XXX
Jornadas Latinoamericanas
de **Derecho Tributario**

MONTEVIDEO | 4 AL 9 DE NOVIEMBRE DE 2018

Tomo III

Tema II

Conjuntos económicos y conglomerados análogos. Tratamiento tributario según la normativa y el principio de sustancia vs. forma

Relatos Nacionales
Comunicaciones Técnicas Oficiales
Otras Comunicaciones Técnicas

Instituto Uruguayo de Estudios Tributarios

ILADT | Instituto Latinoamericano de Derecho Tributario

estrema vaghezza dei requisiti comporti gravi conseguenze per i contribuenti che hanno deciso di costituire un Gruppo Iva.

******

Italia

CONJUNTOS ECONÓMICOS Y CONGLOMERADOS ANÁLOGOS. TRATAMIENTO TRIBUTARIO SEGÚN LA NORMATIVA Y EL PRINCIPIO DE SUSTANCIA VS. FORMA

Giuseppe Marino[1]

I. ¿CÓMO PUEDE CARACTERIZARSE EL CONCEPTO "CONJUNTO ECONÓMICO Y CONGLOMERADOS ANÁLOGOS" CONSIDERANDO SUS NOTAS ESENCIALES?

The aggregation of legal entities is one the main phenomena characterizing the modern business. From an economic standpoint, the trend to grouping represents a changeover from an economic system drown on single entrepreneurs/entities to a system based on the joint action of different subjects who having strategic objectives in common. To "group" means to find a proper coordination between the need of economic unity and the multiplicity of entities, which are both consequences of the recent economic and legal developments characterizing the globalized economy.

As far as Italy is concerned, originally the main reason for corporate grouping has been the separation of legal responsibility between the parent company and the subsidiaries. However, the corporate law reform of 2003 introduced Art. 2497-sexies within the Italian

1 Graduated in Business Administration (Laurea in Economia Aziendale), at Bocconi University, in 1988, and then graduated in J.D. (Laurea in Giurisprudenza), at the University of Milan, in 1992. During the period of his second degree he frequented the Post Graduate Program in Business Tax Law (Corso di perfezionamento in Diritto tributario dell'impresa), at Bocconi University and was then appointed as Research Associate of International and Comparative Tax Law, at the International Bureau of Fiscal Documentation (IBFD), in Amsterdam, The Netherlands, 1989-1993. Once back in Italy he received the Ph.D. in International and Comparative Tax Law at the University of Genoa in 1997. He has been appointed as associate Professor of Tax Law, with tenure, at the University of Milan in 2001 where he teaches Theory and Practice of International Tax Law and Diritto Tributario Italiano ed Europeo. He has been visiting professor of Tax Law at the New York University School of Law, at the University of Paris, Panthéon Sorbonne, at the Meiji University of Tokyo, at the Lomonosov Moscow State University, at the Financial University of Moscow, at the University of St. Gallen, at Bocconi University and at the University of Piemonte Orientale. During his academic career he upgraded the Post Graduate Program into a Master Program in Business Tax Law, at Bocconi University, being the Director from 2002 until 2012; in 2015 he was General Reporter for the research "New Exchange of Information Versus Tax Solutions of Equivalent Effect" of the European Association of Tax Law Professors (EATLP). He has been Member of the Scientific Committee of the European Association of Tax Law Professors (EATLP), The Netherlands, and Member of the Consultative Commission for the Exchange of Information and Tax Cooperation, Principaute de Monaco. He currently is Member of the Taxation and Fiscal Policy Committee of the Business Industry Advisory Council (BIAC), Organization for Economic Cooperation and Development (OECD), in Paris.

Civil Code, whereby a definition of group management and control (*"attività di direzione e coordinamento di gruppo"*) lies with the company having the legal and factual control over another company (which definition of control lies with Art. 2359 of the Italian Civil Code). If a group management and control does exist at the level of the parent company, the latter is always responsible for damages caused to third parties by the subsidiary.

On the other hand, as far as Italian tax law is concerned, the main discussions for having, or not having, a definition of group, were related to the need to eliminate economic double taxation, bringing to a "small" perimeter of group which has been enlarged over the years upon European pressures, and, on the other side, to the need to prevent the economic double non taxation, bringing to "wide" anti-avoidance perimeters of groups, especially in case of cross-border implications.

This is the reason why today Italian tax law does not have a standing alone definition of "group" for tax purposes. Nevertheless, the idea of group is present in the Italian tax system and it fulfils many different functions. Over time, the legislator added new rules implying the existence of a group, or better, different types of group depending on the scope, which have layered until the today's framework was reached.

The Legislative Decree 344/2003 established two optional types of fiscal consolidation, one thought for domestic contexts and the other one for cross-border scenarios. Actually, domestic consolidation (*consolidato nazionale*) is regulated under articles 117-129 of the ITC ("Italian Tax Code" - namely, the Legislative Decree 917/86, also known as "Tuir"), while cross-border consolidation (*consolidato mondiale*) is regulated under articles 130-142 ITC.

On a very theoretical level, it is possible to distinguish two models of consolidation: the first one, the so-called "tax consolidation" or "pure tax consolidation", a true shift of the tax liability at group level, which results in the filing of a single "global" tax return by the parent company. This model is adopted, for example, by France, Denmark, Spain and Portugal. The second one is the model commonly known as "group relief", which consists of the transfer of profits and tax liabilities among different entities and implies the maintenance of the formal autonomy of each of them. This model is adopted, among others, by the United Kingdom.

Italy adopts a hybrid model. In particular, it integrates some elements of "pure consolidation" by requiring the calculation of a single group tax base at the level of the parent company. Such a tax base is nothing more than the algebraic sum of the tax bases of the different entities forming the group, without any de-multiplier adjustment due to the company chain.

On the other hand, Italy also integrates some significant elements of group relief to the extent that from a purely legal standpoint, consolidation does not result in the rise of a single tax liability at group level. Despite the relevance of the group for tax purposes, the level of autonomy of the single entities remains quite high.

Domestic consolidation is something that remains strictly confined in the "tax sphere". Indeed, it does not imply any consolidation at accounting level and therefore it leaves the accounts of the entities forming the group unchanged (it is very important to keep conceptually separate "accounting consolidation", *consolidato civilistico*, from "tax consolidation", *consolidato fiscale*). In substance, domestic consolidation is a technique that can be optionally used to monitor the tax situation of the group and to calculate a single tax base at the level of the "higher" holding company. During the period of validity of the option, all payment obligations are performed by the consolidating holding on the basis of the consolidation results.

Domestic consolidation can be simultaneously opted only by two or more entities that are resident in Italy for tax purposes, on the condition that a control relationship exists between or among them. The notion of "control" applied in this field is established under article 120 ITC and consists of two tests that must be "jointly passed":

1. a direct or indirect participation of at least 50% in the capital of the controlled company, without taking into account non-voting shares;

2. a direct or indirect participation of at least 50% in the profits (*utili di bilancio*) of the controlled company, also in this case not taking into account non-voting shares;

In addition to that, article 120 ITC also provides that European permanent establishments of Italian resident companies can be consolidated, on the condition that there is an effective exchange of tax information in force between Italy and that other State.

Finally, it is important to mention that these requisites have to be met already at the beginning of the financial year during which consolidation is opted for by the taxpayer.

On the one hand, the requirements to be met for consolidation are quite formalistic. On the other hand, the "high level" of participation required in the profits of the controlled company allows us to say that the Italian tax system grants group taxation only where the different entities forming the group are truly united from an economic standpoint. It seems reasonable to say that Italian group taxation must meet formal requirements that widely reflect substantial connections.

Cross-border consolidation is also an optional regime introduced to give relevance to groups for tax purposes. In comparison to domestic consolidation, it allows the Italian parent company "of highest level" to consolidate its controlled entities abroad, as well as the "intermediate entities being resident in Italy for tax purposes". The result of cross-border consolidation is that the income of those consolidated foreign controlled companies is subject to the Italian worldwide taxation.

In practice, cross-border consolidation consists of the attribution to the Italian parent company of profits and losses of its foreign controlled companies in proportion to the participation held (and therefore taking into account the ownership chain), regardless of the fact that profits have been distributed or not.

The main difference in comparison to the domestic consolidation is that cross-border consolidation is regulated by the "all in, all out" principle, of which the rational is to prevent abuses. Indeed, any other solution would make it possible for the Italian parent company to consolidate only foreign controlled companies generating losses or companies being resident in high tax jurisdictions (thus arbitrarily excluding "tax havens").

Despite the higher level of "flexibility" of the domestic consolidation in comparison to the cross-border consolidation, which are due to the different anti-avoidance needs, the similarity of the requirements that companies must fulfill to be eligible allows us to affirm that from an economic standpoint there are no significant differences between the two of them. Even in this case we are facing formal requirements that widely reflect the substance of economic connections among the participants.

One of the main points to be underlined is that where the "all in, all out" principle is not applied, like in the case of Italian domestic consolidation, the "cherry-picking" of controlled companies becomes possible, thus leading to a possible discrepancy between the consolidation scope and the economic reality of the group. Moreover, it is also evident that a set of rules allowing the existence of a consolidation scope covering only a portion of the whole group (like in the case of Italian cross-border consolidation where the Italian resident holding is in turn owned by other foreign entities, which is known as *"soggetto apicale relativo"*) can take into consideration only a limited portion of the real global economic situation of the group.

II. EL CONJUNTO ECONÓMICO Y CONGLOMERADOS ANÁLOGOS EN EL ÁMBITO TRIBUTARIO NACIONAL

2.1. Visión funcional. ¿Qué fines persigue?

The Italian tax legislator works at a "secondary" level, which means that it usually attributes some tax relevance to items that are already regulated under other branches of the law. This is true also for groups, which are "primarily" regulated under company law and "only at a later stage" given relevance for tax purposes.

This characteristic of tax law does not prevent it from being original and promoting innovative ideas, but implies that it must (almost) always lie on a proper legal ground established in other fields of the law and that effective links have to be established with it in order to achieve a homogeneous result.

This is true also with regard to groups. In the Italian tax system the group is not a single subject as such, but it is a "phenomenon" which exists anyway, to which legal significance is given, and that is also able to trigger tax consequences.

As to the function of the concept of group under Italian tax law, in addition to the domestic and cross-border consolidations, one can distinguish also the following main clusters (mainly in the field of indirect taxation):

(a) the "physiological" relevance of the corporate group;

(a1) the calculation of "group for VAT purposes". Indeed, the concept of group has been playing a central role in indirect taxation even before Legislative Decree 344/2003 was passed. This is something that derives from EU law and is a very good example to highlight the "secondary" role of the (domestic) tax legislator. We will come back on this point later on;

(a2) in the past, a special VAT regime for transactions among the companies belonging to the same banking group was in force (it has now been repealed). In particular, it consisted of an exemption for those transactions and the rational behind it was "not to harm the rationalization of structures realized through the outsourcing of functions to other companies forming part of the same group" (see also the resolution – RM – of Agenzia delle Entrate n. 164/E of 18th April 2008).

(b) the "anti-avoidance" relevance of corporate groups to prevent economic double non taxation;

(b1) article 37-*bis* of Presidential Decree 600/1973 (now repealed by the general anti-avoidance rule recently introduced in our tax system), which empowered the Tax Administration to disregard for tax purposes "non-genuine" infra-group supplies of goods and services;

(b2) article 110, paragraph 7, ITC mandates that transactions among related companies must be "at arm's length". This practice is known as "transfer pricing" and it goes without saying that, despite the notion of group is not expressly used, these rules are *de facto* intended to regulate infra-group transactions;

(b3) also in the case of CFC legislation a positive definition of "group" is not explicitly used, although it is self-evident that those rules are by their very nature intended to regulate group scenarios. Italian CFC legislation (article 167 ITC) was recently amended, but what remains prominent is the requisite of control that must exist between the (two?) companies involved.

2.2. ¿Se adopta un concepto uniforme o no? Si existen definiciones múltiples, ¿qué fundamento tienen?

Before the reform of 2003, the Italian tax community debated long on whether to introduce a notion of group into the tax system. A wide part of the scholars was contrary to the introduction of an autonomous tax liability for agglomerates of companies. Many of them speculated on a new concept of "atypical liability" to be attributed to either the group itself or to the parent company.

From a company law perspective, a definition of "group" is also not given. What happens is that the law "acknowledges" the economic relationships among companies in order to effectively regulate the consequences of what goes on in the economic reality.

Tax law intervenes at a second level in respect to this structure and this has two main "repercussions". First, the parent company may always take into consideration tax issues when it decides something involving its controlled (and consolidated) companies. Second, where an entity is part of a group it does not make sense to analyze it individually, but on the contrary, it is always necessary to consider the group as a whole before taking any relevant decision.

As already mentioned, Italian tax law uses different notions of group under different rules. Each one of them has some specific requirements as to ownership and "interaction" that must exist among the member group companies. This is justifiable according to the needs that characterize the different rules and ground their rationales. In general, it is possible to state that in the field of consolidation the requirements of control are more formal. They are, among others, "at least 50 per cent of the capital or of the profits"; which means that they are formal requirements expressing a substantial control.

On the other hand, although it does not set out a true definition of group, article 110, paragraph 7, ITC on transfer pricing does not mention any formal requirements, but it simply makes reference to a "purely substantive" requirement of "control": "[...] directly or indirectly controls the company, are controlled by the company or by the same holding that controls the company [...]".

2.3. ¿En el Sistema tributario nacional pueden identificarse normas que utilicen el concepto como instrumento para cumplir con el fin descripto en 2.1. i)? [...]

As to the domestic and cross-border consolidation, we already mentioned that the Italian tax system does provide neither a positive and standing alone definition of group as such nor of group taxation. Nevertheless, being the phenomenon of company aggregation

very important in Italian economy, tax law extensively acknowledges it and detailed rules are set out to regulate the relationships among the companies that opt for consolidation.

Both domestic and cross-border consolidation are optional regimes; the first consists of the simultaneous option by two or more companies that fulfill the given requisites (a substantial control due to either the ownership of 50% of the shares or of the profits), while the second can be opted for only on a "all in, all out" basis.

Where the domestic consolidation is opted for, such option cannot last less than three years. Nevertheless, its irrevocability does not imply that the access of other companies is prevented. Indeed, only the leaving is forbidden during the period of validity of consolidation, access is not.

The rationale of this irrevocability is to promote stability and, in particular, to avoid the exploitation of the option only in the single years in which a controlled company is at a loss.

The option for domestic consolidation is automatically renewed after three years, until the participants expressly decide to quit it. Its main consequence is the calculation of the "joint global income" of the controlling and the controlled companies for tax purposes.

Unlike domestic consolidation, the option for cross-border consolidation is exercised only by the (resident) parent company. Where "intermediary" companies resident in Italy are present, the domestic consolidation between the consolidating holding and those intermediaries becomes mandatory. This obligation has an anti-avoidance purpose. Indeed, the lack of such an obligation would open the door to the possibility for the resident holding to allocate some of its participations to resident sub-holdings and keep only the ones that are convenient for consolidation purposes (e.g., the ones referred to companies operating at a loss or to companies that are resident in high-tax jurisdictions).

Under article 132, para. 1, ITC, the option for cross-border consolidation cannot last less than five years, unless the requisite of control ceases to be fulfilled. Article 132 also clarifies that subsequent renewals cannot last less than three years each. The rationale behind such time limits is exactly the same as for domestic consolidation.

The consequence of cross-border consolidation is that losses and profits of the foreign controlled company are attributed to the resident holding in proportion to the participation.

Hereinafter, some observations on the tax consequences of consolidation. The first point that deserves attention is the treatment of losses.

Under domestic consolidation, pre-existing losses are not admitted to the regime (art. 118, para. 2, ITC) and must be exclusively attributed to the company that generated them.

Once again, the rationale behind such prohibition is of an anti-avoidance nature, and more specifically is to prevent what in Italian is known as "tax coffin trade" (*commercio di bare fiscali*), namely the transfer of companies with no asset other than tax deductible losses. On the other hand, losses occurring during the period of validity of the option are admitted to consolidation and contribute to the calculation of the "joint global income".

As to the cross-border consolidation, pre-existing losses cannot be admitted as well. But the main difference in respect to the domestic consolidation is that they cannot even be used by the company that generated them for Italian tax purposes. This because foreign losses are generated by foreign activities and calculated under foreign rules, and therefore it would be necessary to re-calculate them under the Italian law (something that looks practically unfeasible, or at least very difficult, both for the taxpayer to do and for the Tax Administration to monitor).

Remaining in the realm of tax consolidation, it is noteworthy that following a significant amendment operated by budgetary law 2007 the infra-group transactions are now fully relevant (e.g. capital gains are attributed to the parent company). In the past, article 123 ITC established a special regime, under which infra-group transactions (supply of goods, with the exception of capital goods, *beni strumentali*) were neutral for tax purposes.

One of the main "instruments" of the consolidation regime are the so-called "consolidation fees" (*pagamenti infra-gruppo*). They meet three specific needs: (1) in the case of transfer of taxable profits to the consolidating parent company, such fees cover the taxes that will be paid by the parent; (2) in the case of transfer of losses to the consolidating parent company, such fees compensate the tax benefit received; (3) they can be used to compensate passive interests attributed to the group under art. 96 ITC.

The described rules are only applicable to corporate taxation (IRES). Even where two companies opt for consolidation the rules to calculate their respective tax base(s) remain unchanged. With the exception of the above-mentioned consolidation fees, ordinary rules are followed. Moreover, it has also to be said that the payment of consolidation fees is not mandatory and that taxpayers can arrange different solutions under their private autonomy.

From a more practical standpoint, after having calculated its own taxable income, the consolidating company collects all the calculations done by the consolidated subsidiaries in order to be able to calculate the "group taxable income". The first step is to add and subtract profits and losses of all the companies involved (art. 118, para. 1, ITC). Once the "group taxable base" is calculated, the consolidating parent company is in charge of submitting the "group tax return" and to pay on behalf of the whole group the "unitary" tax due.

Article 124 ITC regulates those situations where during the period of validity of the consolidation option the requirements for its exercise quit to be met. This may happen not only due to the loss of control by the consolidating holding, but also due to the loss of subjective requisites, like for example where following a transformation or an extraordinary operation a company loses its limited liability.

2.4. ¿En el sistema tributario nacional pueden identificarse normas que utilicen el concepto como instrumento para cumplir con el fin descripto en 2.1 ii)? [...]

Technically speaking, the correct answer to this question is no. Under Italian tax law a positive and standing alone concept of group to be used specifically for anti-avoidance purposes does not exist.

Nevertheless, it is also wise to recall that there are rules specifically set out to counter those avoidance behaviors that are typical of the groups. To a certain extent, they imply a concept of group. Above all, this is the case of art. 110, para. 7, ITC on transfer pricing.

This article was recently amended (art. 59, D.L. n. 50/2017) and adapted to the most recent international standard. In particular, the standard of "normal value" (*valore normale*) has been replaced by the one of "free competition" (*libera concorrenza*).

This new approach is expected to move the "legal *fictio*" closer to the "economic reality". Instead of assuming that an item has a "normal value", and therefore an "intrinsic" value, the law imposes now to look at real facts, or more precisely at supposed facts, and in practice to disregard what really happens within a group in favor of what should happen in "normal free market conditions" among the same companies.

If one wants to extract the concept of group that is implicit in the transfer pricing rules, it becomes immediately evident that it is a very flexible one. Indeed, the rule does not set out any objective threshold or percentage, but it simply relies on a very general concept of "direct or indirect control".

2.5. ¿En el sistema tributario nacional pueden identificarse normas que utilicen el concepto como instrumento para cumplir con el fin descrito en 2.1 iii)? [...]

The answer to this question is similar to the previous one. As already recalled several times, an explicit definition of "group" for CFC purposes does not exist. Nevertheless, it is obvious that having Italy a developed CFC legislation an "implicit" concept of group in this field does exist and plays an important role.

As within the Italian tax system the concept of residence is one of the pillars of anti-avoidance, it follows that CFC legislation has a quite significant role in this field. It was introduced in the system by art. 1, Law n. 342/2000 and became operative in 2002. Since then, it has been amended several times and is now included in art. 167 ITC.

CFC legislation pierces the veil of subjectivity and attributes the profits of the controlled foreign company to the Italian resident holding in proportion to its participation, like it they were realized through a permanent establishment. Where this happens, the profits of the controlled foreign company are "re-calculated" using the Italian rules.

This legislation can be applied to every resident taxpayer, either legal or natural person, controlling a legal entity in a low-tax jurisdiction. Under art. 167, para. 1, one of the objective conditions to trigger CFC is that the resident subject must have the control over the non-resident entity. This can be either a direct or an indirect control, including the indirect control through a fiduciary or an interposed person.

Paragraph 3 of article 167 refers to the notion of control provided by the Civil Code, of which article 2359 distinguishes different types of control:

(a) control by right (*controllo di diritto*), that occurs where a subject owns the majority of voting rights in the shareholders' meeting;

(b) control "in fact" (*controllo di fatto*), that occurs where a subject owns a number of votes that is as a matter of fact able to guarantee him either the control or a significant influence over the entity, or where the same result is achieved by virtue of contractual ties, even without any participation.

2.6. ¿Cuál es el alcance de la obligación tributaria que la ley atribuye las entidades que integran un conjunto económico cuando lo define como aspecto subjetivo del hecho de un tributo? [...]

As already mentioned, the main effect of consolidation is to lead to the calculation of a "joint global income" at group level.

Under Article 118, para 1, ITC the exercise of the option of domestic consolidation results in the summing up of the incomes of all the group members that opted for consolidation, regardless of the percentage of shareholding. From a purely legal standpoint, this gives birth to a "joint obligation" (*obbligazione solidale*), namely a single obligation carried out by multiple subjects.

The consolidating company is the "main responsible" (*responsabile principale*) for the payment of the tax of the whole group. This joint liability has a number of practical consequences, especially in the case of a tax audit. For example, when an assessment notice is issued by the Tax Administration and the consolidating company is called to be heard

with regard to the point(s) in dispute, the participation of the consolidated company is permissible but not mandatory.

This legal framework was at the basis of a wide debate in the past, especially with regard to the consequences of judicial appeals for the members of consolidation who were not part of the legal proceeding of first instance.

One of milestones of the development of this field of the law is the Constitutional Court Judgement of 16 May 1968, n. 58, with which the so-called "*supersolidarietà*" was put out law and the following general principle established: the effectiveness *ultra vires* of any act or action is admissible only where the consequences are favourable to the subject who was not part of the proceeding. Negative effects cannot affect who did not enjoy the right of defence.

On one side, this solution is very much State-oriented, because it guarantees that the tax is paid anyway by someone (if for any reason not the consolidating company, one or more of the subsidiaries). On the other side, it keeps the different members of the group completely separate and does not lead to any mixing of their capital/wealth/assets, etc.

Once again, it seems possible to remark that despite not having a standing alone definition of group, the Italian tax system gives a primary importance to this concept and concretely applies it in multiple forms. To a certain extent, it seem also possible to say that this lack of a single definition lead to a certain fragmentation of the concept(s) of group (indeed, they can be find in several different pieces of legislation).

2.7. ¿En el sistema tributario nacional pueden identificarse normas que utilicen el concepto como instrumento exclusivo para cumplir con el fin descripto en 2.1 iv)? [...]

Here, it can be recalled that when consolidation is opted for and a group is outlined for tax purposes all the members are liable for the payment of the tax, although at a different "hierarchical" level.

Under Art. 127 ITC, the consolidating company is liable for any fine and extra-payment due by virtue of tax audits carried out by the tax administration at group level. In practice, when a notice of assessment is served to a group member, it is necessary to calculate the amount due at group level and the consolidating company is liable for the payment. At this point, the consolidating company is the "main responsible" and the controlled company is "jointly liable" (*obbligata in solido*) for the tax debt. The latter is not liable "directly" for the obligation raising as a consequence of the assessment carried out on its own tax return, but it "becomes" liable for the obligation rising at group level following the assessment.

2.8. ¿En el sistema tributario nacional existen otras normas que prevean el conjunto económico o conglomerados análogos con otras finalidades? Descríbalas y señales su finalidad.

Yes, they do exist. At this point, it is important to say some words on the new concept of "VAT group" which was recently introduced. Even if from an Italian perspective this concept of group originates from outside (EU) and is "injected" into the system (Tit. V-bis, DPR 633/72), there is no doubt that it will have a huge impact, especially in the light of the increasing importance of VAT.

The introduction of the "new group for VAT purposes" (VAT group), a single subject in charge of paying the VAT for a number of taxable persons, is one of the main innovations introduced by the Budgetary Law 2017. Starting from 1st January 2018, all the transactions carried out by one of the group members are to be considered as carried out by the group itself. On the same note, supplies to one of the group members are to be considered as supplies to the group itself.

The option for the VAT group can be exercised where financial, economic and organizational links are jointly present and allows all the participants to be considered as one single person for VAT purposes.

Even in this case a reference is made to the Italian Civil Code, although the requisites are overall more comprehensive than the ones of consolidation. Under Article 70-ter, DPR 633/72, a financial link exists where the requisite of control set out by Art. 2359 of the Italian Civil Code is fulfilled, namely where (a) a direct or indirect control exists; or (b) the two entities are controlled by the same entity (on the condition that such entity is resident either in Italy or in a jurisdiction with which an effective exchange of tax information is in place).

Under the same article, an economic link is considered to exist where between two taxable persons who are resident within the Italian territory one of the following connections is in place: (a) the same "main activity" is carried out; (b) complementary or interdependent activities are carried out; (c) the carrying out of activities that somehow benefit the ones of the other entity.

Finally, an organizational link exists where a certain degree of coordination "rooted in the Civil Code" is present (e.g. shareholder's agreements, etc.).

It is also clarified by Article 70-ter that where a financial link is present, the existence of the economic and organizational ones may also be presumed and taken as given.

Where the option for a VAT group is exercised, the conglomerate of entities becomes a single unit, a single taxable person, with a single VAT number. As a consequence, all the infra-group transactions are irrelevant for VAT purposes.

In the previous version of the VAT group, the controlling entity had the possibility to compensate VAT debts and credits among the different members of the group, and then to make a single payment in case the result was a debt (or to claim a "single group credit" in the opposite case). Nowadays, there is one single taxable person, namely the group, on whom all the accounting and bureaucratic duties are posed. They are carried out by an appointed representative, who can be either the controlling company or the company with the higher turnover as applicable (Art. 70-septies, DPR 633/72). Under Art. 70-octies, the representative is responsible for the carrying out of all the duties connected to the option, and all the other group members are "jointly liable" (*obbligati in solido*) for the payment of the tax.

This option lasts for at least three years.

It goes without saying that the membership of a VAT group is incompatible with the membership of other VAT groups.

2.9. ¿Es los casos que existan definiciones de conjunto económico [...] el relator deberá pronunciarse respecto de si son suficientemente precisas [...]?

We saw that, in general, the Italian tax system relies on definitions of control that are quite formalistic and precise. Although thresholds are generally "high enough, so as to reflect a substantive control", this formalistic nature keeps the level of litigation quite low on this point.

The only significant exception to this is the discipline of transfer pricing, where a more "Anglo-Saxon" substantial approach is adopted also by Italy pursuant to its alignment to international standards.

Under Art. 110, para. 7, ITC on transfer pricing no precise concept of control is outlined. Nor reference to the notion of control set out by Art. 2359 of the Italian Civil Code is made. The Italian Supreme Court (judgement n. 8130/2016) stated that in the absence of any precise criteria a "wide concept of control" has to be adopted. Indeed, in the past several stakeholders put forward the idea that even if not expressly mentioned the notion of control set out by the Italian Civil Code has to be adopted also in the process of application of Art. 110 ITC. From an Italian perspective, this lack of a precise definition was seen from many quarters as a legal vacuum.

In truth, this argument was supported by a minority of scholars and is grounded on the fact that the wording used in Art. 110 is the same used in the Italian Civil Code: "control" (*controllo*); while a wider application would be justified only if the wording "dominant influence" (*influenza dominante*) was used.

The Italian Tax Administration took a different view already some decades ago (Circular 32/1980) and advocated for the "wide definition". It maintained that the notion of control for transfer pricing purposes could not be limited to the one set out by the Italian Civil Code. Indeed, to extend the concept of control provided by the Italian Civil Code to transfer pricing would mean to extend its weaknesses as well, with the consequence of harming the capability of the tax administration to tackle a huge number of transactions commonly carried out in international trade.

The wide notion of control implied in the Italian discipline of transfer pricing is much more flexible than the formalistic one set out by the Italian Civil Code, and it seems therefore much more suitable to pursue its objectives in the current dynamic reality of international trade.

The capability to alter market prices is made possible by an influence that is exercised by one entity over the other(s), and this "pressure" is often something of an economic nature that goes beyond formal ownership and contractual links.

This wide notion of *de facto* control, which represents an exception in the Italian landscape, covers potentially any scenario in which an economic control is conceivable. For example:

- Exclusive selling of the products of the other company;
- Join ventures where one of the two companies would not be able to operate alone;
- Right to appoint the members of the directors board or of the management;
- Common directors or managers;
- Family ties;
- Significant indebtedness and financial dependency;
- Participation of the enterprises in central buying offices;
- Participation of the enterprises in cartels or consortiums;
- Control of supply channels;
- Line of contracts that results in a monopolistic situation;
- Every situation in which there is some sort of influence on entrepreneurial decisions.

In addition to this, it may also be remarked that in all other circumstances where the law intends to make a reference to the Italian Civil Code this is done explicitly. There would be no point in referring to the Italian Civil Code implicitly only in the case of transfer pricing. If the legislator wanted to refer to other fields of the law, it would do it explicitly.

Moreover, it has to be taken into consideration that the exact wording used in Article 110 ITC is "enterprise" (*impresa*) rather than "company" (*società*), which is the one used in private law. The fact that the word "enterprise" is much wider in scope than "company" seems to provide a good ground to believe that the legislator gave on purpose a wider and more flexible scope to the notion of control used in the field of transfer pricing.

III. SEÑALE SI EL PAÍS QUE REPRESENTA HA SUSCRITO CDI QUE INCLUYEN DEFINICIONES DE CONJUNTOS ECONÓMICOS O CONGLOMERADOS ANÁLOGOS EN CLAUSULAS LOB [...]

LOB clauses are included in CDI signed by Italy with Estonia, Israel, Kazakhstan, Lithuania, United States of America and San Marino.

In some cases (i.e. the Convention with the US) some thresholds for the application of the LOB are provided, but no one of these LOBs provide a standing-alone definition of "group" (although it goes without saying that such a clause may affect the economic and legal dynamics of groups).

******