Università
Ca'Foscari
Venezia

Master's Degree

in Management

Final Thesis

The banking secrecy:

The national regulation and an international overview

Supervisor
Ch. Prof. Federico Onnis Cugia

Assistant supervisor
Ch. Prof. Gaetano Zilio Grandi

Graduand
Olga Frascati
Matriculation number 856059

Academic Year
2019 / 2020

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INTRODUCTION

The aim of this thesis is to deeply examine the concept of banking secrecy; it is a known and recurrent concept which represents the obligation that banks have towards their clients to maintain the discretion on the information regarding their affairs.

The origins of the banking secrecy date back to the ancient Greek era, the concept continues to exist over the times, from the medieval age to nowadays; however, there is a debate on the individuation of its legal foundation.

On this matter, in chapter 1 there is analysis of two important theories regarding the legal basis of the banking secrecy, namely article 7 of the Consolidated Law on Banking and article 622 of the Penal Code.

Different perspectives for the acknowledgment of the banking secrecy involve the Constitutional one, that is based on the protection of savings established by article 47 of the Constitution, as well as on the protection of freedoms and of the private economic initiative.

Other important points concern the guidelines given by the Privacy Guarantor on the matter of the treatment of personal data and the verdict 2147 of 1974 of the Court of Cassation that is considered as the customary source of the banking secrecy.

Finally, some observations are pointed out regarding the changes brought by the GDPR for banks.

In chapter 2, there is an examination of the main limits to the banking secrecy. On this regard, an important pronunciation of the Constitutional Court is the sentence 51 of 1992, which subordinated the secrecy to the compliance, among others, to duties of public expenditure contributions.

Other exceptions to the banking secrecy are provided to fight the organized crime of mafia type and the money laundering; also, some are established by the criminal and civil law, if this can help with the discovery of the truth and the facts of the case.

Chapter 3 deals with the positioning of the tax authorities towards the banking secrecy, since they are trying to prevent illicit operations of money laundering and tax evasion; on this regard, banking investigations are deterrence tools that, however, alone cannot defeat the problem.

An analysis, then, have been carried out on the importance of the legal presumption contained in article 32 of the D.P.R. 600 of 1973, since it is the taxpayer that has to

demonstrate that the data resulting from the account verification has been taken into account for the determination of income subject to tax.

Changes were brought by the D.P.R. 463 of 1982, which provided for exceptions to the banking secrecy in the field of VAT coherent with those adopted for the taxes on revenues; also, it establishes the conditions under which the tax office can ask for the data related to the relationships maintained with clients.

Another important step has been taken with article 18 of the law 413 of 1991, with which there is a shift from the culture of secrecy to the culture of transparency; by allowing the data acquisition in a faster way while safeguarding the individuals at the same time.

Then, the finance law 311 of 2004 brought a procedural simplification of the banking verifications, as well as an expansion of the objects and subjects under scrutiny that are not covered by the banking secrecy.

Finally, the concept of loyal cooperation in the European Union is analyzed; in the Union, the Directive 2011/16/EU establishes a discipline in the field of cooperative administration, with three procedures, namely the exchange of information on request, the automatic one and the spontaneous one.

On the other side, on the international context, the OECD is the most committed to the exchange of information, and it developed a convention Model, the article 26 of which is commonly used as a base to write agreements against the double taxation.

An international overview of the banking secrecy is given in chapter 4; each country disciplines and deals with it in a different way, but international bodies solicit the stipulation of agreements to fight illegal operations and favor cooperation; on this regard, a problem is represented by the so-called tax havens, low tax pressure areas.

In Europe, among other activities, the European Council adopted a plan to repress the financial crimes and, since 2003, a complete exchange of information system has been implemented.

Then, an analysis has been carried out to examine the banking secrecy regulation in some European States as Switzerland, France, Belgium, Germany, Austria, Luxembourg, as well as on other foreign countries such as the United States of America, the republic of San Marino and the Vatican City State.

CHAPTER 1
THE BANKING SECRECY: THE NATIONAL REFERENCE REGULATION

SUMMARY: 1.1 Definition and origins of the banking secrecy – 1.2 The first legislative provisions on banking secrecy and the search for its foundation – 1.2.1 The article 7 CLB (Consolidated Law on Banking) – 1.2.2 The article 622 of the Penal Code: Foundation or instrument of protection of banking secrecy? – 1.3 The Constitutional perspective of the banking secrecy: the protection of savings – 1.3.1 The protection of freedoms – 1.3.2 The protection of the Private economic initiative – 1.4 Guidelines of the Privacy Guarantor concerning the treatment of data connected to the banking relationship: banking secrecy and protection of confidentiality – 1.5 The customary source: the verdict 2147/1974 of the Court of Cassation – 1.6 The new privacy rules of the GDPR and the main news for banks.

1. Definition and origins of the banking secrecy

The concept of "banking secrecy" stands for the obligation for the banks to maintain the most absolute discretion on the information concerning the affairs of the clients, that is "all the news relative to the client that the bank cannot reveal if not in presence of particular circumstances (…), unless the consensus of the client itself does not intervene"[1]. Hence, the primary beneficiary of the banking secrecy, is the client of the credit institution.

For consolidated practice, the relationship between the bank and its client is surrounded by a particular secrecy; indeed, we must highlight that the need for the banker to guarantee the maximum privacy on the transactions put in place with its own clients is deeply embedded in the tradition.

As Toscano and Razzante[2] pointed out, some scholars date back the origins of the banking secrecy to the era of the ancient Greeks: the absence of witnesses during the so called "*trapeziti*" operations (in which the coin change activity was carried out on specific desks, called exactly *trapeza*, located in the most popular spots in the city and during the most

[1] COSTI R., *L'ordinamento bancario*, Bologna, 2007, p. 651

[2] TOSCANO F., RAZZANTE R., *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002;

important exhibitions) seems to be conferred to the intent of ensuring the most absolute secrecy.

Then, during the Medieval age, the banking secrecy became a constantly respected practice aimed at ensuring the maximum discretion on the loans that bankers (this term appears for the first time during the XII century) granted to merchants interested in commercial traffic, to lords that were in financial difficulty and to governors involved in the continuous conflicts of that age.

A comparable necessity for discretion protected the activity put in place by credit pawn shops: the reserve developed around this sector was derived from the evident necessity to safeguard the secrecy of the operations made with clients, which were needed mostly to mitigate the poverty of people, through the offer of personal objects in pledge.

When considering more recent times, and more precisely during the XV and the XVI centuries, we observe that the statutes of the first banks constituted in Italy – among them, the Saint Ambrose bank, founded in 1593 – explicitly prescribed the obligation to maintain the secret on the relationship with clients.

During the same period, clear attempts of regulation of the banking secrecy can be discovered among foreign countries: in France, for example, on April 2nd, 1539 the Council of the King took a decision that imposed heavy sanctions of pecuniary type on charge of people who violated the secrecy of banking transactions made; a similar banking secrecy respect was legislated and regulated, since 1668, in Sweden.

It must be made relevant, according to Toscano and Razzante[3], that the activity of banks, which was evolving corresponding to the continuous changes of the economic system characterized by a progressive expansion of industries, has developed precisely strengthening the discretion and the confidentiality of the banker for what concerns the operations made with clients.

Also, Cucuzza[4] stated that "when there was a different arrangement of the banking services, with the affirmation of the bank as a complex of people and things coordinated to the production of services in a business optics, that same discretion became a constant practice of banks in broad terms".

[3] TOSCANO F., RAZZANTE R., *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002;

[4] CUCUZZA 0., *Segreto bancario, criminalità organizzata, riciclaggio, evasione fiscale in Italia*, 1995, pag. 9

The banking secrecy existence is acknowledged as a value, and for this it is worthy of protection; but there is a debate on the individuation of its legal basis, as it is pointed out by Accini[5]; the problem is to find a legal source that obliges to respect the banking secrecy since it does not exist a law rule that presents such a content.

It must be recognized that the term "banking secrecy" represents a formula that collects a great success in terms of both diffusion and recurrence also in the language of nowadays: economists, politicians and scholars frequently refer to it, even if they express positions that often are opposite on the very same definition and foundation of the concept.

As Toscano and Razzante[6] explain, it is the dynamic of the economic relationships and the current arrangement of the credit regime, which has observed along times an increasing development of the banking activity as a consequence of the sharpened mobility of wealth, to emphasize even more the aspect connected to the nature and the protection of the relationships that occur among banks, which are the fulcrum and the place where financial flows pass through, and the clients in general.

Hence, according to the authors, it is evident that the banking secrecy represents an institution of our set of rules on which the attention of experts and operators in the sector mostly centralize; for other reasons, also "strangers" to the credit framework focus on this concept since everyone, in the moment in which enter into contact with a bank, are personally affected by it.

Moreover, it must be highlighted that in the field of doctrinal debate, there is a constant and never dozing off attention towards the banking secrecy, since this topic can be appreciated transversely by various profiles of interest, as it has been pointed out by Toscano and Razzante[7].

However, the appreciated expression (banking secrecy) does not corresponds to a unanimity of positioning for what concerns the origins, the normative recognition, the actual content and the related limits that the concept implies: the legal configuration of the banking secrecy is really difficult because of the absence of sure textual validations and since the set of problems involves wide interests, safeguarded by the Constitutions

[5] ACCINI G.P., *Segreto bancario: profili penali di un tentativo di resurrezione o soppressione*, in *diritto della banca e mercato finanziario*, 4/2008, pag. 463

[6] TOSCANO, R. RAZZANTE, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002

[7] TOSCANO F., RAZZANTE R., *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002;

(such as those of protection of the private economic initiative and of the personal freedom), as well as the defense of savings and the respect of the contribution capacity functional to the public expenditure maintenance.

According to some theories, the banking secrecy is founded on law rules that can be identified, while for other opposite theories the secrecy should have a customary foundation. For the first ones, for sure we must recall the article 622 of the Penal Code as the principal law for which the secrecy should be respected and imposed; this article will be examined later in paragraph 2.2 of this chapter.

As it is known, and as it is pointed out by Marescalco[8], lenders are custodians of a series of remarkable news concerning the life of individuals and having a strictly confidential character in relation to the delicacy of their content. For this reason, the obligation generally imposed to banks to not make known news regarding the personal and patrimonial position of the client (the banking secrecy), if not under predetermined and delimited hypotheses, has as objective the protection of some interests of the clients that could be compromised due to that disclosure.

The topic of banking secrecy has always been central to the attention of the jurisprudential doctrine, and it has acquired an own specific significance after the come into effect of the law n. 675 (31st December, 1996) on the protection of personal data; it has come back into vogue with the emission of the legislative decree n. 196 (30th June, 2003), better known as "Privacy Code".

It is easy to understand the delicacy of this matter, that is originated by the complexity of the relationship between the safeguard of credit and that of confidentiality, also, because it is not always clear which of the two should be considered as prevalent.

In case of violation of the banking secrecy, outside of the privacy rules, the bank is responsible according to the norms of the common law; we must make a distinction between two different profiles: the contractual responsibility profile (that supposes a bank- client relationship) and the less frequent, extracontractual one (that concerns the more generic disclosure of data regarding individuals that have no contractual obligation with the bank).

[8] MARESCALCO F., *Il segreto bancario fra tutela del credito e rispetto dei diritti della persona. Definizione ed ambito di operatività* (parte I)

Referring to the first type of responsibility, we must remind that the debtor and the creditor (both the contracting parties) must behave following the honesty rules. Moreover, we must cite also article 1375 of the Civil Code, for which the contract (in this case, the banking one) must be carried out in good faith.

On the other hand, when considering the extracontractual type of responsibility, article 2043 of the Civil Code and the following ones apply; in this case, there is not the prerequisite of the contract, hence the general rule according to which any negligent act that causes unjust harm to others, obliges the perpetrator to compensate for the damage.

According to Toscano and Razzante[9], it is easy to observe the topicality of this subject, since there are frequent normative participation that have induced, in the last years, to important waivers to the banking secrecy and to the unanimous sharing of the need to adopt a strict and effective reaction to the increasingly invasive mostly economic forms of criminality, and to evaluate the range of the confidentiality obligation that is usually recognized to the banking operations field.

The idea to point out, as already mentioned in the paragraph, is that the problem to deal with is the foundation of the banking secrecy; to tackle this in a systematic way, the authors start from a question: "Is it ratified in our set of rules a confidentiality obligation in the management of news and information acquired executing the banking activity? Hence, does it exist a safeguard of the banking secrecy?"[10].

When trying to examine in depth the question, the first thing to ascertain is the absence in our set of rules of a norm that defines in an indisputable and objective way the foundation of the banking secrecy and from which we can presume, in non-equivocal terms, the content and the limits of it. Indeed, there are dispositions through which we can identify the concept in exam; however, they are directed at safeguarding it or providing hypotheses in which it can be waived: hence, they are norms that implicitly assume the existence of the banking secrecy but they do avoid its definition and to establish the normative foundation.

For the reasons just pointed out, it should be better to contemplate the conceptual area of interest in which the notion of banking secrecy takes place, to impose a consideration on

[9] TOSCANO F., RAZZANTE R., *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002;

[10] TOSCANO F., RAZZANTE R., *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002;

the logic-juridical type of secrets. As a matter of fact, Antolisei[11] declared that "in our juridical set of rules it exists a series of norms meant at containing the fact of procuring, make known or make use of news connected to something that should have remain confidential. These norms are very numerous and they concern the most different subjects (…); they all refer to a common concept, that is, to a situation protected by law, for which a news referred to given facts must be known only by a person or by a small circle of people".

Once the definition of secret has been analyzed, we must then understand which interests are protected by the discipline of the secret.

In this regard, as the authors recall, in this scope we must recall two different positions of doctrine[12].

According to the first positioning, the existence of the secret derives from the explicit will of the owner of the protected interest to confer to the information this characteristics; following this reasoning, the factor which distinguishes the secret must be identified in a psychological element: in this way, the banking secrecy is a tool available to the person taking economic activities, to guarantee its interest at being the only arbitrator to decide to spread facts concerning its own personal patrimonial sphere.

On the other hand, the second positioning establishes that the functioning of the secret and of the connected limitation of knowledge is consequent to the identification, from the system, of an interest of objective nature to the confidentiality of a situation that is retained to be safeguarded, disregarding from the will expressed by the single person. In this case, the verification of the secret is attributable to a precise and objective choice operated independently from the interested subject.

Nowadays, the doctrine has considered to conciliate these two contrasting positions trying to overtake this rigid framework; in this sense, the discipline of the secret safeguards the objective interest to confidentiality of precise and well defined situations, without the necessity of intervention of any expression of will, even if there is the possibility for the owner of the interest deserving protection, to reveal the information.

It is evident, from what we have displayed until now, that there is the necessity of searching for the specific content of the secret and its range; to achieve this, we must

[11] ANTOLISEI F., *Manuale di diritto penale*, Volume 1, 1982, Giuffre editore, pag. 187

[12] TOSCANO F., RAZZANTE R., *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002;

identify the subject protected by the obligation to exclude external people from the knowledge of determined situations, as well as to define the interests that have to be defended. For what concerns the banking secrecy, as it is remarked by Toscano and Razzante[13], these needs apply, even if it is easy to notice some general uncertainty and confusion when searching for its contents.

Methodologically, following the idea just presented, Salanitro[14] explains that the starting point of the investigation should be the individuation of the situations in which a confidentiality duty exists, that of the limits of the duty itself and the identification of the set of commitments which overall could summarize themselves under the name of banking secrecy. Only at this point, then, the problem of the existence of the banking secrecy principle in the juridical set of rules could arise, checking if the right of the bank to confidentiality has a general value or not. Also, "the questions cannot remain only at the methodological level (since there is the risk of becoming abstract), but it must be anchored to data coming from the concrete, verifying the solutions offered by the doctrine and accepted by the jurisprudence"[15].

Hence, according with the author's reasoning, before correctly defining the operativity field of the banking secrecy, we should recognize the attempts made at identifying the juridical foundation and the relative positions taken by the jurisprudence.

[13] TOSCANO F., RAZZANTE R., *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002;

[14] SALANITRO N. *Il segreto bancario, in Giurisprudenza commerciale, società e fallimento*, I, 1977, pag. 73

[15] SALANITRO N. *Il segreto bancario, in Giurisprudenza commerciale, società e fallimento*, I, 1977, pag. 73

2. The first legislative provisions on banking secrecy and the search for its foundation

As we have pointed out in the previous paragraph, the absence of regulations expressly recalling the foundation of the banking secrecy has determined the development of a wide array of opinions in the doctrine.

Two very important theories apt to give foundation to the banking secrecy are those concerning the article 7 of the Consolidated Law on Banking and the article 622 of the Penal Code; both of them will be examined in detail in the next two paragraphs.

Another position that must be recognized when searching for the juridical foundation of the banking secrecy is the one based on the article 1375 of the Civil Code, which would be explained in detail in paragraph 4 of this chapter.

More recently, as it has been pointed out by De Falco[16], another theory has spread, according to which the banking secrecy must be traced back in the field of the common law and, precisely, in the range of the honesty principle connected to the article 1175 of the Civil Code, pertaining to every social contact of contractual nature, independently from the subject that initiates them, being it a bank or any other company.

The specific nature of the information owned by the bank could be relevant institutionally, hence due to the fact that they are news that the bank and no other subject have.

As Di Amato[17] points out, the above-mentioned article in the original formulation recalled the corporate solidarity principle and, hence, it was intended as a mean to introduce in the system of rules the ethic content of the compulsory relationship derived from that principle which imposed, beyond the observance of the loyalty and honesty obligations, also the collaboration of the subjects and the mitigation of each other interests.

Furthermore, it is observed by Toscano and Razzante[18] that the correctness obligation, in the position of each contracting party, should guarantee that from the behavior of the other party does not derive prejudice or damage to the security and integrity of the person and its properties.

For the reason reported in the correctness principle, it should be framed the duty of the bank towards secrecy, with the goal of avoiding any form of interference for the

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[16] DE FALCO G., *Segreto bancario: morte o resurrezione?,* 2009, www.dirittobancario.it;

[17] DI AMATO A., *Il segreto bancario nella prospettiva costituzionale*, Rass. Dir. Civ., 4/1983, pag. 144;

[18] TOSCANO F., RAZZANTE R., *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002; pag. 32

counterpart, which imposes the prohibition to reveal facts referred to the relationships established with the clients.

The individuation of a general law, contractual foundation of the confidentiality obligation of banks removes its specificity and it relegates the violation of the banking secrecy towards subjects that are not clients to the wide area of the extracontractual responsibility (ex article 2043 of the Civil Code).

This interpretation seems to be indirectly confirmed by the new article 87, clause 5 on the Consolidated Law on Banking. The cited clause establishes that, in the field of the compulsory administrative liquidation of a bank and of potential oppositions of it, the judge could ask, to decide on the objections, for the list of the creditors which, is prescribed, "is not made available"[19].

This opinion has been doubly criticized because on one side, it is affected by the limit of the foundation of the banking secrecy since it leaves uncertain the content of the banking secrecy and on the other side, it does not explain the observance of the secrecy in case no contractual relationship existing between the client and the bank, resorting to the article 2043 of the Civil Code and, hence, to the professional secrecy.

In conclusion, as Schiavolin[20] points out, the idea of banking secrecy as a juridical institution per se, supposed by the disposition referred to it, does not seem sufficiently demonstrated. Moreover, it appears nowadays weakened, on one side, from the recognition of the inappropriateness of such a bind with respect to the effective confidentiality needs of clients and of the importance of the economic information and transparence of the market; on the other side, from the newest legislations, such as the new disciplines in the range of fiscal controls and against illegal money laundry.

De Falco[21] recalls that also in foreign countries the question of the juridical foundation of the banking secrecy has been posed. In a volume named *Bank Confidentiality* that he has prepared collecting the experiences and the opinions of many lawyers and scholars of 24 different countries, he explains that countries can be split in four different groups depending on the juridical foundation they attribute to the banking secrecy:

[19] DE FALCO G., *Segreto bancario: morte o resurrezione?,* 2009, www.dirittobancario.it;

[20] SCHIAVOLIN R., *Segreto Bancario*, in dig. Delle disc. Priv., sez. comm., vol. XIII, Torino, 1996, pag. 356;

[21] DE FALCO G., *Segreto bancario: morte o resurrezione?,* 2009, www.dirittobancario.it;

- Countries such as Swiss, Luxembourg and Austria recognize juridically the banking secrecy, the first two with "strong" norms of criminal nature and the latter one with norms of constitutional rank;
- The Anglo-Saxon countries, in which the banking secrecy, in compliance with the peculiarities of that system, is recognized in the famous case *Tournier v. National Provincial and Union Bank of England;*
- Countries in which the systems nowadays have norms which accept a pre-existent and recognized use of the banking secrecy, such as Denmark and Finland or that have an explicit norm on the banking secrecy as such, as Greece, Norway, Spain, Sweden and Portugal;
- Countries which do not have a norm on the banking secrecy but do recognize the contractual or customary nature of the confidentiality obligation in the banking relationship, such as Germany, Belgium, Holland and Poland.

The topic of banking secrecy in foreign systems will be deeply analyzed in chapter 4.

2.1 The article 7 CLB *(*Consolidated Law on Banking*)*

According to authors Toscano and Razzante[22], firstly it was believed that the source of the banking secrecy could be identified in the article 10 of the R.D.L. (Royal Decree Law) of March 12nd 1936, n. 375, that has been modified by the Law n. 141 of March 7th, 1938 (the so called "Banking Law").

The arguments in favor of this orientation is founded on the reading of the above-mentioned article that is so formulated: "Every news, information or data regarding the credit companies submitted to the control of the Inspectorate are protected by the professional secrecy also towards the public administrations.

The Inspectorate officials exercising their functions are considered public officials: they have the obligation to report exclusively to the head of the Inspectorate all the ascertained irregularities even when they take the guise of a crime.

The Inspectorate officials and employees are bounded by the office secrecy"[23].

[22] TOSCANO F., RAZZANTE R., *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 18

[23] Art. 10 R.D.L. of March 12nd, 1936

Following the theories of the authors, we should distinguish in the above-mentioned article, the first clause on one side and the second and third clauses: the latter ones establish a complete prevision of the office secret charged on the officials executing vigilance operations and controlling the activities of the credit institutions, proving the different meaning of the clause 1 of the same article, in which the foundation of the banking secrecy has been found.

Following this direction, also Ruta[24] has observed that this opinion "is confirmed by the position itself of the article 10 in the Title I of the banking law, hence among the 'general dispositions'; therefore, it is a fundamental principle, aimed at the realization of a dual purpose, since, on one side (clauses 2 and 3) it binds the officials and the employees of the Supervisory Board to the office secrecy, and on the other side (clause 1) it expresses general rules to protect the banking secrecy. Indeed, if it were not so, and if we do not recognize to article 10 the previously mentioned general and complex character, and we attribute to it only the content of binding to the secrecy the officials of the Supervisory Board, it would have logically been part of the Title II of the banking law, which examines and disciplines the functioning of the Supervisory Board and it controls the positions of its employees; under no circumstances it should be justified a so clear systematic mistake such the inclusion in the Title I".

When trying to corroborate the just mentioned theory, it has been observed that the expression "every news, information or data regarding the credit companies" contained in clause 1 of the cited article 10 must be appreciated considering the confidentiality obligation including both the news and the information on banks, and those acquired by the latter on the clients' account, conferring meanwhile to the legislator the intent to protect every element or data that is available to a credit company which is, in this sense, the subject to emphasize to appreciate the correct range of the norm.

After this evaluation of the first clause of the article 10 of the banking law of 1936, the doctrinal current examined by authors Toscano and Razzante[25] has pointed out that the set of information and data cited in the norms are "protected by the secrecy…",

[24] RUTA G. *Il segreto bancario nella realtà giuridica italiana*, in Banca, Borsa e titoli di credito, II, 1982, pag. 1046

[25] TOSCANO F., RAZZANTE R., *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 19

highlighting as the verb used in this circumstance is counterposed to that used in the third clause of the article ("bounded"), bringing out the different range of the precepts.
Indeed, as Ruta[26] affirmed, while the third clause is the natural juridical consequence of the fact that the security officers assume the status of public officers when exercising their functions, the precept contained in the first clause has a protection and defense purpose and it is placed in the basic dispositions of the law, as a logic and harmonic development of that defense of savings, which is the primary objective of the whole banking law.
Furthermore, it must be specified that the conclusions drawn from this position cannot be invalidated by the consideration of the expression used by the legislator ("office secrecy" and not "banking secrecy"), which could cause someone to suppose that the natural recipients of the norm must be necessarily characterized by the public officer position, hence in charge of public service. Indeed, it is affirmed by Toscano and Razzante[27] that the expression "office secrecy" contained in the first part of article 10 is not used in technical sense, but it is just necessary to emphasize the link with the *officium* referred to the credit companies, hence the particular type of activity (the banking one) from which the banking secrecy expected by the norm originates.
Moreover, it must be observed that the recipients of the norm must be considered, from the subjective point of view, as an indirect direction, oriented in the first place to the credit institutions (hence, to the related officers and employees) in that they are depositories of news and information intended to remain secret.
To sum up, the first clause of article 10 of the banking law wanted to guarantee, towards anyone and towards requests coming from the public administration, the absolute confidentiality of the services offered to the clients, pursuing, by the confidentiality protection, the goal of safeguarding the national savings and to avoid the negative repercussions that could have involved the entire credit system if the confidence towards banks would have been mined, as it is clearly expressed by the authors[28].

[26] RUTA G. *Il segreto bancario nella realtà giuridica italiana*, in Banca, Borsa e titoli di credito, II, 1982, pag. 1046

[27] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 20

[28] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 20

The above-mentioned opinions have been severely criticized by many authors which have demonstrated some dissatisfactions with the conclusions drawn.

Indeed, in contrast with the opinion of scholars who, in accordance with the position discussed so far, point as the foundation of the banking secrecy the first clause of article 10 of the R.D.L. and have read in it a commitment relevant, beyond the supervisory bodies, the banks themselves (regarding also the news on the clients), it has been pointed out as the cited norm is clearly directed at the supervisory board officers and it had as objective exclusively the one of safeguarding the credit institutions from indiscretions that could damage them. However, being familiar with the particular sensitivity of the financial-economic mechanisms that are at the base of the banking activity in general, it is clear which is the reason that entails the mentioned limitations. According to Toscano and Razzante[29], this interpretation is clearly correct and it can be detected from the preparatory work of the banking law; during the parliamentary discussion, indeed, it has been clearly displayed the necessity to bind to the secrecy the officers and employees of the supervisory board in order to avoid the unhappy experiences occurred in 1893 and in 1922 to, respectively, the Roman Bank and the Italian Discount Bank, institutions that could have probably resisted the crisis of those years if those news and data would not have been spread, causing panic in the depositors and provoking the sudden assault of client to those bank branches.

Another criticism comes from Di Amato[30], who does not agree with "the statement, not adequately demonstrated, according to which the office secrecy term is used in the first clause of article 10 not in technical sense. Indeed, in must be highlighted the inconsistency of the claim which could bring to admit that the Legislator used the same expression with two different meanings in the same arrangement. Moreover, it should be remarked that the Legislator in the same normative body, in the article 78, has appropriately used the banking secrecy term. Consequently, it appears totally unjustified, on the literal plane, the prospected interpretation of the first clause of article 10, considering impossible the coincidence of the notions of banking secrecy with the office one. The latter, as a matter of fact, is directly connected to the physical person that holds a task in the office, to which

[29] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 21

[30] DI AMATO A., *Il segreto bancario*, Napoli, 1979, pag. 111

the confidentiality obligation is connected; hence, the recipients of it could not be the banks, but only their employees".

Hence, it has been observed as the different subjective elements establish the impossibility to make the banking secrecy corresponding with the secrecy provided for in the mentioned article 10; moreover, according to the critics, it is not remarkable the assumption for which the first clause of the law norm could result unnecessary if not considered as the juridical foundation of the banking secrecy: differently from the second and the third clauses of article 10 that consider the office secrecy under a subjective profile, stating that the Inspectorate officers are charged with the confidentiality obligation for what concerns information on the credit companies, the first clause of the norm considers the same phenomena under an objective point of view, clarifying as the office secrecy must be considered as operating also towards the public administrations.

Furthermore, the mentioned norm appears, looking at it under the subjective point of view, hence referring to the recipients of the obligation to respect the confidentiality, inseparable, being possible only to distinguish at the first clause the explanation of a precept and at the consequent clauses the indication of the addresses of the precept itself.

The conclusion of this position, reported by Toscano and Razzante[31], according to which the office secrecy covers only the news acquired by the Bank of Italy, even if it is not limited to the information regarding the banks, is observed clearly in the formulation of article 7 of the "New Banking Law", in which the legislative decree n. 385 of September 1st, 1993 (and entered into force on January 1st, 1994) which ratifies textually that:

"1. Every news, information and data acquired by the Bank of Italy due to its supervisory activity are covered by the office secrecy even towards the public administrations. There are exceptions for the cases provided by the law on investigations on criminally sanctioned violations.

2. The employees of the Bank of Italy, when exercising their supervisory functions, are public officers and they do have the obligation to report exclusively to the head of the Inspectorate all the ascertained irregularities, even when they take the guise of a crime.

3. The employees of the Bank of Italy are bound to the office secrecy".

[31] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 22

Then, it appears clear that the above-mentioned article 7 of the Legislative Decree n. 385 of 1993 is intended to the protection of the news, information and data acquired by the officers, that are the employees of the Bank of Italy in the range of the supervisory activities on the credit companies, covering them with the office secrecy, however opposable towards the public administrations.

As we have mentioned in the previous paragraph, and as it is recalled by De Falco[32], in the past it was believed that the juridical foundation of the banking secrecy could be found in article 10 of the abrogated Banking Law, the content of which is nowadays reproduced in the article 7 CLB.

Here, it is ratified the enforceability of the office secrecy, even towards the public administrations, for the information acquired by the Bank of Italy as a supervisory agency, to which every employee of the Bank of Italy is bound.

This opinion could have been followed in years, now faraway, in which the banks where considered "social institutions"; today, following the entry of concepts such as "universal bank" and "polyfunctional group", the equalization and assimilation between the Bank of Italy and the credit companies has no more foundation, and, hence, there is no foundation the attribution of the banking secrecy to the office secrecy.

2.2 The article 622 of the Penal Code: Foundation or instrument of protection of banking secrecy?

The second thesis on the juridical foundation of the baking secrecy finds its basis on article 622 p.c. which typifies the crime of "disclosure of a professional secret" and punishes (to the complaint of the offended person) with the detention up to one year or with the sanction from 30 to 516 euros "whoever, having news, for reasons of their own state or office, or its own profession or art, of a secret, and reveals it, without just cause, that is, he uses it for his own or others profit (…) if from the fact harm can derive"[33].

This penal disposition, according to Toscano and Razzante[34], could represent the primary source of the banking secrecy if we consider unfounded the opinion for which the criminal

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[32] DE FALCO G., *Segreto bancario: morte o resurrezione*?, 2009, www.dirittobancario.it;

[33] ACCINI G.P., *Segreto bancario: profili penali di un tentativo di resurrezione o soppressione*, in *diritto della banca e mercato finanziario*, 4/2008, pag. 463;

[34] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 24

law has only a mere sanctioning function of juridical precepts which are placed in other sectors of the system.

Some scholars consider that the professional secrecy must be exclusively conceived in the range of confidential relationships between physical people, which should recall to an obsolete vision of the liberal professions.

The authors, instead, believe that to adapt to the variable needs of the modern society, for professional secrecy it should be intended also that relative to the exercise of determined activities; also, Casella[35] writes that this last perspective "catches precisely the fundamental characteristics of the banking secrecy both under the objective profile (every data and news of which the bank becomes aware when exercising its activities), and under the subjective profile. The protected interest is not only the private interest of the single client to the confidentiality regarding its own economic activities, but also the interest of the entrepreneur to bind with discretion and silence its relationships with third parties, which, due to the particular nature of its activity, intertwine in complex events, characterized by the need for respect of the secret, essential condition to its trust".

According to this position, it is observed by Toscano and Razzante[36] that, if there is a profession that in particular allows, to who legitimately exercise it, to enter into contact with the most intimate secrets of the clients is exactly the one of the banker, which assumes, due to the multiple services he provides to clients and the many operations he exerts in the relationships with the public, the quality of confidant and the subsequent establishment of reciprocal trust connection, not differently to what happens generally to the professionals to which the law imposes the confidentiality obligation.

Furthermore, it must be pointed out that the relationship that is established between the client and the banker represents an efficient mean to the complete knowledge of the first mentioned: the realized contact between the two poses the bank in the conditions to know particularly precise news not only related to the type of operations and to the financial consistency of which the counterpart has availability, but also to its temper, ways to act and of the people he spends time with, hence of its personal sphere.

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[35] CASELLA M., *Il segreto bancario e il D.P.R. 15 Luglio 1982, n. 463*, in Banca, Borsa e Titoli di credito, 1983, p. 349

[36] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 24

Moreover, the validity of these observations finds support in the need to consider as the focus should be put on the "secret", and hence on the relationships qualified by discretion and confidence, and how the connotation of professionalism is referred to those activities, of non-occasional nature, but organized and qualified by particular expertise: in this field the activity of the banker should find appreciation, since confidentiality represents a peculiar element.

In other terms, the expression "professional secrecy" could well imply also the exercise of determined activities, among which we must consider the functions carried out by a juridical person, and also public institutions professionally qualified: according to the opinion expressed, it is not excluded that we could speak of professional secrecy regarding banks, considered as companies exercising credit functions.

Even if the article 622 p.c. could seem the suitable norm to sanction any eventual violation of the banking secrecy, there are also some critics to present.

Indeed, even if it is unquestionable that trust is at the base of the relationships between credit institutions and the client, not differently from what happens in the relationships with professional bound to secrecy by law, Molle[37] highlights how this norm badly adapt to a complex structure such as the bank is.

In particular, according to his opinion, the bank has lost in time the nature of individual business, which is remained to that activities based on the work of the single person, to assume the more wide and complex one of a company for the exercise of credit, in which the figure of the single person disappears. Now, the imposition given by the criminal law (article 622 p.c.) of an obligation to those categories of professionals to which the client, under some circumstances, needs to contact, cannot extend to those activities which are organized in a complex form, such as the bank, in which the work of the individual vanishes.

Moreover, it has been criticized that the precept of the mentioned article 622 p.c. must aim exclusively at physical people, which the subsequent exclusion from the punishment of juridical subjects in which the complex organization could vanish the attempt to identify the person in charge.

Furthermore, even sharing the evolutionary perspective of the concept of profession, it should be defined the physical people to which the professional role of "banker" could be

[37] MOLLE G. *Il segreto bancario*, in Banca, Borsa e Titoli di credito, I, 1937, p.174

attributed and, with it, the bind and the obligation to confidentiality and the consequent criminal responsibility in case of ascertained violation of it.

To sum up, critics on the attempt to connect the professional secrecy to the banking one, falls on the unique but decisive objection that the norm presumes an individual and professional activity while the banking one refers to an institution and has an entrepreneurial nature.

Also, some critics attribute to the article 622 p.c. an indefinite content, able to adapt to the continuous forms of evolutions which characterize the modern society and able to extend to comprehend all the professional categories, regardless of their individual nature; it is obvious that we cannot call for professional secrecy in each activity which consents to enter in the private sphere of the client, unless of a dangerous widening of the range of operability of the norm.

According to Crea[38], some doubts have emerged on the possibility to apply to banks the article 622 p.c. on the violation of professional secrecy since the prevalent opinion is that the sanction is applicable for the violation of an already provided prohibition and it could not be itself the foundation of it.

Another author to take into consideration is Accini[39], who pointed out that the article 622 p.c. presents a merely punishing content, not a definitory one, hence it needs another non-criminal disposition to clarify a particular news as a secret.

Therefore, even if in the disclosure of the professional secrecy it has been generally recognized the criminal protection to the banking secrecy, this does not constitute the banking confidentiality obligation, neither it defines its content. The two levels remain separate: on one side the foundation and on the other side the criminal protection.

Moreover, the criminal law does not know a general definition of the concept of "secret" which could act as a term of comparison to specify the notion, the content and the limits of the banking secrecy.

This caused Mantovani[40] to affirm that "the concept of secrecy is, in criminal science, still a secret".

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[38] CREA P.M. *contabile e segreto bancario: quando una virgola può fare la differenza*, in www.lexitalia.it, 6/2003;

[39] ACCINI G.P., *Segreto bancario: profili penali di un tentativo di resurrezione o soppressione*, in diritto della banca e mercato finanziario, 4/2008, pag. 645;

[40] MANTOVANI F., *Diritto penale*. Parte speciale, pag. 523

In spite of such consideration, the doctrine retains that the banking secrecy still needs a protection of also a criminal nature since "it concerns news which disclosure could cause a serious damage to the reliability and, hence, to the financial-economic relationships of the subject and, in any case, violates that privacy intrinsic in the human person"[41].

As we have already anticipated, the prevalent orientation is to consider the disclosure of the professional secrecy of which at article 622 p.c. the mean of criminal protection of the banking secrecy. This presume that the banking secrecy could be assimilated to the professional secrecy and, hence, that the credit activity could be intended as a profession; this is controversial since it is not clear how to limit the application of the article 622 p.c. to the banking profession and not to any other professional economic activity.

Accini[42] concludes that even if the application of the article 622 p.c. to the banking secrecy does not involve the patrimonial responsibility of the bank for the damages caused to third parties by the disclosure, it seems it could be intended that the banking worker (administrator or employee of the credit institution) which violates the confidentiality obligation to which the bank in bound does not incur in the criminal sanction provided by the norm".

This simply means that, according to this part of the doctrine, the banking secrecy is not part of the criminally relevant secrets and, thus, the violation of it does not constitute a crime.

Opposed to this there is the prevalent opinion that interprets the disposition of article 622 p.c. as applicable also to the disclosure of the banking secrecy; this opinion seems to be supported by the need to fill the regulatory vacuum by offering a criminal defense for the cases of violation of the banking secrecy.

According to the author, this option appears comprehensible, but it has a nature of "academic remedy" since the jurisprudence has never pronounced sentences through article 622 p.c. for violations of the banking secrecy.

Instead, the Supreme Court has pronounced a sentence expressly excluding the attribution of the banking secrecy to the wider concept of professional secrecy, presuming that the professional activity is an individual activity, while the banking one responds to

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[41] MANTOVANI F., *Diritto penale*. Parte speciale, pag. 582

[42] ACCINI G.P., *Segreto bancario: profili penali di un tentativo di resurrezione o soppressione*, in diritto della banca e mercato finanziario, 4/2008, pag. 649;

an institution and has an entrepreneurial nature[43] (this critic was already presented in the paragraph).

The adjective "professional" in article 622 p.c. is not referred only to the subjective nature of who exercises an activity, but also to the manner in which that same activity is exercised, intended as a stable, continuous and usual provision of services.

The supporters of this opinion exceed the objection according to which a profession should be by nature exercised individually by observing that "in spite of the complexity of the structure, in the banking routine there is the creation of a personal relationship with the client. Hence, the officer has a complete knowledge of the patrimonial situation of the client with which the relation is created"[44].

In this sense it has been highlighted that the bank- client relationship remains of confidential nature, since it is the bank in its whole the counterpart of who asks for its services and, as a whole, acts professionally as a company[45].

After all these observations, we can consider that the secrecy to which the bank is bound can be qualified as "professional" like the secret of every other liberal professional: the "professionality" of the banking secrecy follows the type of activity (a professional one) it exercise, regardless of the fact that it is carried out by a physical or juridical person.

According to Accini[46], the majoritarian doctrine comprehends in the concept of professional secrecy of article 622 p.c. also the banking secrecy.

Nevertheless, as it has been anticipated, it is an interpretation that has not found acceptance by the criminal jurisprudence which has never pronounced sentences relative to article 622 p.c. for ascertained violations of the banking secrecy.

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[43] Cass. Civ. Sez. I, 18 July 1974, n. 2147, in *Foro it.*, 1974, I, 1465.

[44] COSTI R., D'AGOSTINO P., *I reati bancari*, in Tratt. Dir. Pen. Impr., a cura di Di Amato, Padova, 1992, III, p.199

[45] PEDRAZZI C., *Aspetti penali e processuali del segreto bancario*, pag. 246

[46] ACCINI G.P., *Segreto bancario: profili penali di un tentativo di resurrezione o soppressione*, in diritto della banca e mercato finanziario, 4/2008, pag. 652;

3. The Constitutional perspective of the banking secrecy: the protection of savings

It has been sustained by some scholars that the article 47 of the Constitution which affirms that "The Republic encourages and safeguards the savings in every form", provides for an implicit favor acknowledgment for the exercise of credit and for each of the means and institutions capable of sustaining its development, among which the banking secrecy must be included.

According to this perspective, as it is pointed out by Toscano and Razzante[47], it is evident that the protection and the support of the national saving are assumed by the Constituent as a commitment aimed at guaranteeing the increase of the wealth of the Nation and the development of the economic activity of the Country, which cannot be disinterested towards its incentive, as if it was a phenomena of single interest, but it must, instead, favor its safeguard and the connected increase: pursuing this objective, it is recognized as unquestionable the role of the banking sector, which assumes a central role in the field of the development of the economic and productive system.

Hence, the perceived need of protection and favor of savings and the consequent need of enhancing the credit constitute the deep reasons which have articulated the above-mentioned norm and that have highlighted its fundamental character.

In accordance with this opinion, Ruta[48] stated that it is clear that a misunderstanding of the banking secrecy would have discouraged, instead of encouraging, the formation of a national saving.

Thus, the protection of the banking secrecy (…) responds to public purposes of safeguard of the credit system and, hence, of the national economy.

It is for this reason that the Economic Commission of the Constituent Assembly in its detailed report thought it was appropriate even that it was ratified in the Constitution itself *the maintenance of the banking secrecy in the forms currently in place*.

If they didn't come to that, equally the fundamental principle of the protection and the encourage to savings include the need of the rigorous respect of the banking secrecy, as an element of primary importance, even psychological, for a straightforward increase of savings.

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[47] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 29

[48] RUTA G. *Il segreto bancario nella realtà giuridica italiana*, in Banca, Borsa e titoli di credito, II, 1982, pag. 1046.

On the other hand, it has been easy for other scholars to release from the attempt of who believed it was possible to anchor the banking secrecy to the article 47 of the Constitution, linking to the concept of protection that of "secrecy", the latter being more rigid under the etymological and juridical profiles.

First of all, it has been advanced, as fundamental to exclude that the banking secrecy could find a foundation in the described precept, an historical fact: even if the report of the above-mentioned Economic Commission prospected the need to maintain and respect the banking secrecy, the Constituent Assembly, while definitely drafting the Constitutional Charter, did not retain to translate the advice into a principle.

Following the opinion of Petragrani Gelosi[49], "it does not even convince the reference to the article 47 of the constitution both because the norm appears to be addressed to the small savers who are for sure the less interested to a declared recognition of the banking secrecy, and because in this way the banking secrecy will be recognized at a constitutional level only for what concerns the group of saves and not for that of those who operate thanks to the credit they obtain from the banks".

Moreover, it has been affirmed that the above-mentioned norm even if it calls for the protection of savings in every form, it is not exclusively referred to the savings connected to the banking secrecy.

About that, Porzio[50] pointed out that "if, then, the secrecy is a necessary mean (and only if necessary the Constitution constitute a normative source) to encourage and protect savings, it derives that the secrecy should cover every form of savings: the affirmation of the constitutionality of the banking secrecy should bring, for example, to the unconstitutionality of the nominative of actions, of the real estate registers regime (the second clause of the article 47 refers in particular to the real estate property) and the cadaster".

On this regard, it has properly been observed that it should be uncertain the constitutional legitimacy of the law which, through the means of a particularly efficient safeguard, directs the savings exclusively towards the banks, diverting it from other possible destinations.

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[49] PETRAGNANI GELOSI G. *Il segreto bancario*, in Diritto penale della banca, del mercato mobiliare e finanziario, 2002, pag. 261

[50] PORZIO M., *Il fondamento normativo del segreto bancario*, in Banca, Borsa e Titoli di credito; II, 1982, pag. 1021

3.1 The protection of freedoms

The perspective according to which the banking secrecy can be maintained as convenient for the formation of national savings seems insufficient since it confers to the banking secrecy a prevalent public collocation, in contrast to the "privacy" of the interests that it protects.

This privacy is confirmed by the common opinion that the banking secrecy is available for the client of the bank.

According to Di Amato[51], the power of maintaining hide a news concerning the personal sphere its generally considered as an expression of the right of freedom, meant at its wider meaning.

In this sense, the discipline of secrets constitutes a qualifying moment of the discipline of freedoms, as it has been affirmed by Barile and Cheli[52].

According to part of the doctrine, freedom finds, at the juridical level, its own peculiar connotations in the negative guarantee institutions directed at removing and preventing the obstacles at doing; it is sufficient, hence, to understand how the rights of freedom have juridical significance at least as alienation from power and, more in general, as exemption from any external obstacle to act.

Indeed, the secrecy constitutes a mean given by the system to avoid that there is an external interference limiting the freedom of the owner of the protected situation.

Hence, it is aimed at allowing the owner of the right of freedom to exclude the other subject, sanctioning in a juridically relevant way the non-admission of them at the knowledge of determined news.

According to the author, the banking secrecy cannot be excluded from this perspective, since it safeguards, like the other secrets, the individual freedom sphere.

When considering that the secrets are meant at promoting freedom since they are aimed at avoiding an external interference that limits the independence of the owner of the protected situation, we are induced to affirm that the banking secrecy only in mediated way corresponds to the general interest to the promotion of savings.

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[51] DI AMATO A., *Il segreto bancario nella prospettiva costituzionale*, *Rass. Dir. Civ*., 4/1983, pag. 969

[52] BARILE P., CHELI E., *Corrispondenza (libertà di),* in Enc. Dir., X, Milano 1962, pag. 743

3.2 The protection of the Private economic initiative

A connection with the banking secrecy can be easily found with the article 41 of the constitution, which ratifies that "the private economic initiative is free. It cannot be conducted in contrast with the social utility or in a way that harms the human security, freedom or dignity".

According to Di Amato[53], in this case the banking secrecy must be interpreted as a negative guarantee institution directed at removing and preventing the obstacles to the exercise of the private economic initiative.

On the other hand, this freedom, as of the protection of the individual savings, is not illimited since it must harmonize whit the fundamental objectives towards which the Constitutional Charter is projected, of social and economic growth, equality, and full development of human personality.

The banking secrecy, that represents one of the means for the safeguard of that freedom, must be subject to the same limits.

Hence, the economic freedom and also the banking secrecy must coordinate with the other values constitutionally protected: in this way the banking secrecy cannot be invoked as a dispensation to the constitutional principles of the contributory parity and of the mandatory prosecution. According to Galgano[54], the economic private initiative, even if it is guaranteed by the Constitution as a freedom of the citizen, finds a limit in the contemporary constitutional recognition of other freedoms; its need is expressed by coexisting and dialoguing with the other freedoms.

For this reason, it is not possible, in the constitutional perspective, that the banking secrecy can have such a content that obstacles the need to protect and defend the democratic order, essential prerequisite for the concrete realization of the constitutional plan.

Outside those limits the banking secrecy, according to Di Amato[55], becomes incompatible with the arrangement prefigured by the Constitution for the economic activity in general and for the credit one in particular.

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[53] DI AMATO A., *Il segreto bancario nella prospettiva costituzionale*, *Rass. Dir. Civ*., 4/1983, pag. 971

[54] GALGANO F., *La libertà di iniziativa economica privata nel sistema delle libertà costituzionali*, p. 522

[55] DI AMATO A., *Il segreto bancario nella prospettiva costituzionale*, *Rass. Dir. Civ*., 4/1983, pag. 972

However, giving to the banking secrecy a dimension that does not contrast with the constitutional principles does not mean to conclude that the protection of the private sphere of the single person should be damaged.

The banking secrecy characterized in a significant way the relationship existing in a determined society between the single individual and the authorities; giving protection to the secret of the economic life of the individual means giving caution relative to the private life and to the intimacy of the places where the private life is conducted.

At the same time, when the interest and the possibility to control grow, in each field, the individual life, the need of a precise and rigorous delimitation manifests of the boundary between public and secret.

The wider the extension of the first, the greater and the more careful must be the custody of the privacy margins recognized to the individual.

4. Guidelines of the Privacy Guarantor concerning the treatment of data connected to the banking relationship: banking secrecy and protection of confidentiality

As we have pointed out, there has been a difficulty to identify a norm connected to the banking secrecy has lead Salanitro[56] to affirm that "in this perspective, maybe, it would have been better to recognize in the banking secrecy a real right of personality (which is then the way followed by some foreign systems), except then tracking down in the norms the limits of such right".

Following this opinion, part of our doctrine has supported the prevision in our set of rules of a right to confidentiality, in the range of the wider rights of the individual, intended to be configured as a subjective juridical situation aimed at avoiding that facts attributable to the intimate sphere of the individual could be made of public knowledge and to exclude others from learning information which do not result in a socially significant interest for third parties.

In other words, Salanitro[57] asked himself "if indeed the theme of the so-called banking secrecy is not part of a wider theme, which is that of the recognition of a right (of personality) to confidentiality, meaning that the set of rules protects in general the expectation of each party that the other contracting party does not reveal without any reason (…) the confidential data they have come to know following the establishment of a relationship".

In this direction, according to Toscano and Razzante[58], the existence of the confidentiality right should find a declared recognition in the article 8 of the European Convention for the safeguard of the rights of the individual (made executive in Italy with the law n. 848 of August 4th, 1955), which ratifies the "respect" of the private and familiar life of the individual, as well as of its related domicile and correspondence.

Furthermore, this position could be protected and finds a validation in the article 2 of the Constitution which, by considering that "The Republic recognizes and guarantees the inviolable rights of the individual both as a single party, and in the social formation where its personality is carried out and it demands the compliance to the mandatory duties of political, economic and social solidarity", amounts to a right to confidentiality.

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[56] SALANITRO N. *Il segreto bancario*, in Giurisprudenza commerciale, società e fallimento, I, 1977, pag. 75

[57] SALANITRO N. *Il segreto bancario*, in Giurisprudenza commerciale, società e fallimento, I, 1977, pag. 82

[58] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 28

On the other hand, however, numerous have been the critics registered as a response to this opinions: it has been considered of scarce potential the reference to confidentiality for the absence of clear and precise legislative sources of the general principle itself and for the doubts about the possibility to refer the "discretion" to the patrimonial sphere.

The principal objections, according to Petragnani Gelosi[59], focused initially on the revocation of the existence of the right to confidentiality itself; then, invoking the inappropriateness of the recall to the norms contained in the articles 2 and 3 of the Constitution or to other international sources such as that of article 8 of the European Convention on the rights of the individual o to article 12 of the Universal Declaration of the rights of the individual.

Also, Di Amato[60] points out that it has been criticized the opinion that gives for granted what should be the object of the demonstration: that in our system, the protection of the human being includes the safeguard of the confidentiality, to be considered not only as a perceived social need, but as a good in juridical sense, protected by means of right.

Hence, Toscano and Razzante[61] conclude by affirming that their conviction is that it does not exist an interpretation that allows to detect in our system a generalized and autonomous safeguard of the interest of the individual to its own private life, qualifiable as a distinct right to confidentiality.

However, as De Falco declares, finding the foundation of the banking secrecy in the more general protection of confidentiality ratified ad Constitutional level, and regulated by the Code on Privacy for some other scholars have signified that the banking secrecy should be absorbed in the discipline relative to the protection of data, faced through the specific "Guidelines concerning the treatment of data connected to the bank-clients relationship" (the "Guidelines" in short) published on November 23rd, 2007 on the Official Gazette and periodically updated.

However, when comparing the norm on privacy (law of December 31st, 1996 n. 675 and the subsequent Code in the field of protection of personal data, that is the Legislative Decree of June 30th, 2003, n. 196) concerning the protection of confidentiality sphere with

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[59] PETRAGNANI GELOSI G. *Il segreto bancario*, in Diritto penale della banca, del mercato mobiliare e finanziario, 2002, pag. 262

[60] DI AMATO A., *Il segreto bancario*, Napoli, 1979, pag. 126

[61] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 29

that of the safeguard of the banking secrecy, it is clear that they are distinct, even if they overlap under many aspects; hence, they can be considered as two sets that intersect themselves instead of totally overlap.

The Guidelines offer the possibility with article 3.1 to reflect since from its significative title of *Rules of protection of personal data and the so-called banking secrecy* in which the latter is expressly recalled as a duty to additional and different discretion as compared to the general privacy respect.

The second paragraph of the above-mentioned article says that "Outside the cases of operation of communication of data functional to required and supplied services (for which it is not necessary to obtain the consensus of the interested parties), the credit institutions and the employees in charge of the execution of the banking operations (…) must maintain the confidentiality on the information used".

There is an evident sign of this autonomy of the banking secrecy in an interesting decision of the Privacy Guarantor for the Protection of Personal Data itself of May 23rd, 2001.

This is the case of the employee of a bank that transmits to a lawyer information regarding the reports of the bank account and of securities deposit of a client.

The client has complained about the undeserved transmission of such information from the bank to the lawyer of her ex-husband which has profitably took advantage of them to go against the request of the lady in a procedure for the obtaining of an increase of the monthly divorce allowance.

The bank has argued, recognizing the fact, not for the absence of an autonomous duty towards the banking secrecy but only for the correctness duty requested by article 1375 of the Civil Code.

Moreover, it rejected the assertive violation of the prohibition of disclosure of information invoking the exemption of the current article 24, clause 1, letter g) of the Privacy Code for which it is legitimate to spread information without the consensus of the interested party to allow the exercise in legal seat of a right.

The Privacy Guarantor has decided to censore the behavior of the bank with an interesting justification which helps us to delineate the boundaries between the respect of the norm on the treatment of data and the banking secrecy application sphere.

Indeed, the Authority underlines as the possibility of the bank to spread data to defend or to enforce a right in a legal seat is a faculty of the owner of the service but not a duty.

Hence, when exercising that faculty, the bank should evaluate that there are no other duties, in this specific case, the banking secrecy respect, which go beyond the dimension of the personal data protection as disciplined by the Privacy Code.

Therefore, it is the Privacy Guarantor Authority for the Protection of Personal data itself to remind the existence of various dispositions that negatively provide for a series of exceptions, as illustrated above which assume the existence of confidentiality duties but also some dispositions which establish positively some confidentiality duties of the credit institutions (for example, we can recall the Behavior Code of the banking and financial sector provided by Italian Banking Association or the norms imposed by the Intermediaries Regulation approved by Consob, the National Commission for listed companies and the stock exchange) to conclude that even if the norm of the Privacy Code consent to the owner of the treatment to reveal and spread determined personal data, this does not imply that other norms and, in this specific case, the banking secrecy could not be an obstacle to such a divulgation.

To this perspective aimed at finding a connection between the banking secrecy and the right of the individual through the right of confidentiality, it has been opposed that, to be extremely strong and rigorous, this protection could make difficult the routine of the "banking information" that is the exchange of information between banks on the financial conditions of the clients.

Instead, the Privacy Code itself ratifies in article 24, clause 1, letter d) that the consensus of the interested party to the divulgation of personal data to third parties is not mandatory when it comes to "data connected to the execution of economic activities, treated in the respect of the norm in force in the field of company and industrial secrecy"; hence the routine of the banking information appears to be justified.

To conclude, De Falco[62] pointed out that the banking secrecy finds confirmation in our system not only by contrast, for the exceptions concerned, but also positively, in the norm in protection of personal data and in the subsequent interpretations which affirm its substantial autonomy from the Privacy Code.

There are, also, other norms that can give a hint to interpret the banking secrecy under a new point of view that fosters the confidentiality duty of the financial market operators,

[62] DE FALCO G., *Segreto bancario: morte o resurrezione?*, 2009, www.dirittobancario.it;

which is based on the constitutional protection of confidentiality on one side, and on the safeguard of savings in each form as ratified by article 47 of the Constitution.

This area of expansion emerges from the modern discipline of supply of the banking and investing services, as well as the subject allowed to do that, as it is declared by De Falco[63].

We can recall two norms as an example:

- Article 107 of the "Regulation carrying norms of realization of the legislative decree n. 58 of February 24th, 1998 concerning intermediaries", adopted by Consob in 2007, connected to the duties of financial promoters.

  On the general rules of behavior, at clause 2, it is prescribed that "the promoters must maintain the confidentiality on the information acquired from clients or potential clients or of which they have available because of their activity, exception made towards the subject for which they operate or the subject to which the investment activities or financial means are offered";
- Article 18 of the "Regulation concerning the coordination and procedures of intermediaries that operate in investing services or in collective management of savings", adopted by the Bank of Italy and by Consob in 2007 with a provision which imposes to intermediaries to adopt "adequate procedures for subjects which have access to privileged information or to other confidential information regarding clients and operations with or made for clients, involved in activities which could origin conflicts of interests" aimed at avoiding that such subjects implement personal operations which imply "the abuse or the incorrect divulgation of confidential information regarding the clients and their operations".

[63] DE FALCO G., *Segreto bancario: morte o resurrezione?*, 2009, www.dirittobancario.it;

5. The customary source: the verdict 2147/1974 of the Court of Cassation

As it has been remarked throughout the chapter, there is not in our set of rules, as indeed in that of some foreign countries, a precise definition of the banking secrecy.

However, with the expression "banking secrecy" we mean, in the current use, a bind of discretion connected to the information owned by banks and referring the subject with which they have made operations and also simple negotiations.

In other terms, it has been observed by Toscano and Razzante[64] that the generally appreciated definition identifies in the banking secrecy that bind applied to the credit institutions which asks for the adoption of particular forms of confidentiality and protection around the clients' business: indeed, in the moment in which the latter addresses himself to a bank and he entrusts to it the knowledge of news concerning his own financial and patrimonial situation, there is the commonly perceived need that the disclosure made to the banker is not divulgated to third parties.

Hence, as it is explained by Di Amato[65], the bank, in the role of depository of precise information finds itself at the center of the conflict between the natural attention of the client for a jealous safekeeping of what concerns his private sphere on one side, and the need for precise news on the economic situation of individuals that third parties have since they establish with those individuals relationship of economic nature on the other.

On this regard, it is useful to report a passage of the sentence n. 2147 of 1974 of the Court of Cassation which, dealing with the problem of the banking secrecy, affirmed that "this is a concept that, in its wider and general acceptation, presents itself under a negative point of view: hence as a virtual obstacle to the awareness, from third parties, of situations and operations regarding the banking activity".

Delineated in this way, its meaning is specified in two different directions, in relation to the interest that, with the secret, they intend to protect.

(...) They are two distinct protections, but that certainly merge and complete themselves on the common interest to confidentiality: the clients, finding an indirect but efficient defense in the secrecy sphere that the system gives to the credit companies, for needs regarding the implementation of a service recognized as of social importance; the bank,

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[64] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 15

[65] DI AMATO A., *Il segreto bancario*, Napoli, 1979, pag. 21

in turn, sees its position strengthened by the prohibition made to third parties to have knowledge of the activity with which the clients enters in relation with the bank itself which is aware and involved"[66].

On the doctrinal level there is an accordance among interpreters regarding the effective existence of the banking secrecy and the recognition of a consequent juridical precept of behavior from the credit institutes.

Indeed, it has been pointed out by Toscano and Razzante[67] as the system appreciated in general the banking secrecy, configuring it as a juridical institute by itself, founded on the prohibition for banks to spread the news protected by it, with the exception of specific hypotheses.

Moreover, it is of common opinion, and it is traditionally shared, that one according to which the credit companies have to maintain the more stringent confidentiality on the operation made with their clients not for mere interest of organization of the credit company, but in observance of a precise juridical obligation.

This agreement, however, vanishes in the moment in which the exact normative basis of this obligation must be identified; that is, according to Molle[68], when we want to give to the banking secrecy a juridical foundation to solve, practically, the difficulties that banks encounter when they have a request of information on the client, or it is called to depose, or it is solicited by the tax administrators.

Moreover, according to the author, to say that the norm and its protection appear more implicit than explicit, is not very useful when the reason of this implicit are not given. Does it depend on the will of the parties, or is it outside of this will? And, in this hypothesis, which is the principle of law that must be invoked? Should it be searched in a law norm or should it be found constantly observing the sanction in use?

The efforts made over time by the doctrine to try to identity a specific foundation for the banking secrecy have not come to unanimously shared conclusions; due to this diversity of opinions and the observed normative lability of the concept, a wide range of idea

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[66] Cassazione, Sezione I Civile, sentenza del 30 Novembre 1973 – 18 Luglio 1974, n. 2147, in *Rassegna Tributaria* – Quaderno monotematico di dottrina n.9, 1993, pag. 97

[67] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, p. 17

[68] MOLLE G. *Il segreto bancario*, in Banca, Borsa e Titoli di credito, I, 1937, pag. 172

processing has been created, producing multiple positioning very different among each others, some of which revealed to be unsatisfactory.

6. The new privacy rules of the GDPR and the main news for banks

The General Data Protection Regulation n. 2016/679 (or, in short, GDPR) is the reform regulation of the European legislation for what concerns the data protection.

It has been published in the European Official Journal on May 4th, 2016, it entered into force on May 24th, 2016, but its implementation took place after two years, hence on May 25th, 2018 and, since its application, it has determined a deep change in the management of the personal data.

Since it is a European Regulation, it is directly applicable and, hence, an Italian transposition legislation is not provided, but, rather, some clarifications regarding some aspects, for example on the powers of the National Guarantor for the protection of personal data.

As it has been explained by Franza[69], central in the management of the new discipline is the definition of personal data, that is identified, in a broad way, in any information such as name, surname, tax code, image, voice, fingerprint or telephone traffic regarding an identified physical person or one indirectly identifiable.

The General Regulation applies to any service, or to any operation on series of operations, such as the collection, the registration, the organization, the structuring, the conservation, the adaptation or the modification, the extraction, the consultation, the use, the communication through transmission, the diffusion or any other form of making available, of interconnection, of limitation, cancellation or destruction that has personal data as object, and to any owners (called controllers) and supervisors (called processors) of the service established in the Union territory, but also in general to those that, by offering goods and services to residents in the Union, process data of residents in the European Union (as it is specified in article n. 3 of the Regulation).

[69] FRANZA E., *Le nuove regole in materia di privacy della GDPR e principali novità per le Banche*, 2018, http://www.dirittobancario.it/approfondimenti/privacy/le-nuove-regole-materia-di-privacy-della-gdpr-e-principali-novita-le-banche

In this way, its application is not limited only to the companies that are in Europe, but it safeguards the interested parties that are resident in the Union territory, independently from where the treatment of their personal data takes place.

The physical person that is identified or that is identifiable in a direct or indirect way to which the personal data object of the treatment is referred, is called as the Data Subject.

Particular categories of personal data are the sensitive data, the health data, the biometric data, the genetic data and the personal data which reveal the existence of crimes or criminal convictions or connected security measures, such as the definitive criminal convictions, the conditional release, the prohibition or obligation to stay, the alternative measures to detention.

For the discipline under scrutiny, have significance also the operations of cancellation, destruction and anonymization (or, the service which has the goal of preventing the identification of the interested party).

As it has been pointed out by Franza[70], the intervention made with the GDPR Regulation in the matter of the safeguard of personal data, that are qualified by the same regulation as fundamental human rights, is inside a wider reform through which there is the pursuing of the objective of harmonizing the legislations of the various Member States, guaranteeing a uniform discipline on the subject of protection of the privacy, as well as to reinforce the protection of personal data inside the European Union, by introducing new transparence duties for the Data Controllers and to develop a unique digital market through the creation and the promotion of new services, applications, platforms and software.

Also, in the intentions of the Legislator, this regulation constitutes with the EU Directive 2016/680, the tool that allows to remove the obstacles to a free circulation of data inside the European Union, and assures a homogeneous and high level of protection of the physical persons in all the Member States, to assure, at the same time, greater protections, rights and control powers to the citizens of the Union.

As it is known, the protection of the personal data is a point of crucial importance for the banking institutions, since they want to assure to clients the confidentiality of the banking

[70] FRANZA E., *Le nuove regole in materia di privacy della GDPR e principali novità per le Banche*, 2018, http://www.dirittobancario.it/approfondimenti/privacy/le-nuove-regole-materia-di-privacy-della-gdpr-e-principali-novita-le-banche

data, including the personal data, that is an element of competitive capacity; moreover, they have to avoid to incur in the sanctions provided by the new discipline.

The matters of the circulation of information in the banking field and of the tracking of the banking operations have been updated with the changes provided in the Regulation.

In this regard, it is helpful the "Guide to the application of the EU Regulation 2016/679 on the protection of personal data".

The Guarantor identified six main issues and specified the new elements and the continuity ones with respect to the Privacy Code and by giving practical advices on the possible approaches to adopt in view of the full application of the GDPR.

Moreover, in order to clarify some ambiguities contained in the European Regulation, another support is given by the Group of the European Guarantors, which realized some guidelines to the practical applications of the new mentioned regulation.

It is evident as the Regulation in funded on the obligations and the accountability of the owner and the controller of the service; this accountability principle, is translated in the adoption of technical measures and organizational models aimed at guaranteeing that the management and the conservation of the data are carried out in accordance with the principles of protection of personal data.

Hence, as it is explained by Franza[71], the owner of the service will execute a preventive analysis of the Impact of the service (the Data Privacy Impact Assessment), which allows to identify and apply, from the design of the treatment or of the product, the appropriate corrective measures to prevent the risk.

Instead, for what concerns the security measures, the GDPR requires that they must be able to guarantee a security level that is "adequate to the risk", by offering an open list of applicable measures.

The banking institutes, in the implementation of the system, have to take into account both the singularities provided in the supervisory provisions of the Bank of Italy, and of the provisions contained in the requirements regarding the tracking of access to customers' banking data, storage times of the connected log files and implementation of alerts to detect abnormal accesses to the banking data.

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[71] FRANZA E., *Le nuove regole in materia di privacy della GDPR e principali novità per le Banche*, 2018, http://www.dirittobancario.it/approfondimenti/privacy/le-nuove-regole-materia-di-privacy-della-gdpr-e-principali-novita-le-banche

Moreover, to the Data Protection Officer, it is given the task to evaluate, organize and govern the management of the data treatment in respect of the new regulation.

More in detail, for what concerns the treatment of personal data with respect to the previous legislation, the GDPR does not require neither the written form nor the documentation in writing of the consensus to the treatment, but it provides that the data owner is "able to demonstrate that the interested party has consented to the treatment". Therefore, it will be necessary, in relation to each specific treatment, to keep adequate track of the granted consensus.

Furthermore, the information content to give to the treated party listed in the GDPR are more than those in the Privacy Code, and they must be provided in written form; however, for the services carried out through web, the information could also be given in an electronic format.

For what concerns the right of the interested party to obtain the cancellation of the personal data without undue delay, it will for sure be a question of implementing those technical solution able to ensure the automatic cancellation of data, not only on the single company system through which the data have been collected, but also from all the other system in which the data have eventually passed through.

The just-mentioned innovation is accompanied to the right to portability; indeed, the burden of fulfilling the cancellation request, as well as that of portability, requires the adaptation of both the internal policies and the mapping of data and of the data flows treated by the owner of the service, in order to respect the will of the requesting party as well as to guarantee a better data control, to limit or avoid the divulgation of further information, as confidential information of industrial secrets, to other competing owners.

Moreover, in the case in which it is the bank itself to elaborate the data of clients, hence, it is the unique owner of the treatment, a responsible person for the treatment must be appointed, which gives the specific indication of the nature, duration and purposes of the treatment, as well as the categories of data object of treatment, of the technical measures adequate to allow the respect of instructions contained in the regulation.

As it has been pointed out by Mandico[72], the principle to keep in mind is that the personal data must be collected for determined, explicit and legitimate purposes, and subsequently

[72] MANDICO M., *Conoscere la privacy: il segreto bancario*, gli Stati Generali, 2019, https://www.glistatigenerali.com/banche_privacy/conoscere-la-privacy-il-segreto-bancario/

processed in such a way that this treatment is compatible with those purposes or with the legitimate interest of the owner.

Hence, for any different purpose a specific consensus must be asked.

Moreover, the personal data must be conserved in a form that allows the identification of the interested party for a period of time not exceeding to the achievement of the purposes for which they have been collected and processed.

Finally, it should be reminded that the GDPR has confirmed the approach in force regarding the data flows outside the European Union, by providing, as a principle, that those flows are forbidden, unless specific guarantees of contractual nature. On this point, the alignment between the national legislation and the provisions of the Regulation will require an effort, both for the Italian banks and for the European ones. As it is recalled by Franza[73], another important news is the possibility for the banking groups to identify a single supervisory authority at community level, which acts as a help desk for the transnational treatments, where the owner or the responsible officer uses personal data in multiple establishments in the European Union, or it offers products or services in more European countries.

[73] FRANZA E., *Le nuove regole in materia di privacy della GDPR e principali novità per le Banche*, 2018, http://www.dirittobancario.it/approfondimenti/privacy/le-nuove-regole-materia-di-privacy-della-gdpr-e-principali-novita-le-banche

CHAPTER 2
LIMITS AND EXCEPTIONS TO THE BANKING SECRECY

SUMMARY: 2.1 The limits identified by the Constitutional Court; the sentence 51/1992 – 2.1.1 Other limits – 2.2 Exceptions to the banking secrecy – 2.2.1 Exceptions established by the criminal law – 2.2.2 Exceptions to the banking secrecy established by the law against the money laundering – 2.2.3 Exceptions established by the Civil Procedure Regulation – 2.2.4 Exceptions established by the Supervisory Regulation and, in particular, by articles 51, 53 and 54 of the Consolidated Law on Banking: information, regulatory and inspection supervision – 2.3 Exceptions to the banking secrecy established by the tax legislation.

1. The limits identified by the Constitutional Court: the sentence 51/1992

In light of the considerations pointed out in the previous chapter, the banking secrecy can, hence, be considered as a recognized behavior, guaranteed and protected by the legal system, originated by a customary use that binds the subjects that constantly carry out the credit activity to not reveal to third parties – except for the waivers expressly prescribed by law – news, information and data directly or indirectly connected to any banking operation or to nominatively identified clients, even occasional ones.

In essence, as it is pointed out by Toscano and Razzante[74], the duty of the banking secrecy finds its foundation in an ancient and deeply-rooted habit, functional to the fiduciary nature of the activity in place of the banking institute and it is imposed to safeguard the client, which is the only one who can exclude the bank from the necessity of its observation.

Such a juridical configuration of the banking secrecy has been, also, admirably carved in an important pronunciation of the Constitutional Court (we are referring to the sentence n. 51 of February 3rd, 1992) which, recalling – and hence confirming – the previous configuration of the Court of Cassation on the customary nature of the secrecy, it has better delineated its limits and it has specified the functional positioning in the system of rules, defining the banking secrecy "a duty of confidentiality to which traditionally all

[74] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002; pag. 38

banking institutions are bound in relation to operations, accounts, and the positions concerning the users of the services offered by them.

On this regard, however, it does not neither corresponds in the single clients of the banks a subjective juridical position constitutionally protected, nor a right of personality , since the confidentiality sphere which traditionally surrounds the accounts and operations of the users of the banking services is directly meant to the objective of safety and of good performance of the commercial trade.

Hence, the if, the how and the how much of the safeguard of the banking secrecy are left to the discretional choice of the ordinary legislator, which, in such an evaluation, is bound to a reasonable appreciation of the scope of usefulness and of justice that articles 41, clause 2, and 42, clause 2, of the Constitution provide for regarding the discipline of the economic activities and the belonging of patrimonial assets regime".

Ultimately, as it has been pointed out by Villani[75], the interest protected by the banking secrecy is identified with the sphere of confidentiality that surrounds the economic relationship of the single individuals; in other terms, the intervention of the Constitutional Court aims at bringing the banking secrecy itself back to the range of the economic relationships that are subject to limitations, of legislative nature, by the public authorities, in case wider purposes of social interest arise.

Furthermore, in the sentence under scrutiny, the Court establishes the subordination of the confidentiality obligation connected to the banking secrecy "to the compliance of mandatory duties of solidarity, first among all that of contributing to the public expenditures in reason of each own's personal contribution capacity", as well as "to the fulfillment of primary constitutional needs, as those related to the administration of justice and, in particular, to the prosecution of crimes".

Also, the Constitutional Court proceeds by stating that "in other terms, to the confidentiality to which banks are bound towards the operations of their clients cannot be applied the paradigm of guarantee proper of the rights of personal freedom, since at the foundation of the banking secrecy there are no values of the human person to safeguard; there are, simply, economic institutions and patrimonial interests, to which that paradigm is not applicable".

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[75] VILLANI M., Il segreto bancario nell'accertamento tributario, in www.commercialistatelematico.com; par. 5

On this regard, following what Villani[76] expresses, it seems improbably excessive to derive from these above-mentioned declarations the inexistence of any constitutionally relevant interest connected to the banking secrecy or, better, to the confidentiality of the banking relationships.

Hence, with this sentence, the Court has legitimately interpreted the role of judge of conflicts between constitutional principles, establishing the necessary rules to mediate among the different needs of the system: on one side, that of a necessary contribution to the public expenditures – and, hence, of the equal and correct determination of the tax burden – and to the verification of eventual crimes, and on the other side, that of the safeguard of savings and the protection of confidentiality.

It is evident, hence, as the clear conceptual setting of the Constitutional Court definitively do justice of all the other theories on the banking secrecy and it allows Toscano and Razzante[77] to formulate another observation.

Indeed, even with the signaled conceptual limits that the setting entails, it seems possible to affirm that the custom has the non-negligible quality of having a greater capability of adaptation to reality, hence a bigger flexibility.

This element seems to elude to whom, criticizing the thesis of the custom as foundation of the banking secrecy, affirm that "when it is invoked the existence of a very ancient use of confidentiality by banks it must be observed, as indeed it has already been highlighted, the deep change happened in the various time periods in the function of banks.

This constitutes at least a hint of the evolution of the motivation and of the content itself of the confidentiality, in contrast with that also temporal uniformity of behavior that characterized the normative use"[78].

Instead, the long persistence in time that characterizes the custom as such must not be confused with its stagnation, because the flexibility – interpreted as the capacity to evolve and to adapt to a reality that is renewing – is the primary characteristic of the custom itself.

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[76] VILLANI M., Il segreto bancario nell'accertamento tributario, in www.commercialistatelematico.com; par. 5

[77] TOSCANO F., RAZZANTE R, Il segreto bancario nelle indagini tributarie ed antiriciclaggio, Milano, 2002; pag. 39

[78] DI AMATO A., Il segreto bancario, Napoli, 1979, pag. 133

1.1 Other limits

The banking secrecy, intended as the confidentiality obligation for banks that is bound to the relationships with clients, in the field of the criminal trial is not normally opposable to the investigating magistrate since the interest to the criminality repression legitimates a limited recognition of it, by determining the attribution of wide power to the judicial authority.

This is what it has been pointed out by Castiglioni[79], who also stated that for what concerns the obligation to testify, no one can subtract exception made for the cases expressly specified by law.

On this regard, article 200 of the Code of Criminal Procedure commands a disposition to ratify the faculty of abstention from testifying by invoking the professional secrecy, only for the categories of subjects compulsorily listed, among which the banking officials do not appear: hence, it derives the impossibility to consider the banking secrecy as a professional secrecy. Neither, the banking secrecy results to be included in the duty to abstain from testifying on news covered by the office secrecy of which at article 201 of the Code of Criminal Procedure.

On the other side, article 255 of the Code of Criminal Procedure probably actualizes the only particular case of the limit to the banking secrecy by attributing to the judicial authority the faculty to proceed to the requisition of titles, values, deposited sums in bank accounts and any other thing contained in safety deposit boxes, in banks, when the authority itself retains that they are pertinent to the crime, even if they are neither owned by the accused person, nor they are registered with his name.

This above-mentioned limit to the confidentiality imposed on banks results, according to Castiglioni[80], particularly meaningful since it descends uniquely from a mere valuation of the judicial authority regarding the relevance to the crime of the seized material.

In any case, the freedom of judgement attributed to the magistrate is justified by the goal of the interest to suppress criminal facts.

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[79] CASTIGLIONI M., Il segreto bancario ed i suoi limiti, In Diritto bancario, Diritto finanziario, 1999, pag. 1 SS;

[80] CASTIGLIONI M., Il segreto bancario ed i suoi limiti, In Diritto bancario, Diritto finanziario, 1999, pag. 1 SS;

2. Exceptions to the banking secrecy

When examining the discipline of the banking secrecy, in Italy as well as in other countries, according to De Falco[81], we should notice the numerous exceptions, also called "non-banking secrets", in particular:

- Exceptions to the banking secrecy placed by the fiscal legislation culminated by the adoption of the law n. 413 of December 30th, 1991 with which, there has been talk of annulment of the banking secrecy in the relationships with the fiscal administration, that are in accordance with what has emerged in the sentence n. 51 of 1992 by the Constitutional Court (already presented in the previous paragraph) which believed "that the choices to safeguard the banking secrecy cannot become an obstacle to the mandatory duties of solidarity (…) and those connected to the administration of justice, and the crimes persecution";
- Exceptions to the banking secrecy established by the law against the organized crime of mafia type, such as, for example, the power of the attorney of the Republic and of the commissioner to obtain from the bank any information and documentation that are considered useful for investigation purposes on the holdings of a presumed "mafioso" and against the phenomena of international terrorism;
- Exceptions established by the anti-money laundering legislation for the prevention of the funding sourced of the international terrorism;
- Exceptions established by the criminal procedural legislation which entails the impossibility for the bank to escape the obligation to testify and the possibility for the judge to access to the correspondence, to the acts and to the documents of the banks in order to trace the things to seize;
- Exceptions established by the civil procedural legislation, such as the power of the judge to command inspections ex article 118 of the Code of Civil Procedure, as well as to exhibit documents ex article 210 of the Code of Civil Procedure; also, there is the obligation to make third part statement ex article 547 of the Code of Civil Procedure in case of foreclosure or seizure borne by a client of the bank.

[81] DE FALCO G., Segreto bancario: morte o resurrezione?, 2009, www.dirittobancario.it; pag. 2

Another exception is the denial for the bank to refuse to testify ex article 249 of the Code of Civil Procedure, since, as we have already seen, they are not covered by the extremes of the office secrecy of the professional secrecy.

- Exceptions established by the Supervisory Regulations and articles 51, 53 and 54 of the Consolidated Law on Banking; the first mentioned article, for example, places an obligation for the supervised banks to send to the Supervisory Authority, together with the periodic notices "any other data and requested document".

Hence, the content of the banking secrecy appears to be far from solid, since it has been broken by prevalent values of the national and community regulations.

We can now examine more in detail some of the exceptions above-mentioned.

2.1 Exceptions established by the criminal law

When examining this first exception to the banking secrecy, we should recall article 340 of the abrogated Code of Criminal Procedure of 1930, as it has been pointed out by Targetti[82].

Indeed, this article allowed the criminal judge to proceed both with the seizure, and with the apprehension of the paper supports connected to the bank relationships held, not only with the person accused, but also if "they are not registered with his name", and, in any case, if directed to ascertain "circumstances useful for the discovery of the truth".

This regulatory formula, as it is easy to understand, was already very broad, and it allowed the investigator to fully disclose the terms of the relationship with the credit institution, without having to stop in front of different headings, where they were supposed to be equally relevant to the crime for which they were proceeding.

Also, the author[83] recalls that the breadth of the power to disclose the secret for the criminal judge has been textually reconfirmed in the articles n. 248 and n. 255 of the Code of Criminal Procedure of 1988, that is in force, with the formulation of norms that present substantially the same content.

In fact, some lexical differences are verifiable, for example when it is specified that the judge must have "founded reason" to affirm the relevance of the bank documents to the crime and not just "considering it", as it could be read in the abrogated text.

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[82] TARGETTI R., *Il segreto bancario tra fisco e giudice penale*, in *Le Società* N. 11/1991, Pag. 1457

[83] TARGETTI R., *Il segreto bancario tra fisco e giudice penale*, in *Le Società* N. 11/1991, Pag. 1457

However, it is clear that these are not very significant differences, since there have been used formulas whose non-observance does not cause any procedural consequence, and which do consist primarily of indications of the principle.

In fact, the system in its practical aspects is the same: the faculty to access the credit institutions to examine documents, records and correspondence or, in alternative, an invitation to the bank to deliver them (expressed in article 248 of the Code of Criminal Procedure); criminal seizure in the case of non-compliance with the just-mentioned invitation and in any case it is useful to proceed with the probative seizure of the body of the crime (or, better, of the thing pertaining to the crime) as certainly are the paper supports of the banking relationship with the client or the proper deposit (expressed in article 255 of the Code of Criminal Procedure).

Furthermore, it is important to recall that, according to Targetti[84], the new code has, operationally speaking, simplified in a certain sense the procedure even for the credit institutions themselves, by allowing the access and the prodromal examination to the possible seizure of the documents, records and correspondence also to the officers of the judicial police (expressed in article 370 of the Code of Criminal Procedure).

Under the force of the abrogated Code, the faculty of preliminary examining was exclusively reserved to the magistrate, and the police officers could only intervene to execute the seizure decreed by the magistrate himself.

To be more precise, when recalling article 340 of the abrogated Code, we should consider regarding this matter the third clause of the article itself. As Pedrazzi[85] states, the faculty of magistrates to take advantage of the assistance of the judicial police officers is granted only for the investigative documents that are contained in the first clause of the above-mentioned article, that is to say for the seizure of documents or things that are determinant: instead, it is not allowed for the investigations of which at clause two of the same article, that are the explorative ones aimed at individuating the evidence.

Hence, the magistrate must access personally to the bank when he should examine the documentation available there to search for evidence.

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[84] TARGETTI R., Il segreto bancario tra fisco e giudice penale, in Le Società N. 11/1991, Pag. 1457

[85] PEDRAZZI C., Aspetti penali e processuali del segreto bancario, in La responsabilità penale degli operatori bancari, a cura di M. Romano, Bologna, Il Mulino, 1980, p. 255

The procedural law, so, grants to the police only the material concern of predetermined objects; also, it prohibits any task that implicates an exam of the content of documents or other objects.

Then, even if the banking secrecy is subordinated to the priority needs of criminal justice, it has been in a certain sense guaranteed the confidentiality of the banking environment by limiting as much as possible the access to secret information.

To waive this disposition, the judicial police even under the abrogated Code could be delegated for the preliminary exam but limited to investigations for crimes of terrorism and international criminality types; this modification was introduced by the Law n. 15 of February 6th, 1980.

It is clear to see, according to the author[86] as today, the accused citizen (and, actually, even before the reform of 1988), in front of the judicial authority, has very little room to invoke a banking secrecy that, therefore, at present does not actually subsist.

When examining the relevance of the banking secrecy in the range of the criminal process, another recognition should be made regarding the insurmountable barrier constituted by the article 251 of the Code of Criminal Procedure, that recognizes the right to abstain from testifying for reasons of professional secrecy only to the practitioners of forensic and sanitary professions, as well as to the ministers of cult.

These waivers to the duty to testify are compulsory, as it is reminded by Pedrazzi[87]; on the other side, the professional secrecy of the banker cannot be opposed to the criminal magistrate, since his resistance is inferior to the secrecy of a doctor or of a lawyer.

This does not exclude to consider the need of confidentiality proper of the credit functions; as we have mentioned, with article 340 of the abrogated Code of Criminal Procedure, it is assured that the banking secrecy is not sacrificed if not in the necessary measure to search for the truth; this is a further confirmation of the legal consistency of this type of secrecy.

[86] TARGETTI R., Il segreto bancario tra fisco e giudice penale, in Le Società N. 11/1991, Pag. 1457

[87] PEDRAZZI C., Aspetti penali e processuali del segreto bancario, in La responsabilità penale degli operatori bancari, a cura di M. Romano, Bologna, Il Mulino, 1980, p. 253

2.2 Exceptions to the banking secrecy established by the law against the money laundering

The impact of the law n. 197 of July 5th, 1991, the so-called "anti-money laundering legislation", on the banking secrecy and, more generally, on the confidentiality that is assigned to some relationships between citizens and the State or between citizens and operators in the financial sector has assumed a significant role in our judicial system, according to Toscano and Razzante.[88]

It should be recalled that, in the last years, the reinvestment of income from illegal activities has grown enormously and it has reached supranational dimensions, favored by the integration of financial markets and by the liberalization of the capital movements.

As Delle Femmine notes "there is a nearly constant internationality of the money laundering phenomena consequent to the big illegal business (such as, for example, kidnappings, drug and arms trafficking, smuggling), which profits flow towards the so-called tax and banking havens, countries in which an impenetrable banking secrecy stands at the base of the national economy and where it is possible, to whoever has capitals, to exercise the financial and banking activities"[89].

Also, Petragnani Gelosi stated that "the so-called globalization phenomenon has accelerated the times of a radical reconsideration of the banking secrecy, with the achieved awareness of the necessity of a synergistic effort at international level to fight the money laundering phenomena.

[…] Precisely, the awareness of the polluting capacity of this phenomenon has represented the most significant stimulus for the intermediaries, mostly, banking ones, to accept an active role through the information discipline"[90].

Also, the frontiers of communication offered by the internet and other online systems have disclosed illimited horizons for the individual relations but, at the same time, they

[88] TOSCANO F., RAZZANTE R, Il segreto bancario nelle indagini tributarie ed antiriciclaggio, Milano, 2002; pag. 283

[89] DELLE FEMMINE V. La legislazione antiriciclaggio in ambito comunitario ed internazionale, Rivista della Guardia di Finanza, n.1, 1995, pag. 43

[90] PETRAGNANI GELOSI G. Il segreto bancario, in Diritto penale della banca, del mercato mobiliare e finanziario, 2002, pag. 256

have amplified the expansion potential of illicit activities by broadening the diffusive capacity of the criminal behaviors, as it has been pointed out by Toscano and Razzante[91]. Hence, internet attracts the preferences of the criminal environment due to the characteristics proper of the network communications, and, in particular, of their rapidity, the abstractness of the informatic data, that are easily concealable and cryptable, and the anonymity behind which the person who arranges the operation can hide.

Therefore, if the recleaning of illicit capitals essentially translates in a request for anonymity, with the goal of minimizing the risk of origin identification of the illegal profit by the authorities, it is evident, on the other side, the need to arrange an efficient structure to contrast the phenomenon in object; in particular, this should provide for, and it should demand for, the definition of procedures directed at acquiring data and information regarding the financial operations that pass through the system of banks, still in the absolute respect of the norms regarding the privacy safeguard and the confidentiality of strictly personal news.

Following this direction, Toscano and Razzante[92] highlight the importance assumed by the banking investigations, which represent an efficient tool, both for the frequent recurrence to the credit institutions as the place normally designated to the carrying out of the capital and values movements, and for the impossibility of not leaving documentary traces of the transactions put in place.

Furthermore, Amato pointed out that "on one side, indeed, the banking channel represents the one quantitively more exploited for the movements of money and titles and, among them, even those coming from illicit activities.

On the other side, the punctual accounting registration procedures used by the credit institutions allow, at least basically, a precise individuation of the single financial flows and of the interpersonal links between the interested parties, with results usable in the scope of criminal trials.

It should be added to this that the verification of the banking position of the single subject (and, in particular, connected to the availability of bank accounts) allows to reconstruct the wealth levels, mainly under the dynamic profile of increases and reductions, which,

[91] TOSCANO F., RAZZANTE R, Il segreto bancario nelle indagini tributarie ed antiriciclaggio, Milano, 2002; pag. 284

[92] TOSCANO F., RAZZANTE R, Il segreto bancario nelle indagini tributarie ed antiriciclaggio, Milano, 2002; pag. 285

evaluated in relation to the known official sources of income, constitute extremely significant clues of an illicit activity"[93].

Today, the money laundering constitutes for the organized crime one of the most remunerative forms of reuse of illicit profits and it has assumed alarming dimensions especially since the distortive effect on the financial system is immediate.

On this matter, crucial result to be the declaration given by the Governor of the Bank of Italy, according to which "the presence of professionals and economic structures colluded with the organized crime deeply alters the market mechanisms in the rules and in the goals, by distorting the competition"[94].

It should be recalled that, on this regard, to contrast these forms of reuse of illicit profits, it is essential the so-called active collaboration of the financial intermediaries; on this direction Sbarra highlighted that "in the search for concrete solutions to make the action against the money laundering increasingly vivid and adequate, the Italian legislator has individuated in the direct involvement of the banking system and, more generally, that of financial intermediation, a necessary, common strategic line to adopt, given that this system can carry out a preventive role, highly efficient, as well as a collaborative function with the judicial and police authorities in the repression of the phenomenon"[95].

As Toscano and Razzante[96] remind, the regulatory framework of the law n. 197 of 1991 prescribes a set of preventive rules and repressive measures that are articulated on three mechanisms:

- The channeling of the most significant operations through the financial intermediaries;
- The collection and management of data connected the transactions of amount superior to a minimum pre-established threshold through a specific informatic archive;

[93] AMATO G. Il riciclaggio del denaro sporco, 1993, Laurus Robuffo, Roma, pag. 153

[94] Banca d'Italia, Prevenzione e repressione del riciclaggio nel sistema finanziario, Audizione del Governatore della Banca d'Italia Antonio Fazio, Roma, 25 Febbraio 1997.

[95] SBARRA G. L'operatività del Nucleo Speciale di Polizia Valutaria in materia di contrasto al riciclaggio, Rivista della Guardia di Finanza, 1999, n.1, pag. 307

[96] TOSCANO F., RAZZANTE R, Il segreto bancario nelle indagini tributarie ed antiriciclaggio, Milano, 2002; pag. 299

- The obligation to signal the transactions that are deemed to be suspicious, when there are elements of incompatibility between the terms of the operation put in place and the economic characteristics of the subject who implemented it.

What has been said up to now in the paragraph briefly expresses which is the legislation put in place to contrast the money laundering and this allows to outline another exception to the banking secrecy, that is the one recurring in the cases of investigations of the species in question.

According to Toscano and Razzante[97], it is important to highlight the scope of this exception to the privacy discipline, since the observation of the common practice occurring in the intermediary-client relationship allows to clearly reveal the frequent contrast between the information request by the financial operators and the refuse of the clients to release them, even sometimes opposing for not well expressed confidentiality reasons.

Also, it should be recalled as confidentiality and transparence represent the two antithetical antipodes to which the supporters of opposite perspectives are deployed, for what concerns the matter on access to the information obtainable by the banking system. On this regard, Petragnani Gelosi[98] stated that "(…) still, numerous are the opinions that identify in the safeguard to the banking secrecy one of the fundamental mechanisms for the efficiency and the well-functioning of the sector in charge to the management of savings, according to which the banking secrecy itself should be placed in defense not only of the private interests of the clients but to those general ones of the economic system.

Of opposite sign are the reasonings made by those who emphasize the profile of transparence as a tool imposed by the mandatory duties of social solidarity with the goal of obtaining public primary objectives of criminal nature but, also, of currency, tax or, more generally, of political-economic nature".

On this matter, it can be recalled, also, a sentence of a criminal defense lawyer to end the discussion relative to the interferences to the banking secrecy determined by the anti-money laundering activity; indeed, Antolisei expressed that "even if the norm in exam (article 2 of the law n. 197 of 1999 concerning the data storage) has affected the banking

[97] TOSCANO F., RAZZANTE R, Il segreto bancario nelle indagini tributarie ed antiriciclaggio, Milano, 2002; pag. 334

[98] PETRAGNANI GELOSI G. Il segreto bancario, in Diritto penale della banca, del mercato mobiliare e finanziario, 2002, pag. 257

secrecy, it has done it only in a marginal way: the acquired data remain reserved only in order to eventually allow investigations by the judicial authorities"[99].

It is evident, according to Toscano and Razzante[100], as in a sector as the one of the fight against money laundering in which it is requested a wide availability of information by the investigative bodies, as well as a deep understanding of the client in order to have more chances to ascertain illicit operations, the collision with the aspect linked to data and news protection results immediate and unavoidable.

Two aspects are, yet, unquestionable:

- On one side, there is the need to safeguard a public good, as the market is, from the alterations deriving from the realization of criminal activities (such as, in our case, the money laundering);
- On the other side, there is the citizens necessity to maintain their savings protected even from the interferences of unauthorized subjects.

According to the authors, the mitigation of these two apparently opposite interests must take place by the legislation itself, so that there is a clear and efficient normative support that makes it possible to accomplish the first interest without harming the second one.

This request has been embraced by the authorities and, in the Decalogue-*ter,* the Bank of Italy, while describing the duties of the intermediaries, has expressed that "the corporate bodies must arrange measures aimed at assuring that to the correct personal identification follows the acquisition of complete and true information on the economic and financial situation of the client, as well as on the economic reasons underlying the requested or carried out operations"[101].

These above-mentioned clear and peremptory prescriptions are in themselves such to implicate the overcoming of both the banking secrecy and, especially, the privacy.

For the latter, it is evident that remain little space since it is not surprising as, at the start of a financial relation, the operator knows (and requests) a series of information relating to the client.

[99] ANTOLISEI A., Manuale di diritto penale, 1990, Giuffré, Milano, pag. 698

[100] TOSCANO F., RAZZANTE R, Il segreto bancario nelle indagini tributarie ed antiriciclaggio, Milano, 2002; pag. 335

[101] Istruzioni operative del 12 Gennaio 2001, cap. 2, par. 2.1

To confirm this theory, if the norm of second level just mentioned was not enough, Toscano and Razzante[102] recall that article 14 of the law n. 675 of December 31st, 1996 can be appealed, which explicitly excludes by the cautions related to the privacy "the personal data gathered according to the dispositions of law n. 197 of July 5th, 1991".

Moreover, article 12 of the just-mentioned law commands that the consensus of the interested subject to the treatment of data is not requested when such treatment concerns, among other, "the data gathered and retained according to an obligation provided by the law, by a regulation or by the Community legislation".

Also, article 4, clause 1, letter e) of the same law excludes from its scope of application the treatment of personal data implemented "by public subjects with the aim of defense or security of the Country or prevention, scrutiny or repression of crimes, according to law dispositions that expressly provide for the treatment".

It is more difficult to find punctual sources for the banking secrecy.

In the field of anti-money laundering, a trace can be already found in the "Declaration of Basel principles of December 12nd, 1988", which invited to the disclosure of banks towards the Authorities, and to which followed the Intrabank Agreement signed on the theme of identification of clients, in force since July 1st, 1989.

Finally, it is important to remind as all the dispositions that is some ways can be defined as preluding the anti-money laundering legislation, and that followed each other up to the 90s have somehow (rightly) forced to the collaboration for what concerns the circulation of information, deeds and documents related to crimes hypotheses, as well as to presuppositions of mafia association and money laundering.

When defining a summary of the problems connected to the possible interferences that could verify between anti-money laundering legislation and banking secrecy, Toscano and Razzante[103] explain as it should be pointed out as an effective fight action to the economic criminality necessarily requests the collaboration among credit institutes and the judicial authority: in this perspective, hence, forcing some sacrifices to the single individuals' freedom appears unavoidable.

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[102] TOSCANO F., RAZZANTE R, Il segreto bancario nelle indagini tributarie ed antiriciclaggio, Milano, 2002; pag. 337

[103] TOSCANO F., RAZZANTE R, Il segreto bancario nelle indagini tributarie ed antiriciclaggio, Milano, 2002; pag. 338

On this regard, even if there is the shared need for the guarantee of the safeguard of the rights of a person ratified by the Constitution, a legal system cannot avoid its functions of protections of the public order and of the transparence of the markets and of the economic system as a whole in order to protect the single interests.

2.3 Exceptions established by the Civil Procedure Regulation

In the scope of the civil trial, as it has been recalled by Castiglioni[104], the banking secrecy is not subordinated to particular limits, since the safeguard of the individual interests, to which the judge is submitted, is retained to be overriding the confidentiality obligation that falls on the credit institutions.

However, for what concerns deposition as a head, article n. 249 of the Code of Civil Procedure directly reminds to the provisions of the Code of Criminal Procedure: hence, for the same reasons explained in the previous paragraph, an identification of the banking secrecy with the office secrecy has to be excluded.

The is only an exception for the officers of the Bank of Italy and of the Exchange Office, which, pursuant to article 7 of the Consolidated Law on Banking, are public officers bound to the office secrecy.

Moreover, articles n. 118 and n. 210 of the Code of Civil Procedure respectively provide for an inspection order and an exhibition order which seem to limit the banking secrecy, even if not with the same ease that is applied on the criminal scope, in which the seizure, as we have already mentioned in the previous paragraph, is subject to an evaluation of the judge for what concerns the relevance to the crime of the material to be seized.

Instead, in the civil scope, the inspection mentioned in article n. 118 can be commanded to the bank only if it appears absolutely essential to know the facts of the case.

Furthermore, the inspection order is subordinated to four prerequisites: the request of a party, that the inspection must be necessary to know the facts of the case, that it can be fulfilled with no serious damage for those who have to suffer it, and that who must allow the inspection is not forced to violate one of the secrets provided by articles n. 200 and n. 201 of the Code of Criminal Procedure (that concern the professional secrecy and the office secrecy, respectively).

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[104] CASTIGLIONI M., *Il segreto bancario ed i suoi limiti*, In *Diritto bancario, Diritto finanziario*, 1999, pag. 1 SS;

Also, the exhibition order mentioned in article n. 210, clause 1, of the Code of Civil Procedure is subordinated to the same prerequisites, which in any case cannot violate neither the right of defense of the bank, nor that of the client, the latter being "the owner of a mere interest in the exhibition order"[105].

Finally, a remarkable limit to the banking secrecy is identifiable in procedures for the seizure and foreclosure to credit institutions charged by their customers, when it is believed that the bank cannot exempt itself from make the declaration pursuant to article n. 547 of the Code of Civil Procedure, concerning the declaration of third parties.

However, it is intended that the bank, while making this declaration, could limit itself to declare if the sums in its possession are sufficient to satisfy the credit for which the seizure or the foreclosure is carried out, with no need to precise the total amount of the sums to which it is debtor towards the client.

2.4 Exceptions established by the Supervisory Regulation and, in particular, by articles 51, 53 and 54 of the Consolidated Law on Banking: information, regulatory and inspection supervision

On August 13th, 2010 there has been a rewriting of the entire Chapter II of the Title VI of the Consolidated Law on Banking, which took place by the Legislative Decree n. 141, a transposition of Directive 2008/48 / EC relating to credit agreements for consumers.

On this matter, Urbani[106] has had the opportunity to make some considerations on the arrangement of controls on intermediaries operating in such forms of financing and on other subjects involved in this service towards the consumers.

By combining this rewritten Consolidated Law on Banking and the consequent measure of the Bank of Italy of February 9th, 2011 on "Transparency of banking and financial operations and services. Correctness of the relationships between intermediaries and clients. Transposition of the Directive on consumer credit", distinct categories of subjects emerge:

[105] Court of Appeal, Milan, July 22, 1997

[106] URBANI A., La vigilanza sui soggetti esercenti il credito ai consumatori, in Banca borsa tit. cred., fasc.4, 2012, pag. 442;

- the financier, that is defined by article n. 121, clause 1, letter f) of the Consolidated Law on Banking as "a subject which, being qualified to provide professional financing in the territory of the Republic, offers or signs credit agreements".
  In this case, there is a clear reference to banks and to professionals of the financial sector;
- the credit intermediaries, that operate in the financial activities and carry out by exercising its profession activities as presentation or conclusion of credit contracts.

This progressive extension of the supervision to the intermediaries has been highlighted as a response to the need to contrast the economic criminality, particularly relating the money laundering of money of illicit origin.

Article 128 of the Consolidated Law on Banking, as Urbani[107] recalls, explicitly delineates the supervisory action only to banks, electronic money institutions, payment institutions and financial intermediaries.

The Single Text expresses in terms of "vigilance" rather than "controls", since controls are only a part of a wider vigilance action, since it calls for a posteriori checks on compliance to standards, while the supervision has the connotation of a prudential action, focusing on preventive operations that, more in detail, are declined in the triple articulation of powers of informative, regulatory and inspective types.

For what concern the regulatory aspect, it is evident that the credit authorities have wide power to intervene through dispositions; the Bank of Italy has used this powers, for example by devoting an entire section (precisely, the XI) to internal procedures aspects to ensure the intelligibility by clients of the characteristics of the operations and of the connected risks.

Also, the central position of compliance is confirmed by the verifications imposed related to the respect by intermediaries of the self-regulation initiatives to which they adhered.

For what concerns the informative and inspective supervisions, it is important to recall article n. 128, clause 1 of the Consolidated Law on Banking, according to which "in order to verify the compliance with the provisions of this title, the Bank of Italy may acquire

[107] URBANI A., La vigilanza sui soggetti esercenti il credito ai consumatori, in Banca borsa tit. cred., fasc.4, 2012, pag. 442;

information, deeds and documents and carry out inspections" in any intermediary or financier.

Regarding the informative powers, the norm slightly differs from article 51 of the Consolidated Law on Banking, but even in absence of an expressed prevision, the requested news could have a periodic nature.

Instead, when considering the inspective supervision, we should highlight the Section X of the Bank of Italy measure, devoted to the "Controls", which explicitly provides that the Supervision Organ may require the collaboration of other Authorities, if this intervention is related to subjects operating in the financial sector registered in the list of article 106 of the Consolidated Law on Banking or money changers, as well as of the Finance Guard with no further specifications.

3. Exceptions to the banking secrecy established by the tax legislation

In a fiscal system like ours, characterized by a mass taxation and in which it is utopic being able to defeat the tax evasion only by means of generalized checks thorough, it is recognized the deterrent effect given by the tax investigations, together with a recovery of a civic consciousness from taxpayers related to participation to public expenditures.

As Villani[108] recalls, in the legislative evolution connected to the banking secrecy, of great significance has been the law n. 825 of October 9, 1971, which attributed the legislative empowerment to the Government for the tax reform and which, for the first time, provided for "the introduction, limited to particularly serious hypotheses, of dispensations to the banking secrecy in the relationships with the financial administration, being determined in the content and in the prerequisites".

In those years, according to the author, there was a clear concern of the Legislator, connected to the constitutional provisions contained in article 47, which establishes the safeguard of savings, the protection of the economy of the Country and to not discourage the money accumulation, with the aim of not make emerging the conditions that cause or encourage the dispersion or mass capital drain abroad.

Then, with article 35 of the Decree of the President of the Republic (D.P.R.) n. 600 of September 29th, 1973, concerning "Dispositions in the field of tax on earnings assessment", there was the provision for some exceptions to the banking secrecy in well-determined hypotheses, while with the D.P.R. n. 463 of July 15th, 1982 have been defined, with the introduction in the D.P.R. n. 633 of October 26th, 1972, of article 51-*bis*, the instances of access to the banking documentation of the taxpayer regarding the VAT: initially, the derogation to the secrecy possibility was provided only for investigations on the direct taxes and not on the value added tax; this testifies the absolute prudence with which the Legislator had faced this problem, according to Villani[109].

The just-mentioned provisions regarding the banking secrecy implied an undisputed widening of the powers of the financial offices and of the Finance Guard but they limited, the rigid respect of prerequisites protecting the confidentiality of the relationships between taxpayers and credit institutes.

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[108] VILLANI M., Il segreto bancario nell'accertamento tributario, in www.commercialistatelematico.com; par.3

[109] VILLANI M., Il segreto bancario nell'accertamento tributario, in www.commercialistatelematico.com; par.3

Later, law n. 413 of December 30th, 1991, entered into force on January 1st, 1992, has generated substantial legislative modifications regarding the banking investigations, providing to the financial offices and of the Finance Guard the power to ask for and to obtain information from the banking system independently from the occurrence of particular prerequisites; in the sector of the relationship between banks and the financial administration, the banking secrecy has been completely abolished.

Another interesting point of view is offered by the pronounce of the Court of Cassation n. 12813 of September 27th, 2000.

As Villani[110] recalls, the Supreme College, with the just mentioned pronounce, has confirmed that "the Administration legitimately can, when proceeding to the reconstruction of credit of a taxpayer, use also banking data acquired from other taxpayers, without the subsistence of any duty of contesting those data to the taxpayer or to the unrelated subjects from which they have been acquired".

This statement, however, is associated with a rigid clarification towards the Administration.

This is a disposition that was long awaited to avoid the indiscriminate use of the data acquired from third parties, that sometimes subtend the danger of unfunded disputes that risk to fall into the responsibility sphere of the verified taxpayer.

Indeed, the pronounce of the Court of Cassation calls for a careful evaluation of the elements acquired in this way in the court and, in particular, it is established that the burden of proving the correlation between the banking movements connected to the personal bank account of a third party and the verified taxpayer have to be borne by the Administration itself.

Hence, the Court calls for a better commitment of the tax judges dealing with the valuation of the elements that the Office brings as founding the banking investigation, by imposing to the Administration to prove in the court the attribution of the movements of the third party to the economic activity of the taxpayer that is being verified.

Furthermore, the element requested is specific: it must be evaluated whether the documented economic operations between the third party and the verified taxpayer are pertinent to the company activity; in this way, the Supreme Court has put a limit to the

[110] VILLANI M., Il segreto bancario nell'accertamento tributario, in www.commercialistatelematico.com; par.4

indiscriminate use of the banking data by means of a preventive control made by the judges regarding the concrete connection between the two subjects.

The previous jurisprudential direction, based on article 32, clause 7 of the D.P.R 600/1973 and article 51, clause 7 of the D.P.R. 633/1972, allowed for a simplistic application of the principles contained there, with a low awareness of the defensive guarantees of the taxpayer.

The consolidated tendency was to consider imputable to the company, whether it was of people or of capital, the results of verifications carried out on the bank accounts of the business partners, maintaining in charge of the latter the duty to demonstrate the inexistence of a correlation between the banking movements on their personal accounts and the entrepreneurial activity of the business.

Another connected sentence is the one of the Court of Cassation of April 1st, 2003, with which it has been confirmed in charge of the administrators of a partnership the legal presumption of connection, which makes acquirable and directly usable towards the business their banking data.

This principle is diametrically opposite to what happens for a capital company: for these the partners, natural persons, and the administrators are actually third parties with respect to the juridical person taxpayer; the importance of this sentence is huge, since it allows to definitely overcome the distortions that the previous orientation could cause.

A more detailed overview of the relationship between the banking secrecy and the tax legislation will be carried out in the next chapter.

CHAPTER 3
THE POSITION OF TAX ADMINISTRATION TOWARDS THE BANKING SECRECY

SUMMARY: 3.1 Introduction – 3.2 The banking secrecy and tax provisions – 3.2.1 The legal presumption contained in article n. 32 of the d.p.r. – 3.2.2 The dispensations to the banking secrecy – 3.3 The d.p.r. 463/1982 and the changes brought to the d.p.r. 600/1973 – 3.4 The changes brought by article n. 18 of the law 413/1991 – 3.5 The changes introduced by the finance law 311/2004: the new powers of inquiry and assessment by the financial administration – 3.5.1 Extension of the number of operators of the market where the verifications are carried out – 3.5.2 The objective element of the banking verification: the possibility to acquire also the so-called "off account transactions" – 3.6 Methods and functioning of the exchange of information on tax matters in the light of Community sources – 3.6.1 The exchange of information in the European law – 3.6.2 The exchange of information in an international context.

1. Introduction

As it has already been pointed out in the previous chapter, generally, the regulatory attitude towards the banking secrecy has been subjected to a constant evolution even if, as Toscano and Razzante[111] specify, it has not always been supported by the doctrine.

This development has been determined by the widely shared necessity to prevent that under the cover of a wrongly conceived confidentiality some dangerous operations of money laundering of illicit origin or tax evasion could find a protection.

In accordance to this concept, we should underline what Lattanzio[112] pointed out; he highlighted as "particular relevance, in the field of tax assessments, performs the set of problems connected to the banking controls, since the great dynamism of the economic relationships, based on the mobility of the credit coming from savings, has favored the development of the banking activity, which, towards its activity of credit brokerage, constitutes a tool of support and strengthening of the exchanges.

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[111] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002; pag. 99

[112] LATTANZIO A., *La soggettivazione della verifica tributaria. L'onere della prova*, Facoltà di Economia, Università degli studi di Bari, 1996, pag. 229

Then, through the typical operations of credit nature, as well as those of financial investment, of brokerage in securities and in currencies, and also, by means of the complementary and collateral operations, the companies and the credit institutions have become depositories of a huge mass of data and news linked to the economic, financial and patrimonial situation of their clients".

So, the starting point for some other interesting considerations of Toscano and Razzante[113], is the constitutionally preserved commitment to concur to the maintenance of the public expenditures; following this idea, the modern taxation is characterized by two strictly interconnected aspects: on one side, the self-taxation, and the progressive focusing of the financial administration on the verification activities, on the other side.

Indeed, it happens in the advanced tax systems, and referring to the so-called *mass taxes,* (that are taxes on the earnings and on the value added), that the taxpayer has to declare, calculate and pay the due tax while, on its side, the administration has to verify the correct and timely compliance of the formal and substantial duties by the taxable person.

On this direction, the banking investigations have constituted, since the carrying out of the tax reform, one of the most vivid tools to which the tax administration has constantly appealed, even if by means of a long and not easy path of limitation of the strictness of the banking secrecy, with the aim of trying to simplify the supervision of the income position of the taxpayer.

It is generally recognized, even with the limits they do represents, the undisputed deterrence importance of the use of banking investigations, since it is reflected in a dissuasion effect; the limit is represented by the fact that it is utopic being able to defeat the tax evasion only by means of generalized checks; however, another important tool to reach would be the recovery of a civic consciousness from taxpayers since our fiscal system is characterized by a mass taxation.

Hence, we could not agree with who thinks and considers the banking verifications as the determined arm against the subtractions of taxation material; on this regard, however, it has been observed by Cucuzza and Capolupo[114] that "the access to the bank accounts of the taxpayers by the tax administration has assumed, over time, a more and more marked

[113] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002; pag. 100

[114] CUCUZZA O., CAPOLUPO S., *Accertamento tributario e segreto bancario*, allegato a il fisco, n. 5, 1999, pag. 1631

relevance as and when it has been consolidated the awareness, also at the public opinion level, of the great extent of evasion and, at the same time, the need, at least, of its reduction, taking for granted, on the other side, that its complete destruction is still illusory".

The debate over the matters raised over time by the prevision of specific powers enforceable by the tax administration for the acquisition of data and news at the credit institutions, useful to the determination of the ability to pay of the subject under verification, has always been intense, and it has been brightened up by the emanation, over time, of new legislative provisions and the assumption of position took by the jurisprudence.

In the range of the delineated general scenario, Russo[115] points out that "there are two opposite formations that promptly re-proposed: on one side, those who recognize in the application of the banking secrecy, and despite the enlargement of its connected exceptions provided by specific norms, an obstacle, the most of the times determinant, to the success of the verification action of the tax offices; on the other and contrary side, those who continue to conceive the banking secrecy not as an out of date privilege at disposition of the tax evaders, although as a fundamental principle of our system since it is placed to protect the essential right to confidentiality of the single individual.

This strong opposition has for sure, at the basis, a diversity of political conceptions; hence, this is a verification that do not surprise us a lot, in a time period in which the myth of the neutrality of choices operated in the juridical field is, at this point, definitely faded".

For a long time, as Toscano and Razzante[116] consider, it has been the fear that the prevision of such verifications could have psychological repercussions on the depositors in such a way to damage the credit sector, to induce the legislator to a great, maybe overstated, prudence, to the point of making the banking secrecy opposable to the tax authorities.

The historical justifications, that brought to an effective recognition of the just mentioned concept, for which the banking secrecy is an impenetrable barrier to oppose to the tax administration requests, have to be researched in the presumed economy protection.

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[115] RUSSO P., *Questioni vecchie e nuove in tema di operatività del segreto bancario in materia di diritto tributario*, 1991, Giuffré, Milano, p. 80

[116] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002; pag. 101

This last hypothesis has an explicit recognition in the relation to the Government on the tax reform project, where it can be read that "our Country lives and operates in an open international situation and, hence, it can't neglects, for the effects that are determined in our economy, that other countries both of the Common Market and territorially near and extremely linked to us, for economic and financial obligations, have situations and legislations very different from those in which our Country would be if (…) the tools above mentioned (abolition of the banking secrecy) would be introduced"[117].

In this sense, it must be highlighted as the prudence that clearly shows through the parliamentary acts and the regulatory measures released on this matter that followed one another over time, has been determined by an attitude of prejudice manifested, also, by the doctrine, which stressed the dangers connected to a total transparency of the contributory position of the taxpayers and it has been evaluated as excessive the risk coming from a sort of complete picture of their capacities, related to the usefulness of the results that were intended to pursue with the abolition of the banking secrecy.

On this regard, Ruta[118] declared that "under the merely financial profile, the eventual abolition of the banking secrecy, far from generating beneficial effects to the treasury of the Country for a claimed reduction of the verification costs and for the possible increase of some entries, it would have as a consequence the reduction of the credit capacity and the weakening of our economy, resulting, ultimately, as detrimental for the real interest of the nation.

After all, further investigations conducted in the past has brought to the conclusion that the abolition of the banking secrecy would, for sure, bring some negative outcomes, such as:

a) A reduction in the turnover of the credit institutions, with the result, hence, of indirectly frustrating the goals that the Country has about safeguarding the savings and the exercise of credit;
b) A diminishing of the deposits, from which it derives the dispersion of credit and the treasury of the currency, causing a harm to the entire national economy;

[117] Atti Parlamentari, Camera dei Deputati, V Legislatura, documento n. 1639, p. 40

[118] RUTA G. *Il segreto bancario nella realtà giuridica italiana*, in Banca, Borsa e titoli di credito, II, 1982, pag. 1070

c) An exportation more or less solid of the disposable capitals towards the countries in which the banking secrecy would continue to exist;
d) A diminishing of the flow of foreign capitals in our country".

The prevision in favor of the tax administration of the power to acquire news from the banks, with the goal of verification towards their clients, hence, has entailed delicate political choices since it has been necessary to consider the fiscal interest and the need to avoid prejudices to the banking activity or unjustified damages of the right to confidentiality of individuals, which cannot be exposed to a generalized knowledge of their financial and patrimonial consistency; nevertheless, it must be pointed out as the decisions taken over time and the resulting regulations has delineated an inspective path somewhat tortuous, which not always has been able to give an answer to the needs to which it should guarantee protection.

2. The banking secrecy and tax provisions

If we want to give, as a brief historical report, an idea of the evolution of the tax legislation regarding the banking secrecy in the period prior to 1971, according to Toscano and Razzante[119], we should first of all point out as, following article n. 37 of the Consolidated Text of the tax laws on income from mobile wealth (approved with the Royal Decree n. 4021 of August 24th, 1877 and abrogated after the entry into force of the Consolidated Text of direct tax laws of 1958), it was attributed to the tax agents the faculty to carry out and verification and investigation activity with the goal of income inspections, without the need of the previously mentioned powers towards banks; similar previsions were given by the "Instructions on the state property inspections service", approved in 1984, which recognized to its officials broad faculties of acknowledgment from the banks.

Consequently to the emanation of the banking law of 1936, after which the range of the interests protected by the banking secrecy became wider, there has been a clear change of orientation by the tax administration regarding the accessibility of the curtain represented by the confidentiality guaranteed by the credit institutions connected to the operations carried out with the clients.

[119] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002; pag. 104

On this direction, as an example, we could recall the newsletter of the Ministry of finance of June 28th, 1937 which, on one side, ratified the duty for the banks to declare the interests paid on the credits but it clarified, at the same time, that the requested compliance would not involve the nominative notification of the individual depositors, consisting itself exclusively in a validation regarding the total amount of deposits.

Another significant example of application of recognition of the banking secrecy for tax purposes offered by the tax legislation can be discovered in the "Service instructions for the financial police", approved with the Ministerial Decree of February 1st, 1957, which ratified the prohibition for the members of the Corp to access to the institutions and to the companies which exclusively exercise the credit activity.

This rapid overview can give us a clear, even if not complete, view of the fact that even in the time period prior to the tax reform of 1971, with which the principle of banking secrecy receives a definitive consecration, also in legislative terms, this was fully operative towards the tax administration, which verification needs have been gradually mitigated with the safeguard of the discretion necessity that must protect each banking operation.

2.1 The legal presumption contained in article n. 32 of the d.p.r.

An interesting aspect to analyze is that related to the phase in which the tax administration makes use of the data acquired through banking verifications.

First of all, it must be introduced that articles 32, clause 1, n.2 of the D.P.R. n. 600 of 1973 and 51, clause 2, n.2, of the D.P.R. n. 633 of 1972 make a presumption of taxability of the operations reflected in the bank accounts for which the taxpayer does not offer an adequate contrary proof.

To examine in depth this important theme, we should firstly recall some brief considerations on the importance of the tax presumptions.

Generally, as Toscano and Razzante[120] point out, it is known that the presumptive procedure is founded on a particular syllogistic-deductive practice which, according to what is provided for in article 2727 of the Civil Code, starts from a known fact to go back to an unknown fact assuming as a reference a series of serious, precise and agreed

[120] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002; pag. 253

elements which are subject to the evaluation, in the first place, by the tax administration and, subsequently, they are remitted to the approval of the judge who has, ultimately, the task to analyze the recurrence of the presumptions to admit the proof through presumptions.

When leaving the general discipline and moving to the field of tax assessment, Cucuzza and Capolupo[121] underlined "the existence of numerous and pervasive elements of diversification from the legal tax presumptions from those of the same species disciplined in other fields, in function of a favor that the Legislator shows towards the tax administration".

Furthermore, it should be remarked the fact that the system of presumptions operating in the specific tax sector has a greater complexity and it is very differentiated; subsequently to the tax reform of 1971, the appeal to presumptive procedures was limited in the attempt to guarantee the necessary mitigation between the needs connected to the interests of the tax office, on one side, and the safeguard of the taxpayer's position, on the other side.

However, with the evolution of the tax system, there has been an increased transition frequency from the analytic determination of the tax to the inductive one, up to realize that nowadays the verification methodology can be individuated in the indirect reconstruction of the tax base.

Regarding the configuration of the presumption system in the tax scope, Blaskovic[122] has observed as "the distribution of the burden of proof in tax matters takes place, more than in other branches of the sector, through the *proximity* criterion or the *best attitude* to the proof itself.

(…) The distribution of the burden of proof according to the criterion of the best attitude to the proof is, for sure, a legitimate and rational choice, particularly in those hypotheses (that are the majority) in which the tax administration, for its non-involvement in the genesis of the taxable matter in question, is unable to find adequate evidential tools".

Now that we have made this brief introduction, we should consider the focal problem that comes up referring to the validation and the utilization of the outcomes of the bank

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[121] CUCUZZA O., CAPOLUPO S., *Accertamento tributario e segreto bancario*, allegato a il fisco, n. 5, 1999, pag. 1673

[122] BLASKOVIC D., *Dal segreto bancario alla cultura della trasparenza: aspetti procedimentali-processuali*, in Diritto e pratica tributaria, n. 3, I, 799, 1995, pag. 806

accounts: it is necessary, hence, to scrutinize the significance that the data emerging from the just mentioned accounts have for the purposes of the verification.

As it has been recalled by Toscano and Razzante[123], on this point it must be observed that some essential moments of the legislation on this matter are the presumptions regarding the single data and elements resulting from the bank accounts, as well as the reversal of the burden of the proof in charge of the taxpayer: indeed, the article 32, clause 1, n.2 of the D.P.R. n.600 of 1973 states that "The individual data and elements resulting from the bank accounts are the basis for the adjustments and the verifications provided by articles 38, 39 ,40 and 41 if the taxpayer does not demonstrate that he has taken into account them for the determination of the income subject to tax or that they do not have relevance for the same purpose; at the same conditions they are also put as revenues at the basis of the verifications themselves, if the taxpayer does not specify the beneficiary, the withdrawals in the same accounts and not resulting from the accounting records".

A similar disposition is contained in article 51, clause 2, n.2 of the D.P.R. n. 633 of 1972 which, however, does not recall the withdrawals.

The above-mentioned norms allow, hence, to the controlling bodies of the tax administration to use the data connected to the bank accounts' examination, not otherwise specified, to affirm the existence of greater revenues that have not been declared.

On this purpose, D'Angiolella[124] affirmed that "it's a matter of a tax presumption, linked to the data and the banking and postal documentation emerging, with the duty in charge of the taxpayer to demonstrate the groundlessness of the presumption.

To the inspective bodies it is not requested to establish the correlation between the banking and postal operations and the facts not represented in the accounting records, but only to make the taxpayer able to give a possible justification of them, to the evaluate the foundation and the inherence.

However, to the taxpayer it is allowed to demonstrate the opposite: that he has considered those data in the determination of the income, or that those are not relevant for the same purpose".

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[123] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002; pag. 255

[124] D'ANGIOLELLA R., *Utilizzazione ai fini fiscali dei dati bancari e postali*, in Rivista della Guardia di finanza, n.3, 1996, p.917

Once the requested data have been acquired, the operating bodies have to analyze and elaborate the accounting results applying the presumptive mechanisms ratified by the recalled articles 32, clause 1, n.2 of the D.P.R. n.600 of 1973 and 51, clause 2, n.2 of the D.P.R. n. 633 of 1972, which provided, as it was already outlined, that:

a) The individual elements resulting from the bank accounts are placed at the base of the verifications of the tax administration;
b) This presumption operates in the cases in which the taxpayer cannot demonstrate that he considered the banking data when determining the income or that they do not have any relevance for this purpose;
c) To the same conditions, for the purpose of tax on incomes, they are placed as revenues at the basis of the same verifications, if the taxpayer does not indicate the beneficiary and the withdrawals from the accounts that do not appear in the accounting records.

On the control side, the first step is made by the officer or by the finance police which, on the basis of the accounting records and the acquired documents, carries out a first exam, by individuating the operations that do not have a confirmation in the official accounting and for which it is the taxpayer himself to give the necessary elements in order to reconnect the financial movements to the same commercial and professional operations.
It is evident, as Toscano and Razzante[125] recall, that to allow for a valid and effective response of the taxpayer, it must be given to him all the elements came out from the exam of the bank accounts without limiting to submit overall data of low significance.
If the taxpayer under verification is not able to make such reconciliations and to give the requested demonstrations, or if the latter appear to be insufficient or not relevant with what emerged from the bank account, then the presumptions begin.
The inspective bodies could proceed with the reconstruction of the revenues and the subsequent adjustment of the declared income or to the verification of the due income.
Hence, the acquired data from the exam of the banking and postal accounts that do not find any correspondence in the accounting records of the taxpayer, allow to ascertain in his regards greater revenues, following this scheme:

a) Deposit (not justified) = revenues (not declared)

[125] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002; pag. 257

b) Withdrawals (not attributable to a beneficiary) = costs = revenues (not declared).

On this matter, D'Angiolella[126] pointed out that "in truth, the norm expresses itself in a different way for what concerns the deposits and the withdrawals.

In the first case, it declares that the elements acquired from the bank accounts are placed at the basis of the verifications. In the second case, that are considered as revenues the withdrawals written down in the same accounts and not resulting in the accounting records.

However, beyond the used formula, it must be considered that both the presumptions have been formulated , in substance, for one aim, that of solicit the taxpayer to the respect of the accounting formalities, with the goal of maintaining a real correspondence between the management acts and the accounting records.

The consequence is that, in the opposite case and without clear justifications, the numerical manifestations emerging from accounting will be considered as correlated to management facts and, hence, as revenues not accounted for and not declared"

2.1.1 The dispensations to the banking secrecy

In the legislative evolution that has characterized the banking secrecy matter, a great importance has assumed the law n. 825 of October 9th, 1971, which gave the legislative delegation to the Government for the tax reform and which, for the first time, provided in article 10, n. 12 "the introduction, limited to particularly serious hypotheses, of exceptions to the banking secrecy in the relationship with the tax administration, compulsorily determined in the content and in the prerequisites".

In those years, it was clear the vivid concern of the Legislator, necessarily related to the constitutional provision of article n. 47 which ratifies the safeguard of savings, to protect the economy of the Country and to not discourage the accumulation of money, with the commitment to not favor those conditions that could have caused the dispersion or the capital drain abroad.

The just mentioned regulatory provision expressed in article n.10 of the law n. 825 of 1971 was intended to carefully balance the general interest to the correct use of the credit system with the needs connected to the repression of the tax evasion and it

[126] D'ANGIOLELLA R., *Utilizzazione ai fini fiscali dei dati bancari e postali*, in Rivista della Guardia di finanza, n.3, 1996, pag. 920

comprehended, on this direction, the recognition for the depositor of "a right to the banking secrecy".

Ruta[127] expressed that "under this perspective, the public interest connected to the highlighting of national savings, and to the consequent necessity to not diminishing the trust of the clients toward the bank, by assuring to him the maximum of confidentiality in the relationships maintained with the bank, has found a mitigation with the interest of the tax administration to obtain the contribution of everyone proportional to its capacity.

Looking deeply at these two public interests, they both tend as final objective to the finding of the necessary tools for the economic expansion of the Country".

Just with the tax reforms, hence, for the first time it has been given an express and direct legislative recognition to the banking secrecy which could be limited only, as it has been said, by the exceptional nature of particular hypotheses, characterized by the need to safeguard the public interests.

Hence, we should recall the opinion of Delle Femmine[128], according to which "with the reform of 1972/1973, through the introduction of rules in derogation, it has been introduced the foundation of the banking secrecy in tax matters.

The rigid requirements that legitimated the exception cases, (…) and the lack of a criminal sanctioning legislation, such as the subsequent law n. 516 of 1982, made it virtually impossible any attempt to scratch the banking secrecy".

This situation found another confirmation in the article 35 of the Decree of the President of the Republic of September 29th, 1973 n. 600, having as title "Exceptions to the banking secrecy" which dispositions, as Capolupo[129] pointed out, "established, as a prerequisite for the direct action of the finance police, some particular situations, both as number and specifications, and as tax seriousness, and they authorized the administration to act by maintaining immediate relationships with companies, credit institutions and postal police.

From the practical point of view, the original formulation of article 35 of the D.P.R. n. 600/1973 resulted of a scarce utility for the revenue authorities, vanishing the

[127]RUTA G. Il segreto bancario nella realtà giuridica italiana, in Banca, Borsa e titoli di credito, II, 1982, pag.. 1074

[128] DELLE FEMMINE V., La nuova disciplina di deroga al segreto bancario, con particolare riferimento alla fase di richiesta istruttoria, in il fisco, n. 38, 1996, pag. 7724

[129] CAPOLUPO S., *Manuale dell'accertamento delle imposte*, IPSOA, Milano, 1998, p. 638.

commitment to avoid that the banking secrecy could constitute a tool for tax evasion or tax frauds.
However, this must be seen not as an objective shortcoming of the norm, but as a limit established by the Legislator after a comparison of the two public interests that were put into play".

Precisely, it was the D.P.R. n. 600 of 1973 to provide for four precise obligation, while trying to discipline the powers of inquiry recognized to the tax offices and feasible towards the credit companies and the postal administration, as recalled by Toscano and Razzante[130]:

a) The first type of obligations were the procedural ones, which consisted in the duty for the office to acquire the approval of the Departmental Inspectorate of the direct taxes and the authorization of the President of the tax commission of first degree in charge for that territory;
b) The second obligations were the content ones, due to the fact that the acquisition of the banking documentation could only take place through the tool of request (which, hence, represented the only power attributed to the tax authorities) to be addressed to the credit institute;
c) The third type of obligations are the objective ones, since the banking verifications were limited to the examination of the copies of the bank accounts jointly held by the taxpayer or to the spouse legally or actually not separated or to the minor children cohabiting;
d) The fourth and last type of obligations are the prerequisites ones, that are represented by situations at the occurrence of which it was allowed the documentary confirmation in object.

Referring to these above-mentioned limits, it must be recalled the article 35 of the D.P.R. 600 of 1973 which identified some particularly serious hypotheses in which it was allowed to the tax administration to make an exception to the banking secrecy; furthermore, the district office of the direct taxes, respecting the procedural procedures, could directly address to the banks and to the postal offices in cases in which:

[130] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002; pag. 107

- The taxpayer didn't present the tax declaration and the office was in possess of elements from which it was clear that the taxpayer himself in the tax period had some revenues or other income for an amount superior to 100 millions of liras, or, if it is a physical person, it did acquire, for an amount superior to 25 millions of lira, some types of goods that are considered as luxury and explanatory of a high contribution capacity;
- The office has available certain elements from which it resulted that the taxpayer had obtained in the tax period revenues or incomes, for an amount superior to four times those declared, unless this difference resulted in less than 100 million liras;
- The subject omitted to prepare, for three consecutive tax periods, the accounting records provided by articles n. 14,18, 19 and 20 of the D.P.R. 600 of 1973.

Hence, the exceptional character of the derogation law of 1971 was confirmed by the tax legislation, which provisions subordinated the possibility for the tax offices to use the faculty of abrogation of the banking secrecy only in presence of certain elements, which, assuming a greater contributive capacity, induced to believe that the taxpayer could have subtracted great incomes from taxation.

Different was the situation that was promised in the field of tax on the added value; the emanation of the D.P.R. n. 633 of October 26th, 1972 highlighted the missing prevision of any specific possibility of exceptions to the banking secrecy.

Hence, it was clear, also according to Toscano and Razzante[131], the attitude of the Legislator which believed that the needs of tax nature linked to the tax on value added were not as significative and relevant to be considered protecting the national economy and, hence, to constitute an exception to the banking secrecy.

[131] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002; pag. 108

3. The d.p.r. 463/1982 and the changes brought to the d.p.r. 600/1973

As we have mentioned, there has been the prohibition to give exceptions to the banking secrecy for what concerns the tax on added value; this, highlighted the contrast between article 52 of the D.P.R. n. 633 of 1972 and article 35 of the D.P.R. n. 600 of 1973 related to the previsions given in article 10, n.2 of the derogation law of October 9th, 1971, n. 825 and allowed Cucuzza and Capolupo[132] to affirm that "it was evident that, without denying the discretion of the Government, the attitude to adopt towards the banking secrecy could not forget the adaptation of the formal verification discipline to the principles of unitarity and interdependence of the tax base of the different taxes.

Consequently, it was necessary to operate a uniform choice for what regards the VAT and the tax on revenues.

It was agreed, indeed, that for what concerns VAT there were no exceptions to the banking secrecy, so that the results of the bank results could not be used as a foundation for a verification notice".

To this particular situation that occurred and that ratified, in the field of tax on added value, the totally operability of the banking secrecy, intense critics were advanced by the doctrine, and also the attitude of the jurisprudence was openly adverse to this differentiated regulatory framework.

As Toscano and Razzante[133] explain, the opinion that has created persuaded the Legislator to review the legislation, by address it towards the adoptions of some measures aimed at unifying the discipline regarding the VAT and of taxes on revenues.

In this evolution of the system, greater importance has had the D.P.R. n. 463 of July 15th, 1982 (bearing "Supplementary and corrective provisions of the DD.PP.RR. October 26th, 1972 , n. 633 and September 27th, 1973, n. 600 and subsequent modifications"), which, beyond providing, with the introduction of article 51-bis in the D.P.R. n. 633 of 1972, the application of exceptions to the banking secrecy in the field of VAT in perfect cohesion with the regime adopted for the taxes on revenues, it has ratified the widening of the powers of the tax offices and of the finance police, through the reformulation of article n. 35 of the D.P.R. n. 600 of 1973.

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[132] CUCUZZA O., CAPOLUPO S., *Accertamento tributario e segreto bancario*, allegato a il fisco, n. 5, 1999, pag. 1650

[133] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002; pag. 109

After the orders contained in the D.P.R. n. 463 of 1982, it was established that the office (and the finance police) could ask to the companies and the credit institutes the relationships maintained with the clients and to the postal administration the data connected to the services of the postal accounts, to the deposit books and to the interest-bearing postal bonds, with the specification of all the relationships regarding or linked to those accounts, here comprised the guarantees given by third parties, in the cases in which the taxpayer:

a) Has not presented the tax declaration and the office has elements from which results that, in the tax period, he obtained revenues and income, or he acquired movable or immovable property for an amount superior to 100 million liras;
b) Has presented the tax declaration but the office or the finance police has acquired certain elements from which result revenues or other income, relevant for the determination of the tax base, for an amount superior to the quadruple of the declared one, with the difference greater than 100 million liras;
c) Has not kept the accounting records provided by articles 14,18, 18-bis, 19 and 20 of the D.P.R. n. 600 of 1973; the exception to the banking secrecy was, also, provided in the cases in which the omissions or the false indications ascertained for the determination of the business income were so serious, numerous and repeated to make the records themselves, as a whole, unreliable;
d) Has emitted or used invoices for nonexistent operations.

Other hypotheses of acquisition of the banking documentation happened when, after a synthetic verification (provided by article 38 of the D.P.R. n. 600 of 1973), the total income fundamentally attributable to the taxpayer was not inferior to 100 million liras and to the quadruple of that declared for the same tax period.

As Toscano and Razzante[134] highlight, article 51-bis of the D.P.R. n. 633 of 1972, introduced by article 5 of the D.P.R. n. 463 of 1982, provided for the purposes of the tax on value added comparable hypotheses, referred to the VAT declaration, as well as the case in which the deductible tax declared exceeded of more than a tenth or over 100 million liras the amount due.

[134] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002; pag. 111

By comparing the formulation of article 35 of the D.P.R. n. 600 of 1973 with the previously in force discipline, it emerged with evidence an expansion of the operative area of the just-mentioned norm; in particular:

a) Next to the faculty of emission towards banks of the order of transmission of the documentation, with article 2 of the D.P.R. n. 463 of 1982 it was provided the possibility for the organs of the tax administration to organize the access of their officers, equipped with the specific authorization, to the bank institutes and the postal offices to directly detect the data and news relative to the copy of the bank accounts requested and non-transmitted within the prescribed terms, or with the goal to directly ascertain the completeness and the truthfulness of the information connected to the requested documents.

   With the decree of the finance ministry, have been established the execution procedures of the accesses; it has been executed by functionaries or officials of the finance policy (of degree not inferior to the captain) in the maximum number of four units, subject to the displaying of the identification cards as well as of the provisions that allows for it. Also, the operation must be carried out in hours different from those open to the public, and a report must be compiled at the end, with the description of the performed operations, that has to be subscribed by the head of the office.

b) It has been identified new situations legitimating the acquisitions of the banking documentation, related to the emission or use of invoices for non-existent operations;

c) It has been provided the possibility for the tax organs to ask for the data and news of specific nature, beyond those resulting from the bank accounts, but related to them, through the sending to banks and postal offices of specific questionnaires compliant to the model approved with the decree of the Ministry of finance.

Finally, some critics have been made for what regards the just examined discipline.

Starting from the provision in the derogation law of 1971, according to which the exceptions to the banking secrecy, in the relationships with the tax administration, should be *strictly determined in the content and in the prerequisites*, some scholars had some doubts connected to the above-mentioned prerequisites, hence, related to the *hypotheses of particular seriousness* cited by the law.

Also, the hypotheses of omission or inaccuracy in the keeping of accounting records *such to make them unreliable as a whole* provided by the D.P.R. n. 463 of 1982 did not seem to satisfy the requested conditions; the attribution to the taxpayer of a total income superior to the declared one could move in the field of judgments not analytically verifiable, in which the probability could substitute to the certainty.

Another doubt has been pointed out regarding the content of the exceptions: it has been affirmed by Casella[135] that the formula *copy of the accounts with the specification of all the linked relationships* " has a meaning pertinent to the legislative delegation only if we read it in the sense that there is the concrete need that the office specifies which of the accounts and which of the relationships are under verification; the request for an indiscriminate copy of all the accounts and of all the relationships connected to them would, for sure, not be specific and the credit company that respects an illegal order could be responsible towards its clients".

Lastly, as Russo[136] point out, in the examination of the critical observations, we should recall the opinion of those who, taking note of the weakening of the banking secrecy, has noticed as the interventions of the legislator have revealed "marked by the improvisation and the occasionality, instead of an overview of the problems that come into consideration on this matter and of a clear perception of the underlying objectives that must be pursued.

It has resulted an obscure and fragmentary regulation, due to successive stratifications, which gives too much space to the free will of the interpreter".

[135] CASELLA M., Il segreto bancario e il D.P.R. 15 Luglio 1982, n. 463, in Banca, Borsa e Titoli di credito, 1983, pag. 358

[136] RUSSO P., *Questioni vecchie e nuove in tema di operatività del segreto bancario in materia di diritto tributario*, 1991, Giuffré, Milano, pag. 94

4. The changes brought by article n. 18 of the law 413/1991

In the regulatory evolution that followed the improving of the tools of verification of income, had a great significance the law of December 30th, 1991, n. 413, which brought substantial legislative changes regarding the bank verifications; as Toscano and Razzante[137] point out, the diffuse opinion according to which the fight against the tax evasion should use in a more incisive way the tool of the banking inspection and that this should not be too much oppressed by the provision of laborious procedures of authorization and application, has brought the legislator to provide and discipline new forms of use, by the inspective organs, of the just-mentioned controlling tool.

Also, as Tremonti[138] expressed, it is evident that "subject to the privacy protection, it is impossible to control the income if the financial flows upstream are not transparent.

They cannot scrutinize the incomes if there is not the possibility to look, also, at the capital".

This measure has been delineated in a particular historical context: our country, towards the end of 1991, had the economic need of restoring order in the State accounts, since the deficit had reached limits that could question the appropriate entry of Italy in Europe.

Hence, it was necessary to timely adopt a series of urgent provisions, planned in the so-called 'Financial maneuver'.

On the fiscal side, some measured aimed at increasing the tax base and empowering the verification activities were studied and arranged.

Hence, the law n. 413 of 1991 has been placed to satisfy those needs; in particular, at Title III it carried dispositions aimed at obtaining a higher transparency in the tax-taxpayer relationship: on this matter, it was really relevant the new discipline of the exceptions to the banking secrecy in the sectors of the direct taxes and the tax on value added.

According to Santacroce[139], on the wake of this tax evolution "has spontaneously born, in the tax administration, a sense of satisfaction and euphoria counterbalanced, within the

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[137] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002; pag. 130

[138] TREMONTI G., *Principi ispiratori della riforma fiscale*, in Rivista della Guardia di finanza, n. 2, 1995, pag. 314

[139] SANTACROCE B., *Il segreto bancario e gli accertamenti fiscali dell'Amministrazione finanziaria*, in Rassegna tributaria, Quaderno monotematico di dottrina, n. 9, 1993, pag. 36

economic intermediaries, of a sense of inconvenience derived from the application of article 18 of the law 413 of 1991.

Fortunately, the common sense and a correct interpretation of the law have allowed to avoid possible negative effects that could derive from an arbitrary use of a tool very necessary to verify and identify serious cases of evasion, but, at the same time very delicate, since it subverted already settled balances".

The introduced legislation, indeed, has provided for the complete passing of any reference to particular cases of subtraction of income or invoices to tax or to the confirmation of determined amounts of tax evasion, by limiting to define a new access procedure and of data and news owned by banks and postal offices request.

On this matter, Cucuzza and Capolupo[140] affirmed that "the new disciplined brought by law n. 413 of 1991 certainly constitutes a desired turnaround in the tax/taxpayer relationship, but, to that end, has established a set of rules connected to the correctness and the transparence of the behaviors towards the credit entities and the postal administration, as well as towards the taxpayer himself under banking verification".

The goal of the adopted measure was, hence, that of overcome the culture of secrecy to go towards a culture of transparency characterized by clarity, allowing a concrete use by the tax offices of banking news and information, to which they can access through a procedure that does not result of impediment to the controlling needs.

Among the tools needed to realize this just-mentioned objective, a great importance is assumed by the elimination of the so-called banking secrecy and the different discipline of the professional secrecy.

It is clear, hence, the essence of the law under examination, that according to the legislator, was aimed at, on one side, allowing the tax administration to acquire data from the banking system in an efficient and fast way, to confirm the income position of the taxpayer and, on the other side, to establish the necessary guarantees for the safeguard of the individuals.

The first critics linked to this law were pointed out by Bucci[141], which spoke about "the risks connected to a verification tool which, on one side, can result as a precious arm for

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[140] CUCUZZA O., CAPOLUPO S., *Accertamento tributario e segreto bancario*, allegato a il fisco, n. 5, 1999, pag. 1650

[141] BUCCI L., *Considerazioni sulla valenza presuntiva delle movimentazioni bancarie ai fini dell'accertamento*, in Rassegna tributaria, n. 1, 2001, pag. 147

the fight to tax evasion and, on the other side, if used with too much ease, could create oppression to the unlucky taxpayers that have as only fault to not have the suitable documentation to demonstrate the irrelevance for tax of banking operations, maybe made years ago".

Some years have passed since the entry into force of the law n. 413 of 1991, happened on January 1st, 1992 which brought many modifications in the scope of banking investigations.

On this regard, Sacchetto[142] pointed out that "the entry into force of article 18 of the Law n. 413 of 1991 is by many felt as the event that caused the fall of the banking secrecy in the tax matter. This, even if it is socially interesting to study as typical result of our culture of a diffuse need to simplify concepts through slogans, is not juridically correct, since the banking secrecy has never existed".

It must be highlighted that article 18 has deeply innovated the provisions contained in the decrees n. 600 of 1973 and n. 633 of 1972, by simplifying the acquisition procedures and use of data in possess of credit companies and postal offices.

On this regard, Ripa[143] expressed that "it has not been easy to bypass the constitutional precept on the savings safeguard or to make an exception to the impenetrability of the banking secrecy intended as practice and consolidated use realized by banks on the protection of confidentiality criteria.

Slowly, however, even this limit has been surpassed and it has been sacrificed to follow principles of tax nature and of fight against evasion".

The major measures and modifications introduced by the finance law of 1992 have, as Toscano and Razzante[144] explain, substantially provided to:

a) Remove the mandatory cases legitimating the start of banking investigations;
b) Identify the competent authority to the release of the authorization to ask for the copy of the accounts in the regional commander for the departments of the corps and in the regional director of the tax office for the tax offices;
c) Discipline the reserved and correct use of the acquired data and news;

[142] SACCHETTO C., *Il segreto bancario: profili di tutela*, in il fisco, n. 34, 1995, pag. 8285

[143] RIPA G., *Indagini bancarie: utilizzabilità e presupposti*, in Corriere tributario, n. 12, 2000, pag. 837

[144] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002; pag. 134

d) Provide for the immediate notice, from the credit institute, of the taxpayer against which verifications have been activated.

More precisely, article 18 of the law n. 413 of 1991 has ordered in the range of income taxes (D.P.R. n. 600 of 1973):

a) The modification of article 31 (on the power of the offices), by providing, subject to the authorization of the above-mentioned authorities, the possibility to ask to the credit institutes for what concerns the relationships with the clients and to the postal administration for what regards the data connected to the services of the postal accounts and of the deposit books, the copy of the accounts maintained with the taxpayer with the specification of all the relations regarding those accounts, comprised the guarantees lent to third parties, as well as inviting the taxpayers to appear in person to give news relevant for the investigation or connected to the operations written down in the accounts, whose copy has been acquired after the specific request to the bank of the postal administration;
b) The modification of article 33 (on the accesses, inspections and verifications), through which it has been established that the access to the banking institutes and the post office has to be authorized by the same competent authorities specified in article 32;
c) The abrogation of article 35, which identified, according to the previous system, the hypotheses of exceptions to the banking secrecy.

For what regards the tax on added value (D.P.R. n. 633 of 1972), article 18 of the finance law n. 413 of 1991 has ratified:

a) The modification, in similar terms to those pointed out for the sector of the direct taxes, of articles 51 (on the powers of the offices), and 63 (on the collaboration of the finance police);
b) The abrogation of article 51-bis, which disciplined the previously in force exceptions to the banking secrecy.

A first evaluation of the framework derived from this law, regarding the simplification of the access modalities can be given by recalling D'Angiolella[145], which affirmed that "this simplification has, on one side, involved a strong acceleration to the use of such power,

[145] D'ANGIOLELLA R., *Utilizzazione ai fini fiscali dei dati bancari e postali*, in Rivista della Guardia di finanza, n .3, 1996, pag. 906

but, on the other side, it has weakened the protection of the taxpayer towards the tax administration, for what concerns the requests of banking and postal data, since the control of the legitimacy of the request has been entrusted to an internal organ of the tax administration itself".

As it has been already mentioned, the discipline in force in the field of banking investigations has represented a turnaround in the relationship between tax administration and taxpayer.

On this regard, Toscano and Razzante[146] point out as the fall of banking secrecy offers to the inspective bodies the possibility to have available a wider knowledge of those sectors in risk which resorted to the sheltered offered by the credit system to realize illicit operations with the aim of subtracting funds of huge size from taxation.

The new authorization system introduced by article 18 of the law n. 413 of 1991, by simplifying the procedure of access to the bank accounts, is a valid tool of fight against the tax evasion and to any other forms of economic criminality: with this goal, this normative framework collects consensus, but, at the same time, asks for adequate guarantees to safeguard the taxpayer during the legitimate verifications.

On this regard, it is evident as the specific authorizations and the mentioned conditions, have been provided to protect a correct use of the inspective tool, since the application of the principle of contributive capacity should not fail the need of protection and the confidentiality of the banking data.

The awareness of the delicacy of this matter has induced the finance ministry to intervene with the aim of giving uniform directives on the operative procedures to put in place: with the ministerial circular n. 116/E of 1996 it has been delineated a complete framework of the subject and the procedure to follow to exercise, by respecting the law, the power of acquiring information and data regarding the accounts maintained by the taxpayers with the banks and the offices of the postal administration.

[146] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002; pag. 156

5. The changes introduced by the finance law 311/2004: the new powers of inquiry and assessment by the financial administration

The recent and additional developments in the subject of banking verifications, that cause debates, are object of careful considerations and force the taxpayer to put particular attention in the annotation of the movements of his bank account.

This matter has been subject of the reform operated by clauses 402 and 403 of the Law of December 30th, 2004 n. 311 (also called Finance Law 2005).

As Villani[147] reminds, from this law, a great extension of the tools available to the anti-evasion work of the State, a procedural simplification of the banking verifications and an expansion of the controls made by the people in charge of the sector have derived.

Article 1, clauses 402-404 of the Law n. 311 of 2004 generated a series of changes to articles 32 of the D.P.R. n. 602 of 1973 and article 51 of the D.P.R. n. 633 of 1972.

For what concerns the changes produced to the tools to fight the tax evasion, in the range of the powers of inquiry and of verification, according to Pasquale[148], it is identifiable a double regulatory direction that consists:

a) In the extension, both objective and subjective, of the scope of operation of the exceptions to the banking secrecy;
b) In the introduction of a more consistent informatization of the exchange of data regarding the requests of exceptions to the banking secrecy and the connected answers of the banks.

5.1 Extension of the number of operators of the market where the verifications are carried out

Starting from January 1st, 2005, for the purposes of verifications of the direct taxes and the VAT, the offices can ask to the taxpayers under scrutiny, inspection or verification, the release of a declaration containing the indication of the nature, the number and the identification details of the relationships maintained with banks, Poste Italiane, financial intermediaries, investment firms, collective investment organisms and fiduciary

147 VILLANI M., *Gli accertamenti bancari: i casi di deroga la segreto bancario dopo la finanziaria 2005*, in La rivista di finanza**,** 2005, pag. 11

148 PASQUALE G., *Le deroghe al segreto bancario alla luce delle modifiche apportate con la Finanziaria 2005*, in Rivista della Scuola Superiore dell'economia e delle finanze, 2005

companies, both national or foreign, that are in progress or that are extinct from no more than five years from the data of the request.

In a similar way, there is an increase in the number of subjects to which the tax Administration can forward the authorization to gather data and information on the financial and credit activities carried out by taxpayers.

To the traditional banks and post offices are added:

- The financial intermediaries;
- The Investment firms;
- The collective investment organisms;
- The savings management companies;
- The fiduciary companies.

To all the just-mentioned subjects can be asked data, news and documents connected to any relationships or operations carried out, comprising also the services offered with their clients, as well as the guarantees given to third parties.

As Villani[149] pointed out, an increase in the number of the recipients of requests of data was pretty comprehensible and predictable, due to the vastness of the operators on the financial market and the wide possibility of choices of investment offered to those who have some capital to use.

This extension is in line with the enlargement suggested by the three EU Directives on the matter of anti-money laundering, from 1991 to 2005, as well as the entry into force, on July 1st, 2005, of the savings Directive and the Directive on interests and royalties, both of 2003, and with the community legislation contained in the Directive 77/799/CEE and in the Regulation 1798/2003, regarding the exchange of information, also on banking matter, with the foreign fiscal Authorities, as it has been expressed by Orlandi[150].

5.2 The objective element of the banking verification: the possibility to acquire also the so-called "off account transactions"

As it has been expressed in the previous sections, up to 2004, article 32, clause 1, n.7 of the D.P.R. n. 600 of 1973 allowed the tax Administration to ask to the credit institutions

[149] VILLANI M., *Gli accertamenti bancari: i casi di deroga la segreto bancario dopo la finanziaria 2005*, in La rivista di finanza**,** 2005, pag. 12

[150] ORLANDI, *Accertamenti bancari e retroattività – nota a sentenza della Corte di Cassazione 14 ottobre 2005, n. 19947*, in Rivista della Scuola Superiore dell'economia e delle finanze, 2006

for what concerns the relationships with clients and to the postal Administration for what regards the data connected to the services of the postal accounts and the deposit books, a copy of the accounts maintained with the taxpayer with the specification of all the relationships inherent or linked to those accounts.

It was, hence, essential the existence of ongoing relationships (bank accounts, saving deposits, securities dossiers, and so on…), attributable to clients, which movement could be obtained from the exam of the account balance of the period of interest of the verification.

For this reason, as it has been recalled by Villani[151], in 1996, the circular of May 10th, 1996, n. 116, of the Ministry of finance specified that the banks that received a request from the tax administration, were required to not transmit the banking operations that do not enter in the typology of the so-called "accounts".

According to the clarifications given by the Treasury Ministry, the term "account" was intended as "an account for movements funded on a contractual relationship between the bank and the clients". It was explained, hence, that in the range of the term it was incorrect to comprehend all the banking relationships, but only those suitable, for their nature, to allow movement operations in entry or in exit intended to be registered (for example: bank accounts of correspondence, nominative deposit books, securities accounts).

Other types of operations were covered by the banking secrecy, such as the transitional accounts (that are internally created by banks, for organizational aims, without a contractual tie subscribed by the subject), the ancillary services, such as those connected to the safety deposit boxes, and the so-called off account transactions, or the operations made at the front office.

With the modification contained in the single article, clause 402, letter a), point 4.1 of the Law n. 311 of 2004 it has been surpassed the notion of account and it has been referred to any relationship maintained or operation made between the intermediary and the taxpayer, as well as the services granted.

It has been given, for all the subjects stated in the previous paragraph, the possibility to ask for data, news and documents linked to the relationship.

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[151] VILLANI M., *Gli accertamenti bancari: i casi di deroga la segreto bancario dopo la finanziaria 2005*, in La rivista di finanza, 2005, pag. 13

The introduced innovation allows to ask, also, for the so-called off account transactions, which refer to occasional clients that carries out operations for any amount, as it is recalled by Falcone[152].

The possibility to extend the verification to all the relevant data and elements allows the controlling bodies to obtain all the information connected to:

- The operations of purchase and sale of foreign currency;
- The purchase of certificates of deposit;
- The requests for a bank transfer without charge on the account;
- The transfer of securities;
- The negotiations at the check counter
- The movements at the cash box
- The safety deposit boxes.

[152] FALCONE G., Finanziaria 2005: dagli accertamenti bancari alle indagini finanziarie; Relazione presentata al seminario del 28 aprile 2005 del comune di San Giorgio a Cremano (NA)

6. Methods and functioning of the exchange of information on tax matters in the light of Community sources

In a global market as the current one, the countries can no more operate as completely autonomous systems, since the taxpayer tend to take advantage of the peculiarities of the different tax systems and they do use in an elusive way the dispositions of the treaties against the double taxations creating mechanisms that allow to subtract revenues from taxation, as De Mattia[153] pointed out.

Following this trend, one of the major goals of the European Union consists in the consolidation of the cooperation among the administrations, and, hence, in the establishment of a principle recognized at international level that contains the obligation of cooperation among administrations.

In the European legislation, the principle of loyal cooperation is regulated in article 4, clause 3 of the Treaty on the European Union (TEU) and in article 13.2 of the TEU; the latter one is connected to the relationships between the Institutions on the Union, while the first one extends the principle of loyal cooperation between the Member States and the Institutions of the European Union.

Examining deeply this principle of loyal cooperation, according to Fernandez Marin[154], three contents can be found. The first is summarized in the obligation for the Member States to fulfill the duties coming from the secondary law, hence to those obligations coming from the treaties; the second duty for the States is to abstain from establishing measures that could obstacle the European Union in the accomplishment of its objectives and, finally, the third duty for the States is to adhere to the principle of collaboration, intended as a will of facilitating the operations of the European Union in the execution of the verification tasks of the application of the community law through the exchange of information.

We should examine the exchange of information under a communitarian point of view and under an international one.

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[153] DE MATTIA E., *Scambio di informazioni tra amministrazioni finanziarie e tutela del contribuente*, in *Cultura giuridica e diritto vivente*, 1/2014, pag. 2

[154] FERNANDEZ MARIN F., *Il principio di cooperazione tra le amministrazioni finanziarie*, in A. Di Pietro, T. Tassani, I principi europei del diritto tributario, Padova, 2013, pag. 358.

6.1 The exchange of information in the Community law

In 1977 it has been released the Directive 77/799/EC regarding the reciprocal assistance among the tax administrations for the direct taxes with the goal of guaranteeing a first layer of assistance among States, to answer to a Community need.

The European Commission established a group with the task of analyzing the discipline provided by the Directive; its paper pointed out the limits connected to the norms that prevent the exchange of information or that do slow down the process, such as the norms on the banking secrecy or the absence of adequate terms to answer to the requests made by the authorities of other States.

In 2004, in the light of tax scandals as Parmalat and Enron, the European Commission has expressed[155] on the prevention and the fight against unfair company and financial practices, recalling the necessity of a transparency level that does not allow the big multinationals to use complex financial structures.

In this situation takes place the Directive 2011/16/EU, released on February 15th, 2011, which goal is that of establishing a general discipline in subject of cooperative administration in the tax sector, to definitely surpass the previous directive.

As it is recalled by De Mattia[156], article 1 of this Directive introduces the concept of "predictable relevance": with this term the legislator wanted to assure that inside the categories of information exchanged are comprised the maximum number of its species, but, at the same time, he assures that the applicant State does not rest on a generic or non-pertinent request to the tax verifications in progress towards the taxpayer.

Instead, article 2 provides for an important news regarding the extension of the principle of administrative cooperation to a wider tax range with respect to the old Directive.

Indeed, it introduces an objective field of application broadening the application of the principle to all the taxes excluded the VAT and the compulsory social security contributions.

Then, article 3 defines the concept of person, that has to be interpreted in the wider way possible, by comprising, also, all the physical and juridical persons of the European Union.

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[155] Consiglio dell'Unione Europea, relazione del gruppo ad hoc "Frode fiscale" lotta alla frode fiscale, COM (2004) 661, 27 settembre 2004.

[156] DE MATTIA E., *Scambio di informazioni tra amministrazioni finanziarie e tutela del contribuente*, in *Cultura giuridica e diritto vivente*, 1/2014, pag. 5

Article 18 of the Directive 2011/16/EU established the inefficacy of the norms relative to the banking secrecy and, also, that a State cannot refuse to give the requested information on the basis of the fact that the verification it has to execute have no results for its own tax purposes.

The limits to the exchange of information are connected to the subsidiarity, meaning that a State can receive information only when it has run out of possibilities granted by the internal legislation, and to the reciprocity, meaning that a State can receive assistance from another State in the same way in which it is able to give it.

The Directive on the exchange of information disciplines three different procedures, namely the exchange of information on request, the automatic one and the spontaneous one.

The exchange of information on request, as explained by De Mattia[157], is carried out by the impulse of the competent authority of the member state, and the request cannot have a general content, but it has to be structured in relation to a specific case.

It has been established, in article 7 of the Directive, a term of six months, since the reception of the request, within which the consulted authority has to give the information. Also, the consulted Authority has to immediately communicate the reception of the request, and the legislator established that the communication cannot take place beyond the seventh working day.

The procedure for the automatic exchange of information, allows the fulfillment of the principle of administrative cooperation; article 8 of the Directive provides for a mandatory exchange of information, without prior request, regarding the residents of the Member State.

The procedure, as it is recalled by De Mattia[158], involves some types of income, namely: income from work, compensations for managers, life insurance products that are not covered by other legal tools of the European Union, pensions and, finally, property and real estate income.

Another obligation introduced for the Member States is to communicate to the European Commission the income and capital categories for which they do have information

[157] DE MATTIA E., *Scambio di informazioni tra amministrazioni finanziarie e tutela del contribuente*, in *Cultura giuridica e diritto vivente*, 1/2014, pag. 8

[158] DE MATTIA E., *Scambio di informazioni tra amministrazioni finanziarie e tutela del contribuente*, in *Cultura giuridica e diritto vivente*, 1/2014, pag. 9

available. Hence, when a State does not communicate any information regarding the different categories, it is considered as not interested in receiving in turn that information.
An amendment to article 8 of the Directive has been proposed, related to the minimum amount below which the State may not require the receipt of information, since it is not considered as manageable in practice.
Also, it has been proposed the introduction of a new paragraph in article 8, that extends the automatic flow of information to other categories of income, namely dividends, capital gains and other income generated from assets held in a financial account, of any amount.
The third procedure regards the spontaneous exchange of information, which is regulated by article 9 of the Directive 2011/16/EU.
The just-mentioned article established that the authority of a Member State can spontaneously and occasionally exchange the information that it retains could be useful to another Member State, without prior request.
In particular, the spontaneous exchange is provided in cases in which: the competent authority of a Member State has reasonable grounds to presume that there is a loss of tax revenues the other State; a taxpayer obtains, in a Member State, a reduction or an exemption from tax that should entail an increase in taxes in the other Member State; the business relationships between a taxpayer of a Member State and a taxpayer of the other are carried out through one or more countries in a way that there is a tax reduction in one or both of the Member States; the competent authority of a Member State has well-founded reasons to presume that there is a tax reduction coming from a fictious transfer of profits within groups of companies.

6.2 The exchange of information in an international context

In the international context, the States tend to stipulate bilateral agreements in the subject of exchange of information, with the goal of guaranteeing cooperation among administrations.
The OECD (Organization for Economic Cooperation and Development) is, among the international organizations, the one that is most committed to the exchange of information, by carrying out a series of analysis regarding international tax relations.

Its goal, as it has been pointed out by Buccisano[159], is to help the States to eliminate or, in any case, reduce the distortive effects that inevitably happen when two different tax systems coordinate among themselves.

In the convention Model of the OECD against the double taxation, there is an article named "exchange of information" that constitutes the principal international source on this matter. This model is frequently used by the States as a base to write agreements against the double taxation; the main goal is to eliminate it.

Article 26 of this model is considered as the focal point of interest, and it has a wide range of applicability, being understood that it is a bilateral or multilateral agreement.

Article 26 of the OECD Model at paragraph 1 provides for different procedures for what concerns the exchange of information, however, it is the commentary of the OCSE Model to give a detailed analysis of the existent procedures, specifically, the exchange of information on request, as well as the automatic and spontaneous ones.

It should be reminded that, even if these procedures are the most used at international level and they are recognized also by other international and community sources, article 26 does not limit the exclusive application of these procedures, since it allows the use of other techniques for the acquisition of the necessary information.

The simultaneous verification is then recognized, through an agreement between States, which provides after a verification of the tax situation of one or more taxpayers, for which the States have a common interest, made on their own territory, an exchange of information based on the achieved results.

The tax verification abroad, which is another form of exchange of information, provides for the obtaining of necessary information for a state through the entrance of the authority of the State in the territory of the other State.

The contracting authority of the first State, in respect of the limits set up by the internal law of the other State, can proceed to the collection of information through the hearing of people, or the examination of books and registers or, respecting the procedures agreed between the authorities of the two States, could attend to the auditions or exams carried out by the contracting authorities of the second State.

[159] BUCCISANO A., *Cooperazione amministrativa internazionale in materia fiscale*, *Riv. dir. trib.*, fasc.7-8, 2012, pag. 669;

In the eventuality that the object of interest is an entire industrial or economic sector, the exchange of information is realized by considering that determined sector and not the individual taxpayer.

The exchange of information on request consists in a request made by one contracting State towards another contracting State connected to specific information of tax nature relative to a determined taxpayer.

Furthermore, it is specified that that information must be relevant as one would expect for the internal law applications of the applicant State.

Moreover, it should be recalled that, before advancing a request of information, the State that ask for it has to use all the tools and the means of investigation that its own legislation has at disposition with the aim of obtaining that information.

The procedure of exchange of information can be synthetized in four steps.

The first phase consists on the preparation and the sending of the request by the applicant State. The general rule establishes that the request has to be put into writing; this norm is derogated in cases of urgency, when the competent authority can transmit it verbally.

Moreover, the request must contain all the data and the relevant facts that allow to the State that receives the request to understand the situation and to operate with the aim of transmitting in a complete and efficient way all the requested information.

The second phase consists in the reception and in the control of the request; the receiving authority must transmit the confirmation of receipt of the request of information within fifteen working days.

Successively, it proceeds to the verification of validity and completion of the request, by ascertaining that the conditions agreed on the pact on the exchange of information are satisfied, and that the signature of the competent authority of the other State, as well as all the necessary information are included.

In particular, the request must contain information that, based on the conventional dispositions and the internal legislation, can be effectively exchanged; also, information must be suitable in order to identify the taxpayer and the framework of the request.

The third phase is connected to the process of collection of information, by distinguishing it in information that are already in possession of the tax administration of the State to which the request has been sent and information that need the use of specific tools of acquisition by the same State.

For what concerns the first type of information, the State can simply access to its own database or any other tool to obtain it, while in the other case it could use tools such as investigations, interrogation, documentation requests, requests of testify, perquisitions, and so on.

In any case, the transmission of the information must take place within 90 days from the receipt of the request.

The fourth phase concerns the answer based on the received information.

As Valente and Vinciguerra[160] point out, it is faculty of the requesting State to inform the taxpayer regarding the request of information that will be performed on his behalf.

The receiving State must evaluate the completeness and the validity of the information that has been transmitted to him, by verifying the presence of elements such as: the juridical source on which the request is founded, the information given (also those that has not been requested but were sent as deemed to be relevant), the reasons for the information that was requested but not sent, the methods of acquisition of the information, the tax periods for which the information has been sent and so on.

The need identified by the States to intensify the fight against the international tax evasion has brought them to pinpoint some international and national tools adequate to guarantee an automatic exchange of information.

Some Member States of the European Union, comprising Italy, have concluded some agreements based on FATCA with the United States.

These agreements are based on an exchange of information that allows the tax compliance and that facilitates the application of the tax legislation to favor both the contracting parties.

The hope of these States, as it has been declared in a Press Release of the Ministry of Economy and Finance[161], is that of being able to work in the future with other countries to a common model for the automatic exchange of information and, hence, to elaborate an international standard.

During the G20 of April 2013 it has been confirmed the need for a standard on the automatic exchange of information.

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[160] VALENTE P., VINCIGUERRA L., *Scambio di informazioni. Problemi applicativi nelle verifiche*, Milano, 2013, pag. 31;

[161] Comunicato Stampa del Ministero dell'Economia e delle Finanze, n. 13 dell'8 febbraio 2012.

As it is reminded by De Mattia[162], the first draft of the standards provides for the definition of some conditions for the exchange of information and rules to identify customers (the so-called Common Reporting Standards).

Also, a series of IT solutions have been defined to sustain the authorities on the technical level, by providing for a minimum standard of guarantee of the data protection relating to the transmission procedure that are secure and compatible (the so-called Due Diligence Standards).

The Common Reporting Standards (CRS) established who should report in relation to which information and accounts. In particular, it determines that not only banks are required to collect information, but, also, other financial institutions such as brokers, some collective investment vehicles and some insurance companies.

In the text of the CRS is specified that the transmission of information must be complete, and it comprehends all the types of income, the account balances and the revenues coming from financial activities.

The field of application of this standard includes the accounts held by individuals and entities and, with reference to taxable persons who have legal personality, the standard specifies that it is not necessary to identify the people that control the procedure.

[162] DE MATTIA E., *Scambio di informazioni tra amministrazioni finanziarie e tutela del contribuente*, in *Cultura giuridica e diritto vivente*, 1/2014, pag. 19

CHAPTER 4
THE BANKING SECRECY REGULATION AND THE LIMITS OF ITS PROTECTION: COMPARATIVE ASPECTS, OVERCOMING AND EXCHANGE OF INFORMATION

SUMMARY: 4.1 From banking secrecy to the exchange of information – 4.2 The discipline of the banking secrecy in the European countries – 4.2.1 The banking secrecy in Switzerland – 4.2.2 The banking secrecy in France – 4.2.2 The confidentiality duty in Belgium - 4.2.3 The bank-client relationship in Germany – 4.2.4 The protection of banking secrecy in Austria – 4.2.5 The confidentiality protection in Spain – 4.2.6 The foundation of the banking secrecy in Luxembourg – 4.3 The banking secrecy in the United States of America – 4.4 Banking secrecy and its recognition in the republic of San Marino – 4.5 Banking secrecy in the Vatican City state.

1. From banking secrecy to the exchange of information

The banking secrecy is known and practiced in the majority of the countries of the world, even if with different methods, forms and limits, as Toscano and Razzante point out[163].

Some of the countries give to the banking secrecy a detailed provision, while others simply discipline it through the jurisprudential, contractual or banking practice; moreover, into the second group another differentiation can be made depending on the fact that the banking secrecy can find an expressed regulatory reference or that it discovers its justification in the interpretations of the constitutional norms.

The different experiences reached at international level, hence, make believe that the banking secrecy is necessary and essential in order to safeguard the right to confidentiality in the management and in the treatment of news and information acquired during operations carried out with the banks even if, in increasingly frequent cases, people recur to the banking secrecy in order to favor the money laundering and the realization of tax evasions and make possible the off-shore management of illicit financial activities.

Furthermore, today the vast majority of the financial movements is carried out in a telematic way: indeed, the exchanges are supported by the Internet, so that we can talk

[163] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 47

about virtual tax havens; also, it is possible to instantly transfer, via network, funds in any direction without no trace left on the taxpayer (the so-called disappearing taxpayer).

The recurrence of these just-mentioned phenomena, that have an international nature and that are favored by the presence of countries that have a stringent banking discretion combined with lack of provisions for adequate tax imposition, make it undelayable to consider measures to make the financial transactions take place in a transparent way: this in a need that is perceived by both the control bodies in charge of ascertaining and suppress these crimes and by the financial operators, which are aware of the need to discover the sources of the illicit earnings of the criminal organizations.

However, it must be recalled, as it has been expressed by Pollari[164], that the banks, which conduct a fundamental role as intermediaries of the cash flows, until some years ago " were real ivory towers absolutely impenetrable and this has incentivized whoever wanted to keep confidential on ore more operations to make use of the banking system.

Clearly, those who had an interest on the capital movements and on an information coverage, draw fully from this system.

So, in which measure the organized crime has served from the banks to take advantage of the just-mentioned characteristics, is easy to imagine".

However, numerous are the international bodies that adopted specific solutions to solicit the stipulation of agreements to favor the cooperation among the police services of different countries with the aim of individuating the flows of cash and to confiscate the profit coming from criminal activities.

On this matter, Pezzuto[165] pointed out that "a unilateral solution, or one adopted by few states could not be for sure suitable to solve the problem.

Actually, it could occur the opposite effect, since the most rigorous country would be penalized, and it would be automatically excluded from the market or by the operators interested in the anonymity.

Hence, it is not a case that all the most significant international initiatives are going in the direction of the coordination and of the regulatory harmonization".

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[164] POLLARI N., *Tecniche dell'investigazione finanziaria. Accertamenti patrimoniali, bancari, valutari*, in Rivista della Guardia di Finanza, n. 3, 1995, p.167

[165] PEZZUTO G., *L'utilizzo dei paradisi fiscali ai fini del riciclaggio*, in Il fisco, n. 47, 2000, p. 13974

These just-mentioned initiatives, as Toscano and Razzante[166] recall, are inspired by the awareness of the internationalization of crimes that took place, and of the fact that the manipulation in the credit operations and the currency offenses have crossed the national boundaries; the initiatives, hence, highlight the need to attack the organized crime in its economic component, which constitutes an essential element for its own survival.

As it has been recalled, one of the main characteristics of the modern economy is the possibility to move, without any substantial limit, huge capitals; it must be registered the tendency to take advantage of this possibility in order to allocate the investments where the taxation level is lower and the profits higher.

In an international economy, the tax factor constitutes a determinant element in the decisional process that is at the base of the investment programs of the companies.

On this matter, Toscano and Greco[167] pointed out that "the so-called tax competition is a fundamental element of a democratic system that provides for the possibility for the economic subjects to freely evaluate and choose the investment opportunities.

However, it exists, beyond the need to safeguard the interests of the single economic operators, through the assertion of general principles on which are based the regulatory measures that open the national boundaries to the investments, the necessity to organize some tools that allow the countries to obstacle the distorted use of the norms, and to limit those initiatives that are put in place by declaring a good economic interest, but that do hide purposes of evasive nature".

In this perspective, it must be cited, with increasing frequency, the resort to shell companies that are used to make fictitious triangulations of money and that are established in the so-called tax havens, an expression that identifies those countries that do not provide at all for the tax imposition on earnings of physical or juridical persons or that do subject those incomes to a particularly limited taxation.

On this Regard, Del Giudice[168] expressed that "in fact, the international tax evasion shows itself mainly through financial flows that move from areas of high tax pressure to areas of low tax pressure; this phenomena is favored by the fact that the countries pertaining to

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[166] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 50

[167] TOSCANO F., GRECO F., *Il regime fiscale delle operazioni effettuate tra residenti e società domiciliate in Paesi a fiscalità privilegiata*, in Rivista della Guardia di finanza, n. 4, 1995, p. 972

[168] DEL GIUDICE M., *Brevi note in materia di evasione fiscale internazionale*, in il fisco, n. 46, 2001, pag. 14659

the high tax pressure area are not in the position to directly communicate with the territories pertaining to the low tax pressure areas, meaning that the latter do not offer any international collaboration to identify those financial flows and the subjects to which they are attributed to".

Connected to these strategic evaluations, it has to be recalled the problems connected to the so-called bank havens, which peculiar elements are:

- The secrecy of the credit, financial and commercial structure guaranteed by the hosting country;
- The great specialization of the economic operators that intervene in the transactions;
- The difficulty, even in presence of an expressed request formulated by the judicial authority, to overcome the banking secrecy on the operations carried out on behalf of non-resident subjects and the connected impossibility to ascertain the origin and the final destination of the moved money.

The term 'bank havens' represents an expression that is entered in the dictionary of those who deal with financial problems, even in international sector.

As Cucuzza[169] recalled "some experts have highlighted as, instead of distinguishing the havens between tax and bank, it would be more suitable and significative to denominate them financial havens, by using an all-embracing term that refers to the fundamental characteristics of those countries in which:

- The banking secrecy is strictly protected and safeguarded;
- The financial operations are made fast and simple by adequate and specific legislative tools;
- The credit institutions guarantee an absolute anonymity;
- The execution of banking verifications is restricted or made difficult and it is limited to absolute necessity cases;
- The derision of tax burden on the companies or physical persons incomes makes the money deposits and the investments particularly favorable".

[169] CUCUZZA O., *Economia internazionale e criminalità organizzata*, in Rivista della Guardia di finanza, n. 6, 1996, p. 2089

It must be pointed out, according to Toscano and Razzante[170], as that the own economic and political characteristics of the hosting countries favor the constitution of the bank havens.

For what concerns the first aspect it must be recalled that, usually, the havens better conform in the countries which, not disposing of a solid economic potential or having reduced in the years their productive resources and capacities, prove themselves favorable to take advantage of alternative sources of income deriving from the pricing of hospitality assured to the huge capitals at disposition of subjects resident in those countries in which the legal systems are more stringent and that have severe controls against the illicit money trafficking of dubious origin.

Instead, regarding the political aspect, it easy to notice as the just-mentioned bank havens find a more convenient home in those territories in which the Governments, usually totalitarian ones, guarantee continuity to the political and economic direction.

It is evident, hence, as no one would entrust the management of their capitals to credit institutions or to financial companies based in countries in which an unexpected change of the political guide could take place; this, consequently, could cause a disastrous economic subversion able to put in danger the activity of accumulation and use of the money: the fundamental aspect, hence, regards the guarantee of the investments, in a way that avoid the risk that a political change could determine the loss of the capitals transferred in the territory.

From what has been explained, it clearly emerges the attraction that the recurrence of such favorable environmental conditions exercise on subjects who would normally be addressed to operate in countries characterized by a high taxation and vivid currency controls.

Once the economic and political configuration of the countries that are sanctuaries of money from illicit activities have been delineated, we could recall Ceriana[171], according to which “the attention now is directed to those countries that not only guarantee a tax burden that is minimal or null, but that offer an impenetrable banking secrecy, not only to the international controls, but also to the internal ones.

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[170] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 57

[171] CERIANA E., *Profili internazionali del segreto bancario nell’ottica della lotta all’evasione e al riciclaggio del denaro di provenienza illecita*, in Diritto e pratica tributaria, XV, 1994, pag. 82

In this context the banking secrecy has progressively lost its nature of tool to protect the interests of the individual, to become a factor of financial nature able to influence in a decisive way the choices of the international investors.

Indeed, the anonymity and the secrecy are the best guarantees to employ in licit activities the money derived from a tax evasion or from illicit activities, by allowing the creation of an appearance of legality and transparence".

Hence, the impenetrability of the financial transactions and the connected difficulty to identify the subjects constitute the characteristics of the bank havens that develop by counting on the immorality of the financial operators, that are able to guarantee the maximum secrecy of the operations carried out on behalf of anonymous clients.

In this context, also the organized crime operates, which assumed the characteristics of a multinational business and, having remarkable liquidation at disposition, it can disturb the economic system on its complex as well as contaminate the correct development of the business activities.

As Rossi[172] pointed out "the contrast action to the abuse of such havens to carry out evasions and frauds it is not easy to activate due to the many problematics that the community and national administrations face to acquire cognitive elements connected to the real owner of the financial flows that pass through those territories.

This situation translates on one side in the difficulty for the administrations to objectively evaluate the lawfulness of the advantages coming from the use of the bank havens that tend to be associated to the area of elusion or evasion, and on the other side, in the excessive confidence that some people give to the havens and in the ease with which these tools are used".

It is evident, following Toscano and Razzante[173], as the use of the bank havens represents a vehicle to commit tax frauds or to transfer the profits coming from money laundering and that highlights the importance to develop an increasingly effective network of agreements at international level among the tax and judicial authorities in order to intensify the timely exchange of information and to adopt adequate defense systems to the diffusion of these criminal phenomena.

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[172] ROSSI P., *Paradisi fiscali e bancari. Le strategie di contrasto agli abusi nell'Unione europea*, in il fisco, n. 2, 1998, pag. 507

[173] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 59

On this regard, it must be reminded the lack of a provision of a principle that ratifies the duty to cooperation among different countries; even in the era of the economic integration, the States are still diffident versus any forms of interference and not ready to give up a part of their sovereignty to pursue behaviors that usually end in damaging themselves.

According to this point of view, Bagarotto[174] expressed that "the international tax collaboration has been defined by the doctrine as an unknown planet.

This statement comes from the verification of the existence of a huge banking competition, particularly referred to the so-called bank havens.

The regulation on the banking secrecy of one country transforms, indeed, itself in a tool finalized to the evasion and the money laundering of the money from another Nation, if the transfer of money can take place, in a very simple way, thanks to the globalization process of the financial markets.

After all, this come from the different juridical foundation of the banking secrecy in the various countries and from the different content that this assumes related to the differences that characterize the relationship among private interests and interests of the State in the different countries".

[174] BAGAROTTO E. M., *L'anagrafe dei rapporti di conto non risolve i problemi legati alle verifiche bancarie,* in Corriere tributario, n. 36, 2001, pag. 2718

2. The discipline of the banking secrecy in the European countries

Despite the fact that any country acts legitimately in autonomous way, by providing for a greater safeguard of the interests that it retains to be more significant and relevant in the scope of its national boundaries, it is easy to appreciate a policy basically uniform and shared which associates the majority of the European States for what concerns the discipline of the banking secrecy.

This attitude is the result of the recognition of the importance assumed by the particular problematic regarding the fight against the organized crime and the phenomena of subtraction from taxation of increasingly huge sources of earnings.

On this regard, Ciani and Marchese[175] pointed out that "in the European Union the banking secrecy, a privilege born at the beginning of the 20th century, practically does not exist in the case of criminal investigations.

Instead, it is still present in the tax range (particularly, in Luxembourg and in Austria: in the latter country, according to print sources, have been counted 20 millions of anonymous accounts over 8 millions of citizens)".

As Toscano and Razzante[176] recall, following this perspective, and with the goal to face the delicate problems determined by the institution of tax and banking systems particularly safe, the European Council, on its plan adopted on April 28th, 1997 aimed at repressing the increasingly insidious economic-financial crimes, has manifested the need to reach a greater cooperation among the tax and judicial authorities of the member states with the goal to contrast the use of the financial havens as a tool to carry out frauds that damage the Union or to use the profits from money laundering.

Another important initiative in the European context is the one assumed by the Ecofin Council reunited in Brussels, on November 26th, 2000, during which it has been reached a very important agreement on this matter, which presumes in perspective the overcoming of the banking secrecy.

The Member States, hence, have decided to start, from 2003, a system of complete exchange of information among the tax administrations on the earnings of the non-residents.

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[175] CIANI P., MARCHESE G., *La politica europea in materia di riciclaggio e reati finanziari*, in Rivista della Guardia di finanza, n. 1, 2002, pag. 16

[176] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 61

With the intent of examine in depth the problems connected with the access to data kept by the banks related to the financial operations concluded with the clients, it should be recalled what Iorio[177] expressed, that is "in many states of the OECD the notion of banking secrecy is explicitly provided by legislative provisions which regulate in detail the limits. Instead, in other countries, among which Italy, it is not possible to discover in the legislation a precise notion of the banking secrecy.

This is the case, also, of Belgium, Germany, Ireland, Holland, Spain and United Kingdom, where usually reference is made to the customs or to the consolidated administrative practices.

However, the fact that in these States there is not an explicit legislative disposition that regulates the banking secrecy does not prevent the authorities of the same States from communicating the acquired information to the corresponding foreign authorities.

For tax purposes, in particular, this cooperation is carried out following the bilateral Conventions stipulated by each State to avoid the double taxation and to prevent the community frauds".

A preliminary statement could be point out before analyzing the comparative terms of the different countries, on the common factor, for which the protection of the economic rights of the individuals can be sacrificed only in presence of a public interest of particular importance.

On this regard, it has been affirmed by Serrentino[178] that, even with some limits "criminally, they took sides towards a general abolition of the banking secrecy, to eliminate any obstacle towards the achievement of the truth in the public interest.

In the civil law context, instead, it has been allowed a margin of operativity to the banking secrecy because, in this case, being it relevant more in a private than in a public perspective, it has been privileged the right to confidentiality that is fundamental in the Constitution.

Physically, at last, there has been an opposition to the banking secrecy only in the cases in which it could be used to cover illicit operations, or with the aim to elude the tax impositions".

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[177] IORIO A., *Caccia ai depositi in banche e Poste*, in il Sole 24-Ore del 20 Settembre, 2000

, pag. 130

[178] SERRENTINO R., *Il segreto bancario nei Paesi della CEE*, in Rivista della Guardia di finanza, n. 3, 1986, pag. 350

Under the tax profile, it can be anticipated, as Pollari[179] affirmed, that "the changes to the discipline of the banking secrecy align the position of Italy to that of the other Members of the European Union.

Apart from Luxembourg, which could be considered the European fortress of the confidentiality, the main community states have adopted regulations that do recognized some powers to the tax authorities".

In the next paragraph, it can be found a synthetic overview on the essential aspects of the banking secrecy, as it is disciplined in some European States, even if there is a continuous evolution on this subject.

2.1 The banking secrecy in Switzerland

A particular interest assumes the knowledge of the banking system in charge in the country beyond the Alps since, for a series of factors (as the linguistic affinity and the proximity), Switzerland constitutes one of the foreign destinations preferred by the Italian residents to allocate capitals.

In this context, according to Toscano and Razzante[180], it must be considered the nature of the Italian-swiss relationships that regulate the exchange of information connected to the prosecution of the tax violations.

Switzerland, as it is known, has traditionally retained to not provide assistance for what concerns the prosecutions of administrative offenses in the tax field.

The convention signed between Italy and the Swiss Confederation to avoid the double taxation expressly provides that the exchange of information must be limited to the correct application of the convention itself, by excluding that new forms of collaboration can be activated relating to the verification of the regular perform of the tax provided by the respective internal set of rules.

Furthermore, there have been established both precise confidentiality rules for what concerns the use of the given data and elements, and specific limits to the exchange of information: in particular, article 27 of the Italian-Swiss convention establishes, at clause

[179] POLLARI N., *Tecniche dell'investigazione finanziaria. Accertamenti patrimoniali, bancari, valutari*, in Rivista della Guardia di Finanza, n. 3, pag. 351

[180] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 64

1, that no news can be exchanged able to reveal commercial, industrial, professional and banking secrets.

On this regard, one of the major problems perceived by the Swiss authorities concerning the banking secrecy consists in balancing, on one side, the interest of the individuals on the safeguard on their personal sphere and, on the other side, that of the collectivity to a correct and transparent application of the laws.

Steiner[181] observed that "in Switzerland it is affirming, with no doubt, an inclination to act in exception to the banking secrecy with more ease than in the past, particularly considering the increasing need to cooperate in the fight against the international crime, a necessity highlighted also by the proposal of the Swiss Government to introduce criminal sanctions towards the money laundering of illicit earning".

The legislative foundation of the Swiss banking secrecy is identified both in article n. 27 of the Civil Code which safeguards the individual interests of each person, in the range of which the Swiss Federal Supreme Court has comprised also the information connected to the financial affairs and to the personal properties, and in article n. 28 of the same Code which agrees judicial protection in favor of those whose private sphere resulted violated by third parties.

Moreover, it is unanimously shared that the reserved information obtained by a bank connected to operations concluded with clients are protected by the just-mentioned norms which, hence, constitute a first foundation, of civil nature, of the banking secrecy.

Generally, the relationship between the bank and the client is considered of contractual nature and it is part of the provision of article n. 398 of the Code of duties, which prescribes that the bank executes the requested service with diligence and loyalty, maintaining secret all the news and information that the client decides to retain such.

According to part of the doctrine, the banking secrecy would find an explicit legal basis also in the criminal set of rules, and precisely in article n. 47 of the Federal Law on Banks and Saving banks of November 8th, 1934 (F.L.B.), which, in its current formulation provides that "1. Whoever spreads a secret that has been confided to him by virtue of in position of official, employee, liquidator or commissioner of a bank, by virtue of his position of representative of the banking Commission or employee of a recognized

[181] STEINER H.R., *Il segreto bancario: sedici Paesi a confronto. Svizzera*, a cura di Francis Neate e Roger Mc Cormick, Edibank, Milano, 1992, pag. 381

accounting company, whoever is indirectly came to know that secrecy in reason of such position, and whoever tries to convince other people to violate the professional secrecy, will be punished with imprisonment up to six months or with a fine not superior to 50 thousands francs;

2. If the divulgation is attributable to negligence, the sanction will consist in a fine not superior to 30 thousand francs;

3. The violation of the professional secrecy remains punishable even after the termination of the official relationship or the collaboration, or after having finished to exercise the profession;

4. The federal and cantonal regulations regarding the duty of testimony and of assistance to a public authority remain valid".

According to Toscano and Razzante[182], by examining the just-mentioned norm, it is evident, for what concerns the subjective aspects, as article n.1 of the F.L.B. delimits the range of application of the same norm, by establishing that it is directed to banks, to private bankers and to the saving banks, generally individuated with the name of banks, meaning with this general term all that companies that have been expressly authorized by the Federal Commission to carry out the activity of public savings collection and the supply of credits and loans.

Furthermore, article n. 47 of the law of November 8th, 1934 precisely identifies the subjects which, since they are in a relationship of functional dependence with the above-mentioned banking institutions, result addressees of the confidentiality duty towards the clients. Among these 'figures' have been identified the governing bodies of the banks and the employees: for what concerns the subjects that are part of the latter category, Serrentino[183] affirmed that "the Swiss Legislator, through the use of this generic term, tried to include in the application of the norm all a series of subjects linked to the bank, leaving at the same time to the Judicial authority the arbitrary task to evaluate, case by case, the subjection or not of the potential transgressor to the legislative precept.

The same considerations must be made for what concerns the emissaries, that are those who operate with or for the bank in virtue of specific contractual relationships.

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[182] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 66

[183] SERRENTINO R., *Il segreto bancario in Svizzera*, Laurus Robuffo, Roma, 1998, pag. 55

Even in this case, the term is absolutely generic and, hence, easily object of many interpretations, even if the authorities tend to solve the problem by attaining, time after time, to the same contractual provisions provided for".

Furthermore, among the active subjects of the norm under analysis there are also the liquidators and the commissioners, given the possibility that they become aware, for reasons linked to their office, of all the facts and the operations that the bank and its clients have carried out.

As Toscano and Razzante[184] point out, the information protected by the norm under analysis are substantially of two types:

a) Confidential news coming from the fiduciary relationship occurring between the bank and the client;
b) Information that the banking institute becomes aware of after the implementation of the activity and that can be related also to third parties.

Hence, the objective field of application of the regulation is very wide since it must be reminded that the interest is on the relationship between the bank and its clients as well as, generally, any type of information and news concerning the 'random' contacts that are established between the credit institute and the clients themselves.

Moreover, it must be highlighted that article n. 47 of the F.L.B. has a clear criminal nature and that its execution is not subordinated to any request of the offended party but it must take place ex officio: this circumstance, together with the provision contained in it according to which the secrecy must be guaranteed for the entire period during which it is reasonable to suppose that the client has an interest in the maintenance of the confidentiality and independently from the resolution of the contractual relationship with the bank, put the accent on the importance that the Swiss law recognizes to the banking secrecy.

For what concerns the territorial aspects of applicability, it has been affirmed that the cited article n. 47 does not identify specific benchmarks, revealing the need to refer to the territoriality principle ratified by the Banking law and by the Criminal Code; on this direction, article n. 2 of the F.L.B. establishes, at clause 1, that "the dispositions of this law

[184] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 67

are applicable by analogy to the offices, branches and agencies instituted in Switzerland by foreign banks that exercise their activity in Switzerland".

Then, regarding the possible exceptions to the duty of confidentiality it must be recalled as the Swiss legislation provides for the consensus of the client, which can fully dispose of the right to confidentiality; on this regard, in must be highlighted as the banks put particular attention in ascertaining that the expressed consensus represents the effective and actual will of the subject and that it is not, instead, the result of pressures exercised by third parties or the outcome of requests formulated by courts or foreign public authorities.

The consensus to the divulgation of information in object can be granted through a subject Authorized to act on behalf of the interested party, even if this authorization could not be efficient in the cases in which the news is of personal nature.

No significance, instead, is assumed by the will of the clients in cases of legal controversies between the latter and the bank: in this situation, indeed, the credit institutions can legitimately make some disclosures, without that this constitutes a violation of the general principle of confidentiality, with the condition that the information given under this circumstance are related to the ongoing dispute.

As it has been recalled, Switzerland has always been considered as a tax haven due to the fact that it has always denied the exchange of information on matters different from those connected to the dispositions of Conventions to avoid the double taxation, and it has opposed to the requesting States the confidentiality of the banking relationships and the banking secrecy.

According to Pierro[185], this position has been tempered in the years, even if limited to the behaviors suspected of tax frauds for which the Swiss Government has been committed to exchange information.

In any case, to respond to the requests of the OECD, the Swiss Confederation, had formally committed to intervene to set the conditions for the exchange of information and, in 2000, has not been included in the blacklist of the 'uncooperative tax haven" elaborated by the OECD.

[185] PIERRO M., *Cooperazione amministrativa tra Svizzera e UE: lo scambio di informazioni*, in *RTDT*, 3/2016, pag. 593;

However, after the decision of the G-20 to tighten the law enforcement action against the countries there were not collaborating and, having ascertained that Switzerland had not complied with the indications of the OECD on the exchange of information, Switzerland has been included in the Gray list.

To exit it, it would have to withdraw the reserve opposed to article n. 26 of the OECD on the exchange of information and stipulate at least twelve agreements that provide for an extended administrative assistance clause on tax matters (the so-called TIAE – Tax Information Exchange Agreement).

Switzerland made them in less than two years but it did not adopted provisions aimed at the abolition of the banking secrecy; the pressure of the OECD did not ease and, following the recommendations of the Global Forum (an organism of the OECD), Switzerland decided to stipulate new Conventions that provide for forms of extended assistance and, on March 2009, gave its consent to the exchange of information on request.

However, as it is recalled by Pierro[186], while Switzerland was taking the first steps on the road of cooperation and administrative assistance, the majority of the European and OECD countries had already individuated in the automatic exchange of information the most efficient tool to guarantee the tax transparency and they raised it to a common standard , comparing it, during the Strasbourg Convention in 2010, to the exchange of information on request and the spontaneous one.

The Strasbourg Convention had subordinated the introduction of the new standard to a specific pact (called Multilateral Competent Authority Agreement, or MCAA), subscribed by the competent authorities in 2014; this agreement provides that the automatic exchange of information is carried out in a bilateral way among the signatory states.

The Swiss Federal Council, to keep up with the times, on October 15th, 2013 decided to sign the multilateral Strasbourg Convention, which guarantees assistance between States particularly:

a) In tax verifications made simultaneously and in those made in the foreign country that ask for the presence of the functionaries of the requesting state;
b) In the activity of collection of tax credits in foreign countries even through the adoption of executive measures;

[186] PIERRO M., *Cooperazione amministrativa tra Svizzera e UE: lo scambio di informazioni*, in *RTDT*, 3/2016, pag. 594;

c) In the notification of the connected documentation.

Meanwhile, some European States (namely, Italy, France, Spain, Germany and United Kingdom) had promoted an intergovernmental agreement with the United States ended with the adoption of the FACTA, a systematic disclosure of data relevant for tax purposes. This regulation provided for the subscription of an agreement between governmental authorities, or between financial institutions and the American governmental authority.

This second possibility has been chosen by the countries which were not ready to exchange information in an automatic way, and want to delegate the transmission of data to the financial institutions which has acquired the preventive consensus of transmission by the American client; Switzerland is among the countries that chose this road and, of February 14th, 2013 has signed the FACTA agreement, which entered into force of June 2nd, 2014, and provides for the direct notification of the banking information from the Swiss financial institutions to the American tax authority.

This transmission form allows the Swiss tax administration to be exempted from the automatic exchange of information and it authorizes Swiss intermediaries to release data upon express request.

By signing this agreement, as it has been pointed out by Pierro[187], Switzerland has taken an important step on the road to tax transparency, even if this step was not spontaneous but, rather, it was determined by the need to avoid being excluded from the American financial market. Indeed, a failure to adhere to the FACTA would have resulted in the application of a 30% withholding tax on any type of payment of US origin, causing a huge damage for the financial intermediary.

Then, on March 19th, 2015, Switzerland has signed with the European Union an agreement on the exchange of information of tax nature, which translated in an agreement signed in Brussels on May 27th, 2015 which provided for the adoption of the Common Reporting Standard and, hence, the definitive disappearance of the banking secrecy for the people resident abroad which hold financial resources in the Confederation.

Fundamentally, it is a Protocol that modifies and revises the Agreement of taxation of savings, in charge since 2005, between Switzerland and the European Union.

[187] PIERRO M., *Cooperazione amministrativa tra Svizzera e UE: lo scambio di informazioni*, in *RTDT*, 3/2016, pag. 595;

The protocol has been published on the Official European Journal on December 19th, 2015 and entered into force on January 1st, 2017, with automatic exchange of information starting from 2018.

Hence, the process has been perfected and also Switzerland, as well as all the other European States, is today considered as a collaborative country.

2.2 The banking secrecy in France

When examining the situation in France, it must be recalled, according to Toscano and Razzante[188], that the foundation of the banking secrecy was originally identified in article n. 378 of the Criminal Code, which safeguards the professional secrecy, despite the various perplexities that derived from the general formulation of the rule that punishes the disclosure of information and news of confidential nature from 'all the other people which, for their position or for professional reasons, or during the carrying out of temporary or permanent functions are in possess of confidential information'.

A justification to the extension of the professional secrecy to the credit institutions has been identified in the law of 1973 on the Bank of France, which specified that the agents and the employees of the bank were bind to a duty of confidentiality and that, in case of violation of this obligation, to them the sanctions delineated by article n. 378 of the Criminal Code would be applied.

In this legislative context, the jurisprudence shared the applications of the dispositions on the banking secrecy to the employees of the Bank of France, by highlighting, however, the clear separation existing between public banks and private banks, for which there have been some doubts regarding the application of the above-mentioned rule.

This problem has found a solution with the introduction of the law of January 24th, 1984 which revised the entire organization of the French banking system and whose article n. 57 expressly provided that the mentioned article n. 378 of the Criminal Code is applicable 'to any member of the administration council, of the supervisory board, if it exists, to any person, any competence it has, which take part to the direction or to the operations of a bank or being there employed'.

[188] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 69

However, the same article n. 57 of the law of 1984 provides that the secret cannot be opposed to the judicial authority during the criminal investigations.
Moreover, it must be pointed out that the confidentiality obligation does not cover all the information that the credit institution can come into possession of: in France, in is common practice to ask to a bank elements referring to the financial situation of an economic subject with which there is an interest in concluding deals.
Indeed, according to the French law, the duty for banks to maintain the secrecy concerns the specific information on the total amount of an account or on the operations carried out by the client, and not also those of general nature concerning the solvency of the client.
Then, for what concerns the exceptions to the banking secrecy, it is doubt if the consensus of the client is sufficient to allow the divulgation of confidential news: on this regard, it has been pointed out as the banking secrecy enters in the rights at disposition of the interested party which could raise the bank from the confidentiality obligation.
Finally, for what regards the fight against the money laundering, it must be underlined that France resulted as one of the first countries to declared war to the organized crime and to the reinvestment of money of illicit nature.

2.3 The confidentiality duty in Belgium

In the Belgian legal system, the principle according to which the banker is bind to a precise confidentiality obligation has its foundation in the tradition; indeed, in Belgium the banking secrecy has never found a codification in any law provision.
Moreover, the contribution on this matter given by the jurisprudence, according to Toscano and Razzante[189], is limited, since it didn't contribute in a resolutive way to circumscribe the nature of this legal arrangement.
Hence, the mentioned confidentiality obligation is connected to the banking operations interpreted in the general way (regarding, for example, the opening of deposits, transfers of funds, transactions if foreign currencies, financial advices and so on) and it extends to include all the facts that the banker comes to know in the range of its relationship with the client.

[189] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 71

On this regard, the Belgian Court of cassation has established, in the sentence of October 25th, 1978, that the non-compliance to this duty does not constitute a criminal violation and it excluded the applicability towards the bankers of article n. 458 of the Criminal Code, which provides for criminal sanctions towards doctors, health officers, pharmacists and how many others who, as a consequence of the exercised profession, reveal the information of confidentiality nature.

As Sunt and Richelle[190] specify, "higher social interests can sometimes allow for an exception to the duty of confidentiality to which the banker is bind, by creating in this way numerous exceptions to the secrecy rule.

However, in all these situations, it must be kept in mind that the confidentiality still remains the rule and the divulgation just an exception.

Hence, the duty to make known certain information remains for the banker strictly limited to the safeguard of these other interests".

Furthermore, Belgium in one of the countries in which the banking secrecy generally resists to the tax authorities.

Indeed, some dispositions exist that forbid the tax authorities to ask for data to the banks in order to ascertain the earnings situation of the verified subject: on this matter, article n. 224 of the Income tax Code provides that the direct tax office cannot directly check the bank registers and other cash documents kept with the aim of determine the taxable income of the taxpayer.

However, this mentioned prohibition is inoperative in two cases:

a) The first hypotheses is realized when the taxpayer decides to make an adverse appeal to the verification notified by the tax offices: in this circumstance, they will have the faculty to ask to banks any useful information to determine the taxable income, since the claim against taxation is due to the initiative of the taxpayer.
   Anyway, the latter could forbid the bank to give the requested information, even if such a behavior will make very unlikely a positive outcome of the dispute;
b) The second case is verified when, during the verification, a funded suspect shows up regarding the existence of a fraudulent behavior made by the client with the conspiracy of the bank to realize a tax evasion.

[190] SUNT C., RICHELLE J., *Il segreto bancario: sedici Paesi a confronto. Belgio*, a cura di Francis Neate e Roger Mc Cormick, Edibank, Milano, 1992, pag. 117

However, this hypothesis can be considered entirely theoretical since there is a proved collaboration existing between the Belgian banking association and the tax administration: if the bank Commission, which monitors the activities of the credit companies, finds out a behavior of such nature, it has to immediately notify it to the direct taxes office.

2.4 The bank-client relationship in Germany

In the German legal system, it does not exist a specific rule which safeguards the banking secrecy, which finds its indirect foundation in article n.2 of the Constitution, which guarantees the free development of the individual personality, and in article n. 12, which protects the right to freely exercise the profession: however, they are rules with a generic nature and that are not always easily applicable to the concrete cases.

Hence, the focal point from which the banking secrecy takes foundation must be searched in the contract law, being universally recognized that the confidentiality duty represents an obligation that the bank assumes by contract towards the clients.

Indeed, Ceriana[191] pointed out that "given the vagueness of the constitutional provision in the field of application of the banking secrecy is pretty wide, since its content ends to be delineated, in absence of a specific rile, by the desires of the client, which can decide if and which information to make available to third parties, including the commercial news, freely obtainable only if it's about juridical persons, or subjects signed up to the chamber of commerce.

Then, the content of the banking secrecy originates in the relationship between the bank and the client. In this perspective, it is evident that the first allowed exception is that of the consensus of the client, even if it not completely considered as an exception, considering the dominant position of the client.

It is interesting to point out that even in Germany the problem of the consensus of the client has been introduced after the order of a foreign court, in this case an American one; the jurisprudence could not consider valid the exception since the banking secrecy, being part of the rights of the subject towards the bank, could be limited only by internal dispositions or by the decision of a German court and not a foreign one".

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[191] CERIANA E., *Profili internazionali del segreto bancario nell'ottica della lotta all'evasione e al riciclaggio del denaro di provenienza illecita*, in Diritto e pratica tributaria, XV, 1994, pag. 90

Instead, for what concerns the attitude that the banks must observe towards the potential requesting authorities, there is a clear difference connected to the different nature of the type of requested collaboration.

In the civil proceedings, the bank must maintain the secret and, according to what is ratified by article n. 383, clause 6, of the German law on the civil procedure, it has the right to oppose this binding also in the testimony.

A different position has the bank in the criminal proceedings: to bankers it is not allowed to oppose the confidentiality obligation and, hence, they cannot refuse to give proofs connected to the matters they came to know in function of their professional activity.

Towards the tax administration, which has wide investigation powers, it is possible to make an exception to the banking secrecy only in case of a funded tax evasion suspect and with the aim of certifying the real earnings position of the taxpayer.

In this field, the tax authorities are legitimated to ask information to third parties, included banks, and they can ask for the exhibition of documents and accounting records related to individuals that are under a tax verification; however, this power can only be exercised if there is an ascertained omitted collaboration by the same taxpayer.

Finally, the German authorities took some initiatives to fight the financial terrorism; on this regard, Ciani and Marchese[192] pointed out that "the German Government has presented a plan that provides, among other things, the creation of a federal agency of the financial intelligence, to reinforce the monitoring of the bank accounts. (…)

The effects of such an initiative will be those of enhance the exchange of information on the money laundering of illicit profits at international level, as well that of cutting the principle of banking secrecy in order to facilitate the fight against the tax evasion".

2.5 The protection of banking secrecy in Austria

In the Austrian legal system, the legislative foundation of the banking secrecy or, more correctly, of the right to confidentiality is constituted by articles n. 23, 34 and 35a of the law on the credit system, entered into force in 1979.

Particularly, the just-mentioned article 23 establishes that "the bank, its shareholders, the officers, the employees and any other person who carries out any other type of activity in

[192] CIANI P., MARCHESE G., *La politica europea in materia di riciclaggio e reati finanziari*, in Rivista della Guardia di finanza, n. 1, 2002, pag. 16

its behalf, cannot spread or take advantage of the secrets that have been entrusted to them, or to which they had the possibility to access, in reason of a business relationship with clients or pursuant to article 16, clause 2.

If, during the execution of their activities, officers, public authorities or Austrian national Bank functionaries, do receive information that are subject to the banking secrecy, they are bind to consider that secret as an office secret, and they can release it only in one of the cases provided for by article 23, clause 2.

The confidentiality obligation is always valid, with no time limits".

According to Toscano and Razzante[193], in order to clarify the exact importance of the just-mentioned article, it must be pointed out that:

a) With 'banks', it must be identified any body or subject which is authorized to carry out credit operations in general;
b) With the term 'secrets' reference is made to those facts exclusively known by a restricted group of people and for which there is an interest in subtracting them from a diffuse knowledge;
c) The 'clients' are the people which maintain relationships with the banks in the field of the operations carried out, being not necessary that they are concluded;
d) 'spread' a banking secret means, generally, declare it or, anyway, allow that it becomes known, by omitting to adopt any useful measure in order to prevent and avoid its diffusion in favor of someone who wasn't already knowing it;
e) The 'exploitation' of the banking secrecy must be interpreted in terms of economic use realized to damage the client.

The already mentioned article n. 23of the Austrian banking law provides, at clause 2, some hypotheses of exceptions to the secrecy obligation.

The first one is represented by the consensus of the client: no confidentiality obligation arises if the directly concerned subject allows to make public the news concerned to him, by releasing from any duty the body that keep it.

To be valid, the consensus is requested in written form and it must unequivocally indicate the data for which the divulgation is allowed.

[193] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 80

A second exception is linked to the case in which a dispute arises between the credit institution and the private subject, the solution of which is linked to data covered by the banking secrecy: in this circumstance, it is possible to make known only the news strictly related and necessary to the resolution of the legal problems between the parties.
Another exception option is linked to the possibility of giving commercial information: however, it must be general information regarding the economic situation of the subject, putting attention in balancing the conflicting interests of the clients with those who are requesting the information. For this reason, the bank uses some standard forms through which the information of general nature can be given.
Moreover, an exception to the banking secrecy is made in case of succession, not being allowed that a banking secrecy is opposed when the court is in charge of drawing up of the inventory, or any other type of estimate, of the belongings owned by a dead person; hence, a request for information forwarded by the competent authority forces to give precise and concrete indications connected to the holdings of the person.
Another exception provision is established by clause 2 of article n. 23 of the Austrian banking law, which ratifies that do not have to observe the duty of the banking secrecy "the Austrian criminal courts which are carrying out criminal judicial proceedings and the tax authorities that proceed in order to intentional tax crimes".
The just-mentioned bodies have, hence, the faculty to ask for the divulgation of news covered by the banking secrecy by respecting the principle according to which the exception to the confidentiality obligation allows to corroborate the funded suspects already existing regarding those particular cases of criminal nature.

2.6 The confidentiality protection in Spain

It is generally recognized, in the Spanish legal system, the duty for banks to respect and safeguard the confidentiality of the information regarding their clients and obtained during the implementation of their functions.
Actually, there are some disputes for what concerns the juridical validation of the banking secrecy.
According to a perspective, shared by the Constitutional Court, the principle under scrutiny should find its recognition in article n. 18 of the Spanish Constitution which safeguards the right of a person to the privacy, intended not only with reference to the private life, but also to the information regarding the economic situation.

Other scholars, however, affirm that the banking secrecy finds its foundation in the field of the contractual relationship existing between the bank and it client, while others believe that the tradition and the customary practice are the fulcrum of the confidentiality duty.

On this regard, Armesto and Hiniker[194] affirmed that "it seems to catch sight of two opposite groups: on one side, those who want to extend the field of exceptions to the protection given by the principle (those who see as foundation in the tradition), and on the other side those who believe in the necessity to give more strictness to the banking secrecy.

Whoever is to be considered the juridical foundation of such a respected principle, it is clear that, actually, the non-juridical foundation of the principles les in the fact that the confidentiality element is essential to the effective functioning of the relationship between the bank and the client".

For what concerns the exceptions to the banking secrecy, the attention must be given to the legislative provision in article n. 23 of the Regulation of the Bank of Spain, which forbids to give any type of information and news regarding the withdrawal operations, the constitution of deposits and the transactions carried out by the client of a banking institute, if there is no need to fulfill a provision of the judicial authority.

Hence, as Toscano and Razzante[195] explain, by recognizing that an order by the judge can represent a justification to the exceptions to the banking secrecy, article n. 23 tries to balance the privacy right of a person also in the economic and financial range.

Finally, in the field of the investigations of tax nature, the law for the reform of the tax system gives the possibility, to the competent ascertaining bodies, to command to the financial and credit institutes to communicate the number of 'patrimonial accounts' (personal accounts, deposit funds, certificates of deposits and so on) and the bank accounts in name of the client and the list of securities deposited in it.

Regarding the limits to the powers of the tax authorities, the law establishes that:

a) The authorization to investigate on the accounts of a client must be emanated by well-defined bodies;

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[194] ARMESTO J.F., HINIKER L., Il segreto bancari*: sedici Paesi a confronto. Spagna*, a cura di Francis Neate e Roger Mc Cormick, Edibank, Milano, 1992, pag. 328

[195] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 83

b) The account to be inspected must be adequately specified;
c) Specific formalities must be observed (for example, that for the execution of some controls it is necessary the presence of the interested party).

2.7 The foundation of the banking secrecy in Luxembourg

The banking secrecy in Luxembourg is founded on the right of the client to the confidentiality protection regarding the relationships carried out with a banking institute, from which it derives the prohibition for the bank officers to spread the news concerning matters that deal with the exercise of their functions.

The duty of guaranteeing the confidentiality covers all the data connected to the transactions occurred between the bank and the client and all the financial operations made in Luxembourg or abroad; hence, any information that is not of public domain, to which the credit company accesses in relation to its link with clients, must be considered as confidential.

On this regard, Schmitt and Frieden[196] expressed that "the measure in which a State safeguards the secrecy of the confidential information reflects a determined type of social structure.

The difficult balance between the interests, sometimes in conflict, of the collectivity and of the single individual has been broken in favor of the right to privacy.

The banking secrecy, hence, became naturally one of the foundations of the international financial and banking center of Luxembourg".

Indeed, following what has been expressed by these two scholars, Luxembourg can be considered as one of the European countries that mostly safeguard the banking secrecy.

For what concerns the legal basis of the latter, according to Toscano and Razzante[197], it must be found referring to article n. 458 of the Criminal Code, entered into force during the Napoleonic period, which forbids to doctors, health officers and other people to reveal any secret confided to them by virtue of their profession.

To better identify the meaning of 'other person', the jurisprudence has introduced the concept of 'obliged confidant', comprising also the bankers in this category.

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[196] SCHMITT A., FRIEDEN L., Il segreto bancari*: sedici Paesi a confronto. Lussemburgo*, a cura di Francis Neate e Roger Mc Cormick, Edibank, Milano, 1992, pag. 223

[197] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 86

Moreover, article n. 16 of the law of June 16th, 1981, which introduced in Luxembourg the first EEC directive in banking matters, gave a first juridical reference to this position.
The provision with which it is confirmed that the above-mentioned rule is referred also to bankers is represented by article n. 31 of the law of November 24th, 1984 on the financial sector control.
Furthermore, another foundation of the confidentiality obligation can be found in the prohibition, ratified by the law of March 31st, 1979, to communicate to third parties personal data registered on the informatic systems of the banks.
The above-mentioned article n. 458 of the Criminal Code provides for two exceptions to the banking secrecy: indeed, on one side, it is ratified the possibility for the banker to spread confidential news if he is called to give evidence in court; also, in determined cases, it is the law that commands that the bank officer has to make known some information regarding the client.
On this regard, Serrentino[198] pointed out that "the necessary confidant, sued to testify on a fact covered by the secret, can assume two attitudes: unveil the banking secrecy in the interest of justice, so that the judge can take into account the information given without that being a crime, or he can refuse to speak by invoking the professional secrecy.
In practice, it is valid that 'conscience' element that could determine or deny the testimony.
However, this liberal and subjective nature of the behavior to maintain in the testimony falls under the second exception, when the banker is forced by law to give all the information, even the confidential one, violating the banking secrecy principle, without committing crime since, indeed, he is forced by law".
Another interesting aspect to examine is that connected to the possibility of opposing the banking secrecy to the tax administration.
On this matter, it must be recalled that the tax system is founded on the principle that the taxpayer has to declare all the sources of income: this interpretation comes from the Luxembourg constitutional dictate which provided that the rights of the individual person could be restricted only in cases in which needs of common and higher interest have to

[198] SERRENTINO R., *Il segreto bancario nei Paesi della CEE*, in Rivista della Guardia di finanza, n. 3, 1986, pag. 345

be safeguarded, by assuming that the banking secrecy could not be used to cover criminal activities and linked implications of financial nature.

The application field of the banking secrecy changes as a consequence of the different tax type: for what concerns the indirect taxes, we must refer to the law of January 28th, 1948, in which article n. 30 provides, in the range of the right to investigate in favor of the tax offices, the duty for the banks to give information, acts and documents to the tax officers I order to clearly determine the tax burden on the inheritance.

Moreover, on this matter, we should recall the Gran ducal regulation adopted by Luxembourg on March 24th, 1989, which clearly gives clarifications on the sphere of application of the banking secrecy in the tax matter, by limiting the powers recognized to the competent authorities.

Indeed, the just-mentioned regulation forbids to the tax bodies to ask to the credit institutes information on the single clients and it specifies, at the same time, that the control on the accounting books kept in the bank cannot be used to gather news and data regarding the tax position of the clients.

For what concerns the exchange of information with other foreign countries, there are three phases to examine, according to Rech[199].

The first in the phase before 2009, in which the Luxembourg law forbids that the Grand Duchy exchanges confidential information regarding the clients of financial institutions, exceptions made, in the cases of judicial cooperation, of charges of tax fraud, money laundering and terrorism financing.

Instead, the simple tax evasion suspect is not a sufficient reason to exempt the financial operators from the confidentiality obligation.

The changes takes place on March, 2009, when Luxembourg modifies its legal politic in matter of banking secrecy, by deciding to adopt the OECD provisions in their entirety; all the agreements in theme of double taxation have been re-negotiated, and Luxembourg is ready to ratify also article n. 26.5 of the conventional model.

Another parallel change is the introduction of the provision according to which the banking secrecy can fall also in the case of simple tax crimes (subject to the proof that actually there is a tax crime). According to these new setting, the banking secrecy ceases

[199] RECH F., *Il futuro del segreto bancario lussemburghese*, in www.plottke.lu; pag. 8

in 2009 for what concerns tax matters, but it remains incisive in criminal matters and in the other cases.

Finally, in May 23rd, 2013, Luxembourg joins the OECD convention on mutual administrative assistance in tax matters.

According to Rech[200], with this ratification there is another turning point of erosion of the banking secrecy; the big change is represented by the fact that this convention has a range of application enormously wider than any other prior bilateral agreement.

Indeed:

- The taxes involved changes: the convention undertakes any compulsory withdrawal other than customs duties (for example, taxes on income, on capital, capital gains, local taxes social security taxes, succession, donations, taxes on assets and so on);
- The type of collaboration changes: before it there was a mere exchange of information, while now the convention includes also the spontaneous exchange of information, the transmission of documents, as well as the automatic exchange for some operations.

[200] RECH F., *Il futuro del segreto bancario lussemburghese*, in www.plottke.lu; pag. 10

3. The banking secrecy in the United States of America

Generally, it has been observed that the basic criteria adopted by the United States courts regarding the confidentiality duty to which the credit institutes are bind connected to the news known during the execution of their functions is based on the general obligation of the same banks to not betray the reasonable expectations of the clients, as it has been pointed out by Toscano and Razzante[201].

In order to evaluate the complaints moved by the individuals regarding supported cases of violation of the confidentiality obligation, the courts usually consider the type of information that the client retains deserves protection, the type of relationship with the bank, as well as the circumstances and the methods of disclosure of the news, in order to have an overall appreciation of the dispute.

In the United States, the banking secrecy constituted a matter of intense debate among the jurisprudence, which then elaborated two main positions.

According to the first orientation, in front of the requests made by the police or by the tax Administration the banks have the duty to inform the client of the request in his regards in order to allow him to eventually oppose, by resorting to legal means, to the fact that third parties could become aware of its financial operations.

The just-mentioned jurisprudential position has been recognized in one of the first significative American sentences; the case under scrutiny originated when a bank director, without previously informing the client and obtaining his consensus, revealed to his employer that he issued several times checks that were not covered by adequate deposits.

The client took legal action and, after the acquittal sentence pronounced by the first instance court in favor of the credit institute, the Supreme Court of Idaho cancelled the first decision by affirming that "it results implicit, in the agreement stipulated by the bank with its client, the condition for which no information regarding the account of the client can be spread by the bank or by an officer of the same and, except that it is authorized by the law, or the client, the bank must be held liable for this contractual violation".[202]

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[201] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 88

[202] In Peterson contro Idaho First National Bank 367, Idaho 1961

According to another position, consolidated in some other States of the USA, the bank has the precise prohibition to not divulgate information regarding the operation and financial situation of its clients; to sustain this orientation we can cite the intervention of a Court of Appeal which, during a legal dispute started by a client which affirmed that the credit company he used to resort to make banking transaction did spread confidential information in his regard, established that "a national bank has the implicit duty to not reveal to third parties information regarding the account of the depositor (…)", revealing that "a clear obligation to not divulgate seems to be under development both in America and in the United Kingdom"[203].

According to the just-mentioned perspective, the right to confidentiality has been pushed at the point that the banking institute is considered legally liable also in the hypothesis under which the news and information have been given after an express request made by the police bodies, by considering that, as it has been expressed by Ceriana[204], "any exception to the confidentiality principle to which the bank is bind, even in front of the duty to collaborate with the justice, created a sort of gray area inside which the discretion of the banking institution finished to vanish the right to confidentiality of the financial operation of the client".

In the United States, differently from what happens in other civil law countries, the main objective of the codified law regarding the management by banks of the information connected to the clients is not that of maintaining its secrecy, but that of simplify the correct execution of the law.

In this context, as Toscano and Razzante[205] recall, there is the law on the banking secrecy (called Bank Secrecy Act) of 1970 which, has as main objective that of establishing the situations in which, with the recurrence of some prerequisites, the public administration has the power to obtain the confidential banking information.

Contrary to what its denomination could express, the law of 1970 does not prescribe laws that bind to the observance of the banking secrecy, but it does require that each office, agency or branch of the credit institutes operating on the United States territory records

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[203] In Milhonich contro First National Bank of Miami Springs 224, 1969

[204] CERIANA E., *Profili internazionali del segreto bancario nell'ottica della lotta all'evasione e al riciclaggio del denaro di provenienza illecita*, in Diritto e pratica tributaria, XV, 1994, pag. 87

[205] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 91

and stores the documentation of the transactions carried out by the clients, keeping it at disposition of the authorities of the federal government; in this perspective, the regulations released by the Bank Secrecy Act force, with limited exceptions, banks to forward, within 15 days by the date of the transaction, specific reports to the Internal Revenue Secrecy (that are bodies of the tax administration) containing information regarding the deposits, the withdrawals and other operations that go beyond 10 thousand dollars.

The credit institutions and the officers that do not comply with those provisions risk a fine up to 250 thousand dollars and the legal detention up to five years.

In 1976 the Supreme Court of the United States, intervened in the dispute United States against Miller within which the client of a bank, accused of committing violations to the federal tax laws, criticized the manner in which the banking documentation was used after the orders issued by the General Attorney of the United States, affirmed that the Fourth Amendment of the Constitutions, which safeguards 'the right of the individual to the protection of his person, house, documents and personal belongings, against the possibility of perquisitions and unreasonable seizures', could not be invoked in order to prevent the bank from spread confidential information in execution of the mandate emanated by the district attorneys regarding the execution of investigations on the violations of the federal tax laws.

Moreover, in that circumstance, the Court has pointed out that the clients of the banks cannot have any reason to confide in a privacy claim in the use of banking documentation, but they do have to gain awareness of the fact that the credit institutions can be called to deliver that same documentation upon request of the federal government.

As Toscano and Razzante[206] explain, in order to guarantee a balance of the interests involved by the situation created and to cope with the concerns raised after the sentence of 1976, the Congress approved in 1978 a law on financial Privacy which had as objective that of limiting the cases in which the Authorities can, with prior request addressed to the bank, obtain confidential information.

However, it must be pointed out that this tool has a limited usefulness in practice, since its application is limited under two significative aspects: first of all, the law safeguards

[206] TOSCANO F., RAZZANTE R, *Il segreto bancario nelle indagini tributarie ed antiriciclaggio*, Milano, 2002, pag. 92

only the single individuals or the small associations made of up to five partners, leaving thus all the companies completely subject to the provisions of the Bank Secrecy Act.
Secondly, the law of 1978 concerns only the Authorities and Departments of the federal government of the United States and it does not apply to the requests of information on behalf of clients made by state and local bodies.
Within the limits of application, the law under scrutiny, forbids to the banks operating on the United States territory to divulgate data and information concerning the client before the clients himself knows that the request occurred and he can oppose recurring to the judicial competent bodies to stop the attempt to acquire confidential news.
However, under some circumstances, the above-mentioned authorities can order silence to the bank, which cannot reveal to the client that some documents have been delivered or that a requests in this sense have been made; this happens, for example, in the hypotheses in which a perquisition mandate is emitted by a Court; in this case, the bank has an obligation to give all the requested information and, at the same time, it must exempt from any form of contractual responsibility towards the same clients.
In all the other cases, the credit company that divulgates information or that gives documentation violating the privacy law is liable towards its client of civil sanctions which provide the payment of fines, the compensation for material damages and the duty to bear the legal costs.

4. Banking secrecy and its recognition in the republic of San Marino

The relations existing between the Republic of San Marino and the Italian one have all the characteristics that occur in the relationships between two countries the territory of one of which, due to its small size, is completely surrounded by the territory of the other, thus constituting an enclave, as Urbani[207] pointed out.

Usually, the smaller country has origins that date back in time, and it is proud of its historic autonomy and, on the economic level, it tries to obviate to the competitive difficulties coming from its dimensions with a favorable legislation, aimed at attracting foreign capitals and investments.

On the other side, the second country is worried that, due to the permeability between the two territories and hence, between the two economic and productive realities, there could be competition between legal systems, that could end up in representing an opaque nerve center in capital flows and, more generally, wealth.

Such characteristics, first of all geographical ones, induce the national legal systems involved to find bilateral agreements aimed at regulating the mutual neighborhood relationships.

For what concerns Italy and San Marino, the agreements that constitutes, still today, the fundamental stage of the relationships between the two countries is represented by the Friendship and Good Neighborhood Convention signed in Rome on March 31st, 1939, which provisions ranges from judicial assistance, both in civil and criminal matters, to the administrative one, as well as financial dispositions, regarding, among others, the free circulation of goods and products and the exemption from customs duties.

Article n. 1 of this convention establishes that the relationships between the two countries must be inspired by "feeling of perpetual friendship and good neighborhood".

In the Republic of San Marino, as it has been recalled by Urbani[208], the activities of banks and other financial intermediaries are currently governed by the law of November 17th, 2005, n. 165 called Law on businesses and banking and financial services and insurance

[207] URBANI A., *I rapporti economico-finanziari tra Italia e Repubblica di San Marino*, in M. Pellegrini, *Elementi di diritto pubblico dell'economia*, Padova, 2012, pag. 41

[208] URBANI A., *I rapporti economico-finanziari tra Italia e Repubblica di San Marino*, in M. Pellegrini, *Elementi di diritto pubblico dell'economia*, Padova, 2012, pag. 45

(or, shortly, LISF), which collects in a unique text the most relevant dispositions regarding the different branches of activities in which the financial industry today is structured.

Going into detail, the differences between the sector disciplines of the two countries result to be contained, as it easy to expect due to the natural harmonization that follows the financial globalization and, at the same time, the contiguities that are not only geographical between them.

However, there are some differences between the two disciplines, one of which concerns the presence in the cross-border banking law of a disposition (article n. 36) that recognizes and regulates the banking secrecy, a rule that, as we have pointed out, does not found correspondence in the set of rules of our country.

For what concerns the relationships with the foreign vigilance authorities, the Republic of San Marino, as it is not part of the European Union, may limit itself to authorize its supervisory authority to conclude cooperation agreements with equivalent foreign authorities (ex. Article n. 103 of law n. 165/2005); the only condition, in short, is that they must guarantee the full reciprocity in the exchange of information, that the office secrecy is authorized and that the exchange of information is functional to carrying out supervisory tasks.

However, despite the abstract provision for the possibility of entering into specific agreements to favor the cooperation between the respective supervisory authorities, in concrete terms the local authorities seem to reserve, in these relationships, wide margins of decisional autonomy.

As we have already pointed out, the banking legislation of the Republic of San Marino expressly recognizes the banking secrecy.

Indeed, article n. 36 of the LISF forbids the divulgation of news and data acquired in the exercise of the financial activities lato sensu covered by confidentiality to any company representative, both for the top management and the employees, as well as to the occasional and external collaborators; the same prohibition regards the subjects in the same position but with companies which intermediaries has outsources certain functions which involved the transmission of that data and news.

Moreover, the obligation to maintain the secret remain also when the relationship, function or assignment has ended.

However, the prohibition stops in cases of criminal investigations and towards some internal public bodies, such as the National Central Bank and the Financial Intelligence

Agency, as well as the bodies responsible for the direct exchange of information with the equivalent foreign bodies, as stipulated in the international agreements.

Also, as it has been recalled by Urbani[209], there are some cases, pointed out in the clause 6, in which it is the law itself that excludes the possibility of violation of the secret: for example, when the communication takes place in the range of a dispute between the 'authorized subject', or the intermediary, and the client, even if this communication relates to a relationship between the parties other than the one involved in the dispute, with the only limit that it is inherent to the procedural defense.

Finally, article n. 36 of the LISF, clause 7 allows the heir, the attorney of an insolvency procedure or the guardian to obtain data and news covered by the secret, even if referring to a period prior to the death or to the judicial appointment provision.

All this that has been stated regarding the San Marino discipline to protect the banking secrecy; however, in more general terms, it should be reminded that, in the practical level, the opacity guaranteed to the client finds its main reason in the intent of the latter to subtract from the tax imposition in his origin country.

Indeed, if the two systems, the one of origin of the client and that where the intermediary operates, do reach a bilateral agreement to regulate the tax treatment of the relationship, the concrete usefulness of the banking secrecy loses at the eyes of the client most of its appeal.

For this reason, the efforts made at international level to promote such conventions. In particular, in the OECD field, it has been prepared an agreement model against the double taxation and for the exchange of information; in the moment in which a country reaches the minimum number of twelve of such agreements, it is included in a so-called white list of the cooperative legal systems in the field of exchange of information.

The Republic of San Marino reached this objective in 2009, as it has been recognized by the Progress Report of the OECD of September, 25th of that year, so, according to the international evaluation parameters in cannot be considered a tax haven.

Indeed, on the same subject, the Great and General Council of San Marino has approved, on July 22nd, 2011 the law n. 106, containing "Dispositions for the implementation of the tax assistance through the exchange of information" which seems to testify a real and

[209] URBANI A., *I rapporti economico-finanziari tra Italia e Repubblica di San Marino*, in M. Pellegrini, *Elementi di diritto pubblico dell'economia*, Padova, 2012, pag. 53

concrete approach of this legal system to the standard of exchange of information and of international disclosure; under the new discipline, indeed, the exchange of information on request is guaranteed by San Marino not only towards those countries with which the Republic has signed specific agreements of the administrative cooperation in tax matters, but also to those with which there are not reciprocal conventional obligations, as it has been recalled by Valente and Beccari[210].

To sum up, despite the margins of applicative elasticity that still characterize important segments of the San Marino banking and financial legislation and the lower incisiveness of certain provisions with respect to the Italian ones, in the last years there has been a significative commitment of the local authorities to provide the legal system of the small country with a framework of rules, in the matters of the economic and financial relationships with foreign countries, aimed at reaching a higher transparence and an increased international collaboration, in order to avoid that the international tools aimed at isolating the so-called off shore countries, characterized by a greater opacity in the field, could transform in damage the advantages traditionally assured by its enclave position.

[210] VALENTE P., BECCARI L., *Scambio di informazioni in materia fiscale: la nuova normativa di San Marino*, ne Il fisco, 2011, fasc. n. 1, p. 5187

5. The banking secrecy in the Vatican City state

The Vatican City State (or, for short, VCS), governed by the Holy See, is an enclave located in the city of Rome which attracts, on average, eighteen millions of tourists and pilgrims each year.

It enjoys the record of being the smallest country in the world, both in terms of population and of territorial extension; however, its importance in the international context it is not of the same size.

Indeed, beyond the interest of purely religious character, this country is under a constant monitoring of the world community for the huge cash flows and the considerable financial transactions that take place through the so-called "Vatican bank", the Institute for Works of Religion (the Italian acronym is IOR).

Over the years, this institute has been several times a source of embarrassment for the Holy See, due to accusations made for the activities carried out by it, including those of money laundering.

Just to mention an example of these days**,** there has been a scandal involving cardinal Becciu, which has been fired by the Pope for a serious crime in the Holy See: giving money of the offering to his brother.

This decision has been taken after the conclusion of the investigation on the property in London, which cost the Vatican 300 million euros; the banking account with which the operations to acquire the property have been carried out was managed by the secretariat of the Vatican state and, in particular at that time, by the cardinal himself.

In essence, as it has been expressed by Esposito[211], the account was not subject to external auditors; funds flowed into it coming from the St. Peter offerings and other entities.

The situation exploded when the Pope asked for total transparency on Vatican income and expenses; only then, he knew the content of the account, evaluate each movement and proceed with the investigation.

As mentioned above, due to the situation and the scandals that see the IOR as a means of laundering money and the continuous damages to the reputation of the Vatican City State, on December 30th, 2010 the first anti-money laundering law has been signed.

[211] ESPOSITO F., Il metodo truffaldino del cardinale Becciu, licenziato dal Papa, girava al fratello i milioni della beneficienza, 2020; http://www.genteditalia.org/2020/09/26/il-metodo-truffaldino-del-cardinale-becciu-licenziato-dal-papa-girava-al-fratello-i-milioni-della-beneficenza/

For sure, as Marcolin[212] pointed out, this date has marked a turning point in the history of the country, since it has been a sign of the will of the VCS to start a phase of change.
The reputational factor had an impact, but the decisive element for the drafting of the law was the monetary Convention signed on December 17th, 2009 by the European Union and the Vatican City, regarding the use by the latter of the euro as its own official money and abrogative of the previous monetary Convention of December 29th, 2000, with which the unique currency was introduced in the Vatican City, independently from the fact that the state is not pertaining to the European Union and it is not subjected by the EU regulations.
After this new regulation the Vatican City is committed to follow what has been established in the document, that contains rules of technical character, such as the maximum amount of forgeable coins, the value, the characteristics that they must have and so on.
However, of great importance is article n. 8, in which a series of measures are established; among these, at clause 1, letter b there are those regarding the prevention of money laundering, of frauds and of falsification of cash payment means, medals and statistical reporting requirements. In this way, the Vatican City has to comply with the EU anti-money laundering procedures, contained in the directive 2005/60/EC.
Another very important step towards the reach of a higher transparency in the Vatican City banking operations has been taken of April 1st, 2015, date in which the Holy See and the Italian government have signed an agreement on the exchange of tax information and on the financial transparency. In this way, as Moreno[213] recalled, the banking secrecy of the Vatican City has been cancelled.
With this Convention, indeed, the fight against tax evasion has made an important step forward; in the press release it has been said that "the Convention will allow the full compliance, with simplified procedures, to the tax obligation of the financial activities carried out in the entities that exercise in the Holy See held by physical and juridical persons that are physically resident in Italy".
This goal has been reached thanks to the reform climate promoted by Pope Francis, who found support also at the upper floors of the Vatican due to the strong will of a greater presence in the international agreements' framework.

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[212] MARCOLIN G., *La normativa antiriciclaggio dello Stato della Città del Vaticano*, 2013, pag. 76

[213] MORENO T., *Le implicazioni della fine del segreto bancario per il Vaticano*, Il cartello, 2015

However, the exemption from taxation of the properties of the Holy See is confirmed, to confirm the importance of the Lateran Treaty.

The main objectives to reach are two: the first one is the introduction of a double taxation, in a way that whoever invests money in the Vatican City has to pay taxes also in the residence country, hence, Italy.

The other step, that comes from the adoption of the European protocols of G5 (and this is the reason why the Vatican City has been willing to conclude the agreement), is the one of guaranteeing the automatic exchange of banking information on a simple request of the Revenue Agency and no longer by relying on difficult letter rogatory in search of hidden capitals through the IOR.

The pursued path was strongly wanted by Padoan which, through the promotion of the so-called "voluntary disclosure" has took steps to stop the banking secrecy, by signing relevant collaborations, among which that with the Vatican City, with areas considered as tax havens.

In practice, the norm establishes that the countries ready to sign a bilateral agreement with Italy for the exchange of information before 2017 can be cancelled from the "black list" of the non- collaborative countries and enter into the "white list"; for sure, these agreements represent a real cure for the Italian state budget.

As Moreno[214] pointed out, it is a little bit utopian to think that only through these maneuvers there can be a definitive resolution of the problems of tax evasion and money laundering, since tax havens will continue to exist, regardless of the efforts made; however, these agreements can be an excellent forerunner for the creation of a strong supranational authority which can concretely lead to rigid and effective controls on circulating money.

Focusing on the agreement between the Vatican City state and Italy, it has been welcomed with satisfaction by the Vatican itself, that, for once, wanted to show the whole world its concrete will to reach greater transparency, also thanks to the work of Pope Bergoglio, whose mandate is proving to be beneficial for the entire ecclesiastic organization

[214] MORENO T., *Le implicazioni della fine del segreto bancario per il Vaticano*, Il cartello, 2015

CONCLUSIONS

The aim of this paper has been to focus on and analyze an institute that is often perceived as a myth, the banking secrecy.

When asking the question "what is the banking secrecy?", it is not easy to give a precise and satisfying answer.

Indeed, this institute results clear and simple at the eyes of everyone, but it actually hides some insidious aspects that only a deep study of the topic can unveil.

This is to say that, as I have pointed out throughout the thesis, even if everyone refers to the banking secrecy and comment about is, in our country it has not found yet a clear legal basis that gives it its own clear identity and a precise formulation.

When searching for its foundation, different opinions of scholars believed that it could be found according to articles contained in the Consolidated Law on Banking, or in the Constitution, or in the verdict of the Court of Cassation.

The government has always had the duty to balance the private interests of the single individuals, and their right to privacy and confidentiality, with the public interests of the society.

For this reason, some limits have been given to the power of banking secrecy, such as the non-opposition in the field of criminal trials unless specified cases; also, exceptions have been provided to avoid and fight against the illicit behavior of people, since the secrecy cannot be an obstacle to the administration of justice.

Moreover, in the tax field, the evolution in the importance of the banking secrecy has been supported by the shared necessity to not cover activities of tax evasion or money laundering, since it is important the contribution to public expenditures.

There has been a development of the tax legislation regarding the banking secrecy, that over the time gave power to the tax authorities to make investigations on the operations carried out with clients, increasingly extending the number of operators under scrutiny and the categories of data possible to acquire.

A change has been made also at Community level, since in the modern global economy, the taxpayer take advantages of the peculiarities of the different tax systems; due to this, the goal of the European Union is to consolidate the cooperation among administrations, and it carries it out through the procedure of the exchange of information, that can be on request, automatic, or spontaneous.

Also, at international level, the OECD is active is pursuing this goal of collaboration.
Moreover, as it has been examined in the last chapter, even if each country has its own method to deal with the banking secrecy, the goal of governments is to stipulate international agreements; indeed, these changes are bringing to a weakening of the banking secrecy over the years, that is losing its reputation of impregnable fortress.
Hence, all countries are understanding the importance assumed by the fight against the organized crime and the subtraction from taxation, and they are ready to give up the power and the shield of the banking secrecy in order to achieve the objective.

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Venezia, 15 Ottobre 2020