Taxation of Business Restructuring: a comparative analysis between Italian and German legislations

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Mr. Commander, Officers, Colleagues, kind Guests,

1. Words of Thanks

First of all, I want to express all of my gratitude to the Chief of the School of Tax Police General Saverio Capolupo who enthusiastically authorized our initiative and gave us his generous hospitality. It is thanks to his intuitive understanding on the importance of studying comparative tax law in direct confrontation with people from other countries that we are here today.

I am also really grateful to Colonel Bruno Biagi, Chief of the High Course of Tax Police who immediately agreed to our project and decided to include it in the program of my course of comparative tax law here at the School.

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And many thanks to Colonel Vincenzo Vellucci, Chief of the Ceremonial staff of the School, who coordinated so carefully the organization of this event in all its details.

Before starting our work it is right and proper to make clear that it was Prof. Gerrit Frotscher who had the idea of carrying out together with us annual Joint Seminars on topics of international, European and comparative tax law. He immediately perceived the big opportunities that we could seize by putting together the efforts, the skills, and the knowledge of our Master courses.

On this regard, I think appropriate to quote Maurizio Lupoi, an authoritative Italian scholar of comparative law, who wrote that *"comparison is a travel and comparator is a traveler. He travels to tell. He travels to understand himself and the others"*. Dear Prof. Frotscher, thank You very much for travelling as far as here, giving us such a significant contribution to the comparative studies between German and Italian legislation.

Last but not least, I think that all of us should be grateful to the participants of the working group, who are the real protagonists of this day. In the last months they have carried out a so important work on the single sub-topics, making a great effort to prepare their presentations on time for today and drafting very interesting papers that shall be published in the Rivista di Diritto Tributario Internazionale. I strongly

believe that in hearing them today the audience will be stimulated to make useful suggestions in order to complete their work.

2. Methodological Premises

Coming to the specific object of my presentation, I remember that eight years ago the Master in Pianificazione Tributaria Internazionale and the High School of Economy and Finance "Ezio Vanoni" organized in Rome a conference on the topic *"Comparison in tax law: methods, applications and orientations in the international ambit"*. The purpose of the conference was to investigate both on the methodologies and on the applications of comparative tax law in the European Union area.

Today's Seminar has the aim at demonstrating that comparison in tax law is not only a theoretical matter but widely involves practical issues. In this perspective, it is necessary to point out some issues related to the method that we followed in our research.

The working groups

In order to prepare this Seminar we based our work on a genuine comparative approach. The mixed structure of each sub-WG is the first expression of this approach. Each sub-topic has been assigned to a sub-WG formed both by German and an Italian researchers, who examined it from their respective viewpoints sharing their conclusions on the problems that came up.

I am very happy to notice that, despite the distance and irrespective of the different nationality, profession and age of its members, people from Germany and Italy worked together several months to prepare their presentations. Thanks to this, each sub-WG will appear to the audience as a single group (or, at least, I hope so).

The language

Studying and comparing a foreign law needs to deal with a foreign language. Normally, the best solution is to use the language of the national law that has to be compared.

In this case we chose the English language to communicate between us and to prepare the presentations, being English normally used within the EATLP (European Association of Tax Law Professors), where we met and worked together with professor Frotscher.

Furthermore, the international supremacy of English language is universally recognized since a long time. It is enough to remember on this regard that at the closing session of the Inter-Asian Relations Conference held in New Delhi on April 2, 1947 Mohandas Kharamchand Ghandi (known as Mahatma) said that *"For international commerce, undoubtedly English occupies the first place"*.

Actually, the last International language that we can remember had its origins in Italy. In fact, in ancient times the Latin language was spoken in all the countries included in the Roman Empire (the colonies).

But nowadays it is easy to see that a new International language has spread all over the world: it is the International Juridical English, a new *"lingua mercatoria"* used in order to enforce the new *"lex mercatoria"*. This new global language has been created by the same International organizations who have the competence to introduce the international tax rules (in our subject a big contribution in this direction is given by the OECD).

Moreover, it is a matter of fact that the European Commission as well is increasing the use of English language, regardless that article 342 of the TFEU, Treaty on the Functioning of the European Union (article 290 of the TEU, Treaty establishing the European Community) rules that all languages of Member States are official languages of the Union.

The interpretative criteria

The tax regime of EU cross-border business restructurings has its legal base in Directives of the European Council (the Directive no. 90/434/CEE of 23 July 1990, named Merger Directive, has been integrated by Directive no. 2005/19/EC and Directive no. 2009/133/EC). The Directives have been implemented in the National legislations of the EU Member States.

I must point out that all of the European Directives (included those having fiscal contents) have the main purpose to realize the single market, ensuring the freedom of movement of goods, persons, services and capitals in a competitive environment (article 26, par. 2, TFEU,

article 14, par. 2, TEU). For this reason, the whole EU Law has been interpreted by the ECJ in the light of the economic background of the Treaty. The Court usually adopts this criterion according to the principles of the *"useful effect"* and the *"necessary effect"*.

It is generally recognized that National rules that implement an EU Directive (whatever is the Member State) also need to be interpreted according to these criteria.

The domestic sources

An important part of the presentations is dedicated to the assessment of the legal basis of our subject. It is very interesting to observe that in this subject, especially in the Italian system, there is a big difference between the "law in action" and the "law in the book". In fact, in our country we can see that anti avoidance rules on taxation of business restructuring provide a special preliminary administrative procedure (the so called "interpello") settled by a ruling of the competent tax office.

As we will see, the Italian tax administration gives a large number of rulings each year and their conclusions are often different. The reasons why this happens can be found (i) in the particular nature of the single situations and (ii) in the way in which these situations are represented and demonstrated by the taxpayer in his/her request to the tax office.

Although the effect of these rulings is explicitly limited to the decided case, the Italian taxpayers give a certain importance to them due to the good faith principle. According to my information, the need to respect

the good faith principle ("*Treu un glauben*") is ruled from a long time in Germany. According to the German law, this happens at least when the administration makes use of a discretionary power.

From what I know, a compulsory pre-judiciary proceeding plays an important role in Germany as well. In this proceeding it is the same tax administration who made the tax assessment, or the tax administration of an higher level, or a special administration specifically charged of the control, that re-states on the tax assessment.

I am sure that our speakers (or, at least, Professor Frotscher in the debate) will give us some more information on this regard.

International sources

Very often, taxation of cross-border business restructurings is ruled by non-legislative sources included in the international law.

In this sense, it is easy to think about the OECD *"Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations"*, approved by the Committee on Fiscal Affairs on 27 June 1995. The Guidelines are intended to help tax administrations (of both OECD Member countries and non-Member countries) and Multinational Enterprises (MNE's) by indicating ways to find mutually satisfactory solutions to transfer pricing cases.

Indeed, the Guidelines have been approved by recommendations having a certain binding effect for all the OECD Member States, unless they don't disagree on some provisions by mean of specific

reservations. Moreover, the Guidelines have been officially recognized by the Italian Supreme Court (Judg. No. 22023/06) as a valid source for the interpretation of the arm's length principle.

Nevertheless, the OECD Guidelines simply analyze from a general point of view the different methods used to evaluate whether the conditions of commercial and financial relationships within a MNE satisfy the arm's length principle. Therefore, they only deal with technical issues and cannot be considered to have a full nature of source of law, although we can consider them as a kind of "best practices" (or a "soft law") in the assessment of the arm's length.

3. Taxation of Business Restructuring between two opposite needs: remove tax obstacles or counteract tax avoidance? the Italian Perspective

I cannot enter in the specific topic of our Seminar, and I don't want to, because this is the task of our speakers. But I think that it could be useful to make some preliminary remarks about it.

The topic we have chosen is very important in this moment due to the economical and financial crisis of the last two years: to face it in a better way, enterprises need to modify their structure, both in a domestic and in an European environment, without suffering the burden of taxation.

Moreover, the European legislation requires the Member States to be compliant with the fundamental freedoms of movement provided by the

Treaty. As stated in its preamble, the aim of the Merger Directive is to remove the tax obstacles that prevent from realizing neutrality of cross-border business restructuring.

Despite that, according to article 11(1.a) of the Merger Directive (as amended by the Directive of 17 February 2005, no. 2005/19/EC), *"A Member State may refuse to apply or withdraw the benefit of all or any article of the provisions of Titles II, III and IV where it appears that the merger, division, transfer of assets or exchange of shares: (a) has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that one of the operations referred to in Article 1 is not carried out for valid commercial reasons such as the restructuring or rationalization of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives"*.

In Italy this problem has been widely discussed in the past, since one could think that the Italian tax administration was oriented to consider that all the restructuring operations (more or less) were carried out for tax avoidance or tax evasion reasons (see, for example, the positions expressed by the SECIT, the Central Service of Tax Inspectors, which has been suppressed few years ago).

To narrow down this mistrust by the tax administration, the Italian legislator has approved detailed anti avoidance rules, but the problem

has not been solved yet, as shown by the impressive number of rulings released in this subject.

4. Critical issues

It is not the moment to draw any conclusion. We can do it better at the end of this tiring day. But it could be important to fix since now few points that our speakers will deepen in their presentations.

4.1 As a first outcome of our work it can be pointed out that the German and Italian systems of taxation of business restructurings are ruled in a quite different way. And it is very interesting to notice that the Italian tax system is less strict than the German one, although us Italians like to think that our system is more detailed (according to some: far too much detailed) than the other Member State's tax systems. From this point of view, I recall the German rule on the transfer of assets to a foreign permanent establishment, which will be later analyzed and compared with the Italian legislation (where there is not a similar provision), under Sub-topic 5.

4.2. Another point that must be enhanced is related to the moment in which a restructuring operation can be considered formally done (analyzed in the Sub-topic 4). This point is important in case the business restructuring operation gives rise to a shifting of the residence of a company changing its tax regime. According to the general theory of comparative law, in order to solve this problem a complete

knowledge of the company laws of the two States is needed. The general theory of comparison, in fact, recommends to deepen the context of the rules that are to be compared.

4.3 The Italian presentation on transfer pricing (Sub-topic 3) will put in evidence that in our legislation we have lack of codified rules on transfer pricing practices (not only for Business restructuring). I think that this situation is similar to German, due to the common international base (OECD Guidelines). But are we sure that we really need a more strict regulation?

Thank You for Your kind attention.