanti dalla sussistenza dell'onere fiscale, ovvero alla realizzazione di assetti negoziali per addivenire a un risanamento dell'impresa stessa o, comunque, per evitare l'«*ipotesi di disgregazione liquidatoria del patrimonio aziendale*»[69].

Il parametro individuato dal legislatore per la determinazione quantitativa delle sopravvenienze esenti, dunque, è l'ammontare delle perdite fiscali pregresse e di periodo, di cui all'art. 84, del Tuir[70]. In mancanza di precise indicazioni normative in merito al conteggio di tali perdite nella quantificazione della quota di sopravve-

[67] A tale riguardo, cfr. Contrino, Angelo (2012) «Accordi di ristrutturazione del debito e modifiche alla disciplina del reddito d'impresa», *Corriere Tributario*, 35, p. 2692; Del Federico, Lorenzo (2013) «Le novità sui profili tributari del concordato preventivo e degli accordi di ristrutturazione», *Il Fallimento*, 9, p. 1200.

[68] Contrino, Angelo, (2013) «Sulla nuova fiscalità degli «accordi di ristrutturazione del debito»: profili d'irragionevolezza, aspetti problematici e questioni aperte», cit., p.190.

[69] Così, Dami, Filippo, op. cit., p. 3166, il quale descrive la funzione servente svolta dal diritto tributario al fine di favorire l'affermarsi di istituti cui l'ordinamento assegna il compito di sostenere interessi meritevoli di tutela.

[70] Ai sensi dell'art. 84, Tuir, modificato, nella parte che concerne le regole per il riporto delle perdite dal D.L. 6 luglio 2011, n. 98, le perdite di un periodo d'imposta, possono essere computate in diminuzione del reddito dei periodi d'imposta successivi in misura non superiore all'ottanta percento del reddito imponibile di ciascuno di essi e per l'intero importo che trova capienza in tale ammontare. A detta regola, fanno eccezione eventuali perdite conseguite nei primi tre periodi d'imposta dalla data di costituzione, poiché esse possono essere computate in diminuzione del reddito complessivo dei periodi d'imposta successivi entro il reddito imponibile di ciascuno di essi e per l'intero importo che vi trovi capienza, a condizione che siano riferite a una nuova attività produttiva. Ne discende che, la parte delle perdite che eccede l'ottanta percento degli utili e che, quindi non può essere dedotta nell'esercizio, può essere riportata negli anni successivi senza alcun limite.

nienza attiva esente, occorre svolgere alcune considerazioni alla luce dei chiarimenti e delle soluzioni interpretative prospettate dalla Dottrina.

In materia di perdite fiscali correnti, si ritiene che, al fine di evitare effetti distorsivi, scaturenti dal fatto che il *quantum* imponibile della sopravvenienza attiva derivante dalla riduzione dei debiti concorra alla formazione della stessa perdita fiscale di periodo, in una prima fase, occorre determinare il reddito d'impresa considerando tale sopravvenienza interamente imponibile. Solo successivamente, sarà possibile apportare la variazione in diminuzione in misura corrispondente alla quota esente da tassazione[71]. La parte esente della sopravvenienza attiva, sarà determinata dal raffronto tra la perdita fiscale "teorica", ossia quella determinata prima della variazione in diminuzione, e l'ammontare del *bonus* da riduzione dei debiti da accordo di ristrutturazione, poiché, si ricorda, ai sensi dell'art. 88, comma 4, la sopravvenienza attiva da esdebitazione è esente per la parte eccedente rispetto alle perdite pregresse e di periodo.

Quella suesposta, parrebbe essere la soluzione preferibile nella quantificazione della quota esente del *bonus* da accordo di ristrutturazione, sebbene parte della Dottrina[72], inizialmente propensa a calcolare la perdita di periodo considerando, *prima facie*, la sopravvenienza attiva quale interamente imponibile, abbia sollevato delle perplessità a riguardo, proponendo una diversa lettura del dato normativo In particolar modo, nella determinazione della perdita di periodo, quale alternativa praticabile, è stata proposta l'esclusione della sopravvenienza attiva da detto calcolo, ossia, in altri termini, è stato suggerito di considerare tale sopravvenienza, ai soli fini del calcolo in questione, del tutto esclusa da imposizione[73].

Gli Autori che hanno avanzato la tesi in parola, hanno fatto ricorso all'interpretazione teleologica dell'art. 88, comma 4, provando, in assenza di delucidazioni

[71] Sul punto, cfr. Contrino, Angelo (2013) «Sulla nuova fiscalità degli «accordi di ristrutturazione del debito»: profili d'irragionevolezza, aspetti problematici e questioni aperte», cit., p. 191; Andreani, Giulio – Tubelli, Angelo, «Sopravvenienze attive esenti anche negli accordi di ristrutturazione dei debiti», cit., p. 2221, in sede di primo commento della norma. Gli Autori, in seguito, parrebbero aver prediletto, invece, una diversa interpretazione della disposizione in discorso, alla luce di quanto risulta da Andreani, Giulio – Tubelli, Angelo (2012) «Le sopravvenienze da esdebitamento in presenza di perdite», *Corriere Tributario*, 47, pp. 3621-3627.

[72] Sul punto, v. Andreani, Giulio – Tubelli, Angelo, «Le sopravvenienze da esdebitamento in presenza di perdite», cit., p. 3621 ss.

[73] L'impostazione di calcolo in commento, ribadita anche in Andreani, Giulio – Tubelli, Angelo, «Assonime fa il punto su accordi di ristrutturazione, piani attestati e sopravvenienze da esdebitamento», cit., p. 1983 ss., parrebbe essere condivisa da Assonime. Nella Circolare n. 15/2013, infatti, si legge che «*in coerenza con l'obiettivo di accordare la detassazione nei soli limiti in cui la rilevanza fiscale della sopravvenienza potrebbe determinare un onere impositivo, a carico del debitore, occorre semplicemente confrontare l'entità della sopravvenienza attiva con il risultato di periodo che si sarebbe prodotto in assenza di questa componente*».

normative sull'argomento, a ricostruire la *ratio* dell'esenzione[74]; quest'ultima, è stata individuata nella volontà legislativa di rendere fiscalmente irrilevante la sopravvenienza attiva nella misura necessaria affinché essa non produca alcun reddito imponibile, in modo da ridurre il rischio che l'impresa benefici di una duplice agevolazione qualora, prima, deduca dal reddito imponibile la quota pari all'insussistenza di passività ottenuta dalla riduzione dei debiti; poi, fruisca dell'esenzione da imposta del corrispondente ammontare.

Alla luce di tali considerazioni, si spiegherebbe la scelta del legislatore di limitare il *quantum* esente della sopravvenienza all'eccedenza rispetto alle perdite pregresse e di periodo, di cui all'art. 84, Tuir; detta finalità, secondo gli estensori della tesi prospettata, potrebbe essere raggiunta soltanto escludendo integralmente la sopravvenienza attiva dal computo della perdita di periodo. In questa ipotesi, infatti, si eviterebbe l'emersione di reddito imponibile generato anche da tale componente e, al tempo stesso, la perdita calcolata escludendo la sopravvenienza attiva non eccederebbe quella risultante «*dalla contrapposizione dei costi deducibili con i ricavi imponibili diversi dalla sopravvenienza attiva da esdebitamento*».

In altri termini, l'esclusione integrale della sopravvenienza attiva dal computo della perdita di periodo, eviterebbe che, in virtù dell'esenzione, possa prodursi un incremento della perdita fiscale[75] riportabile in diminuzione dei successivi esercizi in misura superiore alla porzione effettivamente riportabile che si genererebbe considerando la sopravvenienza attiva interamente imponibile. Ciò produrrebbe l'effetto di detassare componenti attivi di reddito, che sarebbero altrimenti imponibili, dando luogo a un'indebita estensione del dettato normativo.

A parere di chi scrive, senza alcuna pretesa di individuare una "*best practice*" da seguire, sarebbe preferibile adottare il primo criterio di calcolo riportato, che

[74] Più specificamente, nel contributo in discorso, Andreani, Giulio – Tubelli, Angelo, «Le sopravvenienze da esdebitamento in presenza di perdite», cit., p. 3621 ss., ricostruiscono la *ratio* dell'esenzione del *bonus* scaturente da accordi di ristrutturazione, a partire dall'orientamento espresso dall'Amministrazione Finanziaria precedentemente al riconoscimento legislativo di detta esenzione: in particolar modo, come si è avuto modo di chiarire in precedenza, gli Uffici delle Entrate avevano espresso, con Nota Ministeriale del 6 marzo 2006, prot. 954-35315, la propria ritrosia ad avallare un'interpretazione dell'art. 88, comma 4, che consentisse di estendere agli accordi di ristrutturazione il trattamento fiscale riconosciuto al *bonus* concordatario, manifestando la propria preoccupazione che l'impresa potesse ricevere un duplice beneficio. Infatti, «[…] *in genere la falcidia dei debiti fa venire meno, nella sostanza, l'effetto di spese, perdite, oneri e passività iscritti in bilancio in precedenti esercizi, che hanno presumibilmente già concorso, quali componenti negativi, alla formazione del reddito d'impresa imponibile*», pertanto, a parere dell'Amministrazione, l'esenzione da tassazione della sopravvenienza attiva da riduzione di debiti, sarebbe stata latrice di un ingiustificato doppio beneficio, ossia, «*prima quello della deduzione di tali oneri e poi quello della mancata imposizione della rettifica degli stessi*».

[75] Perdita che, secondo il meccanismo di calcolo avallato in prima istanza dai commentatori, già avrebbe traccia della sopravvenienza attiva conseguente alla riduzione del debito.

suggerisce di calcolare la perdita di periodo computando la sopravvenienza attiva come se fosse interamente imponibile, al fine di confrontare l'ammontare della perdita così calcolata con il *bonus* da esdebitazione per determinare la quota esente da tassazione. Infatti, stante l'intervento legislativo che ha espressamente sancito l'irrilevanza fiscale delle sopravvenienze attive derivanti dall'implementazione di accordi di ristrutturazione del debito, potrebbero ritenersi superati i dubbi interpretativi espressi in passato dall'Amministrazione Finanziaria in merito alla portata dell'agevolazione in discorso. Inoltre, considerato che dall'accordo di ristrutturazione discende un contenimento dell'esposizione debitoria dell'impresa in crisi, non sembrerebbe corretto non conteggiare, nel computo delle perdite fiscali di periodo, una posta reddituale attiva che, in concreto, ha avuto manifestazione.

L'assenza di puntuali indicazioni da parte del legislatore, peraltro, ha destato alcuni dubbi interpretativi anche in relazione alle perdite fiscali pregresse, poiché l'art. 88, comma 4, effettua un generico richiamo all'art. 84, del Tuir, ossia alla norma che disciplina il riporto delle perdite, senza, tuttavia, discernere tra perdite potenzialmente riportabili e perdite compensabili in ciascun periodo di imposta.

L'art. 84, del Tuir chiarisce che l'utilizzo delle perdite pregresse in compensazione del reddito d'impresa imponibile, può avvenire in misura non superiore all'80% di quest'ultimo, fatta eccezione per le perdite maturate nei primi tre periodi d'imposta dalla data di costituzione della società, interamente utilizzabili. Pertanto, specialmente nell'ipotesi in cui l'ammontare delle perdite pregresse utilizzabili ecceda l'ottanta percento del reddito imponibile, appare necessario chiarire se il richiamo alla norma *de qua* comporti la rilevanza, ai fini della determinazione del *quantum* di sopravvenienza esente, delle perdite compensabili nel limite da questo stabilito, ovvero delle perdite riportabili *tout court*.

In assenza di una puntuale indicazione legislativa al riguardo, sembrerebbe opportuno propendere a favore della quantificazione sulla base delle perdite potenzialmente riportabili, in quanto, patrocinando soluzioni differenti, si perverrebbe a un'integrazione non consentita del dato normativo[76].

[76] Così Contrino, Angelo (2013) «Sulla nuova fiscalità degli «accordi di ristrutturazione del debito»: profili d'irragionevolezza, aspetti problematici e questioni aperte», cit., p. 191. *Contra* Andreani, Giulio – Tubelli, Angelo, «Sopravvenienze attive esenti anche negli accordi di ristrutturazione dei debiti», cit., p. 2222, i quali ipotizzano che «[…] *una differente soluzione potrebbe consistere nel determinare la quota imponibile della sopravvenienza attiva fino ad un ammontare corrispondente alle perdite pregresse disponibili, ma nel caso in cui, in base alla regola generale posta dall'art. 84, la sopravvenienza attiva imponibile ecceda l'ammontare delle perdite effettivamente utilizzabili, queste ultime dovrebbero essere considerate utilizzabili per un importo pari alla sopravvenienza attiva imponibile, prevedendo, per un ammontare corrispondente a tale eccedenza, la riduzione delle perdite successivamente riportabili*». Gli stessi Autori, tuttavia, riconoscono che detta soluzione potrebbe non essere accolta con favore dall'Amministrazione Finanziaria, risolvendosi in una modalità di calcolo che inciderebbe sul meccanismo dell'art. 84; per

La questione, tuttavia, non è pacifica, in quanto è stato evidenziato come, ancorché la tesi prospettata appaia in linea con il tenore letterale della disposizione, essa contrasterebbe con la *ratio* della norma, determinando un effetto di tassazione di quella parte di sopravvenienza che, in virtù del disposto dell'art. 84, non è compensabile in sede di determinazione del reddito complessivo netto. Diversamente, da una lettura più sistematica della norma medesima, discenderebbe il computo delle sole perdite pregresse effettivamente utilizzabili, ossia, fino a concorrenza dell'80% dell'ammontare della sopravvenienza attiva eccedente rispetto all'eventuale perdita di periodo[77].

Si evince, dunque, come, nelle more di un auspicabile chiarimento sul punto da parte dell'Amministrazione Finanziaria, agli interpreti è demandato il compito di ricercare soluzioni operative al fine di porre rimedio alle nuove problematiche sollevate dal novellato art. 88, comma 4, del Tuir.

Ed è da ricercarsi, ancora, in via interpretativa un criterio di calcolo applicabile all'ipotesi in cui, sul piano pratico, si verifichi la compresenza di perdite pregresse e di periodo; le alternative praticabili, essenzialmente, sono le seguenti: la prima, esenterebbe la differenza potenzialmente risultante tra la sopravvenienza attiva e le perdite pregresse, per la parte che eccede la perdita di periodo; potrebbe, altrimenti, esentarsi l'eventuale differenza tra la sopravvenienza attiva e l'eventuale perdita di periodo, per la parte che eccede le perdite pregresse. Eminente Dottrina si è espressa sul punto, affermando che appare più opportuno il previo raffronto della sopravvenienza attiva con le perdite pregresse e, nella fase immediatamente successiva, il confronto dell'eventuale ammontare residuo della sopravvenienza con la perdita di periodo[78].

V. Il regime delle perdite su crediti verso debitori assoggettati a procedure concorsuali e accordi di ristrutturazione

Gli accordi di ristrutturazione sono forieri di implicazioni fiscali anche dal lato creditorio, in quanto la rinegoziazione dell'esposizione debitoria comporta l'irre-

avallare detta interpretazione, conformemente a quanto sottolineato dagli stessi commentatori, sarebbe necessario un correttivo legislativo.

[77] Così Michelutti, Riccardo – Brazzalotto, Alberto, op. cit., p. 1563. In senso conforme, sembrerebbe porsi Assonime che, nella Circolare n. 15/2013, ha suggerito di seguire, nel caso in cui vi siano perdite fiscali pregresse rilevanti nel computo del *quantum* di sopravvenienza attiva esente, le regole ordinarie di compensazione delle perdite pregresse.

[78] Per approfondimenti sul punto, si rinvia a Andreani, Giulio – Tubelli, Angelo (2013) «Le sopravvenienze da esdebitamento in caso di presenza contestuale di perdite pregresse e di periodo», *Corriere Tributario*, 1, p. 68-74.

cuperabilità, almeno parziale, del credito. Di qui, la necessità di chiarire in quali termini operi, con riferimento alla fattispecie in parola, la regola della deducibilità delle perdite su crediti di cui all'art. 101, comma 5, del Tuir.

La norma in questione, è stata incisa dall'intervento legislativo apportato dal "Decreto Sviluppo", poiché, all'interno del primo periodo dell'art. 101, comma 5, è stata estesa agli accordi di ristrutturazione del debito la regola della deducibilità automatica delle perdite su crediti, già applicabile in caso di assoggettamento del debitore a procedure concorsuali.

La regola della deducibilità automatica è chiamata a operare in virtù della presunzione *iuris et de iure*[79] dell'esistenza degli «*elementi certi e precisi*» legittimanti codesta deduzione[80]. Il dettato normativo, infatti, chiarisce che la deducibilità delle perdite su crediti è subordinata, in via generale, alla verifica dell'inesigibilità del credito, che si profila ove emerga l'infruttuoso esperimento di tutti i tentativi ragionevoli finalizzati al recupero del credito medesimo[81].

L'inesigibilità è, invece, presunta, ove il debitore sia assoggettato a procedure concorsuali[82]. In tal caso, l'automatica deducibilità della perdita scaturisce dal fatto

[79] Sulla natura assoluta della presunzione contenuta nell'art. 101, comma 5, cfr. Zizzo, Giuseppe (2010) «Le perdite su crediti verso debitori assoggettati a procedure concorsuali», *Corriere Tributario*, 29, p. 2344, il quale chiarisce che «*laddove prevede che la perdita sia deducibile se risultante da elementi certi e precisi, e comunque se il debitore è assoggettato a procedura concorsuale, l'art. 101, comma 5, definisce chiaramente un sistema di presupposti speciali per attribuire rilevanza a questo onere, sottraendolo alle condizioni di cui all'art. 109, comma 1*»; Contrino, Angelo (2013) «Sulla nuova fiscalità degli «accordi di ristrutturazione del debito»: profili d'irragionevolezza, aspetti problematici e questioni aperte», cit., p. 191. In senso conforme, la prassi dell'Amministrazione Finanziaria che, con Circolare del 23 gennaio 2009, n. 16/E, sottolinea che «*in presenza di procedure concorsuali, in altri termini, l'accertamento della situazione di sofferenza della partita creditoria è ufficialmente conclamata ad opera di un soggetto terzo indipendente (autorità giurisdizionale o amministrativa) e non è rimessa alla mera valutazione soggettiva del creditore*», ossia, in altri termini, l'accertamento giudiziale dello stato d'insolvenza, opera come presunzione assoluta della certezza e della precisione della perdita, al punto da giustificarne l'automatica deducibilità. *Contra*, si menziona l'orientamento giurisprudenziale espresso dalla sentenza della Cassazione, 4 settembre 2002, n. 12831, in *Rassegna Tributaria*, 2002, p. 2070 ss., con nota di Cantillo, Michele, «La deducibilità fiscale delle perdite su crediti verso debitori assoggettati a procedure concorsuali».

[80] Nella sua formulazione vigente, risultante dalla conversione del D.L. n. 83/2012, l'art. 101, comma 5, primo periodo dispone che «*le perdite di beni di cui al comma 1, commisurate al costo non ammortizzato di essi, e le perdite su crediti sono deducibili se risultano da elementi certi e precisi e in ogni caso, per le perdite su crediti, se il debitore è assoggettato a procedure concorsuali o ha concluso un accordo di ristrutturazione dei debiti omologato ai sensi dell'articolo 182-bis del regio decreto 16 marzo 1942, n. 267*».

[81] Così Zizzo, Giuseppe, op. cit., p. 2342, il quale, sottolinea come i tentativi volti al recupero del credito debbano essere giudicati ragionevoli secondo una logica di convenienza economica, valutando anche le caratteristiche del credito, quali la sua entità, la presenza di garanzie reali o personali e la natura del debitore.

[82] In Stevanato, Dario, «Profili fiscali del fallimento e delle altre procedure concorsuali», cit., p. 142, si chiarisce che, nell'ambito delle procedure concorsuali, le perdite su crediti si inseriscono nel qua-

che, mediante la rinuncia all'esazione del credito o la rimessione del debito, l'impresa creditrice compie la scelta negoziale di privarsi della possibilità di ottenerne il pagamento Pertanto, la definitività della perdita non rende necessari ulteriori accertamenti in ordine all'esistenza di «*elementi certi e precisi*» a dimostrarne l'effettiva esistenza e rilevanza[83].

Nella fase antecedente la novella legislativa apportata dal "Decreto Sviluppo", l'art. 101, comma 5, disponeva «*in ogni caso*» la deducibilità automatica delle perdite nel caso in cui il debitore fosse assoggettato a procedure concorsuali, tacendo, tuttavia, in ordine alla fattispecie degli accordi di ristrutturazione del debito. Autorevole Dottrina, essendo ormai concorde nell'affermare l'autonomia dell'istituto rispetto al concordato preventivo, escludeva che potesse invocarsi la regola di deducibilità prevista in materia di procedure concorsuali, fermo restando che i creditori avrebbero potuto provare l'esistenza degli «*elementi certi e precisi*» atti a dimostrare la definitività della perdita[84].

In senso sostanzialmente conforme, si era espressa l'Amministrazione Finanziaria, limitandosi a escludere, in un primo momento, l'operatività della regola della deducibilità immediata[85] e, successivamente, nel parere espresso nel corso del "Telefisco 2009", manifestando la propria ritrosia nel riconoscere l'assimilabilità degli accordi di ristrutturazione alle altre procedure concorsuali e chiarendo che, non potendo invocarsi l'automatica deducibilità della perdita, sarebbe stato necessario dimostrarne l'inevitabilità, non essendo sufficiente, a connotare la perdita di certezza e precisione, il giudizio di omologa degli accordi di ristrutturazione[86].

Peraltro, si segnala che, pur in assenza di una conferma legislativa a riguardo, gli Uffici delle Entrate avevano manifestato un *revirement* rispetto all'orientamento

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dro delle perdite da inesigibilità del credito, «*che implicano una valutazione prospettica delle concrete possibilità di esazione del credito, il quale permane nel patrimonio dell'impresa, alla luce della situazione patrimoniale del debitore*». Per il sol fatto della pendenza della procedura, tuttavia, l'inesigibilità del credito è presunta.

[83] Così Stevanato, Dario (2012), «Profili fiscali del fallimento e delle altre procedure concorsuali», cit., p. 2608 ss. In senso conforme, Zizzo, Giuseppe, op. cit., p. 2342 ss.

[84] In senso conforme Proto, Cesare (2006) «Gli accordi di ristrutturazione dei debiti», *Il Fallimento*, 2006, pp. 129-140.

[85] Con Circolare n. 8/E del 2009, l'Agenzia delle Entrate ha chiarito che «si ritiene che alle perdite su crediti generatesi a partire dalla data in cui il Tribunale omologa l'accordo di ristrutturazione dei debiti, non sia applicabile la previsione di deducibilità immediata contenuta nel citato comma 5 dell'articolo 101 del TUIR».

[86] Per approfondimenti sull' «*inedito*» requisito dell'inevitabilità delle perdite richiesto dall'Amministrazione Finanziaria per acconsentire la deducibilità delle stesse in caso di assoggettamento del debitore ad accordi di ristrutturazione, nonché per una critica sull'argomento, v. Stevanato, Dario, «Profili fiscali del fallimento e delle altre procedure concorsuali», cit., p. 142; Id., «I criteri direttivi per la razionalizzazione delle norme sul reddito di impresa», cit., p. 2599 ss.

precedentemente espresso, ammettendo, in via interpretativa, l'applicabilità della regola della deducibilità automatica delle perdite su crediti alla fattispecie dell'accordo di ristrutturazione, subordinando, tuttavia, detto automatismo, al passaggio in giudicato del decreto di omologa dell'accordo, ossia al momento in cui, non essendo più suscettibile di impugnativa[87], ne fosse accertata la definitività.

La recente modifica legislativa può dirsi, dunque, significativa, poiché ha definitivamente chiarito la spinosa questione della deducibilità automatica delle perdite su crediti in caso di assoggettamento del debitore ad accordi di ristrutturazione. Nella sua formulazione vigente, inoltre, l'art. 101, comma 5, individua con esattezza il momento legittimante l'automatica deduzione, facendo riferimento al momento dell'omologazione dell'accordo e non a quello della definitività del decreto di omologazione: il decreto che dispone l'omologazione, *ex se* è sufficiente a rendere irreversibile la remissione parziale dei debiti cui i creditori hanno acconsentito, così perdendo la titolarità sui crediti a essi facenti capo[88]. Ne consegue che il periodo d'imposta in cui opera per i creditori la regola della deducibilità automatica delle perdite subite, è quello in cui è stato emesso il decreto di omologa[89].

Se da una parte, in riferimento agli accordi di ristrutturazione, sono stati sciolti i dubbi legati all'art. 101, comma 5, non può dirsi lo stesso per le perdite conseguite in conseguenza di un piano attestato di risanamento, poiché, nella versione risultante dalla legge di conversione del "Decreto Sviluppo", è venuta meno la facoltà, inizialmente concessa stando al disegno di legge, di applicare la regola della deducibilità *tout court* anche alla fattispecie in ultimo menzionata. Tale scelta è stata reputata dagli interpreti irrazionale, in quanto, determina, nell'ambito delle soluzioni di composizione concordata della crisi d'impresa, un'asimmetria sul piano del trattamento fiscale.

Lo stesso "Decreto Sviluppo" ha infatti modificato l'art. 88, comma 4, estendendo la regola dell'irrilevanza fiscale del *bonus* da riduzione dei debiti anche al caso di piano attestato di risanamento. Ciononostante, al contempo, è stata (a)

[87] Sul punto, v. Circolare del 3 agosto 2010, n. 42/E.

[88] Così Contrino, Angelo (2013) «Sulla nuova fiscalità degli «accordi di ristrutturazione del debito»: profili d'irragionevolezza, aspetti problematici e questioni aperte», cit., p. 190 ss.

[89] Così Andreani, Giulio – Tubelli, Angelo, «Sopravvenienze attive esenti anche negli accordi di ristrutturazione dei debiti», p. 2223; Papaleo, Pietro Paolo (2012) «Sopravvenienze attive e perdite su crediti negli strumenti anti crisi», in *Amministrazione e Finanza*, 10, p. 6-12. In Ghiselli, Fabio (2013) «Deducibilità delle perdite su crediti negli accordi di ristrutturazione e nelle altre procedure concorsuali», *Corriere Tributario*, 23, pp. 1801-1808., si propone una soluzione meno stringente, in quanto si sostiene che, disponendo che il debitore si considera assoggettato ad accordi di ristrutturazione «*dalla*» data dell'omologazione, si introduce un complemento di tempo che postula che i requisiti di certezza e precisione possano decorrere a partire da una carta data e per l'intera durata della procedura; di qui, la possibilità di dedurre la parte di credito che il debitore non si impegna a onorare, anche nel corso di esercizi successivi a quello in cui è verificata l'omologazione della procedura.

simmetricamente negata la facoltà, per i creditori, di dedurre automaticamente le perdite subite. Sarebbe auspicabile, pertanto, un intervento correttivo sul punto, posto che, pur essendo i piani di risanamento degli strumenti di natura sostanzialmente privatistica, non assistiti dalla fase dell'accertamento giudiziale, l'attestazione del professionista, il quale, ai sensi dell'art. 67, comma 3, lett. d), L.F., è tenuto a esprimersi in ordine alla fattibilità e alla veridicità del piano, dovrebbe costituire un indicatore idoneo della sussistenza degli «*elementi certi e precisi*» richiesti per l'operatività della regola di deducibilità automatica[90].

VI. Considerazioni conclusive

I lineamenti della "nuova" fiscalità degli accordi di ristrutturazione del debito sono quelli tracciati dal "Decreto Sviluppo" che, in buona sostanza, ha recepito soluzioni già desumibili in via interpretativa, in quanto coerenti con la *ratio* posta a fondamento della disciplina degli istituti per la gestione negoziale della crisi d'impresa, *lato sensu* intesa.

Non può dubitarsi che il legislatore abbia inteso chiarire definitivamente l'inquadramento, ai fini tributari, degli accordi di ristrutturazione del debito, sciogliendo ogni dubbio in merito all'opportunità di estendere agli stessi l'applicabilità del regime di detassazione del *bonus* concordatario, di cui all'art. 88, comma 4, Tuir, nella sua formulazione previgente. Al contempo, tuttavia, in relazione alla fattispecie degli accordi di ristrutturazione, il *quantum* della sopravvenienza attiva da esentare è stato limitato alla porzione eccedente le perdite pregresse e di periodo. Ciò ha impedito di realizzare, sul piano sostanziale, l'equiparazione *tout court* dell'istituto, rispetto alla procedura concordataria, ove la non imponibilità del *bonus* da esdebitazione continua a essere riconosciuta in misura integrale.

Contingentando l'esenzione, il legislatore sembrerebbe aver voluto eludere il rischio che, all'agevolazione concessa in ragione dello stato di crisi in cui versi l'impresa debitrice, si affiancasse il beneficio fiscale scaturente dalla facoltà di utilizzare, in misura integrale, le perdite pregresse e di periodo in abbattimento del reddito imponibile, già ridotto per effetto dell'esdebitazione ottenuta implementando l'alternativa negoziale al fallimento. Di qui la scelta (che avrebbe potuto, probabilmente, essere assistita da alcuni chiarimenti relativamente alle modalità di computo del *quantum* non imponibile della sopravvenienza), di limitarne l'esenzione commisurando forfetariamente tale componente reddituale all'ammontare delle perdite

[90] Così Papaleo, Pierpaolo (2012) «Sopravvenienze attive e perdite su crediti negli strumenti anticrisi», *Amministrazione e Finanza*, 10, p. 8.

pregresse e di periodo, così da generare un effetto di "sterilizzazione" di tali perdite fino a concorrenza della sopravvenienza attiva registrata.

Le implicazioni prodotte sul piano fiscale dalle modifiche apportate dal Decreto Sviluppo, sono chiare: si riscontra una disparità di trattamento, rispetto al regime applicabile al concordato preventivo, che non pare essere giustificabile alla luce dei principi ispiratori dell'intervento in parola, tra cui figura, *in primis*, quello statuito nella relazione illustrativa al Decreto, di «*migliorare l'efficienza dei procedimenti di composizione delle crisi d'impresa*», con il risultato che, *ceteris paribus*, fatto salvo il maggior rigore procedimentale che caratterizza l'accesso alla procedura concordataria, la "variabile fiscale" inciderà nel senso di non rendere indifferente il ricorso agli accordi di ristrutturazione del debito, ovvero al concordato preventivo, compromettendo sensibilmente la competitività dell'istituto.

Ciò che non è parimenti chiaro, a parere della scrivente, è l'obiettivo che il legislatore ha inteso perseguire nel differenziare il regime fiscale applicabile alle due procedure. Si consideri, peraltro, che il Decreto Sviluppo ha modificato la norma che considera la prospettiva speculare a quella dell'impresa in crisi, ossia l'art. 101, comma 5, del Tuir, che disciplina le regole di deducibilità automatica delle perdite su crediti in caso di sottoposizione del debitore a procedure concorsuali. Per effetto della recente novella, gli accordi di ristrutturazione del debito sono affiancati alle procedure concorsuali nell'individuazione delle fattispecie in cui la certezza e la precisione degli elementi attestanti la definitività delle perdite, sono presunte *iuris et de iure*, e ne giustificano la deducibilità automatica.

Il coordinamento della disposizione suesposta con l'art. 88, comma 4, anch'esso inciso dall'intervento in parola, avrebbe, probabilmente, dovuto condurre ad ammettere la totale non imponibilità delle sopravvenienze attive da accordi di ristrutturazione, a fronte del riconoscimento, in via speculare, della deducibilità, per intero, delle perdite conseguite dal creditore soggetto a falcidia.

La "nuova" disciplina tributaria degli accordi di ristrutturazione del debito, dunque, parrebbe aver risposto solo in parte all'istanza di una razionalizzazione della materia, da attuarsi mediante il raccordo tra normativa tributaria e legge fallimentare. L'azione del legislatore, se da una parte ha il pregio di aver chiarito alcuni dei profili dubbi concernenti la fiscalità degli accordi di ristrutturazione, che in passato ne minavano le effettive opportunità di impiego; dall'altra, ha lasciato irrisolte molteplici questioni interpretative.

Alla luce delle considerazioni svolte, si evince come il "Decreto Sviluppo" non abbia avuto come esito una vera e propria incentivazione nel ricorso agli accordi di ristrutturazione del debito. Al contrario, esso ha evidenziato la necessità di apportare, alla luce del crescente interesse manifestato dagli operatori, ulteriori chiarimenti legislativi sul tema della fiscalità delle procedure di gestione negoziale della crisi di

impresa, al fine di rispondere all'esigenza di disciplinare con maggiore sistematicità e compiutezza quei fenomeni che ricadono nell'area dell'intricato rapporto tra procedure concorsuali e Amministrazione Finanziaria.

The "Rhetoric" of Proliferation of Mineral Export Restraints and WTO Under-Regulation

di Ilaria Espa

Sommario: I. Introduction; II. Major Structural Changes in Minerals and Metals Trade; III. Emerging Patterns in Critical Minerals and Metals: Mapping the Network of Mineral Export Restraints; IV. The Relation with WTO Relevant Disciplines on Export Restrictions; V. Conclusions: How Much "Ideology" in the Debate Over Export Restrictions?.

I. Introduction

International markets of primary supplies are currently affected by the longest and most comprehensive wave of export restraints on raw materials since the Second World War[1]. As in the case of the first wave of export restraints, which mainly affected agricultural commodities and raw materials during the 1970's and coincided with the oil-crisis-driven price spike of 1972-1974[2], this "second" wave is directly linked to the commodity boom of 2002-2003[3]. However, major differences make it an *unicum* in recent history: first, the phenomenon is not limited to the agricultural sector – although the food crises of 2008 and 2010 have forced the international community, and the WTO itself, to envisage effective ways of

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M. Radetzski, *A Handbook of Primary Commodities in the Global Economy* (Oxford, 2008), p. 66 ss.

[2] For a thorough analysis of the causes at the origin of the commodity boom during the 1970's, in particular with respect to the turbulences provoked within the international markets by the oil crisis, *see* S. Mitra, T. Josling, 'Agricultural Export Restrictions: Welfare Implications and Trade Disciplines', IPC Position Paper, Agricultural and Rural Development Policy Series (2009), pp. 13 ss., available at http://www.agritrade.org/documents/ExportRestrictions_final.pdf.

[3] M. Radetzski, *op. cit.*, pp. 7-8.

disciplining agricultural export restrictions for the purposes of food security[4] – but has come to involve multiple sectors of the economy, including industrial raw materials such as minerals and metals[5]; second, the phenomenon has now entered its first decade, with its lastingness being the result of the persistence of the major geo-economic changes responsible for the 2002-2003 commodity boom, on the one hand, and the eruption of the international economic and financial crisis, on the other hand. The crisis has in fact triggered an intensification in the use of export restrictions, and such measures have been reportedly the fastest growing component among the newly potentially restrictive measures adopted within the framework of the crisis, reaching their peak between 2010 and 2011[6]. Among them, in particular, minerals and metals have been the product category mostly affected by this type of measures[7].

Within this context, industrialized entities traditionally reliant on the massive importation of primary supplies, such as the United States, Japan, and the European Union, started to denounce export restrictive practices on minerals and metals as the manifestation of the rise of a so-called "resource nationalism"[8]. In particular, such countries have strenuously opposed what they identify as a proliferating use of export restrictions and, in particular, of export taxes[9] on a cluster of non-energy minerals and metals, whose demand is expected to receive great impulse due to emerging technologies, and which are considered strategic for the development and growth of key industrial sectors including environmental technologies[10]. As a means to better monitor the dangers inherent in possible abuses, the European Union

[4] R. Howse, T. Josling, 'Agricultural Export Restrictions and International Trade Law: A Way Forward' IPC Position Paper, International Food and Agricultural Trade Policy Council (2012), http://www.agritrade.org/Publications/ExportRestrictionsandTradeLaw.html (accessed 6 October 2012).

[5] See WTO Docs. WT/TPR/OV/W/1-6.

[6] Between 2010 and 2011, in particular, their incidence was more than 150 percent higher than in the previous year; *see* WTO Doc. WT/TPR/OV/14, p. 17.

[7] According to the OECD, export measures are "pervasive" in the minerals and metals sector with the total number of countries applying such measures raising by five from 2009 to 2010, registering the highest incidence of any sector. B. Fliess *et al.*, 'Taking Stocks of Measures Restricting the Export of Raw Materials: Analysis of OECD Inventory Data', OECD Trade Policy Working Paper (Issue 140, 2012), p. 4.

[8] See Closing Statement of the United States at the Second Substantive Meeting of the Panel with the Parties, China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum (DS431), 19 June 2013, p. 1.

[9] Export taxes are reported to be by far the most popular measures applied on minerals and metals, *see* B. Fliess, *op. cit.*, pp. 12-13.

[10] G. Peeling *et al.*, 'Increasing Demand for and Restricted Supply of Raw Materials', in OECD, *The Economic Impact of Export Restrictions on Raw Materials* (2010), p. 158.

launched the so-called Raw Materials Initiative[11] and issued a Report compiled by the *ad hoc* Working Group on defining critical raw materials. The Report elaborated a standard methodology for determining mineral criticality based on elements such as supply risk, economic importance and environmental risk[12]. In a similar fashion, a committee of experts, created within the US National Research Council, released a Report[13] which gives account of critical minerals and metals for the United States on the basis of a "criticality matrix" developed by means of considering key factors, such as supply risk and importance in use. Both initiatives identify a limited nucleus of minerals and metals that, for the most part, overlap[14]: the criticality label is in fact not determined on the basis of physical availability risks, but rather on the combination of uneven geographical distribution of mine production and increasing recourse by the relevant countries to taxes on the exportation of such materials.

Accordingly, the issue of mineral export restrictions has come to the forefront of the international trade debate, giving rise to a "conventional wisdom" that WTO rules on the export side do not provide for an effective, sufficient and credible legal framework capable of preventing abuses in the use of export restraints, as if their multiplication could not but originate from a "regulatory deficiency"[15].

This paper aims at investigating whether this conventional wisdom could be established and substantiated by means of evidence, and focuses on critical minerals

[11] The Raw Materials Initiative was launched by means of a Communication from the Commission to the European Council and Parliament "The Raw Materials Initiative – Meeting our Critical Needs for Growth and Jobs in Europe" (COM (2008) 699 final 4 November 2008), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0699:FIN:en:PDF (accessed 29 June 2013). The EU's Raw Materials Initiative is conceived as an integrated strategy based on three pillars: (i) reducing the EU's consumption of primary raw materials; (ii) increasing the availability of raw materials sourced within the EU, and (iii) promoting the sustainable supply of raw materials from third countries.

[12] EU Commission, 'Critical Raw Materials for the EU', Report of the *ad hoc* Working Group on Defining Critical Raw Materials (30 July 2010), http://ec.europa.eu/enterprise/policies/raw-materials/files/docs/report-b_en.pdf (accessed 11 August 2013), p. 32.

[13] National Research Council, 'Minerals, Critical Minerals and the US Economy', The National Academies Press (2008), http://www.nma.org/pdf/101606_nrc_study.pdf (accessed 11 August 2013).

[14] The critical minerals identified by the EU are antimony, beryllium, cobalt, fluorspar, gallium, germanium, graphite, indium, magnesium, niobium, platinum group metals, rare earths, tantalum, and tungsten. *See* Report of the *ad hoc* Working Group on Defining Critical Raw Materials, *supra* note 12, p. 42. Moreover, the Union identified a nucleus of minerals and metals whose demand is expected to receive great impulse due to emerging technologies: antimony, chromium, cobalt, copper, gallium, germanium, indium, neodymium (rare earths), niobium, palladium, platinum groups metals, ruthenium, silver, tantalum, titanium. The United States identified copper, gallium, indium, lithium, manganese, platinum group metals, rare earths, tantalum, titanium, and vanadium as critical metals. *See* National Research Council, *supra* note 13.

[15] The concepts of "conventional wisdom" and "regulatory deficiency" borrow, respectively, from R. Howse, T. Josling, *op. cit.*, p. 10; and B. Karapinar, 'Export Restrictions and the WTO Law: How to Reform the 'Regulatory Deficiency'' Journal of World Trade (Issue 45, 2001), p. 1139.

and metals as a relevant case study[16]: this category of affected products has indeed generated the greatest deal of tension between industrialized countries, denouncing export restrictions as beggar-thy-neighbour instruments hampering fair access to mineral resources, and richly-endowed emerging economies, determined to use export restrictions as "developmental" tools and/or to achieve non-economic public policy goals – mainly public health and conservation goals associated to the environmental spill-over effects of the mining industry.

The choice to focus on minerals and metals is motived by the absence of specific studies on the adequateness of WTO rules on export restrictions with respect to minerals and metals predicated on a thorough analysis of the distinctive features of the current wave of mineral export restraints. Section II will first describe the general overall trends and developments affecting world supply and demand of minerals and metals; Section III will examine relevant emerging patterns in critical minerals and metals trade; Section IV will analyse how the current panorama of mineral export restraints fits within the pertinent WTO rules; and Section V will present some conclusions on the adequateness of such disciplines and unveil the "rhetoric" in the debate over the proliferation of such measures and WTO under-regulation.

II. Major Structural Changes in Minerals and Metals Trade

The international minerals and metals market has been recently undergoing some major transformations ultimately susceptible to affect the traditional equilibrium of world supply and demand for such materials. These transformations are closely intertwined with the "mineral boom" started as from 2002-2003, and are still ongoing. The first element of innovation consists in the steadily upward pressure on the world price of minerals and metals occurring as from the beginning of the 2000's. This trend is the result of the severe demand shock experienced at the international level due to an "exceedingly fast macroeconomic expansion" triggered by the high growth performance of Asian emerging economies and, in particular, of China[17] after a decade of low mineral prices during the 1990's which had led to

[16] For the purposes of the present analysis, therefore, the expression "critical" minerals and metals would be used to indicate the limited nucleus of materials identified by the European Union and the United States.

[17] Starting from the 1990's, developing countries such as China and India have increasingly accelerated their consumption of resources to feed their economies, expanding at more than twice the OECD rate. *See* M. Radetzski, *op. cit.*, p. 71. Moreover, the development stage of Asian emerging countries is proportionately much more intensive in primary materials use than the OECD economies, which have already reached a mature economy stage, characterized by a declining share of the primary sector, *Id.*,

a decline in production investments and consequently in spare supply capacity[18]. Within such framework, mineral prices reached their peaks in mid-2009 and, after a decline produced by the eruption of economic and financial crises, started to progressively rise again reaching pre-crisis levels again in 2011

Such trends are at the same time arising out of and accelerating a process of rapid industrialization on the part of developing countries in the effort of diversifying their export base and achieve economic development. The tension of developing countries and, in particular, of newly emerging economies towards the diversification of exports away from primary mining is rooted in the determination to "contrast" the traditional patterns of international trade which, through most of the twentieth century, have seen the developed countries as dominant producers of higher value-added goods and importers of raw materials, while developing nations heavily (when not exclusively) relied on primary commodities' exports[19]. In other words, the upgrade of the economic and trade structure is seen by these countries as the only way to "catch up" and fill the development gap with respect to highly industrialized countries, and as an instrument to achieve higher level of growth and economic performance through the exportation of greater volumes of higher-value added products[20].

In promoting such vision, developing countries rely on a substantial body of economic literature which has progressively theorized and documented multiple examples, taken by the empirical evidence, that suggest a negative correlation between high growth rates, on the one hand, and resource-led development on the other hand[21]. In particular, Sachs and Warner elaborated the theory of the so-called "resource curse", according to which mineral-dependent countries would suffer from slower economic growth rates and social progress compared to that of other countries at corresponding levels of economic development due to the combination of a series of factors typically occurring in the mining sector: high market volatility,

pp. 7-12. Hence, the share of global demand has been increasingly biased towards emerging economies, *see* G. Peeling, *op. cit.*, p. 156.

[18] Metals and minerals are essential for economic growth and development in that the manufacture sector is critically dependent on raw materials availability. However, as for modern economies, "the volumes needed have shrunk impressively compared to the value of manufactured output" and, accordingly, metals and minerals account for a relatively small share of world industrial output, *see* M. Radetzski, *op. cit*., p. 11.

[19] *See*, for all, Leamer's description of the international trade structure and, in particular, the concept of "development ladder", in E. Leamer, *Sources of International Comparative Advantage: Theory and Evidence* (MIT Press, 1984), Table 4.4 and Table 4.5.

[20] R. Piermartini, 'The Role of Export Taxes in the Field of Primary Commodities', WTO Staff Paper, ERSD (2004), p. 9.

[21] For an overview of the importance of diversifying the export base *see* D. Rodrick, 'What you export matters', Journal of Economic Growth (Issue 12, 2007) 1, pp. 1-25.

deficient governance of large mineral rents due to corruption and absence of reallocation of macroeconomic level, and social tensions arising out of it[22]. Moreover, the spectrum of the so-called "Dutch disease"[23] is often evoked by developing countries as a reason to exploit mineral booms "domestically" (*i.e.* to boost internally a domestic processing industry for minerals and metals instead of merely relying on high profits arising out of raw materials' export earnings). According to such theory, in fact, there is an inherent risk of shrinkage of the manufacturing sector in the exploitation of a mineral resource bonanza as the excess profits produced by a mineral boom – generated by increased mineral exports and, thus, by large external surplus – induce an appreciation of the real exchange rate. The real exchange rate rise, in turn, decreases the competitiveness of other domestic tradable goods (*i.e.* manufactured goods) and, thereby, generates a production contraction of those goods up to the point when the mineral-abundant country becomes a mono-economy[24].

Although evidence on the presumed negative effects linked to mineral-dependence is non-conclusive[25], it is undeniable that the emerging economies responsible

[22] J. Sachs, A. Warner, 'Natural Resources and Economic Development: The Curse of Natural Resources', European Economic Review (Issue 45, 2001), pp. 827-838.

[23] Davies describes the Dutch disease as "a morbid term that simply denotes the coexistence of booming and lagging sectors in an economy due to a temporary of sustained increase in export earnings", in G. Davies, 'Learning to Love the Dutch Disease: evidence from the mineral economies' World Development (Issue 23, 1995), pp. 1765-1779. The expression was coined in the late 1970's to describe the weakening of the manufacturing sector experienced by the Netherlands throughout the decade as a consequence of the booming exploitation of natural gas earnings. However, some authors pointed out that the name chosen is misleading, in that the Dutch case was not the first nor the most significant, the empirical examples dating back to the booms of gold mining in Australia, guano exportation in Chile and Peru, and sugar in Cuba more than a century ago, *see* M. Radetzski, *op. cit.*, p. 207.

[24] For a detailed description of the mechanism described as the Dutch disease *see* Davies, *op. cit.*, pp. 14-18. It has to be noted, however, that the reallocation effect endangered by the commodity boom increases the overall national welfare and, therefore, would not *per se* constitute a disease susceptible to undermine economic growth and development. However, according to Davies, "the Dutch disease truly becomes a problem if there exists some market failure inhibiting an appropriate structural adjustment or if there is some existing distortion in the economy which is intensified by the mineral export boom". Radetzski underlines, moreover, that the complete reliance on mineral exports would not *per se* be harmful, as long as it ensures profitable exploitation, if it was not for the fact the bonanza "often ends with a bang", mainly due to depletion, emerging commodity surplus or technical innovation which renders the commodity redundant or substitutable, *see op. cit.*, p. 208.

[25] Indeed, a whole series of studies rejected the generality of the resource curse case on the basis of compelling empirical evidence. *See* A. Maddison, 'Explaining the Economic Performance of Nations', in W. Baumol *et al.*, *Convergence of Productivity* (Oxford University Press, 1994); P. Maxwell, 'Chile's Recent Copper Driven Prosperity', Minerals and Energy (Issue 19, 2004) 1, pp. 16-31; G. Wright and J. Czelusta, 'The Myth of the Resource Curse', Challenge (Issue 47, 2004), pp. 6-38; R. Findlay and M. Lundhal, 'Resource-Led Growth – A Long-term Perspective: The Relevance of the 1870-1914 Experience for Today's Developing Economies', World Institute for Development Economics Research Working Paper No. 162/1999.

for the expansion of world demand are undergoing major industrialization paths in the effort of diversifying their export base[26], thus consolidating the process of deep transformation of the traditional international trade patterns triggered the major changes occurring in the international minerals and metals market. The combination of these important transformations, occurring in the geopolitical and economic framework, is ultimately producing an upward pressure on mineral prices and affecting the traditional equilibrium of world supply and demand for minerals and metals.

In conclusion, the major changes affecting the traditional *status quo* in minerals and metals trade are ultimately producing a mounting divarication of interests between industrialized countries, concerned about fair access to primary supplies to sustain their top value-added industries, and developing countries, aiming at breaking their dependence upon resource-led development. In particular, industrialized entities, historically reliant on imports of primary supplies to feed their mature manufacturing industry, such as the European Union and the United States, appear (at least temporarily[27]) dependent on trade to get access over minerals and metals, while net-exporters countries have acquired a parallel control over prices and quantities made available on world markets[28].

III. Emerging Patterns in Critical Minerals and Metals: Mapping the Network of Mineral Export Restraints

The above-referred changes in minerals and metals trade are further amplified in the case of critical minerals and metals due to two main reasons. First, the exceptionally uneven geographical distribution of such resources: mine production of critical minerals and metals is heavily concentrated in a limited number of developing countries, mainly located in Asia (China, Russia, Kazakhstan), but also in Latin

[26] *See* M. Radetzski, *op. cit.*, p. 70 ss.; M. Farooki, *op. cit.*, pp. 70 ss.

[27] Due to the high risk associated to mining investments, characterised by high capital intensity and long-term payback perspectives, and to the regulatory, decisions and implementation lags for investments in the extractive industry, new capacity expansion needs a time lag of averagely 7-8 years to become operational. Moreover, "regulatory requirements facing new projects in both developed and developing countries have generally become more burdensome as public values such as environmental protection and the need for post mining reclamation have captured certain externalities and turned them into development costs while also driving environmental assessment processes to be more inclusive of social issues", *see* G. Peeling *et al.*, *op. cit.*, p. 159.

[28] In particular, dominant mine producers (so-called "large countries") can influence world prices of mining products through the control of exports. In other words, they are "price setters". R. Piermartini, *op. cit.*, p. 3.

America (Brazil, Chile, Mexico, Peru, Bolivia) and Africa (South Africa, Democratic Republic of the Congo)[29]. Within such framework, access to critical minerals and metals is not challenged *ab absoluto* by physical availability risks[30], but rather by scarcity at a regional level, with traditional net-importers such as the EU Member States and the United States particularly vulnerable to the moves of their suppliers on the world markets[31].

Second, the fact that those richly-endowed emerging economies are undergoing a phase of major economic transition, which has been requiring massive use of primary supplies of critical raw materials to feed a growing industry[32]. In this respect, it is noteworthy that, for many critical minerals and metals, the geographical concentration of production does not necessarily reflect the global distribution of the reserve base[33] – with the distribution of reserves being much more widely dis-

[29] For all critical materials, the top five producing countries account for over half of world production and, for materials such as antimony, germanium, lithium, platinum group metals, rare earths, tungsten, and vanadium, almost the entire world production takes place in the top three mining regions. In a limited number of cases, production is so concentrated that a single country detains a dominant position (*e.g.*, South Africa for chromium, 43 percent of total production; Democratic Republic of Congo for cobalt, 65 percent; China for gallium, more than 50 percent; China for germanium, 54,2 percent; China for indium, 56 percent; Chile for lithium, 47,8 percent, China for molybdenum, 35,5 percent; South Africa for platinum, 77,6 percent and together with Russia for palladium, accounting respectively for 44,2 and 41,8 percent; Chile for rhenium, 50 percent; China for silicon, 67 percent); in rare but relevant cases, always involving China, the first producer enjoys a *de facto* monopolistic power (antimony, over 90 percent, rare earths, almost 98 percent, and tungsten, 85,3 percent). Elaboration of the author, using data accessed at 'World Mining Data Report 2012' http://www.bmwfj.gv.at/energieundbergbau/weltbergbaudaten/Seiten/default.aspx (accessed 12 August 2013).

[30] Indeed, based on current levels of mine production and projected levels of consumption for the identified "critical" minerals and metals, the level of world reserves is adequate to meet world demand. Report of the *ad hoc* Working Group, *supra* note 12, p. 16.

[31] WTO World Trade Report 'Trade in Natural Resources' (2010) p. 115, http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report10_e.pdf (accessed 11 August 2013).

[32] In this respect, the traditional "supremacy" of western countries' industries is increasingly challenged by emerging economies at two levels: first, they compete internationally for access to primary supplies, with respect to which a level playing field is a fundamental prerequisite; second, they are increasingly confronted with competition on the export market for semi-manufactured and final goods.

[33] The U.S. Geological Survey Mineral Yearbook commonly distinguishes among world resources (*i.e.* "the concentration of naturally occurring solid, liquid, or gaseous material in or on the Earth's crust in such form and amount that economic extraction of a commodity from the concentration is currently or potentially feasible"), identified resources (*i.e.* "resources whose location, grade, quality, and quantity are known or estimated from specific geological evidence"), reserve base (*i.e.* "that part of an identified resource that meets specified minimum physical and chemical criteria related to current mining and production practices, including those for grade, quality, thickness, and depth") and reserves (*i.e.* "that part of the reserve base which could be economically extracted or produced at the time of determination, including only recoverable materials"). Hence, published reserve figures do not reflect the total amount of mineral potentially available in that mining companies normally only invest what they require

persed than the current patterns of mine production would induce to think[34] – thus suggesting that such countries are currently exploiting at the highest possible rate their deposits in order to feed the massive primary needs of their growing industry.

Within such framework, the mapping of the export restrictions applied on critical minerals and metals is particularly enlightening. All critical minerals and metals have been affected by export restrictions at least in one form and at least in one country[35]. However, the same recurring countries, namely China and Russia, and in limited cases Ukraine and Vietnam, are responsible for this integral coverage of export restrictions[36]. Among them, all countries resort uniquely to export taxes but China, which, on the contrary, imposes quantitative restrictions on the exportation of a wide range of critical minerals and metals[37].

Hence, when qualifying the generally stated "proliferation" of export restrictions on critical minerals and metals, it is noteworthy that such phenomenon does not result out of an "horizontal" diffusion of export taxes and other forms of restrictions by means of the multiplication of the number of countries resorting to such measures; on the contrary, this "proliferation" rather arises from the fact that a few recurring countries are applying – and, in most relevant cases, progressively tightening[38] – export restrictions on an increasingly high number of tariff lines relevant to

for their short-term needs to prove reserves and thus justify commercial investment decisions over a limited time-frame (usually over 20 years). Report of the *ad hoc* Working Group, *supra* note 12, p. 16.

[34] J. Korinek, K. Jeonghoi, 'Export Restriction on Strategic Raw Materials and their Impact on Trade and Global Supply', in OECD, *The Economic Impact of Export Restrictions on Raw Materials* (OECD Publishing, 2010), pp. 103-131.

[35] B. Fliess, *op. cit.*, pp. 19-20; J. Korinek, J., K. Jeonghoi, *op. cit.*, Annex; European Commission, Ninth Report of the DG Trade on Potentially Restrictive Measures (2012) http://trade.ec.europa.eu/doclib/docs/2012/june/tradoc_149526.pdf (accessed 28 June 2013); Trade Policy Review Body - Overview of Developments in the International Trading Environment - Annual Reports by the Director-General, WTO Doc. WT/TPR/OV/1-15.

[36] Some other countries apply taxes on the exportation of specific critical minerals and metals: for instance, India taxes exports of chromium ores on the exportation, and Argentina taxes cobalt articles and waste and copper ores and concentrates. J. Korinek, J., K. Jeonghoi, *op. cit.*, Annex. However, such measures are generally meant to be temporary and, in any case, the countries imposing them do not enjoy significant mine production share. 'World Mining Data 2012', *supra* note 30.

[37] According to the *Catalogue of Commodities subject to Export Licence Administration 2012*, the following items are subject to export quotas: wheat, corn, rice, wheat flour, rice flour, cotton, sawn timber, live cattle, live pigs, live chicken, coal, coke, crude oil, refined oil, rare-earth (including rare earth ferroalloy), antimony and antimony products, tungsten and tungsten products, zinc ore, tin and tin products, silver, indium and indium products, molybdenum, phosphate ores. Mat rush and mat rush products, silicon carbide, talcum lump (powder), magnesia, alumina and licorice products are subject to quota bidding. MOFCOM Announcement No. 98/2011 (30 December 2011).

[38] An emblematic case in this respect is, for instance, the evolution of the Chinese restrictions on rare earths elements on the basis of the Five-Year Rare Earths Industry Development Plan drafted by the country's Ministry of Industry and Information Technology. *See* C. Hurst, 'China's Rare Earths Indu-

critical minerals and metals[39]. Such "vertical" proliferation has raised great concerns among traditional net-importing actors due to two main reasons: first, the fact that the countries responsible for such proliferation are "large" countries enjoying a leading position in world production of either mining or primary materials and thus are able to affect, through the regulation of the export flows, access to such materials; second, the fact that such countries are emerging economies that seem to implement export restrictions as developmental tools within the context of major industrialization plans[40].

The dominant position of tax-imposing countries significantly amplifies the economic implications of an export tax. According to the standard economic theory of export restrictions, in fact, when an export tax is applied by a "large" country, the contraction in the volume of exports of the product affected by the restriction not only induces a diversion of domestic production from the international market onto the domestic market (therefore implying a diminution of the domestic price), but also provokes an increase in the world price of the taxed product. The world price growth widens the price differential between the latter and the domestic price "insulated" by the export tax[41]. In this respect, export restrictions could result in an indirect subsidy to downstream producers, provided with higher domestic supply at below-the-world-prices and thus incentivized to increase production[42].

In light of the above, it is not surprising that the emerging economies recurring to export taxes on critical minerals and metals have all been strengthening their industrial policies[43]. In this respect, significantly, the European Commission has noted that the latest years show "a consolidation of trade measures as part of industrial policy"[44], as if they were part of the attempt to promote downstream processing in order to avoid dependence on commodity-led growth through the exportation of greater volumes of higher-value added products, and thereby accelerate economic transition. In this perspective, China's mix of export taxes on critical minerals and metals is emblematic in that such measures are often associated to an emerg-

stry: What Can the West Learn' Institute for the Analysis of Global Security (2010); and M. Morrison, R. Tang, 'China's Rare Earths Industry and Export Regime: Economic and Trade Implications for the United States', CRS Report for Congress (30 April 2012).

[39] I. Espa, *Emerging Trends in Critical Raw Materials Trade and WTO Regulation of Export Restrictions*, Ph.D. Dissertation, Bocconi University (2013), p. 144.

[40] Ninth Report of the DG Trade, *supra* note 36, pp. 9-12.

[41] For a more detailed explanation *see* R. Piermartini, *op. cit*., pp. 3-6.

[42] *Id.*, p. 10.

[43] For further information, *see* Ninth Report of the DG Trade, *supra* note 36, pp. 9-12.

[44] Ninth Report of the DG Trade, *supra* note 36, p. 9.

ing leading role in downstream sectors[45], thus revealing an "aggressive" industrial policy strategy[46]. Indeed, the European Union has denounced in several cases the "predatory" use of export taxes allegedly adopted by China to increase its export share of semi-processed and final products within international markets, considered to be destructive of the normal price structure and harmful for the European Union competitiveness[47].

Finally, it is noteworthy that, even when adopted within the context of industrial-expanding policies, the goal of supporting the local industries and promoting downstream processing through investment incentives is not always openly declared[48]. Rather, the rationales attached to export restrictive measures applied on critical minerals and metals are varied, and they often include environment-related goals, namely the conservation of finite energy resources and the minimization of public health and environmental impacts linked to the extractive industry[49]. Such justification tends to rely on the standard economic theory of export restrictions,

[45] This is the case of the Chinese cobalt, tungsten, and copper industry, as well as the steel industry. Indeed, in 2010 China was the leading producer of austenitic stainless steel, accounting for about 38% of world output, and producing more austenitic stainless steel than the United States and all of the countries in the European Union combined. Accordingly, in 2010 world production of stainless steel reached an all-time high of 31.1 Mt. International Stainless Steel Forum, 2012, Stainless and heat resisting steel — Crude steel production (ingot/slab equivalent), 2001 through 2010 [by region]: Brussels, Belgium, International Stainless Steel Forum http://www.worldstainless.org/Statistics/Crude/2010.htm (accessed 12 August 2013).

[46] In 2011 China launched its twelfth National Five-Year Plan (2011-2015), which aims at uplifting and reconstructing traditional industries, including iron/steel and non-ferrous metals, construction, equipment manufacturing, shipbuilding, and automotive, as well as boosting seven strategic emerging industries requiring use of critical minerals and metals. As a follow-up of the National Plan, China has been elaborating various sector-specific plans aimed at imposing targeted objectives for the reinforcement of "national champions" in the different industries, such as the raw materials industry. Such plans encompass the identification of strategic industrial development policies, and generally match these policies with trade-restrictive measures, such as export taxes. Ninth Report of the DG Trade, *supra* note 365, p. 10.

[47] See the cases of the EU cobalt industry, the molybdenum industry, and the tungsten industry. Report of the *ad hoc* Working Group on Defining Critical Raw Materials, *supra* note 12, Annex V, pp. 52-53, 130-131, and 209-210.

[48] B. Fliess *et al.*, *op. cit.*, pp. 15-16; R. Quick, 'Export Taxes and Dual Pricing: How Can Trade Distortive Government Practices Be Tackled?', in J. Pauwelyn (ed.),*Global Challenges at the Intersection of Trade, Energy and the Environment* (Geneva, 2009), pp. 194-195.

[49] The recurring invocation of environment-motivated goals is, on the one hand, a reflection of the increasing sensitivity towards environmental degradation issues and of the definitive recognizance, both internationally and at national levels, of the value of sustainable development; on the other, it is rooted on the peculiarities of the mining industry, which is traditionally characterized by harmful and widespread environmental impacts. OECD 'Minerals and Pro-Poor Growth, in Natural Resources and Pro-Poor Growth: The Economics and Politics' (2008) DAC Guidelines and Reference Series, pp. 138-139, http://www.oecd.org/dac/environmentanddevelopment/42440224.pdf.

according to which the diversion of exports onto the domestic market of the tax-imposing country, and the ensuing domestic price reduction, would ultimately induce a decline in domestic production[50]. However, even in such cases, these measures are often ambiguous, as they can be both for environmental preservation and conservation purposes and economic objectives[51]. As a matter of fact, when an export tax combines the environmental rationale with the objective to promote higher value-added activities, even if indirectly, the expansion of the volume of downstream production induced by the policy would require a massive utilization of domestic below-the-world-price inputs, thereby impairing the desired domestic production reduction and thus the achievement of the environmental objectives[52].

IV. The Relation with WTO Relevant Disciplines on Export Restrictions

When dealing with relevant WTO disciplines on export restrictions, the main source of obligations for Members is the GATT 1994. In particular, Article XI:1 GATT, titled "General Elimination of Quantitative Restrictions", provides that:

> "[N]o prohibition or restrictions other than duties, taxes or other charges, whether made effective through quotas, […] export licences or other measures, shall be instituted or maintained by any contracting party […] on the exportation or sale for export of any product destined for the territory of any other contracting party ".

On the one hand, Article XI:1 prohibits all quantitative prohibitions and restrictions on exports adopting a quite comprehensive scope: indeed, existing case law has consistently interpreted in a broad way the term "restrictions" in connection to "other measures", making clear that any form of export quantitative restrictions may fall under Article XI:1 irrespective of its legal status or of its *de iure* or *de facto* nature, as long as it places "a limitation on action, a limiting condition or regulation" or that it has "the very potential to limit trade"[53]. In this respect, any country

[50] R. Piermartini, *op. cit.*, p. 5.

[51] A substantial body of literature has shown mixed evidence as to adequateness of export taxes as tools to achieve environment-related goals in comparison with alternative options such as straight conservation policies and regulation of domestic production. WTO Trade Policy Review – Report by the Secretariat, China, WT/TPR/S/230/Rev.1 (Box III.1, 5 July 2010), p. 44; M. Ruta, A. Venables, 'International Trade in Natural Resources: Practice and Policy', Oxcarre Research Paper (Issue 84, 2012), p. 16.

[52] J. Korinek J., K. Jeonghoi, *op. cit.*, pp. 110 ss.

[53] Four cases specifically concerned export restrictive measures challenged under Article XI:1 GATT: *Canada – Herring and Salmon* (1988), *Japan – Semiconductors* (1988), *Argentina – Hides and Leather* (2001), and *China – Raw Materials* (2011). Another case, *China – Rare Earths,* is still pending before the Panel. The cases challenged the consistency of several measures under Article XI:1 GATT and, in

resorting to quantitative restrictions on the exportation of various critical minerals and metals would run counter to Article XI:1 and be obliged to remove them, unless authentically respondent to public policy goals recognized by terms of either Article XI:2 (a) – the shortage of essential product clause – or Article XX of the GATT 1994.

On the other hand, Article XI:1 expressly allows export taxes and duties. The exclusion of "duties, taxes or other charges […] on the exportation", as opposed to quantitative exports restrictions, from the scope of application of Article XI:1 reflects the traditional preference of the GATT for "tariffs" over quantitative restrictions as the lawful means of restricting imports and exports[54]. However, while GATT contains a detailed framework for binding import tariffs[55], no provision is specifically envisaged to bind export duties in a manner similar to import tariffs, notwithstanding that Article II:1 (a) of GATT does not impede the binding of export tariffs[56] and, furthermore, Article XXXVIII(*bis*):1 encourages

> "negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports".

Hence, WTO Members are left free under GATT Article XI:1 to recur to export taxes and duties irrespective of their level or rationale.

The fact that, by terms of Article XI:1 GATT, WTO Members are not under any obligation on the use of export duties is however not sufficient to substantiate the conventional wisdom on the deficiency of WTO disciplines on the export side,

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all cases, the WTO Panels and Appellate Body considered them to fall within the scope of Article XI:1. *See* GATT Dispute Settlement Report, *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon*, L/6268 – 35S/98, adopted on 22 March 1988; GATT Dispute Settlement Report, *Japan – Trade in Semi-Conductors*, L/6309 – 35S/116, adopted on 4 May 1988; WTO Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted on 16 February 2001; WTO Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R, adopted on 16 February 2001; and WTO Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted on 31 January 2011. For a synthetic yet complete overview of the case law relating to export restrictive measures *see* B. Karapinar, 'China's Export Restriction Policies: complying with "WTO-plus" or undermining multilateralism', World Trade Review (Issue 10, 2011), pp. 389-408.

[54] For a thorough explanation of the underlying conception at the basis of the GATT, *see* J. H. Jackson, *World Trade and the World of GATT* (Indianapolis, 1969).

[55] Article II:1 (b) prohibits "all duties and charges *in connection with importation* other than ordinary custom duties on products bound in Schedules of Concessions" (emphasis added).

[56] Article II:1 (a) states: "Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the *appropriate Part of the appropriate Schedule* annexed to this Agreement" (emphasis added). Thus, the terms of Article II:1 (a) leave Members free to negotiate other type of commitments on an MFN basis in other parts of the Schedule.

at least with respect to critical minerals and metals. All countries responsible for the vertical proliferation of export restrictions on such materials have in fact agreed upon "WTO-plus" obligations on the use of export taxes within the context of their accession negotiations[57]. Such additional obligations are country-specific and in all cases involve, to a greater or lesser extent, commitments on critical minerals and metals.

The scope and coverage of the WTO-plus obligations agreed upon those countries, however, greatly varies, as well as the legal techniques chosen to incorporate such additional commitments into the respective accession packages. The most severe regime has been agreed upon by China, which undertook a general obligation to eliminate all taxes and charges applied to exports of products by terms of Paragraph 11.3 of China's Accession Protocol[58]:

> "China shall eliminate all taxes and charges applied to exports unless specifically provided for Annex 6 of this Protocol or applied in conformity with the provisions of Article VIII of the GATT 1994".

Annex 6 to China's Accession Protocol, entitled "Products Subject to Export Duty", lists 84 different products (each identified by an eight-digit harmonized system number) for which maximum levels of export duty are provided. According to the Note to Annex 6,

> "China confirmed that the tariff levels included in this Annex are maximum levels which will not be exceeded. China confirmed furthermore that it would not increase the presently applied rates, except under exceptional circumstances. If such circumstances occurred, China would consult with affected Members prior to increasing applied tariffs with a view to finding a mutually acceptable solution".

Among the 84 products listed in Annex 6 figure mostly industrial raw materials, including critical minerals and metals such as tungsten ores and concentrates, tan-

[57] Such practice is part of a more general tendency on the part of WTO incumbent Members to request to aspiring new Members requirements which either exceed the obligations arising out of multilateral WTO Agreements (so-called "WTO-plus" obligations) or lie outside the current WTO mandate (so-called "WTO-extra" obligations). The additional obligations negotiated by new WTO members on the use of export duties have been categorized as "WTO-plus" obligations in light of the possibility left to WTO members to negotiate export concessions in Part III of the Schedules of Concessions. The distinction between WTO-plus and WTO-extra obligations borrows from H. Horn, *et al.*, 'Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements', The World Economy (Issue 33, 2010), p. 1567. The authors compellingly argue in favour of the categorization of the obligations on export duties binding upon new WTO Members as WTO-plus obligations in that, because of the potentiality for export concessions' negotiations left to WTO Members, "a WTO instrument already exists in this area" (*id.*, p. 1571).

[58] Protocol on the Accession of the People's Republic of China, WT/L/432, 23 November 2001.

talum and vanadium ores and concentrates, crude antimony, various forms of ferro-silicon and ferro-manganese, as well as ferro-chromium, unrefined copper, copper anodes and cathodes, alloyed copper and copper waste and scrap, unwrought, not alloyed nickel, and unwrought alloyed nickel. The bound export duty rate ranges from 20 percent to 40 percent.

Vietnam and Ukraine, on the contrary, abided by additional obligations on the use of export duties on specific products by terms of their Working Party Reports[59]. Vietnam committed to gradually reduce the specific rates of the export duties applied to various forms of ferrous and non-ferrous scrap metals indicated in Table 17 of its Working Party Report (*i.e.* steel, copper, aluminium, nickel, tin, lead, and zinc) by terms of paragraph 260 of such Report[60]. According to paragraph 240 of its Working Party Report, Ukraine promised to phase down and bind, pursuant to a detailed timetable contained in Table 20 (b), the export duties applied at the time of accession on, *inter alia*, a wide range of non-ferrous scrap metals, including various forms of cobalt, ferro-chromium, unrefined copper, copper anodes and copper waste and scrap, alloyed copper and copper powders, as well as nickel, titanium and tungsten waste and scrap[61].

Finally, the Russian Federation created a new "frontier" in the treatment of export duty concessions by agreeing, by terms of paragraph 638 of its Working Party Report, to create a new "Part V – Export Duties" within its GATT Schedule, where it bound over 700 tariff lines including several critical minerals and metals (*e.g.* various forms of copper, germanium, manganese, molybdenum, nickel, tantalum, tungsten, and vanadium)[62]. According to paragraph 638, in particular:

> "[…] from the date of accession, […] products described in Part V of [the Schedule of Concessions and Commitments on Goods of the Russian Federation] would, subject to the terms, conditions or qualifications set-forth in that Part of the Schedule, be exempt from export duties in excess of those set-forth and provided therein. The representative of the Russian Federation further confirmed that the Russian Federation would not apply other measures having an equivalent effect to export duties on those products. He confirmed that, from the date of accession, the Rus-

[59] In both cases, the relevant Working Party provisions are legally binding in that they were incorporated into the respective countries' Accession Protocols.

[60] Report of the Working Party Report on the Accession of Vietnam, WT/ACC/VNM/48, 11 January 2007. This paragraph is incorporated into Vietnam's Accession Protocol by terms of paragraph 527.

[61] Report of the Working Party Report on the Accession of Ukraine, WT/ACC/UKR/152, 16 May 2008. This paragraph is incorporated into Ukraine's Accession Protocol by means of paragraph 512.

[62] Report of the Working Party Report on the Accession of the Russian Federation, WT/ACC/RUS/70, 17 November 2011. This paragraph is incorporated into Russia's Accession Protocol by means of paragraph 1450.

> sian Federation would apply export duties in conformity with the WTO Agreement, in particular with Article I of the GATT 1994 […]".

Although all countries responsible for the vertical proliferation of export restrictions on critical minerals and metals are bound by WTO-plus obligations by terms of their accession packages, the existence of varying country-specific accession requirements creates unequal rights and obligations among Members and, ultimately, poses dangerous threats to the overall integrity of the system. In particular, given the uncertainty surrounding the amendment procedures of accession protocols[63], all countries undertaking WTO-plus obligations on the use of export duties seem to have contracted ultra-rigid obligations[64], with the exception of Russia. Indeed, by creating a new Part of its Schedule of Concessions as explicitly admitted by Article II:1 (a), the Russian Federation brought its WTO-plus provisions on export taxes into the GATT framework[65], thus reserving the right to amend its additional obligations in accordance with the GATT-specific adjustment procedures traditionally applied for import duty commitments[66].

[63] Two different visions have been developed as to the scope for amendment of new Members' accession protocols. According to the former, accession terms are permanent and immutable in that they constitute pre-conditions for the WTO Membership. In this respect, once accession is completed, such conditions cannot be renegotiated for they would alter the balance of concessions established during the negotiations. The new member could then only withdraw from the WTO altogether, the only exception being the market accession commitments incorporated into the schedules of GATT and GATS, for the Agreements themselves provide for specific adjustment procedures. In the latter view, accession protocols are integrated into the WTO Agreement and serve a supplemental function with respect to WTO agreements by indicating country-specific obligations. Hence, they could be amended through the same procedures required for other WTO Agreements, which in any case require a very high majority of two thirds. For a more detailed overview of the two theories, *see* J. Ya Qin, 'Reforming WTO Discipline on Export Duties: Sovereignty over Natural Resources, Economic Development and Environmental Protection', Journal of World Trade (Issue 46, 2012), pp. 1157-1158.

[64] The additional commitments concerning the use of export duties of new WTO Members, in fact, do not arise out of GATT but exclusively from each of the concerned Member's accession protocols; hence, the possibility of modification or withdrawal of such commitments is conditioned upon the possibility of amending the accession protocols' related provisions. This lack of flexibility of accession protocols determines the non-adjustability of export duty commitments contained in accession protocols.

[65] As it is known, each Member's Schedule of Concessions is formally incorporated in Article II of the GATT and thus in the GATT itself.

[66] *See*, in particular, Article XXVIII:1 GATT. Although Article XXVIII expressly refers to the Members with "a principal supplying interest" in a concession, thereby revealing that the reference framework is that of import duty concessions, the provision is labelled "Modification of Schedules" and it explicitly applies to concessions "included in the appropriate Schedule annexed to this Agreement". Hence, it can be used for both import and export concessions. J. Ya Qin, *op. cit.*, pp. 1160-1161; *see* also M. Matsushita, 'Export Control of Natural Resources: WTO Panel Ruling on the Chinese Export Restrictions of Natural Resources', Trade Law and Development, (Issue 3, 2011), p. 274. This interpretation is also supported by the wording of Article XXVIII(*bis*).

A further element of inconsistency among WTO Members, directly linked to the current fragmentation of WTO disciplines on export duties, relates to the issue of applicability, to WTO-plus commitments, of GATT export-relevant exceptions such as Article XX general exceptions, which address some of the most common public policy goals associated to the use of export restraints on minerals and metals[67]. The Appellate Body made in fact clear in *China – Raw Materials* that the applicability of GATT general exceptions is not automatic for commitments contained in accession protocols, but rather conditioned on the incorporation therein of specific language to that effect[68]. It follows from such approach that, while Vietnam, Ukraine and Russia have all successfully negotiated Article XX flexibilities[69], China is pre-empted to invoke Article XX exceptions to justify export duties in breach of Paragraph 11.3 of its Accession Protocol, failing therein any express reference to

[67] Among the public policy goals recognized by terms of Article XX GATT, the most relevant to export restrictions on critical minerals and metals are those admitting measures: "(b) necessary to protect human, animal and plant life or health […]; (g) related to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption […]; (i) restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental stabilization plan; Provided that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination; (j) essential to the acquisition or distribution of products in general or local short supply; provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist". Furthermore, pursuant to the introductory paragraph of Article XX of GATT, notwithstanding the export restrictions would meet the requirement of these sub-paragraphs, they cannot be "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade".

[68] See Appellate Body Report, *supra* note 55, paragraphs 288-293. For a comment on that decision *see* I. Espa, 'The Appellate Body Approach to the Applicability of Article XX GATT In the Light of *China – Raw Materials*: A Missed Opportunity?, Journal of World Trade (Issue 46, 2012), pp.1399–1423.

[69] In paragraph 260 of its Working Party Report, Vietnam committed to bind the export duties applied on products listed in Table 17 provided that: "[t]he representative of Vietnam confirmed that Vietnam would apply export duties, export fees and charges, as well as internal regulations and taxes applied on or in connection with exportation in conformity with the GATT 1994".

By terms of paragraph 240 of its Working Party Report, Ukraine promised to phrase down export duties in accordance with the binding schedule contained in Table 20(b) on the understanding that: "[…] as regards these products, Ukraine would not increase export duties, nor apply other measures having an equivalent effect, unless justified under the exceptions of the GATT 1994".

Finally, Russia reserved to right to invoke Article XX through the creation of Part V of its Schedule of Concessions, which starts with the statement: "[t]he Russian Federation undertakes not to increase export duties, or to reduce or to eliminate them, in accordance with the following schedule, except in accordance with the provisions of the GATT 1994".

Article XX flexibilities. The unavailability of Article XX defences for violations of Paragraph 11.3 may induce China to divert export taxes into export quantitative restrictions in violation of Article XI:1 GATT, in the attempt to maintain the right to invoke the general exceptions provided for in Article XX. Such *traslatio* seems to have occurred at least once so far with respect to rare earths[70], and indeed China appears as the only country resorting to quantitative forms of export restrictions on critical minerals and metals[71]. This substitution process will however be detrimental to the multilateral trading system in that it would "encourage" the use of quantitative restrictions instead of export taxes, thereby running counter to the cornerstone principle upon which the GATT itself was edified (*i.e.* the choice of "tariffs" over quantitative restrictions as the lawful means of restricting imports and exports).

In conclusion, the current WTO disciplines on export restrictions, contained in the GATT 1994, and various "self-contained" protocols of accession of new WTO Members, introducing WTO-plus obligations on export taxes[72], present several elements of inconsistency arising out of the absence of a system-wide discipline on export duty commitments, and the parallel contraction of country-specific "stand-alone" provisions by selected new WTO Members.

V. Conclusions: How Much "Ideology" in the Debate Over Export Restrictions?

The analysis of the phenomenon of proliferation of export restrictions on critical minerals and metals, on the one hand, and of the relevant WTO disciplines on export restraints, on the other hand, has permitted to shed light on the nature and the intensity of the relationship between the two and, in particular, to better qualify the central yet unsubstantiated conventional wisdom on the "deficiency" of WTO regulation on the export side.

[70] Rare earths are not listed in the Annex 6 of China's Accession Protocol and China would thus be pre-empted from resorting to export taxes on such materials irrespectively of their rationale. In 2010 China removed the export taxes applied on some forms of ferro-alloys containing more than 10 percent of rare earths but in parallel included these materials within the quota for exports of rare earths, thereby reducing such quota by approximately 30 percent. Ninth Report of the DG Trade, *supra* note 36, p. 119.

[71] B. Fliess *et al.*, *op. cit*, p. 5 ss.

[72] The conclusion of the Appellate Body on the applicability of Article XX GATT to violations of Paragraph 11.3 of China's Accession Protocol implies that WTO-plus obligations, as non-GATT obligations contained in country-specific accession protocols, are treated as "stand-alone" provisions in that they arise from agreements (i.e. the accession protocols) that are linked to GATT only when specific language is expressly incorporated to that effect. *See* I. Espa, *op. cit*. pp. 1407-1413.

When dealing with the presumed insufficiency of WTO disciplines on export restrictions, and export taxes in particular, a first striking element is that all the countries responsible for the vertical proliferation of export restrictions on minerals and metals have undertaken specific additional commitments on export duties. Moreover, for all such countries, the negotiated WTO-plus commitments cover, to a greater or lesser extent, critical minerals and metals.

Importantly, the matching of the country-specific commitments on export duties with the network of export taxes applied to critical minerals and metals unveils a certain degree of "rhetoric" in the debate over the proliferation of export restrictions and WTO under-regulation: on the one hand, in fact, in all cases but China the export taxes in place have been introduced and/or maintained without incurring in violations of WTO-plus obligations, indicating that new Members undertaking additional obligations are abiding by them, and thus that WTO disciplines are effective[73]; on the other hand, in the pre-eminent case of China, the export taxes in place extensively and systematically violate the specific obligations agreed upon by terms of Paragraph 11.3 of China's Accession Protocol. While such circumstance has mostly to do with the great asymmetry of the additional commitments agreed by China compared to Vietnam, Ukraine and Russia, which have consented to bind export duties of specific products rather than generally undertaking an obligation on the elimination of export duties, it is important to note that the proliferating use of such measures on critical minerals and metals on the part of China cannot be traced back to a *vulnus* in WTO regulation *per se*. Indeed, Chinese export duties are not legitimately adopted under the purview of China's WTO obligations, but they rather run counter to the specific commitments undertook under its accession protocol and therefore can be challenged before the WTO dispute settlement bodies, indicating that WTO exists and would be effective if respected. Evidently, the same conclusion holds true for the wide range of quantitative export restrictions applied by China on several critical minerals and metals in breach of GATT Article XI:1.

The emblematic example of China seems to suggest that the conventional wisdom on the proliferation of export restrictions and WTO under-regulation cannot be unambiguously established by means of evidence; it rather needs to be tested, at least in the case of critical minerals and metals, in light of the more complex and intertwined dynamics occurring at the international level with regards to emerging

[73] In a limited number of isolated cases, applied export duties exceed the bound rate and/or do not respect the timeline specifically provided for the gradual phasing down of the bound rate. For instance, in 2011 Russia announced a new determination of export tariffs on not alloyed nickel depending on world market prices (WT/TPR/OV/14, p. 95); in 2011 Ukraine announced the postponement in the reduction of export duties on ferrous scraps (WT/TPR/OV/W/5, p.22); Vietnam increased in 2012 the export duties applied on metal scraps (Ninth Report of the DG Trade, *supra* note 36, p. 37).

new patterns and leading actors in international trade, as well as the unfolding effects of an unprecedented financial and economic crisis. In other words, while there are not elements to prove that the massive recourse to export restrictions on critical minerals and metals originates from WTO under-regulation, not even in the case of China, it is undeniable that the current wave of mineral export restraints cannot be read in clinical isolation from the deep transformations occurring in the international minerals and metals market: the major geo-political and economic changes triggered by the heavy geographical concentration of critical minerals and metals in emerging economies, and the structural pressures on traditional international trade patterns – the combination of which is ultimately challenging the *status quo* which has governed the equilibrium between world supply and demand of primary supplies at the expenses of western countries.

In light of the above, the battle over export restrictions opposing, on the one hand, poorly-endowed industrialized countries – the EU and the US *in primis* – and, on the other hand, the newly industrializing countries abundant in mineral resources, has broken out to configure a re-acutization of the north/south conflict over the "space" to be left to WTO Members to legitimately recur to trade instruments to fairly achieve development goals[74]. In particular, the unfolding of the "Chinese case" has recently fuelled this debate, contributing to its further ideologization. In this respect, while it is true that, from a western perspective, export restrictions are often used as developmental tools, instrumental to the acceleration of the major transformations affecting the traditional patterns of international trade, it is also true that such changes are ongoing and would be happening no matter how big the recourse to export restrictions. Hence, western countries cannot fight these major changes through the battle over export restrictions and whatever successful reform on WTO disciplines, not as much urgent because of their meaningless, but rather because of the main inconsistencies arising out of the fragmented WTO accession regime on export duties, would thus need to carefully balance the divergent interest of net-importing and exporting countries.

[74] In this respect *see* B. Gu, 'Mineral Export Restraints and Sustainable Development – Are Rare Earths Testing the WTO's Loopholes?', Journal of International Economic Law (Issue 14, 2011), p. 768.

Cross-border reorganizations involving italian and german companies

di Paolo Ghiglione, Francesco Guelfi, Giuseppe Franch, Marco Biallo, Marco Muratore

Sommario: I. This paper deals with the main corporate and tax issues, from an Italian law perspective, of cross-border reorganisations involving Italian and German companies.; II. Cross-border mergers involving Italian and German companies; (a) Corporate law; (i) Applicable rules; (ii) Qualified entities; (iii) Process of merger of a German company into an Italian company; (iv) Process of merger of an Italian company into a German company; (b) Tax consequences in Italy; (i) Italian tax regime applicable to domestic mergers; (ii) Italian special regime applicable to EU cross-border mergers; (iii) An Italian company is absorbed by an EU eligible company; (iv) An EU eligible company is absorbed by an Italian acquiring entity; (v) Taxation at the level of shareholders; (vi) Indirect taxes; III. Cross-border splits involving Italian and German companies; (a) Corporate Law; (i) Applicable Rules; (ii) Qualified entities; (iii) Process of split of a German company into an Italian company; (iv) Process of split of an Italian company into a German company; (b) Tax consequences in Italy; (i) Italian tax regime applicable to domestic splits; (ii) Italian special regime applicable to EU cross-border divisions; (iii) Taxation at the level of shareholders; IV. Other cross-border reorganisations involving Italian and German companies; (a) Corporate law; (i) Applicable rules; (ii) Contribution in kind from a German company into an Italian company; (b) Tax consequences in Italy; (i) Italian tax regime applicable to an Italian contributing company; (x) the participation has been held for at least 12 months. If shares have been purchased at different times, in order to identify shares eligible for the participation exemption regime, the shares which have been more recently purchased are deemed to have been sold first; (xx) the participation has been classified as fixed financial assets (in the case of companies adopting IAS/IFRS fixed financial assets are the assets other than those held for trading) in the financial statements relating to the fiscal year in which the acquisition of the participation has taken place; (xxx) the participation relates to a subsidiary that carries out an actual business activity . This requirement, however, does not apply to companies listed on a regulated market or to sales made in the context of public offerings; (xxxx) the subsidiary to which the participation relates is not resident in a country or territory deemed to be a tax haven for Italian tax purposes; (ii) Special tax regime for the EU contribution of a business as a going concern; (iii) Special tax regime applicable to EU contributions of shares or quotas; (iv) Transfer taxes.

I. This paper deals with the main corporate and tax issues, from an Italian law perspective, of cross-border reorganisations involving Italian and German companies.

In particular, section 1. relates to cross-border mergers of a German company into an Italian company and vice versa, section 2. relates to cross-border splits of a German company into an Italian company and vice versa and section 3. relates to contribution in kind from a German company into an Italian company and vice versa.

II. Cross-border mergers involving Italian and German companies

(a) Corporate law

(i) Applicable rules

In Italy, cross-border mergers are regulated by the Italian Legislative Decree 30 May 2008, No. 108 (hereinafter the **Italian Decree**) which has implemented Directive 2005/56/EC of the European Parliament and of the Council dated 26 October 2005 on cross-border mergers of corporations (*società di capitali*).

With respect to Italian companies – *i.e.* companies incorporated in accordance with Italian law, involved in cross-border mergers – the Italian Decree is supplemented by Articles 2501 ff. of the Italian Civil Code (hereinafter the **ICC**) which have residual application, *i.e.* which apply where not expressly regulated by the Italian Decree.

> In addition to the aforesaid provisions of the ICC, the Italian Decree does not prejudice the application of a number of other Italian laws regulating specific sectors and matters, such as banking, finance, insurance and anti-trust.[1]

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* This paper constitutes the Italian section of a forthcoming multi-jurisdictional handbook named 'Beck'sches Handbuch Umwandlungen international'.

** Sections 1.(a), 2.(a) and 3.(a) of this paper have been drafted by Paolo Ghiglione, Marco Biallo and Marco Muratore while the remaining sections have been drafted by Francesco Guelfi and Giuseppe Franch.

[1] In particular, the Italian Decree does not prejudice the application of the Italian Legislative Decree 1 September 1993, No. 385 (*i.e.* the Italian Banking Consolidated Act), the Italian Legislative Decree 24 February 1998, No. 58 (*i.e.* the Italian Financial Consolidated Act), the Italian Legislative Decree 7 September 2005, No. 209 (*i.e.* the Italian Insurance Code), the Italian Law 10 October 1990, No. 287 (*i.e.* the Italian anti-trust regulation) and the Italian Law Decree 31 May 1994, No. 332 (*i.e.* the Italian golden shares regulation). Furthermore, the Italian Decree does not prejudice the application of the provisions of Council Regulation (EC) 2157/2001 of 8 October 2001 and of Council Regulation (EC)

In the case of conflict of laws among the provisions of the Italian Decree and those applicable to companies of another EU member State participating in the cross-border merger, pursuant to Article 4, second paragraph, of the Italian Decree, the governing law of the company resulting from the merger shall prevail on the one(s) regulating the other companies involved in the merger process. However, if a conflict of laws arises, the provisions of Article 11 of the Italian Decree regulating the pre-merger certificate (*certificato preliminare alla fusione*) shall nonetheless apply.[2]

(ii) Qualified entities

From a general standpoint, Article 3, first paragraph, of the Italian Decree states that a cross-border merger may only involve companies having a corporate form allowed to participate in a (domestic) merger by the relevant applicable national laws. In this respect, it has to be noted that Italian law does not provide specific limits for participating in a (domestic) merger with respect to the corporate form of the companies involved.

In particular, the Italian Decree applies to cross-border mergers involving corporations (*società di capitali*) incorporated in accordance with Italian law and corporations (*società di capitali*) incorporated in accordance with the law of another EU member State and having their registered office, central administration or principal place of business within the territory of the European Union.

Under the Italian Decree, corporations (*società di capitali*) subject to the rules on cross-border mergers are the following:

(A) Italian joint-stock companies (*società per azioni*), Italian partnerships limited by shares (*società in accomandita per azioni*), Italian limited liability companies (*società a responsabilità limitata*), Italian cooperative companies (*società cooperative*),[3] European companies (*società europee*) and European cooperative companies (*società cooperative europee*);

1435/2003 of 22 July 2003 concerning, respectively, the incorporation of the European company by merger and the incorporation of the European cooperative company by merger.

[2] In this respect, see under paragraph 1(a)(iii)(G) below.

[3] According to Article 3 of the Italian Decree, Italian cooperative companies with prevailing mutual purposes (*società cooperative a mutualità prevalente*) pursuant to Article 2512 of the ICC (*i.e.* cooperative companies (i) performing their activity mainly in favour of their members, consumers or users of assets or services, (ii) mainly using, in the performance of their activity, the work of their members, or (iii) mainly using, in the performance of their activity, the contributions of assets or services by their members) can not participate in a cross-border merger.

(B) the companies mentioned in Article 1 of Council Directive 68/151/EEC of 9 March 1968;[4] and

(C) any other company incorporated in an EU member State having the status of a legal entity and a corporate capital, possessing separate assets which alone serve to cover the company's debts and subject, pursuant to the national applicable laws, to the provisions of the Council Directive 68/151/EEC of 9 March 1968 [5] regulating the protection of the interests of members and of third parties.

The Italian Decree also applies to cross-border mergers involving companies other than corporations (*società di capitali*) or involving corporations (*società di capitali*) not having their registered office, central administration or principal place of business within the territory of the European Union, provided that the application of the rules implementing Directive 2005/56/EC is nonetheless provided by the laws applicable to each of the companies of other EU member States participating in the cross-border merger. In this case, however, a number of provisions of the Italian Decree[6] do not apply to the relevant cross-border merger.

Italian open-end investment companies (*società di investimento a capitale variabile*) are expressly excluded from the scope of application of the Italian Decree.

Ultimately, Italian law provides for certain limits as to the status of the companies involved in a domestic merger. In particular, according to Article 2501, second paragraph, read in combination with Article 2505-*quater* of the ICC, Italian joint stock companies (*società per azioni*), Italian partnerships limited by shares (*società in accomandita per azioni*) and Italian cooperative companies limited by shares (*società cooperative per azioni*) under liquidation can not participate in a (domestic) merger as long as the distribution of their assets has already been started. As a consequence thereof, said Italian companies can not even be part of a cross-border merger.

[4] Council Directive 68/151/EEC of 9 March 1968 has been replaced by Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009, thus all references to Council Directive 68/151/EEC shall be to Directive 2009/101/EC. German companies mentioned in Article 1 of the Directive 2009/101/EC are: (i) *Aktiengesellschaft*, (ii) *Kommanditgesellschaft auf Aktien*, and (iii) *Gesellschaft mit beschränkter Haftung*.

[5] See previous footnote.

[6] In particular, Article 19 of the Italian Decree, regarding the participation of the employees in the management of the company resulting from the merger, is not applicable. In this respect, see under paragraph 1(a)(iii)(L) below.

(iii) Process of merger of a German company into an Italian company

(A) Merger Plan

According to Articles 2501-*ter* of the ICC and 6 of the Italian Decree, the managing body of each merging company has to approve a common merger plan containing the following information:

I. corporate form, corporate name, registered office and governing law of each merging company;
II. the articles of association of the Italian incorporating company with any amendment, if any, arising out from the merger;
III. the exchange ratio of the shares[7] and the amount of any cash settlement;
IV. the terms for the allotment of the shares representing the corporate capital of the Italian incorporating company, the date as of which these shares will bear dividends and any special condition affecting the distribution of profits;
V. the date as of which the transactions of the German incorporated company are apportioned to the balance sheet of the Italian incorporating company;
VI. the treatment of any special category of shareholders[8] and any holder of securities other than shares;
VII. any proposed special advantage granted to the experts who examine the common merger plan or to the members of the managing and controlling bodies of the merging companies;
VIII. where appropriate,[9] information on the procedures for the involvement of employees in the definition of their rights to participate in the Italian incorporating company;
IX. the likely impacts of the merger on employment;
X. information as to the evaluation of the assets and liabilities which will be transferred to the Italian incorporating company;
XI. the reference date of the balance of assets or of the balance sheet of each merging company used to establish the conditions of the merger;
XII. the effective date of the merger or the criteria based on which the effective date can be determined; and

[7] For convenience purposes, and save as otherwise specified, reference to "shares" in the following paragraphs shall be intended as including "quotas" of limited liability companies (*società a responsabilità limitata*) as well.

[8] For convenience purposes, and save as otherwise specified, reference to "shareholders" in the following paragraphs shall be intended as including "quotaholders" of limited liability companies (*società a responsabilità limitata*) as well.

[9] See under paragraph 1(a)(iii)(L) below.

XIII. additional information, if any, to be included in the common merger plan according to German law.

Furthermore, pursuant to Article 7 of the Italian Decree, the following information shall be published in the Italian official gazette (*Gazzetta Ufficiale della Repubblica Italiana*) at least 30 days prior to the date of the shareholders' meeting convened to resolve upon the merger:

XIV. corporate form, corporate name, registered office and governing law of each merging company;

XV. the relevant Companies' Register and registration number of each merging company; and

XVI. the arrangements, for each of the merging companies, made for the exercise of the rights by the creditors and by the minority shareholders of the merging companies as well as the modalities by means of which this information can be obtained free of charge from the merging companies.

According to Article 2501-*ter*, fourth paragraph, of the ICC, the merger plan must be registered in the Companies' Register – or published on the website[10] – of the merging companies no later than 30 days[11] before the date on which the shareholders' meeting is convened to resolve upon the merger, unless these terms are waived unanimously by the shareholders of the relevant merging company.

(B) Exchange/compensation offer

As stated above, the merger plan must contain the exchange ratio according to which the participations held by the shareholders of the German incorporated company will be exchanged with the participations of the Italian incorporating company.

[10] The possibility of publishing the merger plan on the website has been recently introduced by the Italian Legislative Decree 22 June 2012, No. 123.

[11] According to Article 2505-*quater* of the ICC, in case of merger involving companies other than Italian joint stock companies (*società per azioni*), Italian partnerships limited by shares (*società in accomandita per azioni*) and Italian cooperative companies limited by shares (*società cooperative per azioni*), this 30-day term is reduced to 15 days. The possibility of applying this reduction to cross-border mergers has not been dealt with by Italian scholars; however, since the rationale of the said Italian provision hinges on the need to shorten the merger process as far as "simplified" entities are involved, it could be reasonably held that the reduction from 60 days to 30 days applies also to a cross-border merger between an Italian limited liability company (*società a responsabilità limitata*) and a German company having a corporate structure similar to the one of the Italian limited liability company (*società a responsabilità limitata*), *i.e.* a *Gesellschaft mit beschränkter Haftung*.

Under Article 6, second paragraph, of the Italian Decree, the merger plan can also provide for a cash settlement which, however, cannot exceed 10% of the nominal value of the participations of the Italian incorporating company to be assigned to the shareholders of the German incorporated company,[12] unless German legislation allows cash settlement for greater amounts, which is not the case. [13]

(C) Merger report

According to Articles 2501-*quinquies* of the ICC and 8 of the Italian Decree, the management body of each merging company has to approve a merger report. This report must (i) explain and justify, from a legal and economic perspective, the merger plan and especially the exchange ratio[14] and (ii) explain the consequences of the cross-border merger for shareholders, creditors and employees of the relevant merging company.

In addition, the managing body of each merging company has to inform both the shareholders and the managing body of the other merging company of any material change in the assets and liabilities occurred as of the date on which the merger plan has been filed in the registered office – or published on the website – of the relevant merging company up to the date on which the merger is resolved by the shareholders' meeting.

According to Article 8, second paragraph, of the Italian Decree, the merger report must be delivered to the employees' delegates – or, in the absence of these delegates, be made available to the employees – at least 30 days before the date on which the shareholders' meeting resolving upon the approval of the merger is

[12] If the by-laws of the incorporating company do not set forth the nominal value of its participations, a cash settlement shall not exceed 10% of the accounting balance (*parità contabile*) – *i.e.* the amount resulting by dividing the share capital by the number of shares – of the new participations.

[13] A number of Italian scholars have maintained that Article 6, second paragraph, of the Italian Decree – allowing a cash settlement higher than the said threshold of 10%, provided that a higher threshold is set forth under the legislation applicable to a foreign company involved in the merger process – would entail a unjustified discrimination between cross-border mergers (where the cash settlement could be higher that the domestic threshold) and mergers among Italian companies (where the cash settlement cannot exceed the domestic threshold). According to such scholars, this discrimination could not be compliant with the Italian constitutional principle of parity (*parità di trattamento*) as per Article 3 of the Italian Constitution. In this respect please see, among others, G. Rescio, *Dalla libertà di stabilimento alla libertà di concentrazione: riflessioni sulla Direttiva 2005/56/CE in materia di fusione transfrontaliera*, in *Riv. dir. soc.,* 2007, p. 46 and P. Menti, *Attuazione della Dir. 2005/56/CE relativa alle fusioni transfrontaliere delle società di capitali,* in *Le Nuove Leggi Civili Commentate,* 2009, p. 1329.

[14] According to Article 2501-*quinquies*, second paragraph, of the ICC, the merger report must also point out (i) the criteria under which the exchange ratio has been assessed and (ii) any possible difficulties in assessing this ratio.

convened. If received on time, the opinion of the employees' delegates must be attached to the merger report.

(D) Merger audit

Under Article 2501-*sexies* of the ICC, the managing body of each merging company must appoint one or more auditors (*esperti*) who shall draft a report on the fairness of the exchange ratio, pointing out the methods used for, and any possible difficulties in, assessing this ratio.[15] This report must also contain an opinion on the fairness of these methods and on the importance of each of them in assessing the exchange ratio.

Should the incorporating company be an Italian joint stock company (*società per azioni*) or an Italian partnership limited by shares (*società in accomandita per azioni*), the auditor(s) is/are appointed by the competent Court where the Italian incorporating company has its registered office.

In any case, a common report for both merging companies can be drafted by one or more independent auditors, provided that they have been (i) jointly appointed by the merging companies or (ii) qualified by the competent administrative or judiciary authority under German or Italian law.[16] This common report shall contain all the information referred to above plus the additional ones, if any, required under German law.

According to Article 9, first paragraph, of the Italian Decree, the persons eligible for being appointed as an auditor (*esperto*) are chartered legal accountants (*revisori legali dei conti*) and auditing companies (*società di revisione legale*). If one or both merging companies are listed companies, the auditor is chosen from auditing companies enrolled in the special register kept by the Italian authority regulating the Italian securities market (*i.e. Commissione Nazionale per le Società e la Borsa - CONSOB*).

The auditors' report is not needed if it is unanimously waived by the shareholders of each merging company.

[15] Under Article 2501-*sexies,* first paragraph of the ICC, the auditors' report must also indicate the value resulting from each method used to assess the exchange ratio.

[16] The mentioned authority being: (i) the competent regional court, as far as German legislation is concerned; and (ii) the competent Court where the Italian incorporating company has its registered office, as far as Italian legislation is concerned.

(E) Consent resolution of local company

Under Article 2501-*septies*, first paragraph, of the ICC, the following documents must be kept in the offices – or published on the website[17] – of each merging company:

I. the merger plan together with the merger report and the auditors' report(s), if any;
II. the financial statements of the last three fiscal years of both merging companies together with the reports of their managing and auditing bodies; and
III. an interim financial statement (*situazione patrimoniale*) drafted by the managing body of each merging company having a reference date falling within 120 days before the date on which the merger plan was deposited in the registered office – or published on the website – of the merging companies.[18]

The aforementioned documentation must be kept or, as the case may be, published for at least 30 days[19] before the date on which the shareholders' meeting resolving upon the approval of the merger is held, unless this term is waived unanimously by the shareholders of the relevant merging company. Any shareholder is entitled to examine – and obtain, free of charge, a copy of – any of the mentioned documents.

According to Article 2502, first paragraph, of the ICC, the merger is resolved by the shareholders' meeting of the merging companies with the majorities required for the amendment of the by-laws of the relevant merging company.[20]

[17] The possibility of publishing the aforementioned documents on the website has been recently introduced by Italian Legislative Decree 22 June 2012, No. 123.

[18] Under Article 2501-*quater,* second paragraph, of the ICC, the asset position can be replaced with (i) the last financial statements provided that they relate to a fiscal year ended within 180 days before the date on which the merger plan was deposited in the registered office – or published on the website – of the merging companies or (ii) if the relevant merging entity is a listed company, the six-monthly financial report, set forth under Article 154-*ter,* second paragraph, of the Italian Legislative Decree 24 February 1998, No. 58 (*i.e.* the Italian Financial Consolidated Act), provided that its reference date is within 180 days before the date on which the merger plan was deposited in the registered office.

[19] According to Article 2505-*quater* of the ICC, in case of merger involving companies other than Italian joint stock companies (*società per azioni*), Italian partnerships limited by shares (*società in accomandita per azioni*) and Italian cooperative companies limited by shares (*società cooperative per azioni*), this 30-day term is reduced to 15 days. As to the possibility of applying this reduction to cross-border mergers, please see under footnote No. 11 above.

[20] The majorities vary depending on the form of the entities involved. For instance, as far as an Italian limited liability company (*società a responsabilità limitata*) is concerned, unless a different majority is provided for under the by-laws of the company, a cross-border merger can be resolved by the shareholders' meeting with the favourable vote of shareholders representing at least 50% of the corporate capital of the company.

Under Article 10, first paragraph, of the Italian Decree, the shareholders' meeting of each merging company may elect to make the effects of the resolution conditional upon the subsequent approval (by the same shareholders' meeting) of modalities under which the employees will participate in the management of the Italian incorporating company. The shareholders' meeting is also entitled to allow the minority shareholders of the German incorporated company to exercise their right to amend the exchange ratio or to obtain compensation.[21]

Under Articles 2502, second paragraph, of the ICC and 10, third paragraph, of the Italian Decree, the shareholders' meetings of both merging companies are entitled to jointly amend the merger plan, provided that the amendments do not affect shareholders' or third parties' rights.

(F) Foundation formalities in case of a merger into a newly founded entity

If, as a result of the cross-border merger, a new Italian company is founded, the rules governing the foundation of this new company shall apply.[22]

In addition, under Article 2501-*ter*, first paragraph, No. 2, of the ICC, the merger plan must contain the incorporation deed of the new company resulting from the merger.

However, under Italian law it is not possible to found a new company as a consequence of a merger by incorporation. From an Italian perspective, this scenario could therefore apply if two non-Italian companies were merged into a newly founded Italian company.

Where a new Italian company results from the cross-border merger, the merger shall take effect as of the date on which the merger deed is registered in the Companies' Register of the newly incorporated company, as per Article 2504-*bis*, second paragraph, of the ICC.

(G) Formalities for effectiveness

Pursuant to Article 11 of the Italian Decree, upon the request of the Italian merging company, an Italian notary shall issue without delay a pre-merger certificate attesting the proper execution, in compliance with the applicable law, of the pre-merger acts and formalities. In particular, the pre-merger certificate shall attest the following:

[21] The mentioned decision of the shareholders' meeting does not prevent the registration of the minutes of the shareholders' meeting in the competent Companies' Register.

[22] The legal requirements to incorporate an Italian company are various and depend on the legal form of the company to be incorporated. For instance, should the new company be either an Italian joint-stock company (*società per azioni*) or an Italian partnership limited by shares (*società in accomandita per azioni*), its corporate capital must be equal to or higher than Euro 120,000.

I. the filing of the shareholders' resolution approving the cross-border merger with the Companies' Register;
II. the expiration of the term for opposition by the creditors or the fulfilment of the conditions allowing the execution of the cross-border merger prior to the expiration of the term for opposition by the creditors or, in case of opposition by the creditors, the relevant court having stated that the merger can be executed notwithstanding the opposition[23];
III. the approval of the modalities for the participation of the employees in the management of the company, in case the shareholders' meeting, pursuant to Article 10, first paragraph, of the Italian Decree, decided to make the effects of the resolution approving the common merger plan conditional upon the approval of the modalities for the employees' participation in the management of the company;
IV. the resolution of the shareholders' meeting, if adopted pursuant to Article 10, second paragraph, of the Italian Decree, allowing the minority shareholders of the German incorporated company to exercise their right to amend the exchange ratio or to obtain a compensation; and
V. the non-occurrence of circumstances relating to the company requesting the pre-merger certificate which prevent the execution of the cross-border merger.

Furthermore, according to Article 11, third paragraph, of the Italian Decree, within six months from the issue of the pre-merger certificate, such certificate together with the common merger plan approved by the shareholders' meeting shall be transmitted by the Italian incorporating company to the Italian notary public in charge for the execution of the legitimacy control over the implementation of the cross-border merger pursuant to Article 13 of the Italian Decree.

Article 13 of the Italian Decree provides that within 30 days from the receipt of the pre-merger certificate and of the resolution approving the common merger plan by each of the merging companies, the Italian notary shall execute the legitimacy control over the implementation of the cross-border merger, by verifying that:
VI. the Italian and German merging companies have approved the same common merger plan;
VII. the pre-merger certificates of each of the merging companies have been provided; and

[23] Pursuant to Article 2445, fourth paragraph, of the ICC, the court, notwithstanding opposition by the creditors, may authorise the merger when the risk of prejudice for the creditors is ungrounded or because the merging companies have granted an appropriate guarantee.

VIII. the modalities, if any, for the participation of the employees in the management to the Italian incorporating company have been determined.

Following the legitimacy control over the implementation of the cross-border merger, the Italian notary public shall issue a statement confirming the execution of said control.

In addition, pursuant to Article 12 of the Italian Decree, the cross-border merger shall be made by public deed drafted by an Italian notary public following the execution of the aforementioned legitimacy control.

According to Article 14 of the Italian Decree, the following documents shall be filed with the Companies' Register of the Italian incorporating company within 30 days from the date on which the merger deed is executed:

IX. the merger deed;

X. the statement by the Italian notary public in charge of drafting the merger deed concerning the execution of the legitimacy control over the implementation of the cross-border merger; and

XI. the pre-merger certificates.

The Italian Decree does not specify the person responsible for carrying out the filings with the Companies' Register. In this respect, according to Article 2504 of the ICC, the filing of the merger deed with the Companies' Register shall be carried out by the Italian notary public in charge of drafting the merger deed or by the members of the managing body of the Italian incorporating company.

As to the effective date of the cross-border merger, pursuant to Article 15 of the Italian Decree, unless a subsequent date is provided under the merger deed, the merger is effective from the filing date of the merger deed with the Companies' Register of the Italian incorporating company.

The Companies' Register of the Italian incorporating company shall immediately inform the Companies' Register of the German incorporated company that the merger is effective in order to proceed with the cancellation of the German incorporated company.

In addition, pursuant to Article 16, second paragraph, of the Italian Decree, the Italian incorporating company shall fulfil the specific formalities, if any, provided by German law which are applicable to the effects *vis-à-vis* third parties (*opponibilità a terzi*) of the transfer of certain goods, rights and obligations included in the corporate assets of the German incorporated company to the Italian incorporating company.

Furthermore, under Article 17 of the Italian Decree, once the cross-border merger becomes effective, the merger cannot be declared invalid. However, the

occurred effectiveness of the merger shall not prejudice the right to compensation for the damages suffered by the shareholders and third parties as a consequence of the implementation of the cross-border merger.

(H) Legal effect of effectiveness

According to Article 16, first paragraph, of the Italian Decree, a cross-border merger has the same legal effects as a domestic merger pursuant to Article 2504-*bis*, first paragraph, of the ICC, *i.e.* the Italian incorporating company assumes the rights and obligations of the German incorporated company, maintaining all its existing relationships, including those deriving from litigations.

Furthermore, pursuant to Article 16, third paragraph, of the Italian Decree, when all companies participating in the cross-border merger have authorised – by approving the common merger plan – the procedure to scrutinise and amend the exchange ratio or the procedure to compensate minority shareholders,[24] the relevant decision is binding for the Italian incorporating company and for all its shareholders.

(I) Shareholder protection

The instrument provided for under the Italian Decree to protect the shareholders of the companies participating in a cross-border merger consists in granting the one who dissented to the cross-border merger the right of withdrawal from the relevant merging company. The Italian Decree, however, expressly regulates the withdrawal of the shareholders of the Italian merging company only in the case that the company resulting from the merger is a company of an EU member State other than Italy.[25] Therefore, if the company resulting from the merger is an Italian company, the rules provided by the ICC shall apply. In this respect, the rules regulating the withdrawal of the shareholders from the company vary depending on the specific corporate form of the company concerned. For instance, with regards to Italian joint stock companies (*società per azioni*), the rules regulating the withdrawal of the shareholders (see Article 2437 of the ICC) do not expressly provide the merger as a ground for withdrawal. As a consequence thereof, according to Italian scholars,[26] the withdrawal from Italian joint stock companies (*società per azioni*) in case of merger would be possible only if the merger was affected by another transaction

[24] Please see under paragraph 1(a)(iii)(E) above.

[25] In this respect, see under paragraph 1(a)(iv)(B) below.

[26] See, among others, C. Bolognesi, 'Commento sub art. 2502 c.c.' in G. Grippo, *Commentario delle società* (2009), 1264; M. Tamburini, 'Commento sub art. 2502 c.c.' in A. Maffei Alberti, *Il nuovo diritto delle società* (2005), 2548; and M.E. Salerno, 'Commento sub art. 2502 c.c.' in M. Sandulli – V. Santoro, *La riforma delle società* (2003), 438.

or circumstance representing a specific ground for withdrawal under Article 2437 of the ICC, such as, for instance, in the case that the cross-border merger entails a significant change to the corporate purpose of the Italian incorporating company,[27] or specifically provided in the by-laws of the relevant company.

On the contrary, with respect to Italian limited liability companies (*società a responsabilità limitata*), applicable rules regulating the withdrawal of relevant quotaholders (see Article 2473 of the ICC) expressly include the merger as a specific ground for the withdrawal of the quotaholders; therefore, if the Italian incorporating company is a limited liability company (*società a responsabilità limitata*), its quotaholders are entitled to withdraw if they did not approve the cross-border merger.

(J) Creditor protection

With respect to the protection of the creditors of the companies participating in the cross-border merger, the Italian Decree does not contain specific rules but expressly refers to the remedy of the "opposition by creditors" as provided by the ICC. In particular, Article 2503, first paragraph, of the ICC provides that the merger can only be executed after 60 days[28] as from the filing with the Companies' Register of the resolution of the shareholders' meetings of the merging companies approving the merger, except when: (i) the merging companies' creditors whose credit existed prior to the filing of the merger plan with the Companies' Register – or prior to the publication of the merger plan on the website of the merging companies[29] – have consented to the cross-border merger, (ii) the dissenting creditors have been paid, (iii) amounts corresponding to the credit of any dissenting creditor have been deposited with a bank, or (iv) the report by the experts pursuant to Article 2501-*sexies* of the ICC is drafted for all merging companies by a single auditing firm which certifies under its liability that the assets and financial position of the merging companies do not require guarantees to protect the creditors.

If none of the above-mentioned exceptions apply, prior to the expiry of the 60-day term (or 30-day term, as applicable), the creditors of the merging companies have the right to oppose the cross-border merger. The court assessing any such

[27] Apart from the change to the corporate purpose of the merging company, other circumstances which may affect a merger, thus, grounding the withdrawal from Italian joint stock companies (*società per azioni*), may be represented, among others and pursuant to Article 2437 of the ICC, by the transfer of the registered office of the company abroad or a change of the corporate form of the merging company.
[28] According to Article 2505-*quater* of the ICC, in the case of merger involving companies other than Italian joint stock companies (*società per azioni*), Italian partnerships limited by shares (*società in accomandita per azioni*) and Italian cooperative companies limited by shares (*società cooperative per azioni*), the 60-day term provided by Article 2503, first paragraph, of the ICC is reduced to 30 days. As to the possibility to apply this reduction to cross-border mergers, please see under footnote No. 11 above.
[29] See footnote No. 10 above.

opposition may rule that the merger be executed notwithstanding the opposition in the event it holds that the risk of prejudice for the creditors is ungrounded, or in case the merging companies have granted an appropriate guarantee.

(K) Employee protection

Article 4, fourth paragraph, of the Italian Decree expressly provides that Articles 2112 of the ICC and 47 of the Italian Law 29 December 1990, No. 428 apply to the cross-border merger.

In particular, Article 2112 of the ICC provides for the following in order to protect the rights of the employees involved in, among others, a cross-border merger:

I. the employment relationship of the employees of the German incorporated company continues with the Italian incorporating company and said employees retain all rights deriving from their employment relationship with the German incorporated company;
II. the Italian incorporating company has to apply the economic and legal treatments provided by the national, territorial and company's collective agreements applied at the effective date of the cross-border merger, until their expiration, unless they are replaced by other collective agreements applicable to the Italian incorporating company;[30]
III. the cross-border merger does not represent *per se* a cause for dismissal of the employees; however, the employees of the German incorporated company whose employment conditions undergo a significant detrimental change, within three months from the effective date of the cross-border merger are entitled to resign and receive a compensation equal to the amount of payment in lieu of notice to which they would have been entitled had they resigned for a good reason.

Article 47 of the Italian Law 29 December 1990, No. 428 provides that in case the cross-border merger involves more than 15 employees, the Italian and the German merging companies must follow a specific union procedure. The process is carried out through the following main steps:

[30] However, according to Article 2112 of the ICC, the replacement of the collective agreements applied at the effective date of the cross-border merger with the collective agreements applicable to the Italian incorporating company may occur exclusively between collective agreements of the same level (*i.e.* between collective agreements at national or at territorial or at company's level).

IV. the Italian and the German merging companies must jointly inform in writing the work councils and the local branches of the national organisations of trade unions;[31]
V. the notice must be delivered to the work councils and trade unions at least 25 days before the execution of the merger deed;[32]
VI. both the work councils and the trade unions have the right to (i) be informed by the Italian and the German merging companies of their intention to carry out a cross-border merger, and (ii) be informed of the terms, conditions and consequences of such merger; in particular, within seven days of receipt of the aforementioned notice, the work councils and the union representatives may ask that a consultation process begin with the Italian and the German merging companies jointly;
VII. within seven days from the receipt of said request, the German and the Italian merging companies must start the consultation process; and
VIII. after ten days as of the commencement of the consultation process, also in the event that the parties have not been able to reach an agreement with the unions, the requirements concerning the consultation process are nonetheless deemed to have been fully accomplished, and the cross-border merger can be freely carried out. This is because the purpose of the Italian Law No. 428/1990 is not to limit the parties' freedom to carry out the cross-border merger, but rather to ensure that the trade unions are fully informed in advance of it and of any possible consequences on employment relationships.

(L) Employee participation in future co-determination: applicability requirements, process for negotiation and for fall-back scenario, majorities, content, continuation or amendments in the future

Article 19 of the Italian Decree regulates the participation of the employees of the merging companies in the management of the Italian incorporating company.

In particular, Article 19, paragraph 1, of the Italian Decree provides that if at least one of the merging companies has an average number of employees higher than 500 in the six months prior to the publication of the common merger plan

[31] In the case of lack of appointment of the work councils within the involved companies, only the local branches of the national organisations of trade unions shall be informed.

[32] The notice must include (i) the date or the scheduled date for the cross-border merger, (ii) the reasons for the cross-border merger, (iii) the legal, economic and social implications for the employees of the cross-border merger, and (iv) the measures envisaged in relation to the employees. The information supplied to the work councils and the trade unions must be as complete as possible. In fact, the purpose of Italian Law No. 428/90 is to oblige employers to make a full disclosure and to inform work councils and trade unions of the reasons for, and the consequences of, the cross-border merger.

and provides the employees' participation in the management of the company, the participation of the employees in the management of the Italian incorporating company shall be regulated pursuant to procedures, criteria and conditions set in agreements entered into by the parties to the collective agreements applied to the Italian company. In the absence of said agreements, the employees' participation shall be regulated pursuant to various provisions of the Council Regulation (EC) 2157/2001 of 8 October 2001 on the statute for the European company and of the Italian Legislative Decree 19 August 2005, No. 188 implementing the Council Directive 2001/86/EC of 8 October 2001 supplementing the statute for the European company with regard to the involvement of the employees in the decision-making process of the companies.[33]

Furthermore, Article 19, second paragraph, of the Italian Decree, provides that the management bodies of the German and the Italian merging companies may resolve to apply, without preliminary negotiations and starting from the effective date of the cross-border merger, the provisions of Annex I, third section, first paragraph, letter b) of the Italian Legislative Decree 19 August 2005, No. 188 regulating the number of members of the management or supervisory body which can be appointed by the employees of European company and/or by their representative body.[34]

According to Article 19, third paragraph, of the Italian Decree, when following preliminary negotiations, the provisions of Annex I, third section, first paragraph, letter b), of the Italian Legislative Decree 19 August 2005, No. 188 apply, the number of representatives of the employees as members of the management or supervisory body of the Italian incorporating company may be limited. However, in case the representatives of the employees are at least one third of the members of the management or supervisory body in one of the merging companies, the number of the employees' representatives can not be lower than one third of the members of the management or supervisory body.

[33] In particular, Article 19, paragraph 1, of the Italian Decree provides for the application of the following provisions regulating the arrangements for the involvement of the employees in the decision-making process of the European company: (i) Article 12, second, third and fourth paragraphs, of the Council Regulation (EC) 2157/2001 of 8 October 2001; and (ii) Article 3, first, second, third, fourth, letter a), fifth, sixth and eleventh paragraphs; Article 4, first, second, letter a), letter g) and letter h), and third paragraphs; Article 5; Article 7, first, second, letter b), and third paragraphs; Articles 8, 10 and 12; and Annex I, third section, first paragraph, letter b), of the Italian Legislative Decree 19 August 2005, No. 188.

[34] Annex I, third section, first paragraph, letter b), of the Italian Legislative Decree 19 August 2005, No. 188 provides that the employees of a European company and/or their representative body shall have the right to elect, appoint, recommend or oppose the appointment of a number of members of the management or supervisory body of the European company equal to the highest number applicable to the participating companies concerned before the registration of the European company.

Moreover, pursuant to Article 19, fourth paragraph, of the Italian Decree, in the case that at least one of the companies participating in a cross-border merger provides the participation of the employees in the management of the company, the Italian incorporating company shall adopt a corporate form allowing the exercise of the rights of the employees to participate in the management of the company.[35]

Finally, Article 19, fifth paragraph, of the Italian Decree provides that the Italian incorporating company allowing the participation of the employees in the management of the company shall adopt appropriate measures to protect the rights of the employees to participate in the management of the company in the case of subsequent mergers of the same company with other Italian companies within three years from the effective date of the cross-border merger.

(M) Merger leveraged buy out

Pursuant to Article 4, third paragraph, of the Italian Decree, the Italian regulation on merger leveraged buy-out provided by Article 2501-*bis* of the ICC does not apply when the target company in the context of a merger leveraged buy-out transaction (*i.e.* the company subject to acquisition by another company and whose assets, as a consequence of the merger between the two companies, represent the general guarantee or the source of repayment of the debts contracted by the purchasing company for the acquisition of the target company) participating in a

[35] According to the prevailing opinion among Italian scholars, the application of this provision is problematic since, under Italian law, the corporate governance models of Italian companies do not specifically provide for the participation of the employees in the management of the companies. In this respect, see P. MENTI, *supra* footnote No. 13, p. 1351 ff. and M. BENEDETTELLI – G. RESCIO, 'Il Decreto Legislativo n. 108/2008 sulle fusioni transfrontaliere (alla luce dello Schema di legge di recepimento della X Direttiva elaborato per conto del Consiglio Nazionale del Notariato e delle massime del Consiglio notarile di Milano)' (2009) Riv. dir. soc., 754. An Italian scholar – V. FERRANTE, 'I diritti di «partecipazione» dei lavoratori nel caso di fusione transfrontaliera fra società di capitali. Brevi note al D.lgs. 30 maggio 2008, n. 108' (2009) Riv. it. dir. lav., 363 – refers to the Italian "two-tier system" (*sistema dualistico*) as a possible corporate governance model suitable to allow the participation of the employees in the management of Italian companies. Yet, other scholars – see N. FACCHIN, 'Commento sub art. 2409-octies c.c.' in G. GRIPPO, *Commentario delle società* (2009), 657 and V. BUONOCORE, 'Le nuove forme di amministrazione nelle società di capitali non quotate' (2003) *Giur. comm.* 409 – noted that the Italian "two-tier system" model (*sistema dualistico*), even if inspired by the German corporate governance model based on the *Aufsichtsrat* and the *Vorstand*, does not exactly replicate the relevant German model. Indeed – contrary to what provided for by the German *Mitbestimmung* for the German *Aufsichtsrat* – the Italian "two-tier system" model (*sistema dualistico*) does not provide for a pluralistic composition of the Italian supervisory board allowing the participation of the employees in the management of the relevant company. However, following the entry into force of the Italian Decree in 2008, various bills (*progetti di legge*) aiming at introducing a specific regulation for the participation of the employees in the management of the companies have been presented and discussed by the Italian Parliament but none of them has been converted into law yet.

cross-border merger is not an Italian company. As a consequence thereof, the Italian regulation on merger leveraged buy-out shall only apply if the target company participating in a cross-border merger is an Italian company, and this is both in the case of a "direct" merger (*i.e.* in case of merger of the Italian target company into a German company) and in the case of a "reverse" merger (*i.e.* in case of a German company merging into the Italian target company).

Article 2501-*bis* of the ICC provides that in the case of a merger leveraged buy-out transaction the following rules shall apply:

I. the merger plan referred to in Article 2501-*ter* of the ICC must indicate the financial resources available to pay the liabilities of the company resulting from the merger;
II. the report by the management body referred to in Article 2501-*quinquies* of the ICC must indicate the reasons for the transaction and must include an economic and financial plan mentioning the source of the financial resources and the description of the targets to be reached;
III. the report by the experts referred to in Article 2501-*sexies* of the ICC must certify the fairness of the contents of the merger plan concerning the financial resources available to pay the liabilities of the company resulting from the merger;
IV. a report by the person entrusted with the auditing of the target company or of the purchasing company must be attached to the merger plan;
V. Articles 2505 and 2505-*bis* of the ICC, regulating the merger by incorporation, respectively, of a wholly-owned company and of a 90%-owned company, do not apply to merger leveraged buy-out transactions (in this respect, see paragraph below).

The reason for the application of the Italian regulation on merger leveraged buy-out only in the case of an Italian target company instead of any target company, irrespective of its nationality, hinges on the specific purpose of Article 2501-*bis* of the ICC, which is to protect the shareholders and the creditors of the target company. Therefore, in case the target company is a German company, the protection of the relevant shareholders and creditors should be provided by German law. Furthermore, it must be noted that, in the case of an Italian target company, the provisions of Article 2501-*bis* of the ICC (with specific regard to provisions concerning the reports by the management body and by the person entrusted with the auditing of the target and the purchasing companies) shall apply not only to the Italian target company but also to the German purchasing company. Conversely, in the case of a German target company, if specific rules having the same purpose of Article 2501-

bis of the ICC are provided by German law, these provisions shall apply not only to the German target company but also to the Italian purchasing company.[36]

(N) Simplified formalities

Article 18 of the Italian Decree regulates simplified formalities in the case of cross-border merger by incorporation of a wholly-owned company and of a 90%-owned company.

In particular, in the case of a cross-border merger by incorporation of a German wholly-owned company into an Italian company, Article 18, first paragraph, of the Italian Decree provides that the provision of Article 6, first paragraph, letter b) of the Italian Decree shall not apply; therefore, there is no need for the common merger plan to include information relating to special conditions affecting the distribution of profits. Furthermore, Article 18, first paragraph, of the Italian Decree does not prejudice the application of Article 2505, first paragraph, of the ICC, which provides that in case of merger by incorporation of a wholly-owned company the provisions of Article 2501-*ter*, first paragraph, No. 3, 4, and 5, of Article 2501-*quinquies* and of Article 2501-*sexies* of the ICC shall not apply. Therefore, in the case of a cross-border merger by incorporation of a German wholly-owned company into an Italian company, on the one hand, the common merger plan shall not mention information relating to (i) the exchange ratio of the shares and the amount of any cash settlement, (ii) the terms for the allotment of the shares representing the corporate capital of the company resulting from the merger, and (iii) the date as of which the shares representing the corporate capital of the company resulting from the merger will bear dividends, and, on the other hand, the reports by the management body and by the experts are not required.

Furthermore, in the case of a cross-border merger by incorporation of a German wholly-owned company into an Italian company, Article 18, second paragraph, of the Italian Decree also does not prejudice the application of Article 2505, second and third paragraphs, of the ICC to the Italian incorporating company. Specifically, Article 2505, second paragraph, of the ICC[37] provides that the merger by incorporation of a wholly-owned company may be resolved by the management body (instead of the shareholders' meeting pursuant to Article 2502 of the ICC) of the Italian incorporating company provided that (i) this is allowed by the by-laws of the Italian incorporating company, and (ii) the merger is carried out in accordance with Article 2501-*ter*, third and fourth paragraphs, of the ICC and Article 2501-*septies*

[36] See P. MENTI, *supra* footnote No. 13, p. 1323 ff. and M. BENEDETTELLI – G. RESCIO, *supra* footnote No. 35, p. 751 ff.

[37] As recently amended by the Italian Legislative Decree 22 June 2012, No. 123.

of the ICC both relating to filings and deposit formalities of the merger plan and other required documents prior to the adoption of the resolution for the approval of the merger. In addition, Article 2505, third paragraph, of the ICC provides that the shareholders representing at least 5% of the corporate capital of the Italian incorporating company may ask in any case, by means of a request addressed to the company within eight days from the filing of the merger plan with the Companies' Register – or from the publication of the merger plan on the website of the merging companies[38] – pursuant to Article 2501-*ter*, third paragraph, of the ICC, that the resolution for the approval of the merger by the Italian incorporating company be adopted by means of resolution of the shareholders' meeting pursuant to Article 2502, first paragraph, of the ICC.

Article 18 of the Italian Decree does not specifically regulate the merger by incorporation of a German 90%-owned company into an Italian company and, therefore, relevant provisions of the ICC shall apply. In this respect, Article 2505-*bis*, first paragraph, of the ICC[39] provides that Article 2501-*quater*, Article 2501-*quinquies*, 2501-*sexies* and Article 2501-*septies* of the ICC, regulating, respectively, the draft of the asset position (*situazione patrimoniale*), the report by the management body, the report by the experts and deposit formalities of the required documents prior to the adoption of the resolution for the approval of the merger, do not apply to the merger by incorporation of a 90%-owned company provided that the other shareholders of the German incorporated company are granted the right to have their shares purchased by the Italian incorporating company for a consideration determined in accordance with the criteria provided for the liquidation of the shares in the case of withdrawal of a shareholder from the company.[40]

Furthermore, Article 2505-*bis*, second paragraph, of the ICC[41] states that the merger by incorporation of a 90%-owned company may be resolved by the management body of the Italian incorporating company provided that (i) this is allowed by the by-laws of the Italian incorporating company, (ii) the merger is carried out in accordance with Article 2501-*septies* of the ICC concerning deposit formalities of the required documents prior to the adoption of the resolution for the approval of the merger, and (iii) the filing of the merger plan – or its publication on the website

[38] See footnote No. 10 above.

[39] As recently amended by the Italian Legislative Decree 22 June 2012, No. 123.

[40] The criteria for the determination of the liquidation value of the shares in the case of withdrawal of a shareholder from the company may vary depending on the corporate form and the specific provisions contained in the by-laws of the company concerned. For instance, in case of joint stock companies (*società per azioni*), the value for the liquidation of the shares of the withdrawing shareholder is determined taking into account, among others, the value of the assets, the profits' perspectives and the market value of the shares of the company.

[41] As recently amended by the Italian Legislative Decree 22 June 2012, No. 123.

of the merging companies[42] – referred to in Article 2501-*ter*, third paragraph, of the ICC is carried out by the Italian incorporating company at least 30 days prior to the date agreed for the resolution upon the merger by the German incorporated company. Finally, Article 2505-*bis* of the ICC provides that provisions of Article 2505, third paragraph, of the ICC shall apply to a merger by incorporation of a 90%-owned company. Therefore, also in case of a merger by incorporation of a German 90%-owned company into an Italian company, the shareholders representing at least 5% of the corporate capital of the Italian incorporating company may ask in any case, by means of the request addressed to the company within eight days from the filing of the merger plan with the Companies' Register – or from the publication of the merger plan on the website of the merging companies[43] – pursuant to Article 2501-*ter*, third paragraph, of the ICC, that the resolution for the approval of the merger by the Italian incorporating company be adopted by means of resolution of the shareholders' meeting pursuant to Article 2502, first paragraph, of the ICC.

(iv) Process of merger of an Italian company into a German company

The required steps outlined under paragraph 0(a)(iii) above also apply *mutatis mutandis* to a cross-border merger of an Italian company into a German company, except for the following main exceptions:

(A) Formalities for effectiveness

With regard to the legitimacy control over the implementation of the cross-border merger, pursuant to Article 13, second paragraph, of the Italian Decree, such control shall be carried out by the competent German commercial register.

According to Article 12, third paragraph, of the Italian Decree, the public merger deed shall be made by public deed to be drafted by the Italian notary.

With respect to publicity formalities, pursuant to Article 14, second paragraph, of the Italian Decree, within 30 days from the execution of the legality review on the implementation of the cross-border merger pursuant to Article 13, second paragraph, of the Italian Decree, the public merger deed, together with the statement by the competent German authority concerning the execution of the legitimacy control over the implementation of the cross-border merger, shall be filed with the Companies' Register of the place where the registered office of the Italian merging company is located.

As to the effective date of the cross-border merger, pursuant to Article 15, third paragraph, of the Italian Decree, the effective date shall be determined in

[42] See footnote No. 10 above.
[43] See footnote No. 10 above.

accordance with German law. Moreover, the Italian incorporated company can be cancelled from the relevant Companies' Register only following the communication by the Companies' Register of the German incorporating company stating that the merger is effective and provided that the filing with the Companies' Register under Article 14, second paragraph, of the Italian Decree has been carried out (in this respect, see the paragraph above).

(B) Shareholder protection

Pursuant to Article 5 of the Italian Decree, the dissenting shareholders of the Italian incorporated company shall have in any case the right to withdraw from the company. The formalities for the exercise of the withdrawal right and the criteria for the determination of the liquidation value of the shares may vary depending on the specific corporate form of the Italian incorporated company concerned. Furthermore, Article 5 of the Italian Decree does not prejudice the application of other circumstances underlying the withdrawal from the Italian incorporated company, if provided by applicable Italian laws or by the by-laws of the relevant Italian incorporated company.

(C) Simplified formalities

According to Article 18, second paragraph, of the Italian Decree in the case of a cross-border merger by incorporation of an Italian wholly-owned company into a German company, the approval of the merger plan by the shareholders' meeting of the Italian incorporated company is not required.

In case of cross-border merger by incorporation of an Italian 90%-owned company into a German company, pursuant to Article 18, third paragraph, of the Italian Decree, the report by the experts under Article 2501-*sexies* of the ICC is not required provided that the other shareholders of the Italian incorporated company are granted the right to have their shares purchased by the German incorporating company pursuant to Article 2505-*bis*, first paragraph, of the ICC.[44]

(b) Tax consequences in Italy

(i) Italian tax regime applicable to domestic mergers

(A) General remarks

In principle, mergers between companies, whether through the incorporation of a new company (fusione propria) or through the absorption of one or more

[44] In this respect, see paragraph 1(a)(iii)(N) above.

companies into another existing company (fusione per incorporazione), are neutral from a tax viewpoint. In particular, according to Article 172, first paragraph, of the Presidential Decree 22 December 1986, No. 917 (hereinafter the ITC), these transactions do not give rise to taxable realisation or distribution of capital gains or losses on the assets of the merging companies (including inventory and goodwill) even when these gains or losses are recorded in the financial statements of the company resulting from the merger pursuant to Article 2501-quater of the ICC. Specific rules apply in relation to tax deferred reserves registered in the financial statements of the merging companies.

Accordingly, in determining the taxable income of the company resulting from the merger, no tax relevance is generally given to the merger differences (*differenze di fusione*) shown in the financial statements of this company as a result of the share exchange ratio and/or the cancellation of the shares of the merged companies, which were previously owed by the companies taking part in the merger. Neither is it relevant, tax wise, the step-up in value of the assets (including goodwill) booked for civil law and accounting purposes by the company resulting from the merger, unless this company elects for the so-called tax step-up in value (which is described below).[45].

(B) Retroactivity

According to Articles 2504-*bis*, third paragraph, of the ICC and 172, ninth paragraph, of the ITC, a merger may have retroactive effects for accounting and direct tax purposes. The retroactive effects must be set out in the deed of merger and, in any case, cannot start before the end of the last financial period of each of the merging companies. No retroactive effects are allowed for VAT purposes.

(C) Preservation of tax losses

According to the general rule set forth by Article 84 of the ITC, losses can be carried forward without any time limit for Italian corporate tax purposes. However, there are restrictions as to the use of these losses: the taxable income generated in each time period can be set off against carried forward tax losses only up to 80% of that taxable income (exceptions may apply for start-up losses).

In addition to this general rule, there are some limitations for the acquiring company in using tax losses generated by the companies taking part in the merger (including the tax losses of the company resulting from the merger). These limita-

[45] If the balance sheet entries for civil law and accounting purposes differ from those for tax purposes, the company resulting from the merger must keep and attach to the tax return a recapitulative statement of these differences.

tions apply to carried forward tax losses and, if the merger has retroactive effects, to the losses generated in the tax year in which the merger takes place up to the effective date of the merger. In particular:

I. tax losses generated by each of the merging companies can only be utilised up to the amount of the net equity of the merging company that has generated those losses, as shown in its last financial statements (or, if lower, in the interim financial statements required for the purpose of the merger procedure according to Article 2501-*quater* ICC), without taking into account, for the computation of the net equity, the equity contributions effected during the 24-month period preceding the date of the statements;

II. if the shares or quotas of the company, the losses of which have to be carried forward, were owned by the company resulting from the merger or by another merging company, the losses can in any event be carried forward only for the amount exceeding the write-off (if any) of these shares or quotas made for tax purposes by these latter companies or by the company that has transferred the shares or quotas to these companies after the occurrence of the losses and before the merger. This provision aims at avoiding double deduction of tax losses where the write-off of shares is recognised for tax purposes. Following the 2003 tax reform in Italy, however, tax relevant write-off is no longer allowed after the period running from 31 December 2003; hence, this restriction is only applicable in relation to write-off of participations effected on or before this tax period;[46] and

III. finally, losses of merging companies may be used to reduce the income of the company resulting from the merger only if the profit and loss account of the company, whose losses are to be carried forward, shows, in the fiscal year prior to the merger resolution, gross income, labour costs and related social security contributions of at least 40% of the average of the two previous fiscal years, as per the so-called "vitality test".

The restrictions *sub* (I) and (III) above can be disregarded if the company applies for an advanced tax ruling to claim non application of these provisions in the specific case and obtains a positive outcome from the tax administration.[47]

[46] As the restriction is still in force, the companies involved in the merger have nevertheless to keep a track record of the tax relevant write-off of shares made before the tax reform, if relevant losses are carried forward.

[47] To this aim, the relevant procedure is set out by Ministerial Decree no. 259 of 19 June 1998 in accordance with Article 37-bis Presidential Decree no. 600 of 29 September 1973. The procedure required to obtain the tax ruling may take up to 90 days starting from the date when the request is filed with the competent tax office.

The above limitations also apply to non-deductible interest expenses that have been carried forward by the merging companies pursuant to Article 96 of the ITC.[48] In particular, the Italian tax authorities hold that the restriction sub (I) applies to the overall aggregate of tax losses and non-deductible interest expenses: this aggregate cannot exceed the net equity of the relevant company.[49] As a consequence, if this aggregate exceeds the net equity, the company can choose whether to qualify the exceeding amount as tax losses rather than as interest expenses and, mirroring this qualification, shall carry forward the remaining portion of tax losses and/or interest expenses only.

(D) Tax-deferred reserves

According to Italian law, certain tax-deferred reserves trigger taxation in any case when utilised, while other tax-deferred reserves trigger taxation only upon distribution to the shareholders. These reserves are treated in a different way in the case of merger of the relevant company. Indeed, one should bear in mind that a merger generally entails the cancellation of the net equity of the merged companies, thus causing the cancellation of the tax-deferred reserves recorded in their balance sheet. Where the tax-deferred reserves that trigger taxation when utilised are cancelled because of the merger, if and to the extent they are not reinstated in the balance sheet of the acquiring company, they are included in the income of the acquiring company, thus causing a taxable event, according to Article 172,

[48] According to Article 96 of the ITC, interest expenses, net of interest receivable, are deductible for corporate income tax purposes up to a maximum amount computed as 30% of "*reddito operativo lordo*" (**Ceiling**).
Ceiling is computed based on the results of the profit and loss account of the same fiscal year to which interest relates, as the difference between:

(a) proceeds shown in Section A (numbered from 1 to 5) of the scheme of profit and loss account provided for by Article 2425-*bis* of the ICC for non-financial institutions; and
(b) costs shown in Section B (numbered from 6 to 14) of the scheme of profit and loss account provided for by Article 2425-*bis* of the ICC, but excluding costs shown in Section B, number 10, letters a) and b) (that is, depreciation allowances for tangible and intangible assets) and also excluding financial lease rentals shown in the profit and loss account.

Interest capitalised on the cost of the assets is excluded from the above computation.
Banking and financial institutions, insurance companies, holdings of banking or insurance groups and some specific project companies are excluded from the application of the above-mentioned limitations to interest deductibility. In these cases specific rules apply as to the limitation of interest deductibility.
A carry-forward mechanism is laid down, aimed at allowing the deduction of interest expenses not deducted in a certain tax period if and to the extent the Ceiling of the following tax periods is higher than the amount of interest expenses (net of interest proceeds) incurred in such periods. In case of merger, the carry-forward of these non-deducted interest expenses is limited by the restrictions described above.
A carry-forward of the residual part not used Ceiling is also available.
[49] See Italian Tax Administration, Circular Letter 21 April 2009, No. 19.

fifth paragraph, of the ITC. By contrast, reserves that are exclusively taxable upon distribution are included in the taxable income of the company resulting from the merger only if (I) the merger generates a merger surplus or a capital increase for this company that exceeds the overall corporate capital of the companies involved in the mergers (net of the capital represented by shares owned by these companies), which allows the reinstatement of these reserves and (II) this surplus is subsequently distributed to shareholders or the increased corporate capital is reduced as excessive. Any reserves that were transferred to the capital of the transferring company prior to the merger are deemed to be transferred to the capital of the company resulting from the merger and are included in its income if the capital is reduced as excessive.

(E) Tax Consolidation

According to Articles 117 and ff. of the ITC, the domestic consolidation for Italian tax purposes (the **Tax Consolidation**) is not deemed to terminate in the case of merger between two or more companies that have been joining the Tax Consolidation (with their subsidiaries, if any). Specific rules apply if the consolidating company is involved in the merger. In particular, the merger between the consolidating company and a consolidated company would terminate the consolidation between these companies; in this case, however, the effects generally caused by an early termination of Tax Consolidation would not arise, according to Article 124 of the ITC. Further, when the consolidating company is merged with (or into) a company not joining the Tax Consolidation, the Tax Consolidation is not terminated provided that a positive ruling is obtained by the Italian tax authority, according to Article 124, fifth paragraph, of the ITC. In the case of merger that does not cause termination of the Tax Consolidation, the restrictions in carrying forward of tax losses (as described above) only apply with reference to the tax losses generated by companies before joining the Tax Consolidation.[50]

(F) Tax step-up of assets

As mentioned above, if the merger deficit is attributed, for accounting purposes, to the assets of the merged company in the financial statements of the company resulting from the merger, this step-up in value is not relevant, as a general rule, for tax purposes. As a consequence, in the tax books of the company resulting from the merger, depreciation and amortisation funds maintain the same values as prior to the merger and subsequent computation of depreciation and amortisation allowances is made on the basis of the same tax values prior to the merger. Furthermore, if a portion of the merger deficit is attributed to goodwill, the relevant value cannot

[50] See Italian Tax Administration, Circular Letter 9 March 2010, No. 9/E.

be amortised nor written off for tax purposes. As an exception to this general rule, however, a depreciable step-up of tangible and intangible assets is allowed for the company resulting from the merger up to their accounting value by paying a substitutive tax, according to Article 172, tenth paragraph, read in combination with Article 176, paragraph 2-*ter*, of the ITC, at the rate of:

I. 12% on the portion of the step-up in value up to Euro 5 million;
II. 14% on the portion of the step-up in value from Euro 5 million up to Euro 10 million; and
III. 16% on the portion of step-up in value exceeding Euro 10 million.

Step-up in value of goodwill, trademarks and other intangible assets is alternatively allowed by paying a substitutive tax at the rate of 16% (in this latter case the depreciation period of these items would be reduced to ten years instead of the ordinary depreciation period of 18 years at least), while step-up in value of receivables is allowed upon payment of a substitutive tax at the 20% rate. Finally, step-up in value of other assets received (including participations) is generally allowed by paying taxes at ordinary rates.

(G) Tax regime for the shareholders

If the shareholders of the merged company, whether corporations or individuals, exchange their participation with shares or quotas of the company resulting from the merger, no taxable capital gain or capital increase is deemed to be realised. However, a cash settlement may give rise to taxable income.

(H) Anti abuse rules

According to article 37-*bis* Presidential Decree No. 600 of 29 September 1973 the tax administration is allowed to disregard tax effects of any transaction (or series of transactions) carried out without sound economic reasons if these transactions aim at avoiding tax obligations or prohibitions and obtaining undue tax savings.[51].This provision applies to a number of transactions, among others, mergers, divisions, contributions and transactions concerning transfer of a business as a going concern and it applies also to EU cross-border mergers, divisions, contributions in kind and exchanges of shares. It is therefore paramount, as a general consideration, that the above transactions are supported by sound economic reasons.

[51] A taxpayer may apply for an advance ruling with the Italian tax administration to claim non application of this provision.

(ii) Italian special regime applicable to EU cross-border mergers

(A) General remarks

The provisions of the Directive 90/434/EC adopted by the Council on 30 July 1990 (hereinafter the **Merger Tax Directive**) are currently implemented in Italy with Article 178 and the following of the ITC. These rules address mergers through incorporation of a new company as well as mergers through absorption, provided that at least one of the merging companies or the acquiring company (*i.e.* resulting from the merger) is resident in Italy and companies of another EU Member State are involved.

These rules also apply where a merger involves companies resident in EU countries[52] in relation to their permanent establishment located in Italy. In the latter case it is however paramount that the legal procedure that entails the combination of the permanent establishments, under the foreign applicable laws, is assimilable to a merger from an Italian legal viewpoint.[53]

(B) Eligible companies

In order to apply these rules the Italian resident company taking part in the merger must have the legal form of either a limited liability company (*società a responsabilità limitata*), a joint stock company (*società per azioni*) or of a limited partnership with shares (*società in accomandita per azioni*)[54]. Given the generic reference to the tax residence made by Article 178 of the ITC, one can infer that this tax regime applies to companies resident in Italy for tax purposes regardless of whether they have been set up abroad. Further, Italian tax law does not literally prevent application of these rules if the Italian resident company is deemed to be

[52] In this case, the companies taking part in the merger must be resident in (at least) two different EC countries; otherwise the transaction would not qualify as an EC merger for tax purposes, (*e.g.* the merger between two companies having their tax residence in Germany with a permanent establishment in Italy), thus preventing application of the EC merger rule. In the latter case, however, one could maintain that the tax regime of the domestic merger is applicable, thus safeguarding tax neutrality of the transfer of the permanent establishment from the merged company to the acquiring company, provided that the transaction qualifies as a merger from the Italian legal angle and that the companies taking part in the merger have a legal form corresponding to those to which the domestic tax rules apply (see Italian Tax Administration, Resolution 3 December 2008, No. 470).

[53] Italian tax authorities have denied that the merger tax regime is applicable in Italy if the combination of the permanent establishments of two English companies follows an amalgamation procedure under English laws as (among others) this procedure, on the basis of its features, does not qualify as a merger procedure from the Italian angle (see Italian Tax Administration, Resolution 12 February 2008, No. 42/E).

[54] This regime also applies to Italian cooperative companies, mutual insurance companies and public and private entities referred to in Article 73, first paragraph, letter b), of the ITC.

resident outside of the EC under a double taxation convention concluded with a third state.[55]

Companies taking part in the merger which are resident in another EU Member State must have one of the legal forms listed in Annex A to the ITC[56] and be subject to one of the taxes listed in Annex B to the ITC.[57] The legal status and the tax residence of the shareholders of the merged companies is not relevant.

(C) Special tax regime

If these conditions are met, the same rules laid down for domestic mergers apply. The general principle of tax neutrality of mergers finds however some exceptions in order to safeguard the authority of Italy to levy taxation in respect of companies taking part in the merger. Indeed, to the extent that assets of a company taking part in the merger are diverted to another country because of the cross-border merger, Italy may lose the ability to levy taxation on the latent capital gains deriving from these assets. Additionally, specific issues arise if the acquiring company is resident in Italy, in connection with the identification of the tax value, for Italian purposes, of the items acquired by them following the merger. Preservation of tax losses represents a further critical aspect of cross-border mergers. Some of these aspects have been expressly ruled out by the provisions that implement the Merger Tax Directive, while in other cases a possible solution must be catered for on the basis of the general principles. We will hereinafter illustrate the main tax implications where an Italian company is absorbed by a company resident in another EU Member State and then where an Italian company is the company resulting from the cross-border merger.

(ii) An Italian company is absorbed by an EU eligible company

(A) General remarks

In principle, the same rules applicable to domestic mergers apply to this case. If the items transferred as a result of the merger do not form part of a permanent establishment in Italy, however, any capital gains on these items are taxable in Italy. Italian taxation is also triggered if these items are subsequently transferred or taken

[55] G. MAISTO, 'Implementation of the EC Merger Directive', in *Tax Bulletin* (1993), 483. By contrast, this limitation is expressly set out for companies resident in a EU Member State, which must not be deemed as resident outside of the EU under an applicable treaty to avoid double taxation (see Article 178, first paragraph, of the ITC).

[56] This list equates to that set out in the relevant attachment to the Merger Tax Directive, as amended by Article 1 of the Directive of the Council 2005/19/CE of 17 February 2005 as subsequently updated.

[57] This list equates to that set out in the relevant attachment to the Merger Tax Directive as subsequently updated.

away from the permanent establishment (*e.g.* if they are attributed to the headquarters or to a foreign permanent establishment of the company).

It is debated whether, in order to be considered as part of the permanent establishment for the purpose of this rule, it is sufficient for an item to be registered in the books of the permanent establishment (so-called accounting criterion) or, rather, it is necessary that this item is effectively connected to the permanent establishment, meaning, under the interpretation of the OECD commentary, that there is an economic link with the permanent establishment.[58]Indeed, the Italian provisions do not literally require that these items are effectively connected to the permanent establishment, thus suggesting that the mere record of these items in the books of the permanent establishment should theoretically be sufficient to avoid taxation in Italy. In this respect, however, one should bear in mind that the mere attribution of items to a permanent establishment for accounting purposes only, without sound economic reasons, could be scrutinised by the tax authority on the basis of the anti-abuse rules.

In the event that the business as a going concern of the Italian absorbed company does not flow into a permanent establishment in Italy, and therefore triggers Italian taxation, it is debated whether goodwill (that is not shown in the books of the absorbed company) is deemed to be disposed of together with the business. Although the negative solution is preferable, at least where this goodwill is not recognised for tax purposes in the jurisdiction of the acquiring company.[59] the position of the tax administration on this topic is not clear cut and the adoption of a conservative approach in the future – *i.e.* trying to include goodwill in the taxable base – cannot be excluded.[60].

[58] M. Piazza, *Guida alla fiscalità internazionale* (2004), p. 1225; S. Mayer, 'Effetto del trasferimento della sede all'estero' (1995) Corriere tributario 27. Other scholars are inclined to require that an effective connection exists with the permanent establishment, under the meaning of the OCSE Commentary (see G. Maisto, *supra* footnote No. 55, p. 484 and A. Nuzzolo – E. Felter, 'Le direttive sul risaprmio e sulle fusioni' in Aa.Vv. *Manuale di fiscalità internazionale* (2010), 245.

[59] In particular with reference to the migration of a company outside of Italy: M. Piazza, *supra* footnote No. 58, p. 1225; *contra* V. Ficari, 'Il trasferimento della sede all'estero, continuità della destinazione imprenditoriale e contrarietà al trattato CE dell'exit tax sulle plusvalenze latenti' (2004) Rassegna Tributaria 2146 and S. Mayer, 'Il trasferimento della residenza delle società: i problemi che dovrà affrontare il decreto attuativo' (2012) Bollettino Tributario 332.

[60] In a ruling concerning the liquidation of the permanent establishment in Italy of an English company (see Italian Tax Administration, Resolution 7 November 2006, No. 124/E) the Italian tax authority has held that in determining the *valore normale* of the business for the purposes of the Italian taxation, one must also take into consideration the *valore normale* of the client list and the know-how which are not shown in the books of the permanent establishment. Even though the tax ruling does not address the goodwill, the tax authority has clearly extended the scope of the provision – according to which tax is levied in Italy when items are diverted form the permanent establishment here – to intangibles that are not shown in the books of the company.

In the light of the above, Italian taxation would arise where the company resulting from the merger does not consequently have a permanent establishment in Italy following the merger to which the items of the absorbed company may flow: this may be the case where the Italian incorporated entity was a pure holding company (unless the activities of the holding are carried on at the level of permanent establishment) or where the Italian company performed activities that are included in the number of activities treated as exceptions to the general definition of permanent establishment (*e.g.* when it only operates storage, or display of delivery of goods).[61] In these cases Italian taxation would be triggered, thus jeopardising the tax neutrality of the merger.

The deemed disposal is at arm's length, more precisely at "normal value", as defined by Italian law.[62]

(B) Tax value of the items flowed to the permanent establishment

The items flowed to the Italian permanent establishment of the acquiring company, as a result of the merger, maintain the same value for tax purposes that they had for the merged company. In case of step-up in value of these items for accounting purposes, the step-up in value is not relevant for tax purposes[63]unless the acquiring company opts for a tax-step-up by paying substitutive tax according to the terms mentioned in paragraph 1(b)(i)(F) above.

[61] This is the case which has been addressed in the Italian Tax Administration Resolution 27 January, 2009, No. 21/E, where the Italian tax authority has denied tax neutrality in a merger where, based on the activity carried on in Italy by the acquiring company after the merger, a permanent establishment cannot be deemed to exist in Italy.

[62] According to Article 9, third and fourth paragraphs, of the ITC, "normal value" means the average price or consideration paid for goods and services of the same or a similar type, in free market conditions and at the same level of commerce, at the time and place at which the goods and services were purchased or performed, or, if no such criteria are available, at the time and place nearest thereto. When determining normal value, reference must be made – to the extent possible – to price lists or tariffs of the party which has supplied the goods and services or, if necessary, to the indices and price lists of the Chamber of Commerce and to professional tariffs, taking normal discounts into account. For goods and services subject to price control, reference must be made to the regulation in force. Normal value is determined: (i) for shares, bonds and other securities listed on a stock exchange or traded over-the-counter, on the basis of the average settlement price or the actual prices in the last month; (ii) for other shares, quotas of companies not limited by shares and for securities or quotas representing participations in the capital of entities other than companies, in proportion to the net worth of the company or entity or, for newly-incorporated companies, to the total amount of the transfers to capital; and (iii) for bonds and securities other than those indicated under (i) and (ii) above, by comparison with securities having similar features listed on a stock exchange or traded over-the-counter and, if there are none, on the basis of other precise factors.

[63] Differences between the accounting values and tax values of the entries in the Italian permanent establishment must be reported in a recapitulative statement attached to the tax return in Italy of the company resulting from the merger.

(C) Permanent establishments of the Italian absorbed company

Assets relating to any permanent establishment of the absorbed company located outside Italy are deemed to be disposed of at "normal value". In this case, however, if the permanent establishment is located in an EU member State, a notional tax credit is granted to the company. The notional tax credit equates to the tax that the foreign EU member State would have applied in the event of effective realisation of the permanent establishment at that moment. The notional tax credit applies up to the amount of Italian tax due. According to Article 165 of the ITC, in all other cases a double taxation might occur with reference to the assets of the foreign permanent establishment of the company and only the domestic tax credit on foreign taxes can be claimed, whereby only taxes effectively paid in a foreign country would be granted against the tax due on the deemed transfer of the permanent establishment.

(D) Retroactive effects

Under Articles 2504-*bis*, third paragraph, of the ICC and Article 172, ninth paragraph, of the ITC, this merger may have retroactive effects, for accounting and direct tax purposes, with the limitations set out for domestic mergers, provided that the merger does not cause a taxable event as a consequence of the fact that items of the absorbed company do not flow to a permanent establishment in Italy. Therefore, retroactive effects are generally prevented if the Italian absorbed company has a permanent establishment outside of Italy, which passes to the acquiring company due to the merger.

(E) Preservation of losses

In the event the Italian company is absorbed into an EU company and a permanent establishment of this latter company is set up in Italy, tax losses accrued before the tax period in which the merger is effective can be carried forward in the hands of the Italian permanent establishment: (i) in the same proportion as the endowment fund of the permanent establishment to the net equity of the company before merger; and (ii) for an amount not exceeding the endowment fund. It is worth noting that the endowment fund means here the difference between positive and negative items effectively connected to the permanent establishment of the acquiring company after the merger, according to Article 181 of the ITC. The above restrictions to the carry forward of tax losses in the domestic merger apply to tax losses of both the company and the permanent establishment, to the extent that the acquiring company has a permanent establishment in Italy to which flows the business of the Italian absorbed company.[64]

[64] Italian Tax Administration, Circular Letter 30 March 2007 No. 66/E.

(F) Tax-deferred reserves

Under Article 180 of the ITC, tax-deferred reserves shown in the balance sheet of the absorbed company trigger taxation upon merger to the extent they are not reinstated in the records of the permanent establishment in Italy. Based on a literal interpretation no distinction is made – as, by contrast, is done with regards to a domestic merger[65] – between tax-deferred reserves that are taxable in any case when utilised and tax-deferred reserves that trigger taxation only upon distribution to the shareholders.

(iv) An EU eligible company is absorbed by an Italian acquiring entity

(A) General remarks

The same rules applicable to domestic mergers apply here. If the absorbing company has a permanent establishment in Italy, the Italian acquiring company will receive the assets connected to this permanent establishment, which maintain the same value for tax purposes. Differences between the accounting values and tax values must be reported in the tax return, whilst the acquiring company can opt for the tax step-up of these values, up to their relevant accounting value, by paying a substitutive tax.

(B) Tax values of the items that do not pertain to an Italian permanent establishment

In this case it is essential to identify the tax value that will be attributed, for Italian tax purposes, to the items of the acquiring company.[66] Indeed, before the merger these items would not generally have a tax value recognised in Italy, which could be passed to the acquiring company following the merger. On the other hand, it is doubtful that the tax value of these items in the relevant foreign State – *i.e.* the State of the absorbed company or, if different, the State where its permanent establishment is located – can automatically be adopted as the tax value for Italian tax purposes as well. Indeed, the main scholars hold that the tax value of these items for Italian tax purposes should rather equate to their market value,[67] thus avoiding Italy

[65] Please refer to 1(b)(i)(D) above.

[66] This would be the case, by way of example, if following the merger the acquiring company results in having a permanent establishment in Germany, or in another EU country or holding items located in a foreign country, which however do not pertain to a permanent establishment in Italy. The question could also arise with reference to an item located in Italy but pertaining to a permanent establishment located outside of Italy.

[67] *Ex multis*: D. STEVANATO, 'Le riorganizzazioni internazionali di imprese' in (coordinated by) V. UCKMAR, Diritto tributario internazionale (2005) 527 and G. ZIZZO, Le riorganizzazioni societarie,

triggering taxes on capital gains accrued, before merger, in the home country, on the one hand, and avoiding "double taxation" when the home country levies an exit tax on these capital gains, on the other hand. In view of these considerations, the Italian tax authorities seem rather prefer to distinguish whether or not the merger has triggered taxation in the home country.[68] If no taxation has been applied.[69] it would be reasonable to maintain that the tax value, for Italian purposes, equates to the book-value of these items in the home country, thus including depreciation and amortisation. Otherwise, their market value[70] should in principle be considered as the tax value for tax purposes in Italy.

(C) Retroactive effects

Under Articles 2504-*bis*, third paragraph, of the ICC and 172, ninth paragraph, of the ITC, this merger may have retroactive effects, for accounting and direct tax

nelle imposte sui redditi (1996), 352; C. GARBARINO, Manuale di tassazione internazionale, (Milano 2008) p. 1566; M. GIACONIA and D. CHIESA, Fusioni transnazionali: "slalom" fra vincoli fiscali e lacune normative, in (11/2011) Fiscalità e commercio internazionale, 5.

[68] This approach seems to be that adopted by the tax administration in rulings released about the migration of companies from an EU country to Italy, namely about the tax value that must be attributed to the items of the permanent establishment, which is set up in the home country following the migration of the tax residence from that country to Italy (Resolution 67/E of 30 March 2007 and Resolution 345/E of 5 August 2008).

[69] This should not be the case where taxes have not been actually applied because of specific exemption rules applicable in the home country (*e.g.* on the basis of participation exemptions rule).

[70] The meaning of "market value" for this purpose is indeed debated: in a ruling concerning the migration of an individual from Germany to Italy (Resolution 67/E of 30 March 2007) the tax authorities have agreed to consider as tax value in Italy the value adopted by the home country for the purposes of its exit tax. In this respect, the tax authorities referred to the rule set out by Article 12 of the Protocol to the Italy-Germany Tax Treaty, although, as a matter of fact, this rule was not applicable in the case examined. In particular, this provision sets out that "where a Contracting State subjects to tax, on the occasion of emigration of an individual resident in that State, the appreciation of the value of a substantial participation in a company resident in that State, the other State shall, in the case of a subsequent alienation of this participation, to the extent it subjects to tax the gains from such an alienation (…), accept as the acquisition cost for the purpose of determining the gains from the alienation the amount established by the first mentioned State as the fictional value of the participation at the moment of emigration. The term "substantial participation" means a participation of at least 25% in the capital of the company.". Despite this isolated resolution – from which it is not possible to deduct a general principle – we are still in a grey area as to the identification of this "market value" given the lack of expressed provisions of law. To this aim, one could refer to the concept of "*valore normale*" as laid down by domestic rules (Article 9, third and fourth paragraphs, of the ITC – please refer to footnote No. 62); an alternative route could be to refer to the "arm's length value" as defined in the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations dated July 2010, which has been expressly accepted in the Italian jurisdiction following the recent provisions about transfer pricing (Article 26 of the Italian Legislative Decree dated 31 May 2010 and the Regulation of the Italian Revenues' Agency No. 137654 dated 29 September 2010).

purposes, under the terms illustrated above, provided that the merger has legal effect from a date falling in the first half of the tax period. By contrast, if the legal effects of the merger commence in the second half of the tax period, the retroactivity to a previous date would not be allowed to the extent that it would include in the taxable income of the acquiring company the income generated by the absorbed company outside of Italy (other than through a permanent establishment in Italy). Finally, the retroactive effect should be allowed without specific restrictions (in any case not before the end of the previous tax period for Italian tax purposes) in the case of a merger between companies resident outside of Italy with reference to the income of their permanent establishment in Italy.

(D) Preservation of losses

It is debated whether the rule governing preservation of tax losses (Article 179 of ITC) may apply in relation to losses generated at level of the absorbed EU eligible company, thus allowing the use of that losses by the Italian acquiring entity. Refusing preservation of losses of the absorbed company might indeed represent a restriction of the freedom of establishment. Further, bearing in mind the principle of proportionality, it is questionable that this refusal may be grounded on anti-abuse reasons, unless these tax losses can be used twice (i.e. in Italy and in the state of the absorbed company).[71]

(v) Taxation at the level of shareholders

The attribution of the shares of the acquiring company to the shareholders of the absorbed company does not trigger Italian taxation for the shareholders. The tax value of the cancelled shares represents the tax value of the shares received in exchange.

Under Articles 44, 58 and 87 of the ITC, cash settlement must be included in the taxable income of the shareholders by applying the specific rules set out for the determination of the income deriving from the withdrawal from a company.

When the cash settlement is made by the Italian incorporated company to a non-Italian resident shareholder (without permanent establishment in Italy to which the shareholding is connected) an income from capital may arise from the Italian viewpoint, according to Article 23 read in combination with Article 44 of the ITC, and trigger outbound withholding tax. In this case, withholding tax applies at the ordinary rate of 20% (which can however be reduced according to the applicable tax treaty to avoid double taxation) or at a reduced rate of 1.375% when the ben-

[71] Decision of 21 February 2013, Case C-123/11 *Korkein hallinto-oikeus*; See C. GARBARINO, Manuale di tassazione internazionale, 1571.

eficial owner of the payment is a company resident and subject to corporate income tax in a EC Member State or in a State of the EEA that allows an adequate exchange of information with the Italian tax authorities, as per Article 27 of the Italian Presidential Decree 29 September 1973, No. 600. Finally, in this latter case an exemption may be available under the EU Directive 435/90/CEE (so-called "parent-subsidiary directive"), as implemented in Italy by Article 27-bis of the Italian Presidential Decree 29 September 1973, No. 600.[72]

(vi) Indirect taxes

According to Article 2, third paragraph, letter f, of the Italian Presidential Decree 26 October 1972, No. 633, transfers of assets upon a merger transaction are not subject to value-added tax.

Mergers are subject to a registration tax at a flat amount of Euro 168.00 (Euro 200.00 from 1st January 2014), as per Article 4 of the Tariff of the Italian Presidential Decree 26 April 1986, No. 131. If the merger entails the transfer of real estate assets located in Italy, the deed of merger is also subject to a mortgage and cadastral taxes at a flat amount of Euro 168.00 (Euro 200.00 from 1st January 2014) each, according to Articles 4 and 10 of the Tariff of the Italian Decree 31 October 1990, No. 347.

No financial transaction tax[73] should be levied in relation to shares held by the absorbed company and passed to the acquiring company as a result of the merger[74]. It is also worth noting that according to Article 15, first paragraph letter c) of the Ministerial Decree of 21 February 2013, no Italian financial transaction tax[75] ap-

[72] The qualification as parent company under this provision requires, among others, that the shareholder is a qualified EU company that holds at least a 10% shareholding in the acquired company. This shareholding must have been held by the shareholder uninterruptedly for at least one year at the time of the cash payment. If the holding period elapses after the payment, the shareholder is allowed to claim for withholding tax refund (provided that all other conditions are met).

[73] Pursuant to Article 1 Law No. 228 of 24 December 2012, as of 1st March 2013 a financial transaction tax applies at a rate of 0.2% (0.22 in 2013) upon transfer of the property rights in (i) shares and other participating securities issued by Italian resident companies pursuant to Article 2346, sixth paragraph, of the ICC and (ii) financial instruments representing these shares and/or participation securities, whether issued by an Italian resident issuer or not. The taxable base is the "transaction value" *i.e.* generally the consideration agreed between the parties. Transfer of ownership rights in quotas of limited liability companies (*società a responsabilità limitata*) are out of the scope of the financial transaction tax. Further, a number of exemptions applies.

[74] A. Carlucci, L. Miele, S. Posa, Esenzioni ed esclusioni in materia di imposta sulle transazioni finanziarie, in (2013) Corriere tributario, 1151.

[75] As of 1st March 2013 a financial transaction tax applies at a rate of 0.2% (0.22 in 2013) upon transfer of the property rights in (i) shares and other participating securities issued by Italian resident companies pursuant to Article 2346, sixth paragraph, of the ICC and (ii) financial instruments representing these shares and/or participation securities, whether issued by an Italian resident issuer or not. The taxable

plies upon assignment to the shareholders of the merged company of newly issued shares of the company resulting from the merger. If the assigned shares have not been newly-issued upon merger, the safe harbour for intra-group transactions may apply, according to which no financial transaction tax is levied upon transactions carried out between a company and its controlling[76] company, nor between companies which are controlled by the same company.

III. Cross-border splits involving Italian and German companies

(a) Corporate Law

(i) Applicable Rules

Italian law, to the inclusion of the Italian Decree, does not contain any express references to cross-border splits involving Italian companies.

However, even if Italian jurisprudence has not nearly dealt with cross-border splits, the prevailing Italian scholars maintain that the provisions of the Italian Decree apply by analogy to cross-border splits.[77]

What follows assumes that the provisions of the Italian Decree are applicable *mutatis mutandis* to cross-border splits involving Italian companies.

(ii) Qualified entities

The same entities eligible for cross-border mergers are entitled to take part to cross-border splits.

In this respect, please see under paragraph 1(a)(ii) above.

(iii) Process of split of a German company into an Italian company

The required steps outlined under paragraph 1(a)(iii) above apply, save for the following main exceptions:

base is the "transaction value" *i.e.* generally the consideration agreed between the parties. Transfer of ownership rights in quotas of limited liability companies (*società a responsabilità limitata*) are out of the scope of the financial transaction tax. Further, a number of exemptions applies.

[76] According to Article 2359, first paragraph, n. 1) and 2) and second paragraph of ICC.

[77] See, among others, M. BENEDETTELLI – G. RESCIO, *supra* footnote No. 36, p. 746 and F. MAGLIULO, *La scissione delle società* (Milan, 2012), 92. Contrariwise, see P. MENTI, *supra* footnote No. 13, p. 1318, according to whom cross-border splits are out of the scope of the Italian Decree since it expressly carves out the transfer of a branch of business.

(A) Split plan

In addition to the information set forth under paragraph 1(a)(iii)(A) above, under Article 2506-*bis,* first paragraph, of the ICC, the split plan must contain the description of the assets and liabilities of the German split company to be assigned to the Italian beneficiary company.[78]

According to Article 2506-*bis*, fourth paragraph, of the ICC, the split plan may also provide an allotment of the new participations of the Italian beneficiary company which is non-proportional to the original participations held by the shareholders of the German split company,[79] provided that the plan expressly states that the shareholders who do not approve the split will be entitled to sell their participations to one or more identified persons for a fair consideration.

(B) Split report

In addition to the information set forth under paragraph 1(a)(iii)(C) above, under Article 2506-*ter,* second paragraph, of the ICC, the split report must also contain the actual net assets value assigned to the Italian beneficiary company and of the one which will remain within the German split company after the split.

(C) Joint liability

Under Article 2506-*quater,* third paragraph, of the ICC, upon the cross-border split becoming effective, the German split company and the Italian beneficiary company shall be held jointly, but not severally (*obbligazione solidale, ma sussidiaria*), liable with respect to any debts existing at the time the split becomes effective which are unsatisfied by the company that has assumed such debt as a result of the demerger, *i.e.* a debt of the German split company can be claimed against the Italian beneficiary company only after it has been unsuccessfully enforced against the German company and vice versa[80].

[78] If the destination of a given asset of the German split company is not clearly stated under the split plan, this asset remains within the German split company. If the destination is not clear in connection with a debt, the German split company and the Italian beneficiary company are jointly liable for it and the liability of the Italian beneficiary company is limited to the actual value of the net assets assigned by the German split company as a result of the split.

[79] For instance, the corporate capital of the German company Alfa GmbH is held equally by the shareholders A and B. Alfa splits a part of its assets to the Italian company Beta S.p.A. who has a sole shareholder C. The split plan may provide that, as a consequence of the split, Alfa GmbH will be participated in by A and B at 70% and 30%, respectively, while Beta S.p.A. will be participated in by A, B and C at 50%, 30% and 20%, respectively.

[80] It is worth highlighting that, according to the prevailing opinions on the matter, the joint, but not several, liability arising as a consequence of a demerger must be construed as assisted by the benefit of enforcement (*beneficium excussionis*), *i.e.* a creditor of the demerging company would be entitled to

Moreover, the German split company would be held liable *vis-à-vis* third parties with respect to any unsatisfied debts of the Italian beneficiary company only within the limits of the actual net asset value retained by the demerging company as a result of the demerger, with recourse against the Italian beneficiary company. Symmetrically, the Italian beneficiary company would be held liable *vis-à-vis* third parties with respect to any unsatisfied debts of the German split company only within the limits of the actual net asset value assigned to the beneficiary companies as a result of the demerger, with recourse against the demerging company.

(iv) Process of split of an Italian company into a German company

The required steps outlined under paragraph 2(a)(iii) above also apply to a cross-border split of an Italian company into a German company.

(b) Tax consequences in Italy

(i) Italian tax regime applicable to domestic splits

(A) General remarks

Splits of an Italian company, regardless of whether total or partial, are neutral from a tax angle. In particular, according to Article 173, first paragraph, of the ITC, splits do not give rise to taxable realisation or distribution of capital gain or losses on the assets being split (including inventory and goodwill) even though these gains or losses are shown in the financial statements of the beneficiary company (or companies) to which these items are assigned regardless of whether this is a newly incorporated company or an existing company.

It should be noted that to apply domestic rules on splits, it is not necessary that the shares or quotas of the beneficiary companies are allotted to the shareholders of the split company in the same proportion as the rights in the capital of this latter company (so-called proportional division). Further, to apply this tax regime it is not necessary that the assets transferred due to the division constitute a business as a going concern.[81]

The same rule set out for mergers applies here with regard to (I) the retroactive effects for accounting and direct tax purposes, but only in relation to the total split and provided that the end of the fiscal period of the split company equates to that of

claim against the beneficiary companies only after the enforcement of its claims against the split company and to the extent the assets of the split company are insufficient to satisfy such claim.

[81] M. Leo, *Le imposte sui redditi* (Milano, 2010) I 2573. Splits not involving business concerns may however be generally scrutinised from the perspective of the anti-abuse rule.

the beneficiary companies;[82] (II) the possible tax step-up in tax values of the assets of the split company which are attributed to the beneficiary companies;[83] (III) anti abuse rules[84] and (IV) indirect taxes.[85]

(B) Attribution of fiscal rights and duties

These are attributed to the beneficiary companies (or maintained by the divided company in the case of partial division) in proportion to the net equity of the split company transferred to each of the beneficiary companies (or maintained by the divided company). However, to the extent they relate to specific assets (*e.g.* depreciation allotments) they are passed to the beneficiary company that acquires the relevant asset, according to Article 174, fourth paragraph, of the ITC. Tax liabilities of the split company for tax periods prior to the split remain with the split company. In the case of a total split, they are passed to the beneficiary company specifically identified as such in the deed of division. However, each of the beneficiary companies is jointly liable for taxes, sanctions and interest related to the tax period prior to the division, according to Article 173 of the ITC.

(C) Preservation of tax losses and deferred reserves

Tax losses of the split company are attributed to the beneficiary companies (or maintained by the split company in case of partial split) in proportion to the net equity of the split company assigned to each of the beneficiary companies (or maintained by the split company). The same limitations set out for the carry forward of tax losses in the case of merger apply here.[86].

The same rules set out for mergers in relation to the tax deferral reserves apply here as well, whereby the attribution of the tax-deferred reserves to the beneficiary companies (or maintained by the split company in the case of a partial split) is proportional to the net equity of the divided company transferred to each of the acquiring companies (or maintained by the divided company). However, tax-deferred reserves connected to specific assets (*e.g.* reserves set aside in connection with tax step-up in values of assets according to specific laws) follow the relevant assets.

[82] Please refer to paragraph 1(b)(i)(B) above.
[83] Please refer to paragraph 1(b)(i)(F) above.
[84] Please refer to paragraph 1(b)(i)(H) above.
[85] Please refer to paragraph 1(b)(vi) above.
[86] Please refer to paragraph 1(b)(i)(C) above.

(ii) Italian special regime applicable to EU cross-border divisions

(A) General remarks

Italian rules implementing the Merger Tax Directive apply to cross-border splits involving eligible companies[87] where two or more EU member States are involved and provided that: (I) the split is proportional; (II) the items assigned (and those maintained by the split company in case of partial split) to the beneficiary company constitute a business – or a branch thereof –as a going concern; and (III) the cash settlement is less than 10% of the nominal value of the shares or quotas issued by the beneficiary company. The conditions for EU splits are therefore stricter than those for domestic ones, which do not expressly require that the split items form a business as a going concern or a branch of a business as a going concern, nor that the split is proportional.

At least one company involved in the split (the split company or one of the beneficiary companies) must be resident in Italy. Further, in the event that the split partially qualifies as an EU split and partially as a domestic split (*e.g.* an Italian company is split into an Italian company and to an EU eligible company) the special regime only applies to the portion of the net equity assigned to the EU beneficiary company.[88]

The legal status and tax residence of the shareholders of the split company is not relevant.

These rules also apply where a split involves companies resident in EU countries, in relation to their permanent establishment located in Italy.

(B) Special tax regime

If the aforementioned conditions are satisfied, the same rules for domestic split and – to the extent applicable in this case – the special rules laid down for EU mergers (*e.g.* those relating to the tax deferred reserves and carry forward of tax losses) apply.

(iii) Taxation at the level of shareholders

No taxable capital gain or capital increase is deemed to be realised in the hands of the shareholders of the split company, who exchange their participation with shares or quotas of the beneficiary companies. Tax value of the exchanged share-

[87] Please refer to paragraph 1(b)(ii) above for the definition of the eligible company.
[88] See G. MAISTO, *supra* footnote No. 55, 488.

holding is attributed to the received shares or quotas. As in a merger, a cash settlement may give rise to taxable income.[89].

IV. Other cross-border reorganisations involving Italian and German companies

Apart from cross-border mergers and splits, international reorganisations entailing a cross-border transfer of assets and/or liabilities could be structured as a contribution in kind.

What follows is the legal framework under Italian law of contributions in kind from German companies into Italian companies and vice versa.

(a) Corporate law

(i) Applicable rules

Italy has not enacted a special legislation regulating cross-border contributions.

However, under Article 25, second paragraph, letter g), of Italian Law 31 May 1995, No. 218, the governing law of the relevant entity applies as far as the procedural aspects allowing the acquisition of the quality of shareholder are concerned.

Accordingly, Italian law applies to the procedural rules of a cross-border contribution (whether in kind or in cash) as far as the receiving entity is an Italian company.[90]

Furthermore, certain special Italian provisions may apply nonetheless – *i.e.* irrespective of the nationality of the receiving company – if the assets contributed are located in Italy.

(ii) Contribution in kind from a German company into an Italian company

Under Italian law, the German contributing company must file a sworn appraisal report of an expert[91] containing (I) the description of the assets to be contributed,

[89] Please refer to paragraph 1(b)(v) above.

[90] See G. CONETTI – S. TONOLO – F. VISMARA, *Commento alla riforma del diritto internazionale privato italiano* (Turin, 2001), 106.

[91] If the Italian receiving entity is an Italian limited liability company (or an Italian cooperative company whose by-laws opted for the application of the provisions regulating Italian limited liability companies), the expert must be a chartered auditor or a chartered auditing company, as per Article 2465, first paragraph, of the ICC. However, if the Italian receiving entity is a joint-stock company, an Italian partnership limited by shares (*società in accomandita per azioni*) or an Italian cooperative company limited by shares (*società cooperative per azioni*), the expert must be appointed by the Court where the Italian receiving entity has its registered office, as per Article 2343, first paragraph, of the ICC.

(II) the indication of the criteria of evaluation adopted and (III) the certification that the value of the assets to be contributed is at least equal to the one attributed to them for the purpose of the determination of the relevant issued capital stock and of the possible premium.[92]

Pursuant to Article 2441, sixth paragraph, of the ICC, should the Italian receiving entity be a joint-stock company (*società per azioni*), a partnership limited by shares (*società in accomandita per azioni*) or a cooperative company limited by shares (*società cooperativa per azioni*), the directors of the Italian receiving company must approve a report pointing out the reasons for the contribution in kind and the criteria of evaluation adopted for assessing the price of the shares to be issued. The directors' report must be delivered to the board of statutory auditors of the Italian receiving company at least 30 days prior to the shareholders' meeting resolving upon the capital increase. Within 15 days following the delivery of the directors' report, the board of statutory auditors must issue its opinion on the fairness of the price of shares to be issued and this opinion must be deposited in the registered office of the Italian receiving entity at least 15 days prior to the shareholders' meeting resolving upon the capital increase and until this increase is resolved.

The shareholders' meeting of the Italian receiving company must approve the increase of its corporate capital with the majorities required to amend the by-laws.[93] The minutes of the shareholders' meeting must be drafted by an Italian notary public who will act as the secretary of the meeting and shall file the relevant minutes with the competent Companies' Register of the Italian receiving entity within 30 days as of the date of the resolution, pursuant to Article 2436, first paragraph, of the ICC.

(A) Contribution of shares or quotas of an Italian company

If the assets to be contributed are shares or quotas of an Italian company, the formalities provided by Italian law for the transfer of these shares or quotas shall apply.

In particular, as far as a contribution of shares of an Italian company is concerned, the most common way to transfer shares in Italy is by means of an endorse-

[92] Should the Italian receiving entity be a joint-stock company (*società per azioni*), a partnership limited by shares (*società in accomandita per azioni*) or a cooperative company limited by shares (*società cooperativa per azioni*), Article 2440, second paragraph, of the ICC (read in combination with Article 2343-*ter*, first paragraph, of the ICC) provides that, with the favourable decision of the directors of the Italian receiving company, the report is not necessary in a number of circumstances. For instance, the said report is not necessary for the report is not required as well for other assets to be contributed provided that the value assigned to them is equal to or lower than (i) their fair value shown in the audited financial statements of the German contributing company or (ii) the value certified by an independent expert having a reference date falling within the six month period before the contribution.

[93] Please see under footnote No. 20.

ment certified by an Italian notary public, as per Article 2355, third paragraph, of the ICC; while, as far as a contribution of quotas of an Italian company is concerned, the transfer deed must be certified by an Italian notary public, who shall file it in the competent Companies' Register where the Italian receiving company has its registered office within 30 days following the transfer, according to Article 2470, second paragraph, of the ICC.[94]

(B) Contribution of a business as a going concern located in Italy

If the assets to be contributed form a business as a going concern[95] located in Italy, special Italian regulations – aimed at both (I) simplifying the transfer of those agreements, credits and debts pertaining to the business as a going concern and (II) protecting the employees whose employment agreement would be transferred –apply.[96]

In particular:

I. according to Article 2558 of the ICC, unless otherwise provided by the German contributing company and the Italian receiving entity, all agreements pertaining to the business as a going concern are automatically transferred to the Italian receiving company (*i.e.* no specific authorisation or consent of the assigned contractual counterparty is required), except for the agreements having a "personal nature";[97] in any case, the assigned contractual counterparty is

[94] Pursuant to Article 36, paragraph 1-*bis*, of the Italian Law Decree 25 June 2008, No. 112 (as converted by the Italian Law 6 August 2008, No. 133), the transfer deed can be also executed with a digital signature and filed by an Italian chartered accountant.

[95] Under Article 2555 of the ICC, a business as a going concern is "the aggregate of assets organized by the entrepreneur for the conduct of its enterprise".

[96] The same regulations apply whether the contracts, debts and/or credits pertain to a branch of a business as a going concern. In this respect, a branch of a business as a going concern is defined by Article 2112, fifth paragraph, of the ICC as "an autonomous part of an organised economic activity identified by the assignor and the assignee at the time of its transfer".

[97] The Italian prevailing case law and scholars maintain that the agreements having a "personal nature" are those agreements in relation to which the personal qualities of the transferor of the going concern are of particular relevance for the counterparty or, otherwise, those agreements under which the transferor of the going concern has to perform non-fungible activities. In this respect, see, among others, A. VANZETTI, 'Osservazioni sulla successione nei contratti relativi all'azienda ceduta' (1965) Riv. Soc. 539, G.E. COLOMBO, 'L'azienda' in *Tr. Galgano*, 82 and Court of Appeal of Milan 21 January 1986, in *Rep. Foro It., 1986, Azienda* [0790], No. 5.

The majority of Italian scholars have also affirmed that contractual clauses expressly excluding the possibility to assign the agreement to third parties may attribute a "personal nature" to the agreement at stake as long as the agreement expressly refers to the specific context of a transfer of a business as a going concern. In this respect, see, among others, D. RUBINO, *La compravendita* (Milan, 1971), 165, note 132 and G. FERRARI, *Enciclopedia del diritto, sub* "Azienda" (Milan, 1978), 721-722.

entitled to terminate the relevant agreement on the basis of a just cause[98] within three months from the transfer of the business as a going concern;

II. under Article 2559 of the ICC, the assignment of the credits pertaining to the business as a going concern is effective as of the date on which the transfer of such business is registered in the competent Companies' Register; however, the relevant debtor is released if it pays in good faith to the German contributing company;

III. pursuant to Article 2560, second paragraph, of the ICC, the debts are transferred to the Italian receiving company to the extent they are shown in the mandatory accounting records of the transferred business as a going concern; however, the transferor is jointly liable for these debts unless the relevant creditor consented to the transfer;

VI. as per Article 2112, first paragraph, of the ICC, the employees pertaining to the business as a going concern are transferred to the Italian receiving company and maintain all their rights accrued before the transfer. The German contributing company and the Italian receiving company are jointly and severally liable for any and all sums due to the employees as at the date of the transfer of the business as a going concern. In the event of a transfer of a business as a going concern employing more than 15 employees, the German contributing company and the Italian receiving company must follow the union procedure set forth under Article 47 of the Italian Law 29 December 1990, No. 428.[99]

(C) Contribution in kind from an Italian company into a German company

German law applies to the procedural rules of a cross-border contribution as far as the receiving entity is a German company.

In addition, should the assets to be contributed be either (a) shares or quotas of Italian companies or (b) a business – or a branch thereof – as a going concern located in Italy, the Italian special regulations pointed out under sections, respectively, (A) and (B) above apply.

[98] According to the prevailing case law and scholars, the existence of a just cause can be successfully alleged mainly in respect of the financial and economic weakness of the transferee which hinders the reliability of such party in respect to its capacity to duly fulfil its contractual obligations *vis-à-vis* the assigned contractual counterparty. In this respect, see, among others, G.F. CAMPOBASSO, *Diritto Commerciale* (Turin, 2003), I, 151 and G. BONFANTE – G. COTTINO, 'L'imprenditore' in *Trattato di diritto commerciale* (Milan, 2001), I, 6367.

[99] Please see under paragraph 1(a)(iii)(K) above.

(b) Tax consequences in Italy

From a tax angle, the tax treatment of a contribution in exchange for shares or quotas may vary depending on the tax status of the contributing entity and the object of the contribution. In the following we will distinguish between domestic tax regimes (which under certain circumstances also apply in cross-border transactions, as explained below) and tax regimes deriving from the Merger Tax Directive.

(i) Italian tax regime applicable to an Italian contributing company

(A) General remarks

The contribution in kind is treated as a sale and purchase of the contributed assets from Italian tax viewpoint, that may give rise to a taxable capital gain (or a deductible capital loss) for the Italian contributing company, according to Article 9, second paragraph, of the ITC. In general, the gain or loss resulting from the contribution is included in the business income of the contributing company and is subject to Italian Corporate Income Tax and, in certain limited circumstances, to Local Tax on Productive Activities.

In the event that the contribution is represented by a participation or interest in a company or partnership, the capital gain deriving from contribution is 95%-exempt from Italian Corporate Income Tax (i.e. only 5% of the gain is subject to tax) in the hands of the contributing company if the following conditions are met[100]:

(x) the participation has been held for at least 12 months. If shares have been purchased at different times, in order to identify shares eligible for the participation exemption regime, the shares which have been more recently purchased are deemed to have been sold first;

(xx) the participation has been classified as fixed financial assets (in the case of companies adopting IAS/IFRS fixed financial assets are the assets other than those held for trading) in the financial statements relating to the fiscal year in which the acquisition of the participation has taken place;

[100] Article 87 of the ITC.

(xxx) the participation relates to a subsidiary that carries out an actual business activity[101] [102]. This requirement, however, does not apply to companies listed on a regulated market or to sales made in the context of public offerings;

(xxxx) the subsidiary to which the participation relates is not resident in a country or territory deemed to be a tax haven for Italian tax purposes[103];

At the time of disposal of the participation, the requirements (xxx) and (xxxx) must have been existing for at least three consecutive fiscal years.

In turn, capital losses generated from disposal of participations that satisfy the above requirements are not deductible tax.

If the contributed assets were owned by the contributing company for at least three years prior to the contribution as an alternative to the full payment of the relevant corporate income tax in the year in which the contribution has been effected, the company can opt to pay this tax in equal instalments in this latter year and in the following four tax periods[104]. This rule also applies in the case of contribution of financial assets provided that: (i) the transaction does not benefit from the participation exemption[105] and (ii) the participation was recorded in the last three financial statements of the contributing company.

Finally, if the contributed asset is located outside of the Italian territory or pertains to a permanent establishment of the contributing company outside of Italy, possible double taxation (i.e. in Italy and in the state where the asset and/or the permanent establishment is located) can be mitigated through the applicable tax treaty to avoid double taxation entered into by Italy.

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[101] If the participation relates to a holding company (*i.e.* a company which has as an exclusive or main business activity in respect of the holding of participations), in order to verify whether this requirement is met, reference must be made to the subsidiaries of the holding company ("look-through" approach). This requirement is deemed to be fulfilled if the participations that are held by the holding company and which comply with such requirements represent the greater part of the assets of the holding company.

[102] Some limitations apply to disposal of participation in "real estate companies". In particular, the business activity requirement is not satisfied if the assets of the company mainly consist of real estate assets other than the ones that are built or purchased by the same company in order to be (re)sold or used to carry out a business activity.

[103] These countries and territories are currently itemised in a Ministerial Decree dated 21 November 2001. This requirement is however deemed to be satisfied if the contributing company obtains a positive ruling from the tax administration according to the procedure illustrated in Footnote 50. To this end, the contributing company must demonstrate that the subsidiary generated at least 75% of its income outside of the tax haven and that this income was subject to ordinary taxation (Tax Administration, Circular Letter 4 August 2004 No. 36/ *sub* 2.3.3).

[104] Article 86, fourth paragraph of the ITC.

[105] Please refer to refer to paragraph 3(b)(i)(A).

The capital gain (or capital loss) in the hands of the contributing company corresponds to the difference between (i) the market value[106] of the contributed assets[107] and (ii) the tax value of these assets in the books of the contributing company prior to the contribution. If the shares received in exchange for the contribution are listed in a regulated market, however, the market value of the contributed assets cannot be lower than the average value of these shares in the last month.

In the case of contribution of qualified shares or quotas, specific rules may apply to determine the taxable base in the hands of the contributing company.[108] Further, a special tax regime applies if the contributed assets form a business as a going concern or branch thereof.

I. Contribution of a business as a going concern in exchange for shares or quotas

According to Article 175 of the ITC, if an Italian company contributes a qualified participation to another Italian company[109], the capital gain for the contributing company is computed as the difference between:

(x) the higher of the accounting value attributed by the contributing company to the shares or quotas received in exchange for the contribution, or the accounting value attributed by the receiving company to the qualified participation in its books; and

(xx) the tax value of the transferred participation in the books of the contributing company prior to the contribution.

This provision represents an exception to the general rule laid down by Article 9 of the ITC as to the computation of the capital gain in the event of a contribution in kind for shares or quotas.[110]

[106] More precisely their "normal value" as defined by law; please refer to footnote No. 62 above.

[107] In the case of contribution of qualified shares or quotas, specific rules apply to determine the taxable base in the hands of the contributing company.

[108] In particular, we refer to Article 175 of the ITC – which addresses the contribution of a qualifying shareholding *inter alia*, from an Italian company to another Italian company – and to Articles 176 and 177 of the ITC (see below subparagraphs 3(b)(i)(A)(II) and 3(b)(i)(B)(I)for details).

[109] This rule has a wider scope, indeed, as it applies if a qualified participation is contributed by a tax resident person (transferor) to another tax resident person, and both parties are conducting an entrepreneurial activity.

[110] Please refer to paragraph 3(b)(i)(A). Further, the capital gain realised by an Italian contributing company may be computed according to Article 177 of the ITC, as illustrated in the next paragraph 3(b)(i)(A)(II).

For these purposes, a qualified participation means a participation that allows the direct[111] exercise of a "dominant influence" (influenza dominante) or of a "significant influence" (influenza notevole) on the subsidiary according to Article 2359 of the ICC. Please note that, according to this provision, a dominant influence is deemed to exist inter alia when the contributing company owns the majority of the voting rights at the ordinary shareholding's meeting, while a significant influence is deemed to exist when the contributing company owns at least 20% of the voting rights in the ordinary shareholders' meeting (10% at the shareholders' meeting of a listed company).

For the purpose of this rule it is immaterial where the subsidiary to which the participation refers has its tax residence[112]. Therefore, this tax regime may be of relevance where an Italian company contributes to another Italian company a qualifying shareholding in a non-resident company.

The participation exemption regime[113] applies to the capital gain, which has been determined according to this rule, provided that the relevant conditions are satisfied. However, according to the anti-avoidance provision under Article 175, second paragraph of the ITC, if the contributed participation does not qualify for the participation exemption while the received shares or quotas do, the capital gain deriving from the contribution is not computed according to this tax rule but according to the ordinary rule of Article 9 of ITC[114]. Finally, this rule does not apply.

II. Contribution of a business as a going concern in exchange for shares or quotas

Article 176 of the ITC sets out a tax neutrality regime in the event that a tax resident company (or entrepreneur or entity) transfers a business – or a branch thereof – as a going concern to a tax resident company in exchange for shares or quotas of the acquiring entity. This regime also applies when the contributing company and/or the acquiring entity is not resident in Italy for tax purposes, provided that the contributed business as a going concern is located in Italy.

In this respect, it is important that the collection of assets that is transferred qualifies as a business – or a branch thereof – as a going concern from a legal angle: the tax treatment follows the legal qualification[115].

[111] Italian Tax Administration, Circular Letter 22 February 2005 no. 60/E.
[112] Italian Tax Administration, Circular Letter 25 September 2008 no. 57/E.
[113] Please see paragraph 3(b)(i)(A).
[114] Please see paragraph 3(b)(i)(A).
[115] For the qualification of the business concern and of the branch hereof please see under paragraph 3(a)(ii)(B) above.

However, to benefit from this tax relief, the contributing company must record, for tax purposes, the shares or quotas of the acquiring company which it has received in exchange for the contribution, at the same tax values as the business as a going concern was recorded in its books before the contribution was made. Under these conditions, the contribution does not entail the realisation of taxable capital gain for the contributing company, regardless of the accounting values attributed to these shares or quotas in the financial accounts of the contributing company.

According to this tax regime, a rollover relief is granted on the assets of the business, i.e. the assets and liabilities of the business as a going concern must be recorded, for tax purposes, by the acquiring company, at the same value as they were recorded by the contributing company. It is worth noting that, other than in the case of merger and division, the tax positions passed to the acquiring company are exclusively those pertaining to the contributed assets and liability and do not include those of the net equity (eg. tax-deferred reserves) which, in principle, remain with the contributing company.

If, for accounting and civil law purposes, these assets are recorded at a different value to their tax value, the acquiring company must keep and attach to the tax return a statement summarising these differences. This mechanism substantially mirrors the one set out for mergers and divisions as illustrated above.

When the accounting values of the contributed assets differ from their tax value in the hands of the acquiring company, the latter may opt for a depreciable step-up of these tangible and intangible assets up to their accounting value by paying a substitutive tax under the same terms illustrated in the case of a merger. The option for the step-up in value of the other acquired assets illustrated with reference to the merger applies here as well[116].

(B) Italian tax regime applicable to a non-resident contributing company

In principle, no taxable capital gain would arise upon disposal of the contributed assets, in the hands of a non-Italian resident contributing company without permanent establishment in Italy, unless the assets are deemed to be located in Italy for tax purposes, thus making the relevant capital gain subject to tax in Italy pursuant to Article 23 of the ITC.[117] In particular, focusing on the contribution of shares and quotas, According to this provision no taxable capital gain would arise in Italy for the foreign contributing company without permanent establishment in Italy: (I) if

[116] Please refer to 1(b)(i)(F) above.

[117] If a real estate asset, located in Italy, is contributed by a non-resident company (which does not have permanent establishment in Italy) to an Italian company for shares, the capital gain (if any) is however not subject to tax in Italy, provided that this asset has been owned by the contributing company for at least five years and certain conditions are met, according to Article 67, first paragraph, of the ITC.

the contributed asset is the participation in non-Italian companies, provided that the relevant certificates are not physically located in Italy at the moment of contribution; and/or (II) if the contributed asset is a non-substantial participation[118] in an Italian company, whose shares are listed in regulated markets[119].

Where the contribution raises a tax relevant capital gain in Italy for the foreign contributing company, a tax exemption may still apply under certain circumstances. In particular, disposal of non-substantial participations[120] realised by qualifying non residents are exempted. Qualifying non residents are those who are resident in a State with which Italy has concluded a tax treaty that contains an exchange of information clause and who are not resident in a country or territory outside the European Union with a preferred tax regime[121].

Besides this, exemptions from Italian taxation can also derive from the relevant applicable tax treaty to avoid double taxation entered into by Italy: namely, where a tax treaty applies according to which in the case of sale of an asset (other than immovable property), which is not connected to a permanent establishment of the seller in the other country, taxation is triggered only in the State where the seller is resident for tax purposes. It is worth noting that such a clause is included in most of the tax treaties entered into by Italy, including the one entered into with Germany.

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[118] *I.e.* not higher than 2% of the voting rights or 5% of the company's capital, according to Article 67, first paragraph, letter c-*bis*, of the ITC.

[119] By contrast, any capital gains realised by non-resident companies with a permanent establishment in Italy, to which the contributed assets are connected, would be taxable in Italy. Finally, if a non-resident company with a permanent establishment in Italy disposes of assets which are not connected with the permanent establishment (*e.g.* when directly held by the headquarters) the question arises whether the relevant capital gain, if any, is taxable in Italy. Indeed, according to domestic rules, *i.e.* Articles 151 and 152 of the ITC, capital gains realised from a business activity in Italy by a non resident company with a permanent establishment in Italy are subject to taxation in Italy, although the capital gains are not realised through the existing permanent establishment. The practical implications of these rules are debated (see M. LEO, *supra* footnote No. 81, 2420 and M. PIAZZA, *supra* footnote No. 58, 885). In such a case, however, the tax administration seems inclined to accept that the disposal of a participation in an Italian company by the headquarter of a non resident company with a permanent establishment in Italy would not *per se* be considered as deriving from a business activity in Italy, according to Italian Tax Administration, Circular Letter 24 June 1998, No. 165/E, and therefore the exemptions illustrated above should apply in principle. Further, it is worth mentioning that pursuant to Article 13 Paragraph 37 of the OECD Commentary, Italy has reserved the right to subject capital gains from Italian sources to taxes whenever the alienator has a permanent establishment in Italy, even if the property or assets alienated did not form part of this permanent establishment. As a matter of fact, however, Italy has seldom applied this reservation in its treaties to avoid double taxation.

[120] *I.e.* not higher than 20% of the voting rights or 25% of the company's capital if the participation is not represented by shares listed in a regulated market. If the shares are listed in a regulated market the thresholds shown in footnote No. 118 apply.

[121] These countries are currently itemised by the Italian Ministerial Decree 4 September 1996.

I. Contribution of qualified participation into an Italian company in exchange for shares or quotas

Article 177, second paragraph of the ITC lays down a special rule to determine the taxable base in the case of exchange of shares or quotas through which an Italian company acquires, integrates or increases (pursuant to an obligation laid down by the law or by-laws) a controlling shareholding (as defined below) in another Italian company and assigns to the shareholder (or shareholders) of the latter company shares or quotas of the acquiring company. The status of the shareholders is irrelevant and therefore the scope of this provision also includes the case where a foreign company contributes to an Italian company a controlling shareholding in another Italian company. It is worth stressing that this provision only addresses the computation of the capital gain and does not set out a tax neutrality regime; to ascertain whether taxation is levied in Italy, the rules mentioned in the previous paragraph (3)(b)(i)(B) shall apply.

In this case, the capital gain for the shareholders is computed as the difference between (x) the increase in equity of the acquiring company; and (Ixx) the tax value of the contributed shares or quotas in the hands of the shareholders. As a result, a transaction that falls within the scope of this provision does not give rise to taxable capital gains, provided that the contributed shares are recorded in the books of the acquiring company at the same value as when they were, for tax purposes, in the hands of the transferor.

For these purposes, a controlling shareholding means a participation that facilitates the exercise of more than 50% of the voting rights in the ordinary shareholders' meeting of the acquiring company.

(ii) Special tax regime for the EU contribution of a business as a going concern

(A) General remarks

The Italian provisions implementing the Merger Tax Directive apply to business contributions made between two eligible subjects from two different EU member States, one of which is resident in Italy for tax purposes.

Moreover, these provisions apply to contributions that involve companies resident in different EU Member States in relation to a permanent establishment located in Italy. Also, the case where a non resident company contributes its Italian permanent establishment to an Italian company falls within the scope of this provision.

In these cases the same rules illustrated above for the domestic contribution of a business as a going concern apply. However, if the contributing company (or the

Italian permanent establishment) has tax-deferred reserves, these must be reinstated in the permanent establishment of the acquiring company, according to Article 180 of the ITC. Otherwise, they are subject to taxation.

(B) In view of this, a number of examples may be envisaged:

I. An Italian company contributes to a German company its business as a going concern located in Italy

The same rules described above apply here (according to Articles 176, second paragraph, and 179, second paragraph, of the ITC). The tax value of the contributed business as a going concern is rolled over the participation received by the Italian company in exchange for the contribution.

II. An Italian company contributes to a German company a business as a going concern located in another EU Member State (and forming a permanent establishment there)

In this case the roll-over relief does not apply: the contribution is deemed to be effected at market value and may trigger taxation in Italy. A tax deduction is however granted equal to the tax that would have been levied in the State where the permanent establishment is located. This is the same mechanism laid down in relation to the merger whereby the permanent establishment in an EU Member State of the Italian absorbed company is passed to the acquiring company as a result of the merger. Further, in this case, the tax value of the shares assigned to the contributing company in exchange for the contributed permanent establishment will be equal to the tax value of the contributed assets plus an amount equal to the taxable base corresponding to the taxes actually due (net of the notional tax credit).

III. An Italian company contributes to a German company a business as a going concern located in a non-EU Member State (and forming a permanent establishment there)

In this case a tax neutrality regime does not apply and the contribution gives rise to taxation in the hands of the Italian contributing company. Further, as the notional tax credit under Article 179, first paragraph, No. 5, of the ITC cannot be claimed, the Italian company is only entitled to the ordinary tax credit on taxes actually paid abroad according to Article 165 of the ITC. Finally, the tax value of the participation received in exchange for the contribution should equate to the fair market value of the permanent establishment[122].

[122] G. MAISTO, *supra* footnote No. 55, 491.

IV. A German company contributes to an Italian company a business as a going concern that constitutes a part of its permanent establishment in Italy

No taxable gain or tax relevant loss arises from the transfer of the business as a going concern to the acquiring company according to Article 179 of the ITC. Further, the value for tax purposes of the business transferred is carried over to the shares received in exchange. It is questionable, in this case, whether the received shares are deemed to be attributed to the German company or rather to a permanent establishment of the German company in Italy. The former solution seems to be preferable as it is more in compliance with a systematic interpretation of the rule under discussion; the topic is not yet settled.[123]

V. A German company contributes to a French company the business as a going concern exercised through its permanent establishment in Italy

In this case the roll-over applies in relation to assets of the business that, after the contribution, form part of a permanent establishment of the acquiring company in Italy. Accordingly, no taxable gain or loss arises from the contribution in Italy provided that the value for tax purposes of the business transferred is carried over to the shares received in exchange (Article 178, first paragraph, letter (d) of the ITC). Otherwise, if the assets transferred as a result of the contribution do not form part of the permanent establishment of the acquiring company in Italy, any capital gains on these assets are taxable in Italy. Italian taxation is also triggered if these items are subsequently transferred or taken away from the permanent establishment.

(iii) Special tax regime applicable to EU contributions of shares or quotas

(A) Finally, a tax neutrality regime is catered for in the case of "exchange of shares" under the meaning of the Merger Tax Directive, as implemented in Italy in Article 179 of the ITC. In the case of contribution of shares in exchange for shares, this special regime applies when:

I. the shares or quotas that are contributed represent an interest in an eligible company under the meaning of the Merger Tax Directive;

II. one of the EU eligible companies (under the meaning of the EC Merger Tax Directive) or a resident company acquires, integrates or increases (according to an obligation laid down by law or by the by-laws) a controlling interest in an

[123] See Assonime Circular Letter 2008, No. 51; M. Leo, *sub* footnote No. 81, 2763; M. Gusmeroli, *L'attuazione in Italia delle modifiche del 2005 alla direttiva fusioni*, in *Bollettino tributario* (2009), 765.

Italian company or in an EU eligible company (*i.e.* the company whose shares or quotas are contributed);

III. shares or quotas of the acquiring EU eligible company are assigned to the shareholders of the contributed company;

IV. at least one of the participants is resident in Italy or the participation exchanged is connected to a permanent establishment in Italy of a foreign eligible company; and

V. any cash settlement does not exceed 10% of the par value of the shares.

In other terms, the contributed company and the acquiring company must be eligible companies and be resident in two different EU Member States for tax purposes. By contrast, the nature and tax residence of the shareholders of the contributed company is not relevant: at least one of these must be resident in Italy, however, or the acquired shares must, as a result of the transfer, be connected to a permanent establishment in Italy of an EU eligible company.

(B) Special tax regime

If the conditions set above are satisfied, any income or gain realised from the contribution in Italy is not deemed to be taxable income and the tax value of the contributed shares or quotas is carried over to the shares or quotas received in exchange. It is remarkable that, to achieve tax neutrality, Article 179 of the ITC does not lay down any requirements as to the value that the acquiring company must assume in its records with reference to the contributed shares or quotas.[124].

(iv) Transfer taxes

Contribution of assets, when made by a VAT subject, is generally subject to VAT or VAT exempt, depending on the nature of the assets transferred, on the subjective position of the contributing company and of the acquiring company: in this respect the same rule applicable in the case of sale of assets for consideration applies. In particular it is worth mentioning that the contribution of a going concern or a branch of a going concern is out of the scope of VAT, while contribution of shares or quotas are generally VAT exempt (*i.e.* zero rate VAT).

Registration tax at a flat amount of Euro 168.00 (Euro 200.00 from 1st January 2014) is levied if the contribution is subject to VAT, if the contribution is effected in cash and where the contributed assets qualify as a going concern (or a branch of a going concern). In other cases, a proportional registration tax applies; the amount

[124] See Italian Tax Administration, Resolution 25 July 2003, No. 159/E.

of the relevant tax rate ranges between 0.5% and 15% (up to 13% starting from 1st January 2014), depending on the nature of the asset contributed.

If the contribution entails the transfer of real estate assets located in Italy, mortgage and cadastral taxes apply at a proportional rate of 3% or 4% depending on the nature of the contributed asset, on the subjective position of the contributing entity and of the receiving company. If the real estate asset forms part of a going concern (or a branch of a going concern) however, mortgage and cadastral taxes apply at a flat amount of Euro 168.00 (Euro 200.00 from 1st January 2014) each.

Assignment to the contributing company of newly-issued shares upon contribution in kind does not trigger the Italian financial transaction tax pursuant to Article 15, first paragraph letter (c) of the Ministerial Decree of 21 February 2013.

If the contributed assets are shares in an Italian company, the financial transaction tax may be triggered upon transfer of the relevant property right to the receiving company unless the safe harbour for intra-group transactions applies[125] or the transaction falls under the meaning of reorganisation transaction pursuant to Article 4 of the Directive 2008/7/CE adopted by the Council on 12 February 2008[126].

[125] Please see paragraph (1)(b)(vi).

[126] Article 15, first paragraph, letter (h) of the Ministerial Decree of 21 February 2013. Therefore, if the contribution in kind entails the transfer of shares, which do not represent a controlling shareholding, the financial transaction tax might be triggered, unless the shares are included in a business as a going concern.

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