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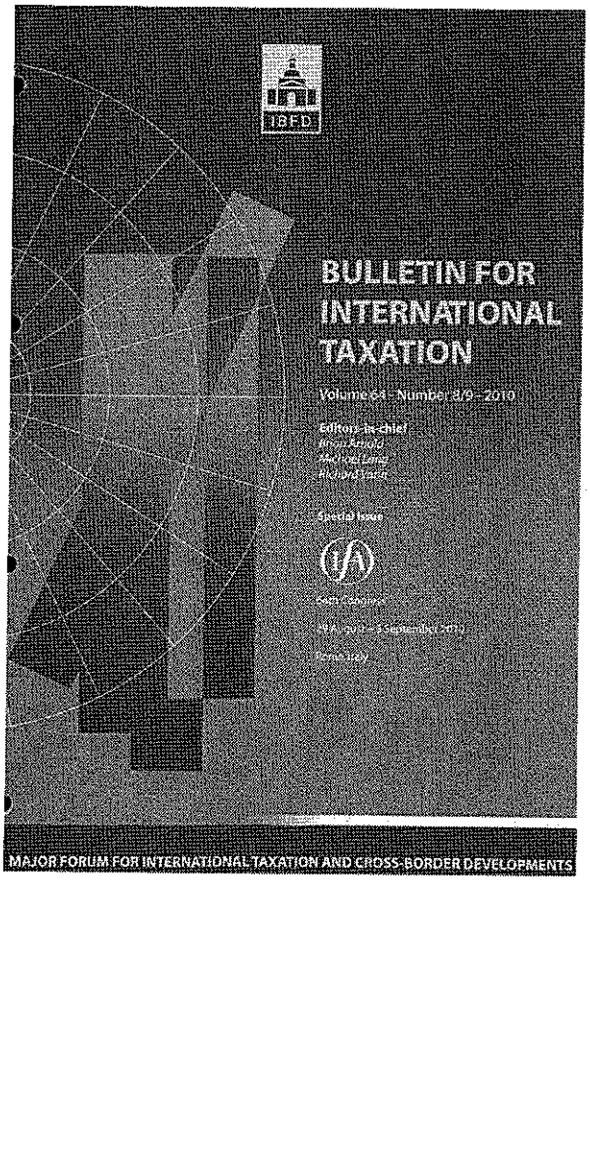
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The Italian Tax System: International and EU Obligations and the Realization of Fiscal Federalism

In this article, the authors reflect on the constraints on the Italian legislator deriving from EU and international provisions, with a particular emphasis on the delegation law regarding fiscal federalism, which is in the process of being implemented.

1. Reform of the Fifth Title of the Constitution and Fiscal Federalism

1.1. Introduction

Constitutional Law 3 of 18 October 2001 amended the Fifth Title of the Italian Constitution regarding the relationship, including from an economic and tax perspective, between the state and the various regions, provinces and municipalities. The result of the reform of the Constitution is an extension of the legislative power of the regions and wide financial autonomy of the regions and local entities with respect to both expenses and income. As for the present analysis, the reform impacted most of all the distribution of legislative powers between the state and the regions. In this respect, the reform modifies the structure and ranking of legislative powers, putting the powers of the state and the regions on the same level.

The former version of Art. 117 of the Constitution did recognize the legislative powers of the regions, but, as a result of the 2001 reform, these powers are now equal to that of the state and, most of all, the system for attributing competences has been changed by reversing the indication of subjects. Further, the method of distributing legislative powers over areas of competence has been amended such that:
- the regions now have legislative power over any subject not expressly attributed to the state;
- the legislative powers of both the state and the regions must be exercised in compliance with the Constitution, and are subject to EU and international constraints; and
- the state has the power to establish "fundamental principles" only if the "concurrent" legislative power of the regions is expressly provided for.[1]

With regard to taxation, under the 2001 reform, the Constitution:
- in Art. 117(2)(e), attributes to the state exclusive legislative powers in respect of the "tax and accounting system of the state";
- in Art. 117(3), gives the state and the regions concurrent jurisdiction over the "coordination of public finance and the tax system", although it is the state that has the exclusive power to establish the fundamental principles; and
- in Art. 117(4), gives the regions "residual legislative competence" uninfluenced by the "fundamental principles", with regard to areas that do not fall within the exclusive competence of the state under Art. 117(2)(e), and, as far as taxation is concerned, residual legislative competence comprises regional and local taxes.

Under Art. 119(2) of the Constitution, regions and local entities establish and enforce their own taxes according to the principles of coordination of public finance and the tax system by making implicit reference to Art. 117(3).

Eight years after the reform, the Parliament, by way of Law 42 of 5 May 2009 ("the delegation law"), finally delegated to the government the power to enact the legislative decrees necessary to define the fundamental principles in respect of the coordination of public finance and the tax system. Law 42 of 5 May 2009 also established, in accordance with Art. 76 of the Constitution, the principles and criteria to be followed by the government in implementing its decrees.

In this respect, the authors intend to provide general reflections on the provisions of the delegation law with regard to the distribution of the tax base between the different levels of government and the equalization mechanism.

1.2. Distribution of tax base between the different levels of government

Art. 2(o) and (t) of Law 42 of 5 May 2009 eliminates the possibility of regional double taxation in respect of the same objects taxed by the state, except for additional taxes under state law. Accordingly, no regional intervention is permitted in respect of the tax base and rates at a different level of government, nor is any possible reduction in taxes permitted, the revenue of which is not allocated to the same level of government. There is an exception, however, if such measures relate to the need for development or for beneficial taxation. This should

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1. Art. 117(3) Constitution.

imply that, by keeping the current tax system of the state unchanged, the prohibition of regional double taxation works as a fundamental principle of coordination and aims to prevent the overwhelmingof the regional system and any conflict with the national system. Moreover, the limit of the prohibition to the hypotheses of regional taxation "on the same national tax object" may induce the thought that the prohibition only concerns juridical double taxation and not economic double taxation. In other words, it seems that it preserves the possibility for the regions to establish their own taxes to be imposed on wealth that may be only "economically" assimilated to that taxed by the state, but not "juridically".

Two consequences arise with regard to this prohibition. The first is that the existing national tax system remains unchanged, as there is no "transfer" to the regions of exclusive competence regarding any important national taxes. The second is that the regime for ordinary regions and that for regions with special autonomy are not perfectly aligned.

With regard to the first consequence, the fact that the national tax system remains unchanged significantly reduces the primary taxation power of the regions under Art. 117(4) of the Constitution. This is because the regions can exercise such powers only by establishing residual taxes, i.e. minor taxes for the purpose of development of regional and local policies.

With regard to the second consequence, it should be noted that the prohibition against double taxation, as a fundamental principle of coordination established by the state, does not automatically apply to regions with special autonomy. These regions, under their constitutional ranking statutes, can establish their own taxes subject only to the condition that such taxes comply with the principles of the national tax system. In this respect, the Italian Constitutional Court (*Corte Costituzionale*), in Decision No. 102 of 2007, confirmed that regions with special autonomy are not subject to the fundamental principles of coordination established by the state. This is because these principles, under Art. 10 of Law 3 of 18 October 2001, only apply if the autonomy recognized by the new Fifth Title of the Constitution is greater than that enshrined in the Regional Statute. There is no doubt that, with regard to taxing powers, the autonomy enshrined in the Regional Statute is greater than that recognized for ordinary regions under the Constitution.

1.3. The equalization mechanism

The remarks in 1.2. relate to fiscal federalism with regard to the distribution of the tax base between the different levels of government, which is accomplished in compliance with the principles of autonomy, subsidiarity and differentiation. The requirements for unity and uniformity of treatment derive from another important aspect of fiscal federalism, which relates to the idea that financial resources should be distributed between the regions and local entities in compliance with the principles of equality and solidarity.

In this regard, the most important problem to resolve is the meaning to be given to Art. 119(3) and (4) of the Constitution. The criterion referred to in Art. 119(3) for qualifying for resources under Art. 119(4) is the "reduced fiscal capacity of inhabitants", which is undoubtedly less favourable for poorer regions. Art. 119(4) also sets out the general rule that the resources provided for by Art. 119, i.e. regions' and local entities' own taxes, "derived" own taxes, reserves, tax rates, participations in revenue from national taxes, and other patrimonial revenue, "allow municipalities, provinces, metropolitan cities and regions to finance fully their public functions". Although the criterion of "reduced fiscal capacity" in Art. 119(3) appears to be inadequate to ensure that regional and local entities obtain the full financing referred to in Art. 119(4), these two provisions cannot be interpreted in the sense that one always prevails over the other.

The parameter represented by the "fiscal capacity per inhabitant" should be valid only for the financing of non-essential functions, connected to rights that, even if relevant, cannot be defined as civil or social rights and, therefore, must not necessarily be guaranteed evenly. This indicator may also be accompanied by other criteria that provide incentives for fiscal capacity, such as administrative efficiency or fiscal effort, or compensate, by means of "beneficial taxation", the fiscal weakness that may result from the adoption of the criterion of fiscal capacity. The parameter of demand set out under Art. 119(4) of the Constitution should instead remain valid for essential levels of civil and social rights established by the state and fundamental functions of municipalities, provinces and metropolitan cities under Art. 117(2)(m) and (p), as implemented by Art. 9 of Law 42 of 2009, on the basis of the standard cost criterion.

This depends, from a constitutional perspective, on the distribution of resources used to finance essential rights (and services) in compliance with the fundamental rule in Art. 3 of the Constitution, which sets out the obligation to ensure equal treatment for all citizens, regardless of where they reside.

2. Fiscal Federalism and the Constraints of EU Law

2.1. EU law and domestic legal systems

Fiscal federalism is limited not only by constitutional constraints, but also by EU ones. In this respect, it should be noted that the reform of the Fifth Title by Constitutional Law 3 of 18 October 2001 affected the relationship between EU and domestic law. Specifically, the new version of Art. 117(1) of the Constitution expressly refers to EU law as a source of constraints to be complied with when the state and the regions exercise their legislative powers.

Before the 2001 reform, the limit on state sovereignty and the consequent application of EU law was rooted in Art. 11 of the Constitution, which allowed for limitations of sovereignty within the scope of a legal system in order to ensure peace and equity among nations. Such a provision was considered to be the only constitutional reference regulating the relationship between these two legal systems.

The introduction of Art. 117(1) of the Constitution and the reference to "constraints deriving from EU law" do not, however, appear to have altered the situation. Specifically, Art. 117 does not directly establish the hierarchical supremacy of EU law or recognize new limitations on sovereignty in favour of EU law in addition to those derived from Art. 11. Art. 117 also does not appear to add anything further to the conclusion reached under constitutional case law,[2] i.e. that, where there is a concurrent EU law, whether or not EU law must be complied with is determined on the basis of the limitations on domestic law contained in Art. 11. Accordingly, EU law may prevail over constitutional provisions, except for those establishing the fundamental principles of the Italian legal system and human rights.

Consequently, under a multilevel system, as is currently in force in Italy, the ranking of legislative powers appears to be as follows: first, the principles and fundamental rights established by the Constitution, which can abstractly be considered to be "counter-limits" (see 2.6.); second, primary and secondary EU law; third, other provisions of the Constitution; and fourth and finally, ordinary law provisions.

2.2. "Double level" of functioning of EU constraints for the tax legislator and fiscal coordination

The EU constraints imposed on the tax legislator relate to both the features of taxes (national and local) established in different Member States and to the ways adopted by Member States in which to implement fiscal federalism, in particular, with regard to "beneficial taxation". These issues are becoming increasingly important in the European Union. Specifically, it is common to decentralize taxing powers to subnational territorial organizations, subject to significant differences in the various Member States with regard to territorial organization, competencies, the exercise of power, transfer mechanisms, subsidies, supply and necessary conditions, models of local taxes and relevant revenue.

The principle of solidarity, under Art. 3 of the Treaty on the European Union (previously, Art. 2 of the EC Treaty), is the basis of the relationship between EU and domestic law, as well as of the "fiscal coordination" that occurs mutatis mutandis amongst the Member States. Taxation is significantly influenced by the European Union – even local taxation (for example, by prohibiting local taxes that are not compatible with EU law, as well as by prohibiting discrimination, restrictions and provisions that can be regarded as prohibited state aid). Accordingly, the taxation autonomy of local entities, especially in respect of the form and regulation of local taxes, is limited not only by constitutional constraints, but also by EU ones, thereby making the management and implementation of the attribution of taxation powers to the various levels of territorial autonomy more complex. In other words, the national legislator is bound, on the one hand, by a strong tendency towards decentralization and, on the other, by significant EU constraints.

The issue also concerns the institutional level, starting from the individuation of the subjects who must contribute to the EU quota of participation, which is connected to the scope of the legislative and taxation power to be transferred to local entities. The transfer of resources to local entities is accompanied by the transfer, from the state to the local entities, of a part of the costs of participation in the European Union. However, such transfers must be balanced, at the institutional level, by the promotion of the role of local entities in participation in the EU decision-making process regarding taxation, from which they had previously been excluded.

It is evident that these issues are complex and require a careful analysis of the possible structures of such "multilevel" taxation, which is scarcely addressed by the Treaty on the Functioning of the European Union (TFEU, previously the EC Treaty).

2.3. EU constraints: free movement of goods, non-discrimination and environmental taxes

In light of the foregoing and focusing only on local taxes, the determination of the tax objects by local entities should first comply with EU principles regulating the customs union, which have resulted in the abolition of customs duties on imports and exports and all other taxes equivalent to customs duties. In this regard, reference is made to the European Court of Justice (ECJ) decision in *Legros*[3] (C-163/90), as confirmed and refined by the subsequent *Lancry*[4] (C-363/93) and *Simitzi*[5] (C-485/93) decisions and noted in *Carbonati Apuani*[6] (C-72/03) with regard to the "marble tax". According to *Legros*:

> [a] charge levied at a regional frontier by reason of the introduction of products into a region of a Member State constitutes an obstacle to the free movement of goods which is at least as serious as a charge levied at the national frontier by reason of the introduction of the products into the whole territory of a Member State.[7]

This ECJ case law reflects a teleological interpretation of the EU provisions regarding the free movement of goods[8] and, in particular, the realization of the customs union. This interpretation also influences the choices of local tax legislators, who are required, in determining the tax base, to consider the central role played by the free movement of goods in the European Union.

At the same time, compliance with the non-discrimination principle established in the TFEU (previously, the EC Treaty) is also required in respect of the other fundamental freedoms – specifically, the free movement of

2. Decisions Nos. 183/1973 and 170/1984.
3. Case C-163/90, *Legros* (16 July 1992).
4. Joined Cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93, *Lancry* (9 August 1994).
5. Joined Cases C-485/93 and C-486/93, *Simitzi* (14 September 1995).
6. Case C-72/03, *Carbonati Apuani* (9 September 2004).
7. C-163/90, *Legros*, Para. 16.
8. Art. 34 TFEU (previously, Art. 28 EC Treaty).

persons[9] and capital,[10] and the freedom of establishment.[11] In this respect, the *Maria Geurts*[12] (C-464/05) and *Eckelkamp*[13] (C-11/07) decisions are relevant, as they indicate possible breaches of the non-discrimination principle that can arise as a result of the fragmentation of taxation powers.

The recent *Regione Sardegna*[14] (C-169/08) decision of the ECJ should also be noted. In this case, the ECJ held that a regional tax on stopovers for tourist purposes by aircraft used for the private transport of persons, or by recreational craft, imposed only on natural and legal persons whose tax domicile was outside the Sardinia region, was an obstacle to the free movement of services.[15] This resulted in an additional cost to some operators and an advantage to others.

Finally, EU provisions influence the determination of what is taxable in respect of local environmental taxes. In this respect, reference must be made to the "polluter pays" principle established by the TFEU (previously, the EC Treaty), as well as to remarks made by EU institutions (in particular, the Commission) with regard to the elements of an environmental tax. According to the Commission:

> a tax falls within the category of environmental taxes if the tax base is a physical unit (or a substitute or derivate) of something, the negative effects of which when used or released are scientifically proved.[16]

Negative environmental impact means a deterioration of free environmental goods or a reduction in the supply of such goods. When analysing the definition of environmental tax given by the Commission, by replacing the expression "tax base" with the more precise expression "tax object", it is easy to understand that an environmental tax is a tax characterized by a direct causal link between its object and the physical unit (polluting emissions, environmental resource, good or product) which causes or may cause environmental damage.

There are two fundamental elements to this definition. First, the environment is no longer external, but is internal to the tax issue (the causal link). Second, emphasis is not being placed on environmental protection, but, rather, on environmental deterioration, scientifically proved, or better on the physical unit that causes or may cause the deterioration of the environment (the environmental damage).

The latter appears to be material for the purpose of creating an environmental tax, not just a tax with an environmental function. Environmental protection is a political, cultural and social objective of a non-fiscal nature. Until the tax instrument is deemed to be an instrument for environmental protection, there is no environmental tax, i.e. a tax in respect of which the environment is an internal element of the tax structure. By focusing on "the physical unit causing environmental damage", rather than "protection of the environment", an environmental tax can be created with an environmental object.

2.4. State aid and "beneficial taxation"

EU constraints in respect of state aid affect the structure of national taxes and the implementation of "fiscal federalism". Only the issue of "beneficial taxation" is discussed in this article. In this respect, ECJ case law (the first decision in this regard being given in 2006) has defined the relationship between the state and local entities regarding the introduction of "territorially limited" tax reductions.

The leading case is *Azores Islands*[17] (C-88/03), decided on 6 September 2006, followed by the decisions of the ECJ in *Basque Countries*[18] (C-428/06) of 11 September 2008 and of the Court of First Instance (CFI) in *Gibraltar*[19] (T-211/04) of 18 December 2008. In these decisions, the following three scenarios in respect of the relationship between national and regional tax systems were distinguished:

(1) The central government unilaterally decides to introduce, in a specific geographical area, a lower rate of tax than that applying at the national level. This is a clear case of selectivity from a territorial perspective, even if it is possible to argue that territorial differences may sometimes be considered to be relief measures justified by the nature or the structure of the tax system of the Member State or directly deriving from fundamental principles of the state itself.

(2) The distribution of competencies in respect of tax provides for the possibility for all territorial entities of the same level to establish freely, within the limits of their own competencies, the tax rate applying in their territory ("symmetrical federalism"). This does not result in territorial selectivity, as it is not possible to identify a "normal" taxation level in respect of tax reliefs potentially applicable by any territorial entity at the same level and, therefore, there is no "rule derogation", which is characteristic of territorial selectivity.

(3) A territorial entity, in exercising powers that are sufficiently autonomous from the central power, may set a lower tax rate than the national one, which applies only to enterprises in its own territory ("asymmetrical federalism"). This can be deemed to be legitimate, provided that the territory of the entity in which the specific measure applies is the relevant territorial context for ascertaining whether or not

9. Arts. 21, 45 and 49 TFEU (previously, Arts. 18, 39 and 43 EC Treaty).
10. Art. 63 TFEU (previously, Art. 56 EC Treaty).
11. Art. 49 TFEU (previously, Art. 43 EC Treaty).
12. Case C-464/05, *Maria Geurts* (25 October 2007).
13. Case C-11/07, *Eckelkamp* (11 September 2008).
14. Case C-169/08, *Regione Sardegna* (17 November 2009).
15. Art. 56 TFEU (previously, Art. 49 EC Treaty).
16. "Statistics on Environmental Taxes", commissioned by European Commission, prepared by ATW – research, 6-7 May 1996.
17. Case C-88/03, *Azores Islands* (6 September 2006).
18. Joined Cases C-428/06 to C-434/06, *Basque Countries* (11 September 2008).
19. Joined Cases T-211/04 and T-215/04, *Gibraltar* (18 December 2008).

the provisions adopted by the territory at issue may favour certain enterprises over others, thereby ensuring the widespread application of the measure.

The ECJ has established criteria for verifying "autonomy" at the institutional, procedural and economic-financial levels. The economic-financial level is the most delicate level; it involves evaluating the actual functioning of the system of intergovernmental financial relationships, which differs from state to state as to its features, reasoning, organization and equalization effects. This creates a series of combinations that are too numerous to apply a single interpretation to. In this respect, only the reasoning in recent ECJ case law appears to be adequate to provide a solution to the issue, under which a real "causal link" needs to exist between the increase in transfers and the lower revenue derived from the reduction in the tax burden, such that the entity is deprived of its responsibility for its fiscal choices.

2.5. Delegation law: fiscal federalism and constraints on "beneficial taxation"

The Italian legislator must take into account the principles and limitations identified by the ECJ with regard to "beneficial taxation" (see 2.4.) in implementing the delegation law in respect of fiscal federalism. The legislator is very conscious of this, provided that the delegation law itself sets forth that the individuation "of forms of development taxation, with particular concern for the creation of new enterprises in underused areas" should be performed "in compliance with EC law".[20]

There are three categories of regional taxes under the delegation law:

(1) own regional taxes stricto sensu, established and regulated by regional law in respect of objects not already taxed by the state;
(2) own taxes "derived", established and regulated by national law, the revenue of which is for the regions, under the principle of territoriality; and
(3) additional taxes on the same tax bases as national taxes.

No particular issue arises with regard to "derived" own taxes where the regions have the power to modify the rates and provide for tax reliefs, allowances and deductions within the limits and under criteria established by national law and in compliance with EC law, and with regard to additional taxes on the same tax bases as national taxes, where regions can introduce percentile variations of additional rates and provide for allowances within the limits established by national law. These powers are symmetrically attributed to ordinary regions, which are not subject to territorial selectivity. From this perspective, the presence in the national territory of regions with special autonomy is not important, provided that the powers at issue are attributed to a uniform group of subjects (ordinary regions).

As to own regional taxes, regions can define any tax element that is not a taxable object of the national tax. Each region can identify such objects. Even though specific models might prevail in the national context, the variability of own taxes as to *an* and *quantum*, is obviously incompatible with the individuation of "reference models" and, therefore, the issue only concerns the form of possible tax reliefs (subjective, objective or territorial) provided by the regulation of the regional tax.

Starting from subjective and objective tax reliefs, some statements of the decision of the CFI in the *Gibraltar* case are significant, since the judges affirmed that "direct taxation falls under the competence of Member States" and pointed out that:

> the latter and local entities being sufficiently autonomous from the central Government, as explained in the decision on the tax regime of the Azores... are the only subjects competent to regulate taxation systems of enterprises which they believe to be more adequate to the needs of their economy.[21]

In light of this statement, the judges analyse the taxes established in Gibraltar to replace the income tax for enterprises and conclude that the Commission had not demonstrated that these regimes represented actual derogations.

As to territorial tax reliefs (within the regional territory), the "regional" localization of the tax should exclude the possibility to enforce forms of territorial selectivity. In fact, in the latter case, the "whole territory" would be necessarily represented by the regional territory, save for the applicability of Art. 107(3) of the TFEU (previously, Art. 87(3) of the EC Treaty) in order to identify "subregional" areas entitled to tax benefits. Accordingly, it is not necessary to evaluate the applicability of the principles established by the ECJ in the *Azores*, *Basque Countries* and *Gibraltar* cases, which have been conceived in relation to asymmetrical federalism. The ECJ established, a long time ago, the principle that aid recognized by regions is per se significant, since even aid recognized by regional or local entities falls within the scope of general regulation, notwithstanding the specific regime and denomination. As to regions with special autonomy, it is not possible to forecast the autonomy test, because everything depends on the implementation provisions under Art. 27 of the delegation law, which should regulate, inter alia:

> the specific modalities whereby the state ensures the achievement of the constitutional goals of equalization and solidarity for the regions with special autonomy with per-capita income levels lower than the national average level.

The limits relevant to material selectivity also apply to territorial tax reliefs established by regions with special autonomy. For example, this arose with regard to tax reliefs granted by the region of Sicily in respect of the "Euromediterranean Centre of financial and insurance services", which resulted in an unfavourable decision of the Commission[22] due to the presence of a form of material selectivity.

20. Art. 2 Law 42 of 2009.
21. T-211/04 and T-215/04, *Gibraltar*, Para. 146.
22. Decision No. 2007/498/EC, 7 February 2007.

2.6. "Counter-limits"

In 2.1., the authors referred to the legal ranking of EU provisions and to the fact that even EU law is subject to the principles and fundamental rights derived from the Constitution. These can be considered to be counter-limits. In identifying these principles it should be determined first whether, in general, the system of values underlying constitutional tax principles complies with the system of values underlying EU tax provisions or differs therefrom and is, therefore, capable of introducing other principles that could conflict with EU law. The authors' opinion is that, currently, these differ.

With regard to the customs union, the prohibition against customs duties and equivalent taxes has been identified as an important principle of EU law. With regard to the non-discrimination principle, the prohibition against state aid and the efficiency and preservation of specific national tax systems are important principles of EU law. The values on which these principles are based are economic ones, which is typical of systems characterized by free exchange and the external and internal neutrality of the tax element, where taxation is primarily considered from a negative perspective and, in particular, only with regard to the unity of the internal market and the four fundamental freedoms.

Taxation is clearly still a factor in competition distortion in the European Union and not just an instrument for collecting the necessary financial resources for development and equal distribution of wealth, as is intended by national systems. Accordingly, conflicts between constitutional tax principles and EU tax rules must be examined, as the ECJ often decides tax cases using the EU principles established by the Court itself, which do not always coincide with the constitutional values of the Member States. Examples of this tendency can be seen in the *Halifax*[23] (C-255/02) and *Cadbury Schweppes*[24] (C-196/04) decisions of the ECJ, regarding VAT deductions and parent-subsidiary taxation, respectively. These decisions, which adopt a general EU anti-abuse principle inferred by the ECJ, not only have the effect of depriving specific provisions of their original value, but also entire national legal regimes, such as, under Italian law, regimes regarding tax avoidance, *fraus legis* and fictitious interposition.

Prior to determining the extent to which national fundamental tax principles and EU principles differ, a more in-depth analysis to identify the former is required. To this extent, it is necessary to focus attention on the constitutional principles regarding ability to pay and fiscal equality (see 2.7.).

2.7. Ability to pay and fiscal equality

The prevailing opinion in Italy is that the ability-to-pay principle is a fundamental constitutional principle and, therefore, could potentially act as a counter-limit in the event of conflict with EU principles. The nature of the fundamental ability-to-pay principle is derived from its function as a measure to guarantee the protection of persons and individual rights. Accordingly, it acts as a genuine constitutional limit on the exercise of legislative taxation powers. From this perspective, the entire environmental tax system – i.e. taxes applicable to a mere emission of polluting substances under the "polluter pays" principle in respect of only non-economic objects that do not demonstrate any increase in wealth – could be considered to conflict with the ability-to-pay principle.

If, however, the ability-to-pay principle is found not to be a fundamental principle, the only principle that could theoretically characterize the Italian tax system, compared to the EU tax system, would be that of substantive equality. This could be interpreted as the correct distribution of wealth and equal treatment (under parity of conditions) in Art. 3(1) and (2) of the Constitution. Such a principle would not be in line with EU law in cases where EU law takes into account the values of equality – specifically, of substantial equality – but protects those values to a lesser degree and with different implications than under Italian constitutional principles.

The different scope and the lower level of protection granted by the EU equality principle are apparent with regard to, in particular, the non-discrimination principle, i.e. the principle that stands for fiscal equality in the European Union, relating to nationality. This has, to date, been deemed to be merely a formal aspect of the principle of equality, which refers to a distinction between persons and is intended to ensure that a non-resident operating in a Member State is not fiscally discriminated against by that state in comparison to a resident of that state. Although this principle does prohibit restrictions, it does not go as far as the national principle of equality, as it does not address the need for a correct distribution, in terms of the rationality and coherence of the tax system, but remains, at least currently, a mere instrument for prohibiting fiscal asymmetries, which, at a subjective level, obstruct the realization of the internal market and free competition.

3. Reform of Fifth Title of the Constitution and Constraints Derived from International Obligations

3.1. Introduction: new Art. 117(1)

Almost without exception, and in the context of a wide range of interpretative options, commentators have welcomed the introduction of a provision that states that the legislative power of the state and regions must be "exercised pursuant to the Constitution, as well as to constraints deriving from EC and international obligations".[25] This is because it is believed that the reform has finally "constitutionalized" the principle of respect

23. Case C-255/02, *Halifax* (21 February 2006).
24. Case C-196/04, *Cadbury Schweppes* (12 September 2006).
25. Art. 117(1) Constitution.

for international commitments by the national legislator.[26]

The hypothesis that an international provision, in prevailing over domestic ones, may conflict with internal *subsequent* provisions had actually obliged the commentators, before the reform of Art. 117 of the Constitution, to make efforts to ensure through interpretation the prevalence of the international provision. Sometimes the existence of a "power of special resistance" of the treaty provision has been affirmed, with the consequence that the treaty provision prevails over the domestic subsequent ones of the same rank. The doctrine also invoked the principle of speciality of the implementing provision in respect of the domestic subsequent and conflicting provision, *ratione personarum* or *ratione materiae*. In some cases, it relied upon the existence of a "presumption of compliance" of the domestic legal order with the international provision introduced into it, since it must be supposed that the state had no intention to infringe the obligations undertaken in the international context, which would result in a liability in respect of a breach of treaties. Accordingly, the provision must be interpreted in a way that may ensure the fulfilment of international obligations. In some other cases, the doctrine claimed that a principle of speciality sui generis existed, which was required in order not to apply the international provision, thereby affirming that the subsequent provision shows the intention not only to regulate the same relationships differently, but also *to deny* international obligations already undertaken.

The Constitutional Court, in Decisions No. 348 and No. 349 of 24 October 2007, recognized the significance of the new Art. 117 of the Constitution. In addition, in examining the compatibility with the European Convention on Human Rights of national provisions that calculated the expropriation indemnity as the average of the value of the estate and the dominical income, the Constitutional Court affirmed that incompatibility issues should now be considered to be legitimately constitutional issues in respect of a breach of Art. 117(1) and, therefore, fall within the scope of the exclusive competence of the Court, except for cases where the ordinary courts could interpret this in the light of the Constitution.

Specifically, the general constitutional prohibition against breaching international obligations is "integrated" with the international provisions (according to a scheme sometimes referred to as "interposed provisions" and sometimes as "mobile reference"), thereby making Art. 117(1) of the Constitution fully operational. By providing a constitutional guarantee in respect of a breach of international obligations, the new provision closes a loophole in the Italian legal system.

The Constitutional Court also noted that international treaties are subordinated to the Constitution as a whole, without acquiring the rank of constitutional provisions. In this regard, the Constitutional Court confirmed that Art. 10 of the Constitution establishes that "the Italian legal order complies with generally recognized provisions of international law" only with regard to customary law. Accordingly, whilst the Italian legal system automatically must conform to the latter, it is still necessary that there be a conformation act in respect of international provisions. Finally, the Constitutional Court denied the possibility that ordinary courts can refuse to apply national provisions that conflict with obligations derived from international law. Such a mechanism is reserved for EU provisions (whenever directly applicable). Consequently, with regard to tax, "constitutionalizing" the principle that treaty provisions supersede conflicting national provisions, requires addressing the peculiar ways in which the international constraints affect national legal systems.

3.2. Principle of "non-aggravation"

The "dynamic" application of treaty provisions in the national legal system must be analysed from two perspectives:

(1) the conclusion of tax treaties containing provisions (more or less favourable than the national ones) in the presence of national provisions regulating the same situations; and
(2) the introduction of new national provisions (more or less favourable than treaty provisions) with regard to tax treaties already concluded.

It should be noted that international tax provisions can bind the national legal system in different ways. In some cases, tax treaties affect the personal connection criteria. For example, with regard to the application of the "worldwide-taxation principle" to persons that are resident in Italy, tax treaties set a limit by only allowing for taxation of income in the source state, thereby obliging Italy to abstain from taxation. In other cases, the treaty provision modifies the material connection test. This arises when the national connection criteria set out in Art. 23(1)(d) of the Consolidated Income Tax Act (CITA) differ from those established by the tax treaties. In further instances, the treaty provision limits the amount of taxation. This arises where the tax treaty, having recognized the taxation right of the state of residence of the recipient, allows the source state to withhold an amount not exceeding a certain percentage. In these circumstances, the treaty provision limitsthe taxation power of the state by integrating the national tax rate provision, but leaving the other elements unchanged.

In all these scenarios, the tax treaty provision prevails over the national pre-existing provision on the basis of *lex specialis* rather than on the basis of *lex posterior dero-*

26. See G.U. Rescigno, "Note per la costruzione di un nuovo sistema delle fonti", *Diritto pubblico* 3 (2002), p. 782 and B. Conforti, "Sulle recenti modifiche della costituzione italiana in tema di rispetto degli obblighi internazionali e comunitari", *Foro italiano* 11 (2002), p. 229 et seq. For "minimalist" views, see C. Pinelli, "I limiti generali alla potestà legislativa statale e Regionale e in rapporti con l'ordinamento internazionale e con l'ordinamento comunitario", *Foro italiano* V (2001), p. 194 et seq. and E. Cannizzaro, "La riforma 'federalista' della Costituzione e gli obblighi internazionali", *Rivista di diritto internazionale* 4 (2001), p. 921 et seq.

gat legi priori (the "succession of laws in time" rule).[27] In other words, the treaty provision prevails because it is more specific, not because it was enacted later in time. In fact, the national provision applies not only to those relationships that do not fall within the scope of subjective application of the tax treaty, but also to cases not covered by the tax treaty for objective or territorial reasons. The international provision also "integrates" the national situation, but does not replace it. Accordingly, the national provision often contributes to the application of the international provision.

What happens when subsequent treaty provisions are less favourable than national provisions? Will the national (more favourable) provision or the tax treaty (less favourable) provision prevail? International doctrine does not answer these questions. It appears not to distinguish between more and less favourable provisions with regard to recipients.

There are three reference points in the search for a solution to this question. First, it is necessary to verify whether or not a general principle exists under customary international law according to which tax treaties may not worsen a taxpayer's position (in comparison to the treatment under national regulations). Second, it is necessary to clarify the position of tax treaties within the hierarchy of internal sources. Third, it is necessary to ascertain the presence of specific provisions under national tax law or international treaty law, regarding the relationship between national and international tax sources.

The existence of such provisions is much discussed in the literature. Discussions include the principle of "non-aggravation", which includes the concept that a tax treaty cannot create a national tax liability in a certain state in respect of a certain item of income where such taxation is not already provided for by national regulations, as well as the concept that it is impossible for a tax treaty to have less favourable effects for the taxpayer than those deriving from national regulations. Some commentators believe that, currently, there is no evidence of the existence under international law of such a customary provision. These commentators note that tax treaties in fact provide for less favourable treatment due to the introduction of the exchange of information and emphasize the existence of national provisions that allow tax treaties to create "taxable objects" not provided for by national law. In this regard, reference is made to French Law 1472 of 28 December 1959, which expressly allows for the taxation (for the purposes of income tax) of income sourced in France under the provisions of a tax treaty, even if national provisions do not provide for such taxation.[28]

Although it is not possible to undertake a comparative analysis here, there are important indicators regarding the existence of such a principle. With regard to the Italian legal system, not only has it been applied in various decisions adopted by the Italian Ministry of Finance and the Italian Supreme Court (*Corte di Cassazione*),[29] thereby demonstrating the adherence to this principle by the authorities in charge of the application of tax treaties, the legislator has, itself, acknowledged the existence of this principle in the Italian legal system.[30]

The primacy of international law over national tax law, deriving from the *lex specialis* principle, was confirmed by the legislator in the 1973 tax reform in two different provisions. These include Art. 75 of Presidential Decree 600 of 1973, according to which "international agreements implemented in Italy are to be complied with in the application of provisions concerning income taxes", and Art. 41 of the same Presidential Decree, which states that "tax exemptions and breaks established by international agreements implemented in Italy and laws concerning international entities and organisms are still applicable" (authors' unofficial translations).

These provisions have always been substantially considered to be superfluous, as they affirm the generic *lex specialis* principle. Accordingly, the Italian legislator, in Art. 128 (now Art. 169) of the CITA, established that "the provisions of the present Act apply, if more favourable to the taxpayer, even in derogation of international agreements against double taxation",[31] thereby assigning to the provision the task of "expressing the only meaning reasonably attributable to Art. 75 of Presidential Decree No. 600/73" (authors' unofficial translation).[32]

With reference to the international legal order, some comfort may be found in the amendments to the 2000 OECD Model Tax Convention ("the OECD Model"),[33] which added a new paragraph (Para. 4) to Art. 23. Under this paragraph, the state of residence cannot exempt the income if the state of source has applied *treaty provisions* in order not to tax this income, whilst, according to the interpretation given by the state of residence, the state of source may tax the same income.

This provision *does not only apply* where the state of source had interpreted the treaty such that it considered the income as taxable by the state itself, but then, due to

27. G. Gest and G. Tixier, *Droit fiscal international* (2nd ed.) (Paris: Press universitaires de France, 1990), p. 65 and G. Croxatto, "Diritto internazionale tributario", *Digesto discipline privatistiche sezione commerciale* IV (1989), p. 646.
28. "*Nonobstant toute disposition contraire du Code général des impôts, sont passibles en France de l'impôt sur le revenu des personnes physiques où de l'impôt sur les sociétés, tous revenus dont l'imposition est attribuée à la France par une convention internationale relative aux doubles impositions*" ("Notwithstanding contrary provisions contained in the General Tax Code, all the items of income in respect of which the tax treaties attribute the appropriate taxing power to France are subject to personal income tax or corporate income tax") (authors' unofficial translation). See E. Zeller, "Qu'en est-il du principe de subsidiarité et du principe de non-aggravation en droit fiscal international français?", *Revue des affaires internationales* (2002), p. 124.
29. For example, Cass., sez. trib., 10 December 1999 to 8 May 2000, Case No. 5768, 5768, *Rivista di diritto tributario* II (2000), pp. 316-317.
30. On the key role of legislation, case law and administrative praxis in the reconstruction of international customary law, see L. Condorelli, "Consuetudine internazionale", *Digesto delle discipline pubblicistiche* III (1989), p. 498.
31. In this respect, see G. Maisto, "Profili internazionalistici dell'imposizione delle imprese nella delega per la riforma tributaria", *Rivista di diritto tributario* (2003), p. 703 et seq.
32. See also C. Garbarino, *La tassazione del reddito transnazionale* (Padua: Cedam, 1990), p. 517 et seq.
33. In this respect, see N. Saccardo, "Le recenti modifiche alla Convenzione-tipo dell'OCSE e al Commentario", *Rivista di diritto tributario* IV (2000), p. 261 et seq.

its internal regulations, such income turned out to be not actually taxable. In this case, the state of residence *shall nonetheless* recognize the exemption. In this way, this principle is substantially legitimated, thereby leading to the belief that the Italian praxis and the clear *opinio juris* that follows it does not represent an exception in the international landscape.

However, in addition to these arguments based on positive law, such a principle may be directly inferred from the fundamental purpose of the treaties at hand, which is, within a context of a process of progressive expansion of the *purposes* of the instrument of tax treaties, the prevention of double taxation, by limiting the various legal orders according to the "*Grenznormen*" mechanism, sometimes by excluding the obligation arising from one of the internal legal orders in the presence of the conventional situation (exemption method) and sometimes by compensating the tax obligation between the two legal orders concerned (imputation method).[34] Moreover, such a principle is sometimes expressly reproduced in the international treaties themselves.[35]

3.3. Subsequent enactment of more favourable national provisions

With regard to scenarios where a more favourable national provision is introduced following the conformation of the national legal system in a tax treaty, the authors have already referred in 3.1. to theories under which, by means of rules of interpretation, the international provision will supersede the subsequent national provision. These theories are, however, not widely held. As to the criterion of speciality, *ratione personarum* or *materiae*, a subsequent national provision may have special features compared to a pre-existing international provision. The principle of speciality sui generis has also been criticized on the basis that it is not possible to identify in the execution order a clear normative intention of the state to fulfil the obligation undertaken. In addition, even the supporters of the concept of speciality sui generis do not deny the possibility of implicit derogations where the national and international provisions coincide.

Nevertheless, if it is decided to adhere to these theories, and, therefore, to hold that the international provision prevails over a subsequent domestic provision (even if more favourable), as a special provision, Art. 169 of the CITA must be considered, which provides the opposite, i.e. that the national provision applies, if more favourable, even if it derogates from international law. If Art. 169 is found not to be a customary principle, it would be again necessary to refer, in respect of the relationship between national and international provisions, to the principles regarding the prevalence of the latter over the former, which would lead, in any event,to the overriding of the national provision.

The fact that the international provision prevails over the national provision, as a special provision, means that the courts must apply the special provision whenever the conditions are met. Consequently, the court has no discretion as to the application of provisions regarding the same situation whenever one of these has special features compared to the other. The court cannot apply both provisions, and it cannot apply the general provision if the situation is governed by a second, more specific provision.

Accordingly, the primacy of international law implies the application *tout court* of the treaty provision, even if it worsens the situation resulting from the application of national law. In this sense, Art. 169 of the CITA does not confirm a general principle of speciality, but, rather, moderates its effects, by allowing the taxpayer to make a choice that, in the authors' opinion, is not open to question by the tax administration on its merits, regarding the applicable provision. Art. 169 of the CITA makes sense only if a customary principle of "non-aggravation" is recognized. In fact, it is a legislative provision that cannot, on its own, resolve the normative conflicts at issue.[36]

It is clear that the existence of this customary principle of international law must be coordinated with the existence of a specific international obligation undertaken by the state. The obligation must, therefore, be fulfilled to avoid the state's liability in the international context. Art. 169 of the CITA allows its fulfilment, as it does not affect the taxation power of the other contracting state as agreed. From this perspective, Art. 169 can only result in a reduction in the tax revenue for the Italian state and never for the other contracting state.

3.4. Treaty ranking under national hierarchy of legal sources: possible systems and "non-aggravation"

The authors have explained in 3.1. how the resolution of the question at issue is also influenced by constitutional principles governing the position of tax treaties within the system of national sources. In this respect, the OECD Report "Tax Treaty Override", of 2 November 1989, distinguishes the following four cases with regard to constitutional systems:

(1) those that expressly attribute a preference at a constitutional level to provisions in international tax treaties (for example, France and the Netherlands), where there are no issues of "treaty override";
(2) those that recognize this prevalence by inferring it from unwritten constitutional principles (for example, Belgium and Luxembourg), where there are no issues of "treaty override";

34. In the sense that the principle of non-aggravation is simply derived from the analysis of the purposes of tax treaties, without turning this into a customary principle. See R. Baggio, *Il principio di territorialità ed in limiti alla potestà tributaria* (Milan: Giuffrè, 2009), p. 75.
35. See Gest and Tixier, supra note 27, p. 66, who refer to Art. 22(3) of the 1967 France–United States tax treaty. However, in this respect, also consider provisions (for example, Art. 15 of the protocol to the Italy–France tax treaty of 5 October 1989) that provide that when, under the tax treaty, income must be exempted from taxation by one of the two states, the exemption must be recognized, provided that the same income is taxed in the other state. Such a provision is obviously useless where the attribution of taxation power by means of the tax treaty can create the taxable object.
36. In this respect, see A. Fedele, *Appunti dalle lezioni di diritto tributario* I (Turin: Giappichelli, 2003), p. 86.

(3) those in which national and international provisions have the same ranking (for example, the United States), so that normative conflicts are resolved according to a chronological criterion; and
(4) those that affirm the parliament's supremacy (for example, the United Kingdom), thereby subjecting the implementation of international treaties, as executed by the government, to its will, which implies that the legislature is free to apply the tax treaty or not and to enact provisions conflicting with it.[37]

With reference to the Italian legal system, if the perspective of the constitutionalization of compliance with international constraints is adopted, the hypothesis of recognizing, *in any case*, the prevalence of the treaty provision, even if less favourable, appears to be stronger.

This may also strengthen the argument that a tax treaty can make an object taxable that was not previously taxable under national law, as demonstrated by the French experience. The French experience is based on Law 1472 of 28 December 1959, which codifies Art. 55 of the French Constitution, which provides that:

> Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur pubblication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.[38]

In these circumstances it is particularly important to recognize the existence of a customary principle of international law that prevents international agreements from "worsening" the taxpayer's position.[39]

3.5. "Treaty override" and the "evolutionary" interpretation

A different problem (other than that governed by Art. 169 of the CITA) relates to the possibility of the tax treaty being "infringed" by means of a subsequent amendment to national regulations, where the subsequent national provision is not "more favourable", but "less favourable" than the international one. This issue is complex, as it is connected with the "evolutionary" interpretation of tax treaties.

As is generally known, Art. 31(3)(c) of the Vienna Convention on the Law of Treaties recognizes the interpretative value of "any relevant rule of international law applicable to relationships between the parties". This is a "historical-evolutionary" rule that allows the adaption of the treaty to changes in international provisions by recognizing the importance of customary international law in addition to treaty provisions that bind the contracting states. However, this is not decisive. The primary principle of international law is always that each word should be attributed the meaning it had when the convention was executed (the "principle of contemporanity"); the attribution of a different meaning is still an exception to the general rule.

If this is regarded as true, it is also true that the principle of contemporanity does not necessarily require a "static" interpretation. In fact, it may be that the meaning of words evolves, provided that this is compatible with the intentions and expectations of the parties when they concluded the tax treaty. This issue can be seen with regard to the words "artiste", "sportsman" and "entertainer", and the concepts of "permanent establishment" (PE) and "royalties", which have changed in accordance with novel issues arising from e-commerce.

The issue does not relate to an "evolutionary" interpretation, but, rather, to the amendments to the national legal system, which are notoriously frequent in the tax field. This issue typically arises in the context of Art. 3(2) of the OECD Model. This provision allows for the domestic meaning to be given to a term not defined in the tax treaty. The question arises as to whether or not this refers to the domestic law in force when the tax treaty was concluded (a "static meaning"), or the domestic law applicable when the tax treaty is enforced (an "ambulatory meaning").

The issue is very close to the "treaty override" issue, i.e. the possibility of a domestic provision "breaching" the tax treaty. In fact, if domestic regulations change, it is necessary to verify whether or not the change is *sic et simpliciter* an infringement of the tax treaty or if an "evolutionary" interpretation of the tax treaty is possible.

The issue of whether or not a "static" or "evolutionary" interpretation should be applied has been a focus of international doctrine. A clear preference for the latter has been expressed. The tax treaty doctrine has only incidentally dealt with this issue. The first signs of addressing this issue appeared in the Commentary on Art. 3(2) of the OECD Model, which, in the 1992 version, provides for an "evolutionary" interpretation, by referring to the need to refer to the domestic meaning of words when the tax treaty is applied. This approach resulted in an amendment to Art. 3(2) in the 1995 OECD Model, which established that:

> for the application of the Convention at any time by a Contracting State, expressions not defined therein have the meaning which is currently given to them by the regulations of the State... (emphasis added)

37. In this regard, see C. Haccius, "Irish Tax Treaties", *European Taxation* 4 (1998), p. 115 et seq. and K. Vogel, "New Europe Bids Farewell to Treaty Override", *Bulletin for International Fiscal Documentation* 1 (2004), p. 5 et seq.
38. "The treaties and agreements ratified or approved, starting from the date of their publication, prevail over provisions of laws, subject to protest regarding their application by the other contracting state" (authors' unofficial translation).
39. There are no relevant effects on the relationship between treaty provisions and the Constitution, as tax treaties are, in any event, at a lower level than the Constitution. In this regard, see Rescigno, supra note 26, p. 784. To the authors' knowledge, the only question of constitutionality was that brought up by the Tax Court of first instance of Rome, Order, 17 October 1983, regarding Arts. 3 and 53 of the Constitution and Art. 15(1) of the Italy–United States tax treaty of 1955, which provided for the deductibility of taxes paid abroad on dividends from the United States up to a fixed amount of 8%. In that case, the taxpayer had been subject to a 30% withholding tax, resulting in double taxation on the remaining 22%, which the original court deemed to conflict with the constitutional principles of equality and tax capability. However, the Constitutional Court in Ordinance No. 419/1987 dismissed the question of constitutionality on the ground that "this kind of taxation has a scope of application that goes beyond single states and thus often allows for the use of instruments according to discretionary choices, as happened in the case at issue" (authors' unofficial translation).

Undoubtedly, an "evolutionary" interpretation is preferable to a "static" one so as not to fossilize the tax treaties at issue and in light of the high volatility of domestic tax legislation. However, tax treaties do not affect the power of states regarding taxation; they are simply intended to limit domestic taxable objects. Accordingly, changes to domestic regulations in respect of tax rates are still possible, subject to the non-discrimination principle.

An "evolutionary" interpretation requires clarification. First, the taxpayer makes a choice on the basis of a certain law that is affected by legislative amendments – for example, in relation to the expansion of an income category to include situations previously excluded or falling within a different income category. This does not really require the protection of relationships characterized by a certain duration, which are far from being protected even at a purely domestic level, but rather implies that the meaning to refer to is the one existing at the time when taxable objects arise.

Second, evolutionary interpretation must be considered to be subject to the same limits regarding recourse to domestic law under Art. 3(2) of the OECD Model, which makes it possible – for example, based on the context – to apply the former provisions rather than the subsequent legislation. Accordingly, a domestic provision that challenges a change of residence aimed at selling shares held in a building company, by making the assignment equal to a property assignment for the purpose of it falling within the regulation of land income instead of share capital gains, should be deemed incompatible with the context. Consequently, it is necessary to consider the relevance of amendments to domestic legislation that do not significantly affect the distribution of cross-border income as provided for by the tax treaty; otherwise international obligations would be breached.

The most relevant issues regarding compatibility with tax treaties relate to distributive provisions, i.e. those provisions that allocate taxation powers between the contracting states by localizing income in either state on the basis of certain connection criteria and domestic provisions that modify the subjective or objective scope of application of the tax treaty, or result in international double taxation that is incompatible with the "spirit" of the tax treaty.

Similar problems relate to anti-avoidance provisions, both general and specific. With regard to general anti-avoidance provisions, their effect could be extended to international situations, provided that they are connected, subjectively or objectively, with the territory of the state, for the purpose of protecting the state's income. On the other hand, it is also true that the fulfilment of international agreements can be verified by uniform implementation in the different contracting states and that uniform implementation may be compromised by the application *sic et simpliciter* of poorly defined anti-avoidance measures.

With regard to specific anti-avoidance provisions, a problem arises when they result in material amendments to the localization criteria. In this respect, controlled foreign company (CFC) provisions are problematic. CFC provisions have been considered to be incompatible with certain treaty provisions – in particular, with Art. 5(7) (control of a company in one state by a company of another state does not make either a PE of the other), Art. 7(1) (taxation of company income only in the state of residence) and Art. 10(5) (prohibition of taxation of profits not distributed by a company resident in another state).[40]

Finally, in respect of the consequences of a "treaty override", some commentators emphasize that conclusions regarding international tort in the international doctrine (i.e. that a breach of rights by a contracting state can result in an obligation to pay compensation) cannot be applied in respect of taxation.[41] According to this view, it appears that, in tax treaties, there are no provisions that directly impose obligations on certain subjects (the state or taxpayers); there is only a general obligation to comply with the tax treaty. This gives rise to a connection between two tax jurisdictions in the event of litigation regarding taxation. Exceptions can only be found in respect of certain provisions, such as those dealing with non-discrimination and the exchange of information. In contrast, in other cases, the problem arises at the level of interpretation and coordination between the tax treaty and domestic legislation, and does not directly affect a breach of obligations under a tax treaty. Accordingly, the problem does not relate to "compensation", but, rather, to the mechanisms that are intended to restore the original contractual balance.

This interpretation focuses on the dynamics of "treaty override". It has been noted how amendments to domestic legislation are not prohibited if they remain within the limits of the balance established by the tax treaty. The state can even modify a tax system by providing for an interpretative adjustment or, if necessary (eventually, if required by the counterparty) by treaty renegotiation. In any event, the consequence is not compensation for damages, but, simply, the interruption of the tax treaty's effects. With regard to the taxpayer, who is also an addressee of the tax treaty, this cannot prejudice the possibility of challenging the conflict between the domestic and the international provision before national courts. In this regard, the mechanism established by the Constitutional Court in Decisions No. 348 and No. 349 of 2007, which provides for the possibility to resort to the incidental question of constitutionality whenever it appears that the conflict cannot be resolved by means of interpretation, applies not only in the event that the Italian legislator enacts a (special) internal provision expressly in breach of an obligation deriving from a tax treaty, but also with regard to general provisions, since only the part

40. In this respect, see N. Melot, *Territorialité et mondialité de l'impôt* (Paris: Dalloz, 2004), p. 696 et seq. and C. Sacchetto and S. Plebani, "Compatibilità della legislazione CFC italiana con le norme convenzionali e con l'ordinamento comunitario", *Diritto e pratica tributaria internazionale* (2002), p. 13 et seq.
41. Garbarino, supra note 32, p. 496 et seq.

of the internal provision that conflicts with the specific treaty to be enforced can be declared unconstitutional.

In conclusion, provided that the tax treaties at issue contain certain obligations only with regard to certain states, the interpretation advanced by some authoritative commentators[42] must be considered. This interpretation is to the effect that, in the event of domestic regulations enacted after those implementing the tax treaty, the conflict may be resolved by the (already tested) application of the principle of *lex specialis*, whilst the principle of the succession of laws over time may apply in respect of former provisions. In this regard, the question of constitutionality only arises when there is an express intention to derogate from international obligations. Consequently, the hierarchical equality of provisions implied by this kind of analysis appears to be fully compatible with the principles expressed by the Constitutional Court in Decisions No. 348 and No. 349 of 2007.

4. Conclusions

The authors have thoroughly analysed the constraints on the Italian domestic legislator deriving from both EU and international provisions. With regard to EU constraints, EU principles – such as the principle of non-discrimination, the four fundamental freedoms and state aid provisions – may well influence the tax objects and the general structure of the local taxes to be levied under the implementing decrees of Law 42 of 2009. The same applies for environmental taxes, in respect of which the current EU approach may play a fundamental role in the development of new taxes. In addition, the authors have highlighted the critical interpretative aspects arising when the economic principles underlying the EU system and the social values contained in the Constitution are compared: although, at the moment, they do not appear to fundamentally conflict, the different approaches of the TFEU and of the Constitution cannot be ignored, also in view of the future developments of the European Union.

With regard to international constraints, the authors have dealt with the influence of such provisions on the internal tax law system, thereby highlighting how the different interpretation of the new Art. 117 of the Constitution may influence the authority of treaty provisions under the domestic tax system. In this respect, a major role could be played by the principle of "non-aggravation", although, due to its low ranking as a principle, it may not fully resolve a conflict between treaty rules and domestic ones. Last, but not least, the authors have analysed the implications on the authority of treaty provisions of recent Decisions No. 348 and No. 349 of 2007 issued by the Constitutional Court.

42. B. Conforti, "La Corte costituzionale e gli obblighi internazionali dello Stato in tema di espropriazione", *Giurisprudenza italiana* (2008), p. 565 et seq.