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AN EVOLUTIONARY AND STRUCTURAL APPROACH TO COMPARATIVE TAXATION: THEORY, METHODS AND AGENDA FOR RESEARCH

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1. Taxation within the wider comparative debate on theory and methods

2. Theory of comparative taxation

- a. Specific aspects of “comparability” in taxation*
- b. An analytical approach: in search of a common base*
- c. A model of the evolution and structure of tax systems*
- d. Types and hierarchies of tax rules*
- e. Evolution of tax systems (synchronic and diachronic plane)*

3. Methods of comparative taxation

- a. Functional approach: models, “formants” and common core in tax law*
- b. Dynamics of tax formants; tax cryptotypes*
- c. Common core approach and its tax comparative uses*
- c. A sceptical view on the use of economic analysis of law in comparative taxation*
- e. Institutional approach and analysis of alternative tax solutions*

4. Perspectives for comparative tax research

- a. Static versus dynamic comparative taxation*
- b. Five challenges (evolutionary analysis, tax transplants; tax convergence/divergence, EU tax common core, EU taxation of group of companies)*

1. Taxation within the wider comparative debate on theory and methods

This paper is inspired by the need to adopt the comparative approach into the field of taxation, and is aimed at contributing to the general discussion on the theory and method of comparative law by adopting the lateral view a new field of comparative studies, “*comparative tax law*” (or “*comparative taxation*”). Indeed, with the exception of few pioneering works¹, there is no settled field of studies which can be labelled “comparative taxation”, while comparative legal studies in other areas have undergone intense development and diffusion².

¹ Ault, “Comparative Income Taxation: A Structural Analysis,” (2004); Beltrame and Mehl, “Techniques, politiques et institutions fiscales compares,” (1997); Thuronyi, “Comparative Tax Law,” (2003); Thuronyi, “Tax Law Design and Drafting,” (vol. 1, 2000).

² Numerous comparative books are available in different languages; just to mention a few, see for example: Von Mehren, “The Civil Law System, Cases and Materials for the Comparative Study of Law,” (1957); Gutteridge, “Comparative Law,” (1946); see also Lawson, “A Common Lawyer Looks at the Civil Law,” (1953); David, “Traite Elementaire de Droit Civil Compare,” (1950); Gorla, “Il Contratto; Problemi Fondamentali Trattati con il Metodo Comparativo e Casistico,” (1954); Zweigert and Kötz, “An Introduction to Comparative Law,” (Tony Weir transl. 2nd rev. ed. 1998); Costantinesco, “Traité de droit compare,” (1972); Schlesinger, Baade, Damaska and Herzog, “Comparative Law: Cases, Text and Materials,” (1988); David, “Major Legal Systems in the World Today,” (J. Brierly

National tax systems have developed at domestic level in response to social and political needs³, while at international level we have now a quite impressive body of literature, encompassing both domestic rules on international transactions (national systems of “*international tax laws*”)⁴, and international rules and principles (“*international law of taxation*”)⁵. These two areas overlap, share

transl. 3rd ed. 1985); Bogdan, “Comparative Law,” (1994); Decruz, “Comparative Law in a Changing World,” (2nd ed. 1995); Glendon, Gordon and Carozza, “Comparative Legal Traditions,” (1999); Gordon and Osakwe, “Comparative Legal Traditions,” (2nd ed. 1994); Merryman, Clark and Haley, “The Civil Law Tradition,” (2nd ed. 1994); Schlesinger, Baade, Herzog and Wise, “Comparative Law,” (6th ed. 1998); Von Mehren and Gordley, “The Civil Law Tradition,” (2nd ed. 1977); David and Brieley, “Major Legal Systems in the World Today,” (3rd ed. 1985). As to the comparative law journals, see for example: *Academie Internationale de Droit Compare*, *American Journal of Comparative Law*, *International Encyclopaedia of Comparative Law*, *Legal Systems Cyclopedia*, *Labels Zeitschrift*, *Revue Internationale de Droit Compare*. By contrast there is no academic journal of comparative tax law.

³ There are therefore various local approaches and doctrines on tax matters along the lines of the tradition of legal compendia (Watson, “The Importance of Nutshells,” 42 *Am. J. Comp. L.* 1 (1994). Legal features of tax systems are described in treaties, summaries and handbooks used in education and by scholars and practitioners. See for example: Bittker, Eustice and Goldstein, “Federal Income Taxation of Corporation and Shareholders,” (7th ed. 2000); Cooper, Kreyer and Vann, “Cooper, Kreyer & Vann’s Income Taxation, Commentary and Materials,” (4th ed. 2002); Coppens and Bailleux, “Droit Fiscal,” (2nd ed. 1992); Cozian, “Précis de fiscalité des entreprises,” (25th ed. 2001); Doralt and Ruppe, “Grundriss des Österreichischen Steuerrechts,” (2000); Grosclaude, “La doctrine fiscale en France,” vol. 1: 1987-1999 (2000), vol. 2: 1999-2002 (2003); Hamilton, Deutsch and Ranieri, “Guidebook to Australian International Taxation,” (7th ed. 1996); Jarach, “Finanzas Publicas y Derecho Tributario,” (2nd ed. 1996); Kahn, “Federal Income Taxation,” (4th ed. 1988); Kay and King, “The British Tax System,” (5th ed. 1990); Krishna, “The Fundamentals of Canadian Income Tax,” (6th ed. 2000); Perez, “Derecho Financiero y Tributario,” (9th ed. 1999); Rivier, “Droit fiscale Suisse: L’imposition de revenue et de la fortune,” (1980); Soler Roch, “Tax Law in Spain,” (2002); Tiley, “Revenue Law,” (4th ed. 2002); Tipke, “Die Steuerrechtsordnung,” (2nd ed. 2003).

⁴ Domestic systems of international tax laws are described in nutshells which resemble those on domestic taxation, but have a special attention to outbound and inbound transactions in respect to specific countries; see for example: Castagnede, “Précis de fiscalité internationale,” (2002); Easson, “Taxation of Foreign Direct Investment: an Introduction,” (1999); Gest and Tixier, “Droit fiscal international,” (1990); Huston, Miyatake and Beyer, “Japanese International Taxation”; Isenbergh, “International Taxation: U.S. Taxation of Foreign Persons and Foreign Income,” (3rd ed. 2002); Jacobs, “Internationale Unternehmensbesteuerung,” (5th ed. 2002); Kuntz and Peroni, “U.S. International Taxation,” (1991); Malherbe, “Droit fiscal international,” (1994); Oberson and Hull, “Switzerland in International Tax Law,” (2nd ed. 2002); Schaumburg, “Internationales Steuerrecht,” (2nd ed. 1998); Xavier, “Direito tributario internacional do Brasil,” (5th rev. ed. 2000); Tixier and Rohmer, “Fiscalité internationale des personnes physiques,” (1995); Valdes Costa, “Estudios de derecho tributario internacional,” (1978); Xavier, “Direito tributario internacional”; Villegas, “Curso de finanzas, derecho financiero y tributario,” (2002).

⁵ International law of taxation was initially developed in the first half of last century: Neumeyer, “Internationales Finanzrecht,” 14 *Zeitschrift f. int. Recht* 186 (1914); Bruins, Einaudi, Seligman and Stamp, “League of Nations Report on Double Taxation,” Financial Committee, Economic and Financial Commission, League of Nations, (1923); Van Themaat, “Internationaal Belastingrecht,” (1946); Chretien, “La recherche du droit international fiscal commun,” (1955); Buhler, “Internationales Steuerrecht und internationales Privatrecht,” (1960). These studies then developed at an increasingly faster pace: Ogley, “The principles of international tax: a multinational perspective,” (1994); Arnold and McIntyre, “International tax primer,” (2002); Qureshi, “The public international law of taxation,” (1994); Einaudi, “La Cooperation Internationale en Matière Fiscale,” *Académie de Droit International, Recueil des Cours*, (1928); Gest and Tixier, supra n. 4; Isenbergh, “International Taxation,” supra n. 4; Kerogues, “Droit Fiscal International,” (1979); Kingson, “The Coherence of International Taxation,” 81 *Col. L. Rev.* 1151 (1981); Knechtle, “Basic problems in international fiscal law,” (1979); Kole and Brown, “International Tax Transactions,” (1997); Lagae, “Inleiding tot the internationaal belastingrecht,” (1976); Lyons, “International tax glossary,” (1996); Malherbe, supra n. 4; Picciotto, “International business taxation, a study in the internationalization of business regulation,” (1992); Pires, “Quo vadis International Tax Law?” *Intertax* 394 (2002); Rieger, “Prinzipien des internationalen Steuerrechts als Problem der Steuerplanung in der multinationalen Unternehmung,” (1978); Rohatgi, “Basic International Taxation,” (2001); Schaumburg, supra n. 4; Vanistendael, “Reinventing source taxation,” *EC tax review* 151 (1997); Vogel, “Worldwide vs. source taxation of income—A review and re-evaluation of arguments,” *Intertax* 224 (1988); Vogel, “Unternehmensfinanzierung im Internationalen Steuerrecht,” (1995); Vogel, “Fiscal Obstacles to the International Flow of Capital Between a Parent and its Subsidiary, General Report,” *VIX Cahiers de droit fiscal international* 15; Wassermayer, “Doppelbesteuerungsabkommen,” (1997); Williams, “Trends in International Taxation,” (1994).

common concepts⁶, and are summarized in the jurisdictional rules which settle conflicts of national tax jurisdictions found in the OECD Model⁷.

National tax systems are now interconnected because of the increase international investment: we have witnessed an evolution both at national and transnational level, triggered by the work of international organizations, the development of the tax treaty network, the contributions of tax scholars, the creation of innovative domestic legislation for taxing transnational transactions (such as anti-tax havens rules, transfer pricing). Yet in this scenario the comparison of national tax systems has played a marginal role, while the main focus has been on the resolution of conflicts of tax jurisdictions and on the development of domestic regulatory patterns affecting cross-border transactions.

The fact that comparative taxation is still missing leads us to an important question: what can comparative taxation learn from comparative studies and what can it contribute to them? To answer this question one needs to look at the vast comparative legal literature, and thus the aim of the paper is twofold: (i) to lay down theory and methods of comparative tax law, by reviewing how the main approaches generally adopted in comparative legal studies can be used in this new area of research, and (ii) to propose perspectives for future comparative tax research on the basis of such theory and methods.

Comparative law has revealed important key features for the understanding of law as a global phenomenon, but there are several shortcomings which can be summarized as follows⁸:

- a) in comparative studies there is a predominance of private law, while public law and taxation are relatively unexplored⁹;
- b) comparative studies are often limited to describe foreign laws¹⁰ and a comprehensive explanatory framework which includes public law and taxation is missing¹¹;

⁶ Good examples, are, just to mention a few: Alpert and Van Raad, "Essays on International Taxation," (1993); Arnold and McIntyre, supra n. 5; Lindencroma et al. eds., "International studies in taxation: law and economics: Liber Amicorum Leif Mutén," (1999); Rohatgi, supra n. 5. Some of these studies specifically concern tax treaties, for example: Vogel, "Klaus Vogel on Double Taxation Conventions," (3^d ed. 1997); Baker, "Double taxation conventions and international tax law," (2001); Vogel, "Doppelbesteuerungsabkommen – Kommentar," (1996).

⁷ "Oecd Model Tax Convention on Income and on Capital"; Oecd, "Trends in international taxation," (1985); Oecd, "Issues in International Taxation No. 1: Four Related Studies," (1987); Oecd, "Issues in International Taxation No. 2," (1987); Oecd, "Taxing Profits in a Global Economy," (1991); Oecd, "Taxing International Business," (1997); Oecd, "Towards a global tax cooperation," (2000).

⁸ See Reimann, "The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century," 50 *Am. J. Comp. L.* 671 (2002).

⁹ New areas now begin to evolve, such as criminal law, constitutional law, civil procedure, administrative law.

¹⁰ Reimann, supra n. 8, at 672, notes that looking through the volumes of the American Journal of Comparative Law, one recognizes that the articles about foreign law outnumber those explicitly comparing two or more systems. There is a latent tendency to limit comparative law to the study of foreign laws (for example see: Merryman, "The Loneliness of the Comparative Lawyer," (1999), but there is now a general consensus on the fact that foreign law studies are not comparative law; see Reimann, "Stepping out of the European Shadow: Why Comparative Law in the United States must develop its own agenda," 46 *Am. J. Comp. L.* 637 (1998).

¹¹ Taxation is probably the field in which comparative materials on "foreign laws" are best arranged and best available. There are numerous journals (both academic and practice-oriented) which regularly address complex transnational and comparative issues (see for example: Tax Management International Forum, Tax Management International Journal, Tax Planning International Review Bulletin for International Fiscal Documentation, Bulletin for International Fiscal Documentation, EC Tax Review, European Taxation, International Tax and Public Finance, International Tax Journal, Intertax, Tax Notes International, Tax Planning International Review). Databases (such as the products of the International Bureau of Fiscal Documentation, the Harvard World Tax World Series, Tax Laws of The World), and websites (www. kluwerlaw.com; www. ibfd.nl) provide a wealth of information on domestic tax systems.

- c) comparative studies do not always adopt a systemic approach which addresses the operation of the legal system as whole, while taxation can only be understood in connection with such a systemic approach¹².

These shortcomings would somehow at surface level suggest that taxation is not yet a proper topic for comparative analysis. The scholarly debate in comparative studies however shows one very fundamental element: the need to combine *theory* and *method* to develop “a coherent and intellectually convincing discipline”¹³, which clearly encompasses all legal phenomena, including taxation. This paper is thus aimed at laying down the *theoretical basis* of comparative tax law, defining the *methods* which can be used to pursue comparative analysis, and providing the outlines of “comparative evolutionary analysis” (“CEA”) in taxation, a promising new field of studies. The paper endeavours to bridge the gap between taxation and comparative legal studies and shows that there is an “evolutionary structure” of national systems which can be studied by using comparative methods.

As to the *theory* (paragraph 2), the paper adopts as analytical approach to search for a common base of tax concepts by solving certain problems of non-comparability, and presents a model of tax systems which evidences that effective tax rules are created by a dynamic process occurring within each tax system, so that comparative tax analysis should be based on a clear understanding of the *structure* as well the *evolution* of tax systems. As to the *methods* (paragraph 3), the paper proposes a *functional approach* which looks at effective solutions adopted by different tax systems to similar tax problems and discusses on the use of formant approach, common core approach and economic analysis of law in comparative taxation, concluding that an *institutional approach* should be adopted in which alternative tax solutions are considered in a comparative setting.

The paper submits that comparative tax research should be methodologically eclectic and avail itself of all the facets of the functional approach. In this context the legal formants approach shows how effective rules develop at domestic level and diverge/converge at cross-border level, the common core approach reveals the actual patterns of tax convergence, while the institutional approach contributes to the understanding of circulation of tax models on the basis of their comparative efficiency. All these approaches, in turn, contribute to the study of evolution and circulation of tax models among different countries: tax models serve as a paradigm for tax policy discussion, and through the continuous change of statutory law as well of administrative guidelines and case law, circulate among domestic systems. The paper therefore evidences that a functional approach should be adopted in which the functions of tax rules in different systems are revealed and reconstructed in coherent tax models which can be effectively compared showing patterns of divergence or convergence.

The paper also argues that comparative studies should not be limited to artificially isolated topics but should include *legal systems considered as complex evolutionary structures*. This implies that one should focus on effective solutions to legal problems conceived as the result of interactions of basic elements of law-in-action, namely case law, administrative guidelines, legal doctrine, as well as statutes and regulations. Indeed the very one thing which characterizes comparative law as belonging to mainstream social science is the functional approach¹⁴ and thus the paper generally

¹² Gerber, “System Dynamics: Towards a Language of Comparative Law?” 46 *Am. J. Comp. L.* 719 (1998); Pizzorusso, “Sistemi Giuridici Comparati,” 343 (1995); Legrand, “John Henry Merryman and Comparative Legal Studies: A Dialogue,” 47 *Am. J. Comp. L.* 25 (1999).

¹³ Reimann, *supra* n. 8, at 673.

¹⁴ The functional approach is truly a paradigm in Kuhn’s sense; for a comprehensive summary, see Reimann, *supra* n. 8 at 673: “today, we understand that when we compare rules, we must take a functional approach, i.e., analyze not only what rules say but also what problems they solve in their respective legal systems. We realize that we need to consider rules in context, i.e., at least within the existent procedural and institutional frameworks and, if we want to

adopts such an approach: tax rules constitute solutions to problems, serve specific functions and lead to the emergence of “*tax models*” (for the definition of “*tax models*” see below page...).

Finally one endeavour is truly common to comparative legal studies and to the new field of comparative taxation: the need to move beyond the idea that comparison is a just a method or a special technique¹⁵. Comparative tax law should not be viewed simply as a different way of looking at tax issues, but as a separate discipline, strictly hinged to a theoretical framework¹⁶. Indeed in comparative studies at large there an intense debate on theoretical foundations is under way and many scholars support a systemic approach. This paper contributes to such a debate by proposing that comparative taxation is based on the *a theory of the evolution and structure of tax systems* which shows which tax models circulate, and how they circulate.

Comparative taxation thus adopts an *evolutionary and structural approach* which can be summarized in the following tenets:

- a) comparative taxation is secured to an explanatory framework, i.e. a *theory of the evolution and structure of tax systems* and look at how tax systems as a whole work;
- b) comparative tax research is methodologically eclectic within the ambit of the *functional approach*¹⁷;
- c) comparative taxation primarily looks at *legal transplants*, rather than static comparisons of statutes;
- d) domestic tax change is viewed as the result of *circulation of models* among countries.

In short “hard-nose comparative work” in tax matters should not be limited to the study of foreign tax laws, but requires an underlying theory and reliable methods¹⁸. Comparative research is then to be judged according to the usual standards of comparative research: generality of the scope of the issues, accuracy in explaining the variation of collected data, parsimony in identifying the key explanatory propositions, falsifiability of propositions based on facts and not on value-judgements, capability of insight in terms of new research¹⁹. As to the methods, they should be flexible and within the ambit of the functional approach.

The establishment of a common framework for comparative taxation requires that the research community shares an agenda for future comparative tax work, and paragraph 4. of the paper is devoted to this issue. The paper distinguishes between static versus dynamic comparative taxation (paragraph 4.a.): research in the former field may lead to important insights as to the formation of tax families, but it is the research in the latter field that opens up a new set of relevant issues as it focuses on change of regulatory tax patterns, interdependence of tax systems and circulation of tax models. The paper concludes (paragraph 4.b.) that these issues contribute to set a possible agenda

grasp their deeper meanings, also within their socio-economic and cultural environments. And we know that we must observe not only the law on paper but also the law in action, i.e., the application and interpretation of rules and their true force and effect including, perhaps, their impotence. In short, we know that we must go way beyond mere rule comparison. These insights may have been novel three generations ago but, today, every self-respecting comparative lawyer can be expected to know them. If they are often ignored, this is not due to a lack of established knowledge, only to ignorance or indifference in practice”.

¹⁵ Often comparative law is viewed just as a technique, a loose approach to law which considers not only municipal law; for example: Gutteridge, “Comparative Law,” supra n. 2, at 1; Kahn-Freund, “Comparative Law as an Academic Subject,” 82 *L. Q. Rev.* 40 (1996); Schlesinger, Baade, Herzog and Wise, “Comparative Law,” supra n. 2; Zweigert and Kötz, “Introduction to Comparative Law,” supra n. 2; Merryman, supra n. 10.

¹⁶ Gordley, “Is Comparative Law a Distinct Discipline?” 46 *Am. J. Comp. L.* 607 (1998).

¹⁷ See for example: Widner, “Comparative Politics and Comparative Law,” 46 *Am. J. Comp. L.* 739 (1998).

¹⁸ In this sense: Mattei and Reimann, “New Directions in Comparative Law,” 46 *Am. J. Comp. L.* 597 (1998); Reimann, supra n. 8. There is however an opposite loose non theoretical approach, see for example: Tallon, “Quel droit compare pour le XXIeme siecle?” 703 *Revue de Droit Uniforme* 705 (1998).

¹⁹ These criteria are proposed by Widner, supra n. 17, at 133.

for future comparative tax research and envisages “*five challenges for comparative taxation*”: to provide a theoretical basis for *comparative evolutionary analysis* (“CEA”); to develop the analysis of *tax transplants*; to study *tax convergence and divergence* within a strategic equilibrium framework encompassing the tax policies of different countries; to identify an *evolutionary map for EU corporate taxes* revealing a common core, and to define a *EU common model of tax consolidation of group of companies* on which agreement could be reached through reinforced cooperation.

2. Theory of comparative taxation

a. Specific aspects of “comparability” in taxation

As in other areas of comparative studies, comparative taxation faces the issue of “comparability”²⁰; there are four aspects related to the peculiar nature of taxation which make comparative work particularly difficult.

First aspect: comparative tax research does not amount to just collecting legislative material of different tax systems, but should instead consist of a set of interconnected stages: (i) selection of methodological approaches, (ii) collection statutory materials, and of case law, administrative guidelines, and legal doctrine in the different national tax systems, and (iii) explanation of the data through a coherent model. Comparative taxation is not just the description of different national tax legislations, rather its focuses is the comparison of different tax systems in their structural complexity (see below paragraph 2.c.).

Second aspect: the task of comparing statutory tax is materially impossible because the legislative change of tax statutes in the various countries is very rapid²¹. This constitutes a material constraint more relevant in taxation than in other legal fields, and indicates that the goal of comparing tax legislations as such is not viable for practical reasons.

Third aspect: the level of *complexity* of domestic tax legislation leads to regulatory structures which are quite different in different countries, and this makes it very difficult to define exactly what is being compared. Tax systems appear as unextricable skeins, Chinese puzzles not intelligible from the outside, so that it is not possible to extract legal structures which are readily comparable: the tax complexity of individual domestic systems makes it difficult not only to understand the actual operation of each system, but also to discern which features of different systems should be compared.

The primary question is: “why at the level of a single country tax structures are so complex” and the answer to this questions is based on a simple principle: there are common structures that govern the generation of a variety of fiscal institutions and taxes, independent of the details of each domestic system.

²⁰ Wroblewsky, “Problem of Incomparability in Comparative Law,” 53 *Riv. Int. Fil. Dir.* 92 (1976); Sacco, “Legal Formants, a Dynamic Approach to Comparative Law,” 39 *Am. J. Comp. L.* 1 and 343 (1991).

²¹ The existing tax databases contain updated materials and basic descriptions of the tax systems; this enables the user just to study the foreign tax laws, but no to compare them.

Thus tax complexity can be explained through the following summarized model: within a tax system providing differentiated treatments,²² taxpayers naturally take an opportunistic behaviour and select that behaviour which is tax-favoured by taking advantage of distinctions found in statutory tax language and in alternative procedural setting (“*self-selecting behaviour*”). This behaviour increases of *costs of control* by tax authorities. Government, in order to economize such administration costs, implement rules in which heterogeneous taxpayers are grouped for the purposes of taxation, so as to minimize the variance of characteristics distinguishing individuals within each group; the outcome is a “*sorting equilibrium*” which is quite unstable. The combination of the three elements (self-selecting behaviour, administration costs and sorting equilibrium) is the relatively simple cause of the sheer complexity of tax rules at domestic level²³.

Fourth aspect: “tax concepts” used at domestic level cannot be compared directly, as they are often not readily convertible into each other. For example a term such as “due process of law” in the area of taxation may be used locally in a national tax tradition which may not coincide with the meaning of similar terms used in other countries; in these cases similar terms do not have the same legal meaning. In other cases different terms may have the same legal meaning²⁴. As a consequence of this, the comparison of tax concepts of different domestic tax traditions can be carried out only if an adequate analytical framework is adopted which allows to bridge the gap created by language/cultural legal barriers and by local conceptual distinctions²⁵.

As a result of these four aspects of “comparability”, criticism is often expressed as to the actual viability of comparative taxation. In particular it is a common belief that the complexity of tax legislations, the rapid change of regulatory patterns, and the peculiarities on national tax cultures are a major obstacle to effective comparison. Comparative taxation should therefore take an evolutionary approach and not just study foreign tax laws.

Comparative analysis is meaningful under the condition of being “evolutionary”, that is being aimed at finding which elements of a given domestic tax mechanism have developed domestically and which have not. This analysis provides a “conjectural history” of a domestic tax mechanisms adopted in a given country by linking it to a tax model²⁶, so that the problem of non-comparability due to the complexity of domestic tax mechanisms is solved: structural elements are identified by reference to tax models, even if they are imported from tax mechanisms of other countries

²² Differentiated treatments depend on the type of income, the vehicle, the timing of transaction, in complex patterns of tax planning; see: Scholes, Wolfson, Erickson and Maydew, “Taxes and Business Strategy: a Planning Approach,” (2005).

²³ On tax complexity: Kaplow, “A Model of the Optimal Complexity of Legal Rules,” 11 *Journal of Law, Economics and Organization*, 150 (1995); Kaplow, “How tax complexity and enforcement affect the equity and efficiency of income tax,” in Slemrod, “Tax policy in the real world,” *Cambridge University Press* (1998); Warskett, Winer and Hettich, “The Complexity of Tax Structure in Competitive Political Systems,” 5 *International Tax and Public Finance*, 127 (1998).

²⁴ See for example the analysis of common law vs statute law: Atiyah, “Common Law and Statute Law,” 48 *Mod. L. Rev.* 1 (1985); Calabresi, “A Common Law for the Age of Statutes,” (1982); Glenn, “La civilisation de la common law,” 3 *Rev. Int. Droit Comp.* 595 (1993); Lipstein, “Common Law Courts in the Age of Statutes,” *La Sentenza in Europa*, (1988); Rubin, “Common Law and statute law,” 11 *J. Leg. Stud.* 205 (1982).

²⁵ Glenn, “Are Legal Traditions Incommensurable?” 49 *Am. J. Comp. L.* 617 (2001); Sacco, supra n. 20, at 10; Sacco, “Les Problèmes de traduction juridique,” in *Rapports Nationaux italiens au XII congrès*, (1986); Schroth, “Legal translation,” 34 *Am. J. Comp. L.* 47 (1986).

²⁶ The fact that current domestic taxes differ in their specific features should not lead to the wrong idea that there is no link between underlying tax models and such current rules. For a clear exposition of the causes leading to legal diversity: Sacco, “Diversity and Uniformity in the Law,” 49 *Am. J. Comp. L.* 171 (2001).

We therefore need a *systemic approach*²⁷: to carry out comparative tax analysis one should consider not only statutory rules, but also the “*processes*” leading to the creation and implementation of rules (both singular and general rules, see below paragraph 2.d.). In short, “systemic elements” relate to the connection between a specific set of legal rules with other sets of legal rules within the tax system, while “processes” relate to evolutionary structures of tax systems, whereby singular and general tax rules are created and implemented. For example it is not possible to compare only domestic statutory taxing rules on mergers, but it is necessary to consider, for example, the rules on realization of capital gains (“systemic elements”); furthermore one should extend the comparative analysis to procedural rules, such as ruling or anti-avoidance rules and principles (“processes”), and so on.

b. An analytical approach: in search of a common base

To understand how “processes” and “systemic elements” can be compared, one should distinguish between the rules making up the domestic tax system and the set of principles and concepts which make it possible to describe such rules as a system. This set of principles is usually expressed in national languages using local conceptual taxonomies and leads to different local “*tax legal doctrines*”²⁸.

To clarify what we mean by “tax legal doctrine”, we need to make recourse to legal theory, adopt an *analytical approach*²⁹, under which tax law is considered as a set of discourses on tax rules³⁰. If one distinguishes between “*language*” (tax rules) and “*meta-language*” (discourse on the rules), *tax law* is considered here as the *discourse on tax rules*, and not only as the mere set of tax rules as they can be found in statutory materials.

It is therefore correct to distinguish between *tax law as such* (the set of tax rules), and *tax legal doctrine* (the science whose object are the tax rules). We should therefore view tax doctrine as a set of principles which makes it possible to understand the law as a *complex institutional framework*.

Tax legal doctrine shapes tax law-in-action. First, it serves an *explanatory function*, which makes it possible to understand the tax system as a whole, thereby enabling the management of the chaotic mass of statutory materials, case law and administrative guidelines continuously changing over time³¹. Second, it serves an *euristic function*, as it provides interpretive frameworks which solve conflicts of rules and fill the gaps of the system, making it possible to reach a level of “tolerable uncertainty” of tax law³². Finally, it serves a *prescriptive function*, as it sets out the criteria to decide the so called “hard cases” by establishing “the conditions of what is legally conceivable”³³.

One can therefore distinguish between two levels of tax doctrine: *first-level tax doctrine* and *second-level tax doctrine*. First-level tax doctrine develops those basic concepts having a wide scope, often proposing alternative views of tax laws; this is usually found in the work of tax scholars. By contrast, second-level tax doctrine develops techniques which make it possible to solve specific cases and to implement tax rules; this is usually found in case law, administrative

²⁷ Gerber, supra n. 12; Reimann, supra n. 8.

²⁸ Synonyms of “legal doctrine” are “jurisprudence,” “Dogmatik,” “legal theory”.

²⁹ Stroll, “Twentieth-century analytical philosophy,” *Columbia University Press* (2000); Ross, “On law and justice,” (1958); Wittgenstein, “*Tractatus logicus-philosophicus*,” Chapter IV (1934).

³⁰ Jori, “Legal Positivism,” (1992).

³¹ Luhman, “*Rechtssystem und Rechtsdogmatik*,” (1974).

³² Luhman, “*Rechtssoziologie*,” Chapter 2 (1987); Alchourron and Bulygin, “Normative systems,” (1972).

³³ Dworkin, “Taking Rights Seriously,” *Harvard University Press* (1977).

guidelines and lawyers' briefs. In a continuous process, second-level tax legal doctrine takes from first-level tax legal doctrine basic concepts to apply them to specific cases, and first-level tax legal doctrine absorbs specific solutions from second-level tax legal doctrine and makes them generally applicable to future cases³⁴.

Tax law-in-action therefore is the outcome of first and second level tax legal doctrine as implemented by agencies, courts, lawyers, scholars in law-in action. Tax legal doctrine is a discourse *on the law* which takes place *within the law*, and can be easily distinguished from meta-legal or extra-legal discourses, such as sociology of tax law, economic analysis of tax law, etc.

This digression makes it clear that tax concepts found in local tax doctrines can be compared, *provided however that* they are considered as basic elements of tax-law-in action. Tax concepts should be perceived in their reciprocal comparison, and not by considering local concepts: the concept of tax avoidance in Germany cannot be explained by using the concept of tax avoidance in the U.K., for example. Quite often local tax lawyers assume that foreign solutions are radically inconsistent with those of their own tax system, but comparative tax law challenges these assumptions³⁵.

In comparative taxation one therefore should consider the distinction between first and second level doctrine and to compare domestic concepts at the same level. First level principles may be compared, leading to generally explicative comparative analysis (for example on constitutional tax rules), whereas second level principles may be compared, leading to sector-specific explicative comparative analysis. For example it is not possible to compare the Anglo-Saxon doctrine of substance over form with the continental doctrine of abuse of law, but it can be useful to compare how these doctrines emerged at domestic level as "anti-avoidance approaches" by operation of statutes, courts, agencies or scholars and verify whether reception occurs in a cross-border situation³⁶.

c. A model of the structure and evolution of tax systems

In this paragraph we will provide a model which can be applied to tax systems and which accounts for their *evolutionary structure*. Through this we will prove that comparative taxation is based on legal theory³⁷. We do not need here a "grand theory"³⁸, but a theory of law which specifically serves the purpose of comparative tax analysis: *analytical legal philosophy* serves this purpose³⁹.

In the analytical approach, theory of law is the analysis of prescriptive language; such a theory of law is therefore a *discourse on legal concepts*, i.e. a meta-language having as its object the legal

³⁴ This is a feedback or auto-catalytic process, on which: Teubner, "Law as an Autopoietic System," (1995); Georgescu-Roegen, "The entropy law and the economic process," *Harvard University Press* (1971).

³⁵ Fletcher, "Comparative Law as a Subversive Discipline," 46 *Am. J. Comp. L.* 683 (1998); Muijt-Watt, "La Fonction Subversive du Droit Compare," *Revue Internationale de Droit Compare* 503 (2000).

³⁶ The interaction between first-level tax doctrine and second-level tax doctrine does not occur exclusively domestically, but also between countries. For example it may be useful to reconstruct the development of substance over form in the U.S. and U.K. to verify whether substance over form has been adopted as an hermeneutic approach in continental tax traditions; see for example Ault, *supra* n. 1, at 1, 33, 50, 70, 132, 153.

³⁷ Gordley, *supra* n. 16, at 607.

³⁸ Alford, "On the Limits of Grand Theory in Comparative Law," 61 *Washington Law Review* 945 (1986).

³⁹ There are different theories of law which include, for example, kelsenian pure theory of law, legal positivism, legal realism, institutionalism, economic analysis of law, and so on; see: Harris, "Legal Philosophies," (1997).

doctrine⁴⁰. According to the analytical approach the object of theory of law is not the law as a set of rules, but the study of law-in-action as a system.

There are therefore three *levels of language* involved here: (i) *level 1*: the language of the legislator, i.e. the positive legal rules, (ii) *level 2*: the meta-language of local legal doctrine, and (iii) *level 3*: the meta-meta-language of theory of law. Despite the apparent chaos of existing tax legislations and tax laws-in action (level 1), legal scholars develop viable concepts of tax law in national contexts (level 2), while legal theorists discuss on such concepts irrespectively from national contexts (level 3).

A general discourse on tax law at comparative level overlaps with general theory of tax law; as a result comparative taxation aims at providing an *explicative framework for comparing domestic solutions*, and therefore is a type of analytical theory of law. When analytical theory of law is used in comparative analysis, it is possible to “de-contextualize” concepts developed by national tax doctrines and make them truly comparable in a theoretical discourse which has also practical purposes⁴¹.

Theory of law also serves an additional important purpose in comparative taxation, as it shows how tax law evolves (in short: the *evolutionary structure of tax systems*). It is possible to define a general explicative framework of the evolutionary structure of taxation which is the prerequisite for comparing positive rules and local tax concepts. A model of the evolutionary structure of taxation is a conceptual construct that serves as *explicative framework*⁴²: once a model is adopted it readily serves at the means to carry out comparative analysis and to deal with the four aspects of incomparability outlined above. The model adopted here is based on hierarchies of rules.

d. Types of hierarchies of tax rules

The *structure of tax law* is defined by hierarchies of tax rules; in particular a widely accepted model of the tax system is based on the distinction between *primary tax rules* and *secondary tax rules*.

Primary tax rules are prescriptive statements directly aimed at taxpayers imposing obligations or duties⁴³; primary tax rules are mainly restrictive rules specifying the requirements for taxation (which are generally found in tax statutes and regulations), but may also be derogatory rules allowing for exceptions, relief, or elections. Primary tax rules can be *general tax rules* (i.e. directed to many recipients) as well as *singular tax rules* (i.e. directed to one recipient).

⁴⁰ Jori, supra n. 30.

⁴¹ On the combination of comparative law and legal theory see: Legrand, “Comparative Legal Studies and Commitment to Theory,” 58 *Modern Law Review* 262 (1995); Battifol, “Droit comparé, droit international privé et théorie générale du droit,” *Rev. intern. droit compare* 661 (1970); Zimmermann, “Savigny’s Legacy. Legal History, Comparative Law, and the Emergence of a European Legal Science,” 53 *The Law Quarterly review* (1996); see, e.g.: Merryman, Clark and Haley, “The Civil Law tradition,” cit. supra n. 2, at 1; Twining, “Globalization and Legal Theory,” 185 (2000); Reimann, “The End of Comparative Law as an Autonomous Subject,” 11 *Tul. Eur. & Civ. L. Forum* 49 (1996); Ewald, “Comparative Jurisprudence (I): What Was It Like to Try a Rat?” 143 *U. Pa. L. Rev.* (1989); Zekoll, “Kant and Comparative Law-Some Reflections on a Reform Effort,” 70 *Tul. L. Rev.* 2719 (1996); Merryman, supra n. 10; Samuel, “Comparative Law and Jurisprudence,” 47 *Intl. & Comp. L. Q.* 817, 827.

⁴² Searle, “The Construction of Social Reality,” (1995).

⁴³ Hart, “The Concept of Law,” *Clarendon Press*, 78 (1961); Hohfeld, “Fundamental legal conceptions as applied in juridical reasoning,” 26 *Yale Law Journal*, 710 (1917).

General tax rules are created *ex ante* by institutions with proper powers (law-makers or governmental agencies), take the form of statutes or regulations, are related to transactions which occur after their enactment and are based on broad discretionary power (political discretion). Singular tax rules are created *ex post* by institutions with proper powers (local offices of the tax administration and tax courts), take the form of judicial and administrative decisions (including tax settlements), and are based on exercise of different types of discretionary power (administrative discretion).

*Secondary tax rules*⁴⁴ confer normative powers and lead to the creation or variation of duties and obligations. A class of secondary tax rules is made by constitutional rules which prescribe the institutions which have the power to tax and specify how such power can be exercised, in particular those rules attributing legislative tax powers; another type of secondary tax rules are those attributing to tax administration the power to enact regulations (general tax rules) or specific binding decisions (singular tax rules). Primary rules are enacted because there are secondary rules that attribute the underlying rule-making power to specific institutions; valid primary rules are those approved through the procedures set for the legislative process.

One can combine the distinction “general/singular tax rules” and the distinction “primary/secondary tax rules”, and can therefore distinguish between *primary (general or singular) tax rules* and *secondary (general or singular) tax rules*. Primary (general or singular) tax rules directly concern the taxpayers’ behaviour (these can be defined in short as *taxing rules*). Secondary (general or singular) tax rules concern other primary general or singular tax rules (these can be defined in short as *structural tax rules*). In conclusion a tax system is the set of *primary* and *secondary rules* in a given moment.

Because of the operation of secondary rules, a tax system is a set of primary/secondary rules organized in a *hierarchical structure*⁴⁵. A hierarchy is a relation of two elements in which one element (at lower hierarchical level) depends on the other element (at higher hierarchical level). Thus a *legal hierarchy* is a relation between a higher secondary rule and a lower rule (which may be a secondary/primary rule or a general/singular rule), as the lower rule is validly enacted on the basis of the powers attributed to a rule-making body by the higher secondary rule. The secondary rule creates the legal hierarchy, as the validity of the lower rules depends on the higher rule.

One can therefore distinguish among different types or *hierarchies* within a tax system:

- a) a relationship between a higher general rule and a lower general rule⁴⁶;
- b) a relationship between a higher general rule and a lower singular rule⁴⁷;
- c) a relationship between a higher singular rule and a lower singular rule⁴⁸;

As a general principle *legal validity* in relation to tax rules is determined by *hierarchical structures*, as follows:

⁴⁴ Hart, “The Concept of Law,” supra n. 43, at 79.

⁴⁵ The idea the law has a hierarchical structure is typically advanced by legal positivism: Kelsen, “General Theory of Law and State,” (1945); Kelsen, “Reine Rechtslehre” (1934); Kelsen, “What Is Justice?” (Harteny transl. 1991); Kelsen, “Pure theory of law,” *University of California Press* (1970); Raz, “Practical Reason and Norms,” *Princeton University Press* (2nd ed. 1990); Raz, “The authority of law,” *Clarendon Press* (1979); Raz, “The morality of freedom,” *Clarendon Press* (1986).

⁴⁶ An example of type a) is the following: a regulation is issued pursuant to statutory rules.

⁴⁷ An example of type b) is the following: a statutory rule attributes to tax administration specific powers to issue decisions, such as tax audits, private rulings or settlements (singular rules).

⁴⁸ An example of type c) is the following: a decision (singular rule) issued by an authority attributes to a lower authority specific powers to issue a decision (singular rules) according to certain procedures and/or standards.

- a) a statutory rule (lower general rule) is valid if it complies with the constitutional rule (higher general rule), either in terms of due legislative process or compliance with required standards for exercise of discretionary powers (political discretion);
- b) a regulation (lower general rule) is valid if it complies with the statutory rule (higher general rule), either in terms of due process, or compliance with required standards for exercise of discretionary powers;
- c) a decision by a court or an administrative agency (lower singular rule) is valid if it complies with the constitutional or statutory rule (higher general rule) either in terms of due administrative process or compliance with required standards for exercise of discretionary powers.

There are also “tangled hierarchies” when both primary and secondary rules belong to the same hierarchical level, for example in a contract or a statute in which secondary rules regulate the recognition of primary rules as applicable to future situations (so called “incomplete contracts”)⁴⁹.

e. Evolution of the systems (synchronic and diachronic plane)

The hierarchical relationship between (singular/general) rules created by secondary rules accounts for the *structure* of the tax system; this model of the structure however does not take in account that rules change over time and that there *evolution* of the system. Change of tax rules within the tax system determines an *evolutionary structure* of the system. In other terms, the hierarchical structure of the tax system operates on the *synchronic plane*, i.e. it accounts only for the structure of the system in a *single moment of time*, while on the *diachronic plane* the tax system should be regarded in *different moments of time*.

It should be clarified, however, that, in a given moment of time (in the *synchronic plane*), the tax system is composed by (i) *one set of valid general rules*, and (ii) *different sets of singular rules*. General rules validly enacted according to hierarchical structures continue to be so until they are abrogated or declared invalid⁵⁰. By contrast, the different sets of singular rules are derived either from general rules, or from previous singular rules through a continuous process “from the bottom” which introduces new rules in the system⁵¹. An example of a singular rule derived from general rules is when a singular rule is interpreted by two different courts or administrative agencies differently, so that in that moment there are two different singular rules derived from the same general rule; it is so because any general rule, when applied with reference to a specific fact situation, generates a singular rule. An example of a singular rule derived from a previous singular rule occurs in common law systems when a two different singular rules are enacted by two different courts through legally binding decisions making reference to the same precedent.

On the *diachronic plane* the tax system evolves because *new general and singular rules are created*; therefore if one considers the tax system in subsequent moments of time, the tax system is seen as being made by *different sets of rules which follow one another*. The tax system evolves because new rules are introduced and old rules are eliminated or substituted. In conclusion, the tax system evolves because of *diachronic change* (time 1, time 2, time *n*) of general and singular rules,

⁴⁹ Teubner, “Breaking Frames: The Golden Interplay of Legal and Social Systems,” 45 *Am. J. Comp. L.* 164 (1997).

⁵⁰ Please note that those general rules which become invalid at a later stage retroactively by operation of judicial or constitutional review, originally are valid.

⁵¹ Cappelletti, “The Doctrine of Stare Decisis and the Civil Law: A Fundamental Difference or no Difference at all,” *Fest. Zweigert* 381 (1981); Mattei, “Stare Decisis,” (1988).

but also because of *synchronic emergence* (time 1) of different sets of singular rules (rule 1, rule 2, rule *n*).

The tax system continuously creates new singular rules with reference to specific fact situations and thereby it carries a pervasive innovative force: any fact situation can be governed by a singular rule. Moreover, depending on the authority enacting the rules or the legal process adopted, such singular rules can belong to two basic types:

- a) a *unilateral (jurisdictional or administrative) singular rule*, which is the result of a court decision or of an administrative agency;
- b) a *bilateral (jurisdictional or administrative) singular rule*, which is the result of a settlement or agreement by tax authorities and taxpayer within a jurisdictional or administrative process.

When the tax system evolves through *unilateral singular or general rules*, evolution is driven “*from the top*” by government institutions, while when it evolves through *bilateral singular rules* evolution is driven “*from the bottom*” by subsequent sets of games leading to evolutionary stable strategies⁵².

This *evolutionary structure* of the system shows that there is *diachronic and synchronic change of both general and singular rules at the level of each country*. As a consequence, comparative analysis must address not only the general rules in a given moment of time, but also general rules in different moments of time, as well as singular rules as they aggregate in a given moment of time and in different moments of time. We can say, using a metaphor, that comparative taxation should address the “*evolutionary domestic trends*”: statutes, regulations, court and administrative decisions, unilateral and bilateral singular rules, and any other kind of source of tax law. As a result comparative taxation requires a *dynamic analysis of the sources of law* of the different legal systems involved⁵³ and encompasses both legal and political processes⁵⁴.

For example in comparative taxation it does not make sense to compare in a straightforward way Anglo-Saxon substance over form with continental abuse of law, but it makes sense to compare the actual legal processes through which such approaches take place. Moreover tax settlements between taxpayers and tax authorities in different countries cannot be compared, unless one clarifies first which are the procedural frameworks within which these agreements occur.

3. Methods of comparative taxation

a. Functional approach: models, “formants” and common core in tax law

By adopting an analytical approach we can make local tax concepts homogeneous; by considering the evolutionary structure at diachronic and synchronic plane of both general and singular rules we

⁵² The coherence of law is particularly evident in the evolution of common law, on which there is an ongoing debate: Rubin, “Why is the Common Law Efficient?” 51 *J. Leg. Stud.* 51 (1977); Priest, “The Common Law Process and the Selection of Efficient Rules,” 6 *J. Leg. Stud.* 65 (1977); Goodman, “An Economic Theory of the Evolution of the Common Law,” 7 *J. Leg. Stud.* 393 (1978); Heiner, “Imperfect Decision and the Law: On the Evolution of Legal Precedent and Rules,” 15 *J. Leg. Stud.* 227 (1986); Rizzo, “Change in the Common Law: Legal and Economic Perspective,” 9 *J. Leg. Stud.* (1980); Gennaioli and Shleifer, “The evolution of common law,” 115 *Journal of Political Economy* 1 (2007). For a very comprehensive account see: Elliott, “The evolutionary tradition in jurisprudence,” 85 *Columbia Law Review*, 38 (1985). The issue of coherence of law is also posed by comparing common law and statute law: Atiyah, supra n. 24; Calabresi, supra n. 24; Glenn, supra n. 24; Lipstein, supra n. 24; Rubin, supra n. 24.

⁵³ Gerber, supra n. 12.

⁵⁴ Gordley, supra n. 16, at 607-8.

can also make tax systems homogeneous. We can now shift from the theory to the *methods of comparative taxation*.

The debate on methods has a long tradition in comparative law; some scholars conceive comparative law as communication among legal cultures⁵⁵, others as a challenge to legal positivism⁵⁶, other as a “legal science”⁵⁷ or as law-in-action⁵⁸. Others scholars adopt a systemic approach⁵⁹ or focus on legal change⁶⁰, while other scholars are interested to the distinction between common law *and* civil law tradition⁶¹. Despite the different approaches, the discussion on methods is central in comparative legal studies⁶², as well as in comparative taxation.

The ongoing debate on methods when referred to tax matters can be summarized in a simple proposition: the goal of comparative taxation is to identify *analogies* and *differences* of domestic tax systems, and the method should therefore be based on the *functions* of tax rules within the common structural framework of these different national tax systems. The functional method can be applied at domestic level to study the impact of tax rules⁶³, but the comparative perspective allows to *compare the functions of rules in different systems*, thereby indicating *potential alternatives to domestic solutions*. This feature connects traditional comparative analysis of rules to innovative comparative analysis of systems and institutions⁶⁴.

Functional analysis addresses the evolutionary structure of domestic tax systems with reference to both singular and general rules, and explains how tax law-in-action solves tax problems in different countries. Sets of tax rules solve specific “*tax problems*” and can be defined as “*tax models*” or “*tax*

⁵⁵ Ancel, "Quelques considérations sur les buts et les méthodes de la recherche juridique comparative," in Rotondi, "Scopi e metodi del diritto comparato," 11 (1973); Ancel, "Quelques réflexions sur l'évolution et la situation présente des études comparatives," in "Festschrift für W. Wengler zu seinem 65 Geburtstag," 2 *Interrecht* (1973); Ancel, "Réflexions sur la recherche et sur la méthode comparative," in "Fest. F.M. Rheinsteins zum 70 Geburtstag," (1969).

⁵⁶ Cappelletti, "Comparative Law Teaching and Scholarship: Method and Objectives," in "Scritti in onore di R. Sacco," (1994); Cappelletti, "Le Droit Comparé et son Enseignement face à la Société moderne," in M. Rotondi, "Inchieste di diritto comparato," (1973).

⁵⁷ Gerber, *supra* n. 12, at 719; Stein, "Uses, Misuses and Nonuses of Comparative Law," 72 *Northwestern University Law Review*, 198 (1977); Kahn-Freund, "On Uses and Misuses of Comparative Law," 37 *Modern Law Rev.* 1 (1974); Zweigert and Kötz, *supra* n. 2; Knapp, "Problèmes méthodologiques dans la science comparée," in Rotondi, "Buts et Methodes du Droit Comparé," 429 (1973); Kahn-Freund, *supra* n. 15, at 40; Gordley, "Comparative Law and Legal Science," 44 *Am. J. Comp. L.* 555 (1996); Schmithof, "The Science of Comparative Law," 7 *Cambridge Law Journal*, 94 (1939); Szabò, "Les buts et les méthodes de la comparaison du droit," in "Rapports généraux au IX^e Congrès International de droit comparé, Bruxelles," 163 (1977); Langrod, "Quelques réflexions méthodologiques sur la comparaison en science juridique," *Rev. Int. Dr. Comp.* 353 (1957).

⁵⁸ Sacco, "Les buts et les méthodes de la comparaison du droit," in "Rapports italiens au IX^e Congrès International de droit comparé, Téhéran," 113 (1974).

⁵⁹ Vanderlinden, "Comparer les droits," (1995).

⁶⁰ Pound, "Comparative Law in Space and Time," 4 *Am. J. Comp. L.* 70 (1955).

⁶¹ Von Mehren and Gordley, "The Civil Law System: An Introduction to the Comparative Study of Law," (2nd ed. 1977).

⁶² Frankenberg, "Critical Comparisons: Rethinking Comparative Law," 26 *Harvard Int. L. J.* 411 (1985); Friedman, "Some Thoughts on Comparative Legal Culture," in Clark, "Comparative and Private International Law: Essays in Honor of John Henry Merryman on his Seventies Birthday," 52 (1990); Henderson, "The Future of Comparative Law," 1 *Pacific Rim. L. Rev.* 1 (1993); Marsh, "Quelques réflexions pratiques sur l'usage de la technique comparative dans la réforme du droit national," 47 *Rév. de droit int. et de droit comp.* (1970); Rheinsteins, "Comparative Law. Its Functions, Methods and Usages," 22 *Ark. L. Rev.* 415 (1968); Rodiere, "Introduction au droit comparé," (1979); Schmidt, "The Need for a Multy-Axial Method in Comparative Law," in "Festschrift Zweigert," 525 (1981); Tallon, "Comparative Law: Expanding Horizons," 10 *J. Soc. P. T. L.* 265 (1968/69); Reitz, "How to Do Comparative law," 46 *Am. J. Comp. L.* 617 (1998).

⁶³ A model of the impact of legal rules is developed by Twining and Miers, "How to do thing with rules" (1987).

⁶⁴ Gerber, *supra* n. 12 at 724.

mechanisms”, which are the objects of comparative taxation. A “tax model” is a combined set of structural elements which circulates among countries, while a “tax mechanism” is the implementation by a given country of a tax model in the form of an actual set of regulatory arrangements. Both tax models and tax mechanisms are made of a set of structural elements which circulates among countries. A tax model is a legal archetype or paradigm rather than a living legal structure.

The idea is simple: if we find a *common structure* of different tax systems, we can compare the functions of domestic tax rules. Functionalism is a kind of analysis of tax systems which goes beyond formal legal rules, but looks at actual solutions which are adopted in different countries; comparative taxation addresses “tax models” in whatever form they operate (a set of statutory rules, a judicial doctrine, an administrative guideline, an established pattern of behaviour), as long as they serve the same or similar function. The benchmark is the function of tax rules within the tax systems.

We link here comparative taxation to the functional approach, which constitutes the backbone of comparative law at large⁶⁵, where, among others, two methodological approaches have been developed: the *theory of legal formants*⁶⁶ and the *factual approach*⁶⁷. While the theory of legal formants compares “operative rules” through the analysis of the basic elements of law (the so called “formants”: judicial, legislative, doctrinal formant), the factual approach compares actual legal solutions to common problems (“*common core*”) irrespectively from domestic legal concepts and rules. These functional approaches can be adopted in comparative taxation, which thus addresses actual solutions to tax problems. Comparative taxation brings about a radical critique of the legalistic approach, as it does not compare tax statutes, but solutions to tax problems thus challenging undisputed assumptions of municipal tax scholars⁶⁸.

In the next paragraphs we will investigate how to evaluate analogies/differences of different domestic tax systems, with the aim of defining the most suitable methods of comparative tax law. We will then introduce a specific application in comparative taxation of the functional methods, i.e. the analysis of the *evolution and circulation of tax models*.

⁶⁵ Gordley, “Comparative Legal Research: Its Function in the development of Harmonized Law,” 43 *Am. J. Comp. L.* 555 (1997); Kahn-Freund, supra n. 58; Stein, supra n. 58; Lepaulle, “The Function of Comparative Law. With a Critique of Sociological Jurisprudence,” 35 *Harv. L. Rev.* 838 (1922); Stone, “The End to Be Served by Comparative Law,” 25 *Tul. L. Rev.* 325 (1951).

⁶⁶ Sacco, supra n. 20; Monateri, “Legal Doctrine as a Source of Law: A Transnational Factor and a Historical Paradox,” in “Italian National Reports, XII Congress of the International Academy of Comparative Law” (1986).

⁶⁷ Schlesinger, Baade, Damaska and Herzog, “Comparative Law: Cases, Text and Materials,” supra n. 2, at 39; Schlesinger, “Formation of Contract: A Study of the Common Core of Legal System,” (1968); Schlesinger, “The Common Core of Legal System, An Emerging Subject of Comparative Study,” in “Twentieth Century Comparative and Conflicts Law, Legal Essays in Honor of Hessel E. Yntema,” 65 (1965); Schlesinger, “The Past and The Future of Comparative Law,” 43 *Am. J. Comp. L.* 477 (1995). This approach has proved particularly effective in studying the common core of European private law: Bussani and Mattei, “The Common Core Approach to European Private Law,” 3 *Col. J. Europ. Law* 339 (1997); Mattei and Bussani, “In Search of the Common Core of European Private Law,” 2 *Europ. Rev. of Private Law*, 485 (1995); Gerber, “The Common Core of European Private Law: The Project and Its Books,” 52 *Am. J. Comp. L.* 995 (2004). On procedural and administrative law issues: Cappelletti, “New Perspectives for a Common law of Europe,” 1 *Publications of the European University Institute* (1978); Rivero, “Vers un droit commun européen: nouvelles perspectives en droit administratif,” in Schwarz, “Tendances towards a Common Administrative Law in Europe,” 2 *European Law Review*, 3 (1991). On underlying legal values: Stein and Shand, “Legal Values in Western Society,” (1974); Wieacker, “Foundations of European Legal Culture,” 38 *Am. J. Comp. L.* 1 (1990).

⁶⁸ Fletcher, supra n. 35.

Different approaches should operate in a combined way and depending on the subject matter and the issues; the methodological approach should therefore be eclectic and selected on a case-by-case basis. As a general rule:

- a) the legal formants approach shows how the basic elements of tax law (“formants”) circulate among different countries generating, at multi-country level, common “tax models”;
- b) the common core approach shows which is the common structure of “tax mechanisms” adopted by different countries and whether and to what extent these mechanisms derive from common “tax models” existing at multi-country level;
- c) the legal formants approach and the factual approach in their combination show the evolutionary structure of “*tax convergence*” and “*tax divergence*” of different tax systems.

b. Dynamics of tax formants; tax cryptotypes

In order to know what tax law is, it is necessary to analyse the entire complex relationship between the formants of the tax system. A “*tax formant*” is any kind of legal proposition that affects the solution of a tax problem. For example rules contained in writings of tax scholars, as well as rules contained in judicial decisions or guidelines of Tax Authorities are formants. Also constitutional rules and broad definitions are tax formants. Legal propositions that do not contain rules but broadly stated principles are tax formants too. All of these tax formants are not necessarily coherent with each other within each tax system; to the contrary, tax formants are usually conflicting⁶⁹.

The theory of legal formants is a dynamic approach to comparative law and focuses on law as a social activity: a formant of the law may be a group or a community institutionally involved in the activity of creating law. Within the Western legal tradition there are basically three groups involved in such an activity: the practicing lawyer, the legal policy maker (a legislator or a judge), the legal scholar. Thus the legal process is seen as competitive arena of different types of elite groups and there is a criticism of the idea that the law is unitary⁷⁰. The structure of law is seen as a model of competing formants within the unique setting and constraints of legal traditions.

The theory based on evolutionary structure of the tax systems developed in the previous paragraphs and the formant approach share the same view that the legal system should be considered in its basic constitutive elements. As a result, the legal system is not viewed as the mere collection of validly enacted legislation, but as a *complex institutional process*. In this paper we have discussed the evolutionary structure of law by addressing the discourse of lawyers on the legal rules and distinguishing different types of rules; likewise, in the formant approach operative rules are defined as the *result* of the operation and interaction of formants. Both our approach and the formant approach have points in common with legal realism, as they both look at the actual operation of law⁷¹.

⁶⁹ One must not only know how courts have acted but one must also consider the influences to which the judges are subject and consider the law as a set of interlocked documents; Sacco and Monateri, “Legal formants,” in “The New Palgrave Dictionary of Economics and the Law,” (1998).

⁷⁰ These professionals produce different kinds of texts: statutes, opinions, articles, briefs summons. They have an archive (previous written documents) and a professional tested style to transform old documents and produce new ones. These texts and documents, and they way they are produced, the way they are interlocked, the way they are re-used and cited, become a key feature in understanding the structure and evolution of law. The law can therefore be reconstructed as a set of interlocked documents used by professionals according to their respective strategies. Sacco and Monateri, “Legal formants,” supra n. 69.

⁷¹ The formant approach is similar to American legal realism, but it is different from it as it uses comparative analysis as the tool for understanding domestic laws. Furthermore in the formant approach the law is not reduced to judge-made law. Mattei, “Comparative Law and Economics,” (1997).

There is a *competitive relationship between tax formants*. Within a single country, tax formants (case law, administrative decisions, doctrine) tend not to coincide in determining the operative tax rules; for example guidelines of Tax Authorities may conflict with case law and scholarly opinions, or case law can generate conflicting trends. Within a given tax system, the operative tax rule is not uniform, not only because one rule may be given by case law, another by scholars and yet another one by statutes. Within each one of these sources there are formants competing with each other and this phenomenon is denominated “*dissociation of formants*”; At paragraph 2.c. we have defined the dissociation of formants as the existence of different rules in the *synchronic* plane⁷².

Dissociation of formants also operates at multi-country level: (i) on the one hand, tax statutes and regulations in a tax system can be identical to the provisions enacted in other tax systems, but can be applied differently; *(ii)* on the other hand, provisions or general definitions in two tax systems can differ while operative rules are the same. A full understanding of how formants relate to each other makes it possible to identify the factors that affect operative rules through the process of dissociation of formants. For example one can understand how in country A a certain operative tax rule emerged and then compare it to the same operative tax rule which has emerged in country B through a different operation of formants (for example in country A the operative tax rule can be created by courts, while in country B by legislation). By contrast, one can understand how in country A a certain operative tax rule emerged and compare it to the different operative tax rule emerged in country B through a similar operation of formants (for example in country A and country B different operative tax rules can be created by courts in respect to similar problems).

Comparative taxation addresses the processes through which solutions to tax problems emerge by the operation of the tax system, and can take a *narrow view* or a *comprehensive view*. When comparative taxation takes a *narrow view*, it focuses just on the *evolution of a single formant*, for example the judicial formant or administrative guidelines in different countries in relation to a specific tax problem. In these cases we can say that there is circulation of formants among different countries (“*inter-country comparative analysis of formants*”). This phenomenon leads for example to the reception of a judicial doctrine developed in Country A into the case law of country B, or to the adoption of similar administrative guidelines. Tax formants tend to circulate independently, so that it is common for a tax system to receive only one formant from different tax systems, for example scholars import doctrines, judges adopt foreign judicial approaches, legislators copy foreign tax statutes⁷³.

By contrast, when tax comparative analysis takes a *comprehensive view*, it may consider the *combined evolution of various tax formants* (case law, administrative decisions, doctrine), and the circulation of formants of different kinds between different countries. For example in country A a certain operative rule may be determined by leading legal doctrine and be adopted by country B as an administrative guideline⁷⁴; in country A a certain operative rule may be developed by case law and be adopted by country B as a statute⁷⁵; a certain operative rule may be adopted in country A by statutory language as a result of importation of legal doctrine developed in country B and thereafter be exported as a statute in country C eventually leading in country C to an operative rule developed

⁷² In terms of the theory of the evolutionary structure of tax systems adopted in this paper, singular rules can conflict in the synchronic plane: within a given legal system, the legal rule is not uniform, not only because one rule may be given by case law, another by scholars and yet another one by statutes, and within each one of these sources there are also formants competing with each other.

⁷³ According to this theory, taking into account the transnational nature of law, a unitary kelsenian theory of the sources of law is challenged.

⁷⁴ For example scholarly distinctions of German scholars have influenced the drafting of Italian tax legislation.

⁷⁵ For example the substance-over-form doctrine has been developed in the U.S. as a judicial doctrine and has percolated in various general anti-avoidance clauses of European countries.

by courts taking a different view to that originally developed in country A⁷⁶, and so on. In these cases there is circulation of formants among different countries (“*inter-country comparative analysis of dissociated formants*”).

An important case of “circulation of dissociated formants” among countries occurs in *legal transplants*⁷⁷; in these cases a legal structure (for example a statute) is imported from country A to country B. This transplanted structure may eventually operate in country B differently from the original structure of country A, for example administrative agencies may provide a implementation different from the original one. In these cases substantially similar statutory rules lead to different results and therefore constitute different operative tax rules⁷⁸.

There is one more aim of the formant approach: the identification of “*tax cryptotypes*”, which can also be defined as “*implicit tax principles*” or “*mute tax law*”⁷⁹. At domestic level, tax doctrine quite often coins shorthand expressions which summarize underlying principles of tax law, for example “substance over form”; this can occur at various levels of the tax system, so that one may find also specific, context-oriented tax cryptotypes, such as “earnings and profits” in U.S. corporate taxation. Cryptotypes domestically serve a hermeneutic function, because they provide *ex ante* possible interpretations.

Tax cryptotypes are non-written operative rules. The broader the tax cryptotype, the more important: basic tax cryptotypes (“*foundational cryptotypes*”) constitute the “tax mentality” in a given country and heavily affect the development of practical tax solutions⁸⁰: for example in certain countries a legalistic approach to tax rules makes it impossible to develop an effective anti-avoidance doctrine as it is deemed that all non-regulated behaviour is permitted, while in other countries “substance over form” is the general clause⁸¹.

⁷⁶ This has occurred with respect to various corporate tax models relating to the taxation of foreign income by the residence country originally conceived in the U.S. (CFC rules, foreign tax credit) which have been borrowed by other countries and thereafter been modified as a result of local scholarly and policy debate.

⁷⁷ After a seminal work by Schwarz, “La réception et l’assimilation des droits étrangers,” in “Introduction à l’étude du droit comparé. Recueil d’études en l’honneur d’E. Lambert,” 581 (1938), the research on legal transplants was initiated by Alan Watson: Watson, “Aspects of Reception of Law,” 44 *Am. J. Comp. L.* 335 (1996); Watson, “Comparative Law and Legal Change,” 37 *Cambridge L. J.* 313 (1978); Watson, “Legal Transplants and Law Reform,” 92 *Law Q. Rev.* 79 (1976); Watson, “Legal Transplants: An Approach to Comparative Law,” Edinburgh (1974); Watson, “Society and Legal Change,” (1977); Watson, “From legal transplants to legal formants,” 43 *Am. J. Comp. L.* 469 (1995); Watson, “Legal Transplants and Law Reform,” 92 *Law Q. Rev.* 79 (1976); Legal transplant and formant approach have also been used in combination: Sacco, *supra* n. 20; Recently legal transplant have originated a lively debate: Ewald, “The Logic of Legal Transplants,” 43 *Am. J. Comp. L.* 489 (1995); Mattei, “Efficiency in Legal Transplants. An Essay in Comparative Law and Economics,” 14 *Int. Rev. Law and Econ.* 3 (1994); Wise, “The Transplant of Legal Patterns,” 38 *Am. J. Comp. L.* 1 (1990); Ajani, “By Chance and Prestige: Legal Transplants in Russia and Eastern Europe,” 43 *Am. J. Comp. L.* 93 (1995); Berkowitz, Pistor, Richard, “The Transplant Effect,” 51 *Am. J. Comp. L.* 163 (2003); Miller, “A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant,” 51 *Am. J. Comp. L.* 839 (2003).

⁷⁸ This clarifies the relevance that interpretative practices (grounded on scholarly writings, on legal debate aroused by previous judicial decision, etc.) have in determining the operative rules.

⁷⁹ Postema, “Implicit law,” 13 *Law and philosophy* 361 (1994); Sacco, “Mute Law,” 43 *Am. J. Comp. L.* 455 (1995); Sacco, *supra* n. 20; Lasser, “Judicial (Self-)Portraits: Judicial Discourse in the French Legal System,” 104 *Yale L. J.* 1325 (1995); Lasser, “Comparative Law and Comparative Literature: A Project in Progress,” *Utah L. Rev.* 471 (1995).

⁸⁰ Legrand, *supra* n. 12; Van Hoecke and Warrington, “Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law,” 47 *Int’l & Comp. L.Q.* 495 (1998); Waxman, “Teaching Comparative Law in the 21st Century: Beyond the Civil/Common Law Dichotomy,” 51 *J. Leg. Ed.* 305 (2001); Reimann, “Droit positif et culture juridique. L’américanisation du droit européen par réception,” 45 *Archives de philosophie du droit*, 61 (2001).

⁸¹ Glenn, *supra* n. 25.

The interesting feature of tax cryptotypes at comparative level is, in fact, that a non-written implicit tax principle of country A may become an operative rule in country B. For example through explicit statutory language or pervasive case law or administrative practices. Another example is the “fair play rule” in tax procedures, which is a tax criptotype in certain countries and an explicit procedure established by statutory rules in other countries. Similarly, in certain countries the availability of tax settlements is a tax criptotype, while in other countries explicit procedures are devised for that.

c. Common tax core approach and its comparative uses

In comparative tax research what really matters is the actual function of tax rules, rather than their statutory wording; as a result, comparative tax research quite often turns out to be the discovery of meaningful “*tax convergences*”⁸². Differences in the formulation and structure of tax rules, instead of indicating effective divergence, often indicate only an apparent diversity due to the operation of tax complexity at domestic level.

One of the main tasks of comparative taxation is therefore to focus on real “*tax convergence*”, rather than apparent “*tax divergence*”, and the corresponding result is the discovery of deep common structures of taxation (a tax “*common core*”). The comparative tax scholar should adopt a common core approach, if he/she is interested to revealing *deep structures of convergence*⁸³. A good comparative work should not stop at the assessment of superficial differences of tax systems, but should go on and assess whether there are deep similarities.

The *common core approach* in comparative law has been introduced by Rudolf Schlesinger⁸⁴, who has developed a comparative method based in the direct confrontation of answers given by local jurists to a set a common questions based on common problems, carefully avoiding explicit linguistic reference to local “terms of art” used to provide shortcut definition of operative rules. In this method each question is formulated in such a way that all relevant factual elements of the case in a country are specified, with the result that also in the other countries such factual elements are considered in providing answers to the question. This approach naturally brings forth the definition of rules worded in a language sufficiently standardized, but, at the same time, adequate to encompass local peculiarities. Moreover, in order to render the answer generally intelligible, no legal concept expressed with the traditional methods of legal doctrine is allowed, unless such concept is expressly recognized by everybody by virtue of explicit definitions.

The approach is labelled as “common core approach” because its aim is to assess the boundaries of a “common core” of rules in relation to similar problems. By using the “common core”, it is also possible to identify the actual difference of local concepts and qualifications. The approach is also

⁸² It should be noted here that the post-modern debate which emphasized structural differences rather than basic convergence (on which Reimann, supra n. 8 at 677) is not relevant to taxation, where countries belong to the same basic tax family for the fact of sharing common political and representative structures generating the modern administrative State. A very interesting area of research, in line with anthropological legal studies, would be to study legal systems not belonging to the Western legal tradition with the tools of static comparative taxation (see below paragraph 4.a.), but this is still an untouched, and very promising, field. In general see: Geertz, “Local Knowledge: Fact and Law in Comparative Perspective” (1983); Pospisil, “Anthropology of law: a comparative theory,” (1971); Roberts, “Order and Disputes. An Introduction to Legal Anthropology,” (1979); Rouland, “Aux confins du droit. Anthropologie juridique de la modernité,” (1990).

⁸³ On convergence and divergence: Legrand, “European Legal Systems are not Converging,” 52 *Int'l. & Comp. L.Q.* 81 (1996); Merryman, “On the Convergence (and Divergence) of the Civil Law and the Common Law,” 17 *Stan. J. Int'l L.* 357 (1981).

⁸⁴ Schlesinger, “Comparative Law,” supra n. 2; Schlesinger, “Formation of Contract” supra n. 67; Schlesinger, “The Common Core of Legal System,” supra n. 67; Schlesinger, “The Past and The Future of Comparative Law,” supra n. 67.

denominated “factual approach” because it is based of facts and circumstances and the common explicative framework is carried out by analogy of solutions, and *not* by analogy of qualifications and legal concepts.

The principal problem of the common core approach in taxation is how to obtain comparable answers to the questions about different tax systems. In order to do that the answers must refer to questions interpreted as identically as possible by all those replying, irrespective of local tax doctrines. Besides, the answers must be self-sufficient, needing no additional explanations. Each question should (i) take account of any relevant circumstance in any of the tax systems analysed to be sure that these circumstances would be considered in - and therefore comparable with - the analysis of every other system, and (ii) present a tax problem, i.e. a tax policy issue.

Often, the circumstances that operate in one tax system are officially ignored and considered to be irrelevant in another, and yet, in that other system, operate secretly, slipping silently between the formulation of the rule and its application by tax administrations and judges. Thus, the special feature of common core approach is that it makes tax scholars and policy-makers to think explicitly about the circumstances that matter, by forcing them to answer identically formulated questions.

The common core approach provides a picture of the tax law existing in different countries and is aimed at seeking common solutions to tax problems. In particular at EU level, a common core approach does not push in the direction of tax uniformity because its underlying idea is that the best means to achieve an open tax space in Europe is through the creation of a model "European corporate tax law" capable of shaping a truly common set of tax models and to uncover common general principles which are already present in the tax laws of the European countries⁸⁵. The goal of a common core approach is not to impose new categories, as the emphasis is not to create EU uniform rules, but to find similar solutions in the existing tax laws of EU countries and to analyse and compare the rationale behind them⁸⁶.

There is therefore a strong difference between a *tax common core approach* a *tax harmonization approach*: while the former approach simply reveals analogies irrespectively from local specificities, the latter approach has a normative dimension as it imposes a single solution upon the natural process of legal diversification (and sometimes such solutions do not even exist in any European tax system). The basic idea of the common core approach is not to create new super-imposed tax law, but to compare existing tax laws to provide a set of tax policy alternatives.

The common core approach thus constitutes a tool for policy makers, by providing a set of alternatives addressing common tax problems. Common core analysis investigates technical and policy issues and it may facilitate technical communication among tax policy makers. The

⁸⁵ On coordination of corporate taxes in the EU: Cnossen, “Tax coordination in the European Community,” in “Series on International Taxation,” (1987); Cnossen, “Company Taxes in the European Union: Criteria and Options for Reform,” 17 *Fiscal Studies*, 67 (1996); Cnossen, “Reform and Coordination of Corporation Taxes in the European Union: An Alternative Agenda,” *IBFD Bulletin*, 134 (2004); Devereux, “Debating Proposed Reforms of the Taxation of Corporate Income in the European Union,” *International Tax and Public Finance*, 73 (2004); Garbarino and Panteghini, “Corporate Taxation in Europe” in Gregoriou and Read, “International Taxation Handbook” (2007); Mintz, “European Company Tax Reform: Prospects for the Future,” CESifo Forum, 3/1 (2002); Sorensen, “Company Tax Reform in the European Union,” *International Tax and Public Finance*, 91 (2004). See also: European Commission (2004), “Structures of the Taxation Systems in the European Union,” Eurostat, Theme 2, Economy and Finance; European Commission, “Implementing the Community Lisbon Program: Progress to date and next steps towards a Common Consolidated Corporate Tax Base”, Com (2006) 157 of April 5th of 2006; European Commission, “Taxation in the Internal Market,” Sec 1681/2001 of October 23d of 2001.

⁸⁶ A considerable amount of European tax law has been already enacted as directives and regulations; such production of EU law, short from making common core tax research useless, actually makes it even more necessary for the analysis of common core and circulation of tax models.

common core approach in comparative taxation shows that focuses on convergence of tax models, (specially at EU level).

An area where the common core approach can be used is the study of the common structure of “tax mechanisms” adopted by different countries and whether and to what extent these mechanisms derive from common “tax models” circulating among different countries⁸⁷. Another area is corporate taxes affecting groups operating at European level, as a common core approach seeks to reveal what is already common among the different tax systems of EU countries⁸⁸. Common core research is thus a promising tool for showing deeper analogies hidden by formal differences and should be used to reveal a reliable map of tax law of Europe, especially in respect to corporate taxes; such a map is indispensable in the process that leads towards convergence of tax models through reciprocal recognition and substantial approximation.

c. A sceptical view on the use of economic analysis of law in comparative taxation

One of the current limitation of comparative studies is the lack of an interdisciplinary approach⁸⁹, such as that adopted in economic analysis of law (“EAL”)⁹⁰ or neo-institutional approaches⁹¹. In the next two paragraphs we will show that an institutional approach is better suited than EAL to compare alternative tax models in a multi-country scenario.

In EAL, the legal system is viewed not as a set of rules, but a set of implied prices. The behaviour is determined by efficiency, as individuals can compare the price of non-compliance with potential alternative uses of resources. On the descriptive plane EAL shows that an inefficient rule is a rule that attains a social goal at a price which exceeds the price at which the same goal could be attained

⁸⁷ The common core approach can especially be used in the area of procedural law, for example the comparative analysis of tax settlements: the settlements are widely adopted – and therefore there is a real common core – while the actual legal structures through which they are achieved vary greatly (they can be just a matter of legal practice or they can be allowed under specific procedures).

⁸⁸ Garbarino and Panteghini, *supra* n. 85.

⁸⁹ See Mattei, “Why the Wind Changed: Intellectual Leadership in Western Law,” 42 *Am. J. Comp. L.* 195 (1994); Reimann, *supra* n. 8 at 685 and related footnotes on the few examples of interdisciplinary work in comparative law.

⁹⁰ There is a huge literature on EAL; the following are the main contributions useful to comparative law: Balkin, “Too Good to Be True: The Positive Economic Theory of Law,” 87 *Columbia L. Rev.* 1447 (1987); Bowles, “Law and the economy,” (1962); Burrows and Veljanovski, “The economic approach to law,” (1981); Calabresi, “The New Economic Analysis of Law: Scholarship, Sophistry, or Self-Indulgence,” 86 *Proceedings British Academy* 85 (1982); Calabresi, “The costs of accidents,” (1970); Id, “Tragic Choices,” (1978); Cooter and Gordley, “Economic Analysis in Civil Law Countries: Past, Present, Future,” 11 *Int. Rev. L. & Econ.* 262 (1991); Cooter and Ulen, “Law and Economics,” (1987); Cooter, “Law and the Imperialism of Economics: An Introduction to the Economic Analysis of Law and a Review of the Major Books,” 29 *UCLA L. Rev.* 1260 (1982); Hirsch, “Law and economics - An introductory analysis,” (1979); Hovenkamp, “Positivism in Law and Economics,” 78 *California L. Rev.* 815 (1990); Kaplow and Shevell, “Economic analysis of law,” in Auerbach and Feldstein (eds.), “Handbook of Public Economics,” 1161 (2002); Kirchner, “The Difficult Reception of Law and Economics in Germany,” 11 *Int. Rev. L. & Econ.* 277 (1991); Kirchner and Schanze, “Ökonomische Analyse des Rechts,” (1978); Mattei and Pardolesi, “Law and Economics in Civil Law Countries: A Comparative Approach,” 11 *Int. Rev. Law Econ.* 265 (1991); Oliver, “Law and Economics, London,” (1979); Polinski, “An Introduction to Law and Economics,” (2nd ed. 1989); Posner, “Economic Analysis of Law,” (4th ed. 1989); Posner, “Economic analysis of law,” (1977); Veljanovski, “The economic approach to law: a critical introduction,” 7 *British Journal of Law and Society* 158 (1980).

⁹¹ Alchian, “Uncertainty, evolution and economic theory,” 58 *Journal of Political Economy* 211 (1950); Anderson, Arrow and Pines, “The economy as an evolving complex system,” (1988); Boulding, “Evolutionary Economics”; Hodgson, “Economics and institutions: a manifesto for modern institutional economics,” (1988); Hodgson, “Economic evolution: intervention contra pangloss,” 25 *Journal of Economic Issues* 519 (1991); Hodgson, “Economics and evolution: bringing life back into economics,” (1993); Nelson and Winter, “An evolutionary theory of economic change,” *Harvard University Press*, (1982); Witt, “Evolutionary Economics,” (1993).

by an alternative rule and that a cost/benefit analysis is the prerequisite for selecting institutional alternatives⁹².

The competitive market model is the background of EAL, as the basic idea of EAL is that the market efficiently resolves the competing demands made on scarce resources under a set of highly restrictive assumptions: *utility maximisation*, *stable preferences* and *opportunity costs*. As to utility maximisation, the theory allows for irrationality but argues that groups of individuals behave as if their members are rational. Under the stable preferences hypothesis individuals are assumed to trade with each other in order to maximise their perceived welfare, and this trading will cease when all have achieved the best they can given their initial endowment of resources. As for opportunity costs, economic value is measured by willingness to pay by giving up alternative choices, and thus the economic value of resources used for any purpose involves a cost equal to the value of its best alternative use, i.e. its *opportunity cost*.

A distinction is generally drawn between *positive economics* and *normative economics*. Positive economics is an empirical science which generates predictions that can be verified empirically and therefore is relevant to determine the impact of legal rules by identifying and quantifying the effects of law on measurable variables; a good example of this in tax matters is the positive economic analysis of tax evasion⁹³, and there is also a tradition of public finance which addresses the effects of taxes on the behaviour of the taxpayers⁹⁴. By contrast, *normative economics* is concerned with the goals of allocative efficiency, i.e. the identification of situations where efficiency is not achieved and prescribing alternative corrective solutions, on the assumption that *perfectly competitive markets* achieve efficient outcomes⁹⁵.

EAL can therefore provide a comprehensive framework to evaluate legal rules, as it can determine the impact of legal rules and suggest efficient allocation of resources⁹⁶. Assuming that EAL provides such a comprehensive framework, one could envisage that comparative tax law may gain theoretical perspective by using the EAL methods. The claim is that economic methods could be used to build efficient models for tax rules, and that such “neutral models” would work as

⁹² Komesar, “Imperfect alternatives. Choosing institutions in law, economics, and public policy,” (1992); Komesar, “Legal Change, Judicial Behavior, and the Diversity Jurisdiction: a Comment,” 22 *J. of Leg. Studies*, 387 (1980).

⁹³ The economic analysis of tax evasion treats the decision to violate tax rules as a rational choice: a taxpayer does not pay taxes because this provides higher net benefits than alternative legitimate behaviour. Here the taxpayer is characterized as a rational individual with stable preferences who maximises expected utility. A corollary to a theory of tax evasion as a rational act is that any factor that reduces the expected return will, other things being equal, reduce the level of tax evasion. The sanctions which can be subsequently enforced are like a “price” that decreases the expected return from engaging in tax evasion. The economic amount of the sanction is the product of the severity of the sanction and the frequency with which it is imposed, and the theory predicts that an increase in the severity or in the frequency of sanctions will decrease the number of offences.

⁹⁴ Kotlikoff and Summers, “Tax Incidence,” in Auerbach and Feldstein, “Handbook of Public Economics” (1987).

⁹⁵ Welfare economics is based on the concept of market failure: when the assumptions underlying the perfectly competitive market are not met, the market will either operate inefficiently or fail to exist and this is considered as a prerequisite for legal intervention.

⁹⁶ The typical example of this is the Coase theorem, according to which if transaction and bargaining costs are absent, affected parties to an externality will agree on allocation of resources that is both Pareto-optimal and independent of any prior assignment of property rights. The normative content of the Coase theorem is that if there are no transaction costs the efficient allocation of resources is obtained without the intervention of legal rules. The Coase theorem therefore states that property rights do not affect the efficiency of market forces when exchange is costless; it focuses on the obstacles to market solutions constituted by transactions costs, which include a variety of frictions that impede bargaining, such as the costs of trading, searching, negotiating, policing and enforcing agreements. In situations where bargaining is precluded, the law has an efficiency objective of reducing transaction cost and directly promoting a more efficient allocation of resources. See: Coase, “The Problem of Social Costs,” 3 *J. L. & Econ.* 92 (1960); Cooter, “The Coase Theorem,” *The New Palgrave*, 92 (1987); Cooter, “The Cost of Coase,” 11 *J. Leg. Studies*, 1 (1982).

homogeneous ground for comparison of solutions to tax problems by different tax systems. Comparative tax law, an effort to understand similarities and differences between tax systems, could therefore be conjugated with EAL, an effort to evaluate legal rules and institutions from the point of view of economic efficiency⁹⁷.

In short: the economic analysis of tax law could envisage ideal efficient models (although in a simplified form) which would then serve as a benchmark for the actual comparative analysis⁹⁸. In this perspective comparative taxation would operate both at the level of positive and normative analysis. From a *positive perspective* comparative taxation would offer a framework to identify similarities and differences between tax systems using the economic model as a benchmark; economic tools would then be used to develop efficient models of legal solutions, with which different tax systems would be compared from an efficiency perspective. From a *normative perspective* comparative taxation would then suggest changes in order to get closer to the efficient model and therefore, conjugated with EAL, it would suggest cost-justified tax reform.

In conclusion, while comparative taxation would aim at differences and similarities between tax systems, EAL would aim at evaluating tax rules and institutions from the point of view of economic efficiency. As a result comparative taxation could be combined with EAL to provide a better understanding of *comparative efficiency of tax rules*.

The claim would then be to use the EAL efficiency-base models in comparative taxation. This claim however does not consider two main shortfalls: first, there is no empirical evidence of the impact of tax measures on economic behaviour⁹⁹; second, economic analysis of taxes does not account for the political environment within which tax structures are designed¹⁰⁰. For example a pure economic tool - general equilibrium approach - shows the distribution of taxes across individuals and by sectors

⁹⁷ This approach has been proposed by Mattei, *supra* n. 71.

⁹⁸ Such models should be complex enough not to be simplistic and allow for completely factual analysis (irrespective of the details of positive national tax laws).

⁹⁹ This in spite of the fact that public finance and a wide economic literature addresses the problem of effects of taxes on the behavior of the taxpayers one by distinguishing three questions: (i) who pays the taxes (tax incidence); (ii) how taxation alters the price system (effects of taxation), and (iii) how taxation affects welfare by a creating deadweight loss which is additional to the tax itself (burden of taxes). See Auerbach, "Public finance in theory and practice," in Slemrod, *supra* n. 23; Auerbach, "Measuring the impact of tax reform," in Slemrod, "Tax policy in the real world," *supra* n. 23.

¹⁰⁰ There is a broad literature which evidences that the tax structure is a product of the political process, but it has not entered yet the mainstream of tax policy studies. See: Brooks, "The logics, politics and policy of tax law: an overview," in Edgar et al., "Materials of Canadian Income Tax," (12th ed. 2000); Buchanan, "Public finance in democratic process," *The University of North Carolina Press* (1987); Buchanan, "Tax reform as political choice," 1 *Journal of Economic Perspectives*, 29 (1987); Buchanan, "The political efficiency of general taxation," 46 *National Tax Journal*, 401 (1993); Hansen, "The Politics of Taxation," (1983); Hettich and Winer, "Democratic choice and taxation," *Cambridge University Press* (1999); Hettich and Winer, "Economic and political foundations of tax structure," 78 *American Economic Review*, 701 (1988); Hettich and Winer, "The political economy of taxation," 481 (1997); McLure, "The political economy of tax reform and their implications for interdependence: United States," in Takatoshi and Krueger, "The political economy of tax reform," *University of Chicago Press*, 97 (1992); Peters, "The Politics of Taxation" (1991); Profeta, "Public Finance and Political Economics," in Bernardi and Profeta, "Tax Systems and Tax Reforms in Europe," (2003); Radaelli, "The politics of corporate taxation in the European Union," *Routledge Research in European Public Policy* (1997); Roemer, "The democratic political economy of progressive income taxation," 67 *Econometrica*, 1 (1999); Rose and Karran, "Taxation by Political Inertia," (1987); Rose, "Maximizing Tax Revenue While Minimizing Political Costs," 5 *Journal of Public Policy*, 289 (1999); Sandford, "Why tax systems differ: a comparative study of the political economy of taxation," (2000); Swank and Steinmo, "The new political economy of taxation in advanced capitalist democracies," 46 *American Journal of Political Science*, 642 (2002); Weiner, "Rules, politics and the normative analysis of taxation," in Backhaus and Wagner, "Handbook of Public Economics" (2002); Witte, "The politics and development of the federal income tax," *University of Wisconsin Press* (1985).

and assesses the incidence of tax measures¹⁰¹, but an institutional approach - the political economy of taxation shows that the general equilibrium approach can serve at best as a “counterfactual” by which tax incidence is assessed in absolute terms¹⁰².

Tax measures do not actually operate in isolation, but they function in relation to the economic and political framework and other non-tax factors, such as attitudes and patterns of investment, the government’s economic policy and its capability for forwarding economic development, its capacity to maintain monetary and political stability. The role of politics in normative design of tax models should not be underestimated and the proper counterfactual for judging the effects of tax measures remains an open issue, as there are many weaknesses of optimal taxation and tax incidence analysis.

In conclusion, in spite of the efforts made by the economic science in order to quantify the role of tax factors on taxpayers’ behaviour, it is impossible to determine their exact impact, because all the predictions are based upon a multitude of changing and unpredictable factors¹⁰³. Predictions based on a balanced consideration of the general utility and costs of tax measures are however used as they are helpful for the formulation of rational tax models. More specifically economic analysis based on field studies and administrative monitoring of tax measures could suggest to revise or repeal the existing legislation and the adoption of tax measures of a different type¹⁰⁴.

These limitations of economic analysis evidence that EAL cannot be used as a normative tool in comparative taxation. Since tax structure is a product of politics and not of economics, in order to compare different tax systems one must understand the respective political processes and related transaction costs, and therefore a straightforward use of EAL tools in comparative tax law is not recommended. A wider framework is provided here by a combination of *neo-institutional economics* and *legal institutionalism*.

e. Institutional approach and analysis of alternative tax solutions

*Neo-institutional economics*¹⁰⁵ proposes that individual decisions are made in a social context and therefore it demands a model of selection to explain social outcomes. By studying the logic of contracts and economic organizations in competitive markets¹⁰⁶, it shows that institutional arrangements are optimal insofar as they reduce *transaction costs*¹⁰⁷.

The neo-institutional approach eschews models based on the frictionless ideal markets, focuses on transaction costs to explain the choice between market and non-market solutions, and interprets institution as a framework in which transaction costs may be reduced. This neo-institutional

¹⁰¹ Ballard, Fullerton, Shoven and Whalley, “A general equilibrium model for tax policy evaluation,” *University of Chicago Press* (1985).

¹⁰² A “counterfactual” in economics is a situation in which it is assumed that a certain assumption is removed from a model, in order to assess its impact on certain variables in a “as if” situation; see: Lewis, “Counterfactuals,” *Harvard University Press* (1976); Kay, “Tax policy: a survey,” 100 *The Economic Journal*, 18 (1990).

¹⁰³ Hettich and Winer, “Democratic choice and taxation,” *supra* n. 100.

¹⁰⁴ It is true that the advice of economists has an impact on the structure of the tax system, but has only a supporting role to the political process.

¹⁰⁵ North, “New institutional analysis,” *Journal of Institutional and Theoretical Economics*, 230 (1986); North, “The growth of government in the United States: an economic historian’s perspective,” 28 *Journal of Public Economics*, 383 (1985); North, “Transaction costs, institutions and economics history,” *Journal of Institutional and Theoretical Economics*, 7 (1986); Williamson, “Markets and hierarchies,” (1975); Williamson, “The Economic Institutions of Capitalism,” (1985).

¹⁰⁶ Demsetz, “The organization of economic activity,” (1988).

¹⁰⁷ For a general discussion: Allen, “What are transaction costs?” 14 *Research in Law and Economics*, 1 (1991).

approach focuses on the details of the environment in which transactions take place, and suggests an empirical attitude that requires the collection of data on individual transactions rather than on quantitative aggregates. This approach is process orientated, dynamic, tends to be evolutionary, and seeks to identify the principal factors of institutional development. As a result this approach rejects market equilibrium analysis and instead places emphasis on the adaptation to disequilibrium, hypothesising that “inefficiency” gives rise to adaptive efforts to minimise costs¹⁰⁸.

The neo-institutional approach emphasises time, uncertainty and the frictions associated with market contracts, and non-market (or relational) contracts. The transactions costs of writing and executing contracts are interpreted as emanating from uncertainty and bounded rationality and lack of competitive pressures (small number of contractors). The combination of these factors gives rise to “opportunism” which is defined as “effort to realize individual gains through lack of candour or honesty in transactions”, and to the need for “governance structures” (law, arbitration, the market) that will discourage parties from being opportunistic. The emphasis of this approach is not on a utility maximising contracts where the law fills in terms unspecified by, but on adjustment processes that preserve on-going contractual relations in the face of opportunism¹⁰⁹.

Legal institutionalism is similar to neo-institutional economics. However its focus on, contracts and transaction costs is naturally higher, so that various approaches have been developed. Among them the so called “*legal process*” aims at the selection of the best institutional decision for each kind of problem that requires a legal choice¹¹⁰.

According to *legal process* understandings about how members of a community are to conduct themselves imply the existence of *procedural understandings* about how questions in connections with substantive issues should be settled; these procedural understandings lead to institutionalised procedures or *institutions*. An organized society is one which has an interconnected system of procedures adequate to deal with every kind of question affecting the group’s internal and external relations. This applies to tax issues, and consequently “*fiscal institutions*” can be defined here as procedures (or any other similar legal structure) which deal with every kind of question affecting the group’s internal and external relations in respect to raising tax revenues¹¹¹.

A principle of “*institutional settlement*” provides that decisions which are the result of established procedures are binding, so that *tax law can be viewed as the outcome of fiscal institutions*: a

¹⁰⁸ The differences between neo-classical and neo-institutional approach are illustrated by their respective treatment of contractual relations. In the neo-classical framework the allocative goal of contract law is to promote the efficient allocation of resources; by contrast the neo-institutional approach recognises that the temporal character of contract gives rise to the possibility that one party may breach the contract even when it is inefficient to do so, and that this requires enforcement mechanisms.

¹⁰⁹ Efficiency thus is seen not as a legal situation replicating ideal markets, but procedural efficiency in adjusting to an uncertain and changing environment. Polinski, *supra* n. 90.

¹¹⁰ On the legal process approach: Blume and Rubinfeld, “The dynamics of the legal process,” 11 *J. Legal Stud.* 405 (1982); Eskridge and Frickey, “The Making of the Legal Process,” 107 *Harvard Law Review*, 2031 (1994); Falk Moore, “Law as process,” (1978); Hart and Sacks, “The Legal Process,” (1994); Peller, “The evolution of Reasoned Elaboration,” 59 *Cal. L. R.* 1152 (1985); Peller, “The Methaphysics of American Law,” 73 *Cal. L. R.* 1152 (1985); Rodriguez, “The substance of the new legal process,” 77 *Cal. L. R.* 919 (1989); White, “The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change,” 59 *Vanderbilt Law Review*, 279 (1973).

¹¹¹ Differing degrees of discretion need to be exercised within the different fiscal institutions and under the restraints of different checks. Thus tax courts are given the greatest freedom from external control as their task is to adjudicate on a case-by-case basis, while individual preferences are revealed through the political process and the majority principle. In all cases of use of discretion – with the exception of truly political decisions taking the form of a tax statute or regulation – there must be a justification of the decision provided for the individual case: Hart and Sacks, *supra* n. 110.

particular decision is the product of a particular kind of procedure¹¹². Fiscal institutions include not only public procedures for the creation of binding statutory tax rules, but also settlements (tax rulings, or settlements during tax audits).

The principle of “institutional settlement” has two corollaries. First, fiscal institutions devised for the settlement of problems exist because of the operation of secondary rules, and generate singular rules. As a result there can be various combination of general and singular rules to settle a specific problem (see above paragraph 2.d.). For example a problem may be settled by judicial decisions, a statutory rules, administrative guideline, or a combination of them¹¹³. Second, in the long run, fiscal institutions become the most stable part of the tax system, continuously generating binding rules to solve cases. As a result they acquire a generative-constitutive function of law-in-action.

The structure of fiscal institutions is very significant in shaping the behaviour of taxpayers since it determines taxable transactions and the permissible range of private activities under which decisions shaped by tax constraints are made. Within this general framework, the mass of singular tax rules are the primary force of internal evolution of the tax system. One could therefore view the working apparatus of fiscal institutions as engaged in continuous transformation of private decisions into binding rules, and in continuous revision of the conditions under which similar decisions will be made in the future¹¹⁴.

Neo-institutionalism and legal process suggest that a decision by a fiscal institution is an “*institutional decision*”, as it reflects the process through which the actual decision is made. Any institutional decision is alternative to other potential decisions which could had been made to solve the same tax problem and implies an *opportunity cost*: as a result the analysis of an institutional tax decisions implies an “*institutional analysis*”, which is the analysis of the choice among alternatives, each of them having a complex structure.

An institutional choice amounts to the selection of a given tax model to address a tax problem, and this selection implies a “institutional analysis” of alternative tax models already implemented in that country or, more importantly, in other countries. In comparative taxation therefore the institutional choice approach can be applied by looking at the *institutional efficiency of alternative tax models in different tax systems*.

EAL would predicate that tax models which are efficient in the strong economic sense should be preferred, but the institutional approach indicates that tax models which are efficient in the relative policy sense should be preferred. As a matter of fact comparative analysis of alternative institutional solutions shows that there is *range of potential solutions* to a given tax problem, each solution being associated to costs which determine a certain trade-off between equity and efficiency.

This analysis of costs/benefits associated with alternative solutions to tax problems is to be distinguished form the analysis of economic impact of taxes. Here we do not discuss about tax incidence, effects of taxation or burden of taxes, but we discuss about the *design of fiscal institutions* (such as procedures, compliance devices, etc.), as well of sets of tax rules (such as

¹¹² Note that institutionalism can be accommodated within a theory of law which consider secondary and primary rules, as institutions are created by secondary rules to produce primary rules with differing degrees of discretion; see above paragraph 2.d.).

¹¹³ EAL, when it considers alternative rules in terms of efficiency, can be viewed as a market-oriented type of institutionalism; see: Posner, “The new institutional economics meets law and economics,” 149 *Journal of Institutional and Theoretical Economics*, 73 (1993); Williamson, “Transaction cost economics meets Posnerian law and economics,” 149 *Journal of Institutional and Theoretical Economics*, 99 (1993).

¹¹⁴ They become “the matrix of everything else”; Hart and Sacks, *supra* n. 110.

corporate tax models) aimed at achieving a specific tax functions¹¹⁵. In this perspective the main issue is the *institutional efficiency* of a tax model, not strictly its economic impact.¹¹⁶

A domestic tax policy, viewed from a comparative perspective is therefore *not only* an institutional choice among alternative domestic solutions, *but also* an institutional choice among alternative solutions coming from other countries or provided for by generally adopted tax models: institutional choice uses the tools of comparative taxation. In conclusion the institutional approach can be used in a *functional comparative analysis* to consider operative tax rules in a context in which alternative solutions can be readily compared in connection with their costs¹¹⁷.

4. Perspectives for comparative tax research

We have clarified that to adopt a theoretical framework does not mean to impose a unique, grand general theory and that comparative tax research, solidly based on theory, should be eclectic as to the methods. We have proposed here a possible framework, but to establish a new field of comparative studies tax scholars need to share a general understanding of their enterprise, and, more importantly, should be able to identify perspectives for common research. To contribute to set such a scholarly agenda we submit here a few perspectives for comparative tax research, by distinguishing static versus dynamic comparative taxation and by addressing a few scholarly challenges in respect to comparative evolutionary analysis and circulation of tax models.

a. Static versus dynamic comparative taxation

The emerging dimension of comparative taxation is the fast evolution of tax systems. In spite of the paucity of literature on the evolution of tax systems¹¹⁸, it is reasonable to believe, on the basis of the paucity of accessible data, that current developments (particularly in relation to corporate taxes): (i) have *exogeneous causes*, i.e. are mainly driven through legal transplants, and (ii) are relatively fast. By contrast, until the 1990's developments of domestic tax systems: (i) had *endogeneous causes*, i.e. were mainly driven through domestic evolution, and (ii) were relatively slow. When one looks at current processes of tax change, one notices this stark difference.

Thus, if one looks at the time span of the processes, one can distinguish two basic areas: *static versus dynamic comparative taxation*. Static comparative taxation focuses on slower structural processes of tax change, whereas dynamic comparative taxation focuses on current process of tax change. Static comparative taxation studies the very basic common core of modern tax systems created by "fiscal institutions", while dynamic comparative taxation studies the ongoing process of interdependent change of specific features of these tax systems.

¹¹⁵ See for example: Warren, "Alternatives for international corporate tax reform," 49 *Tax Law Review* 1001 (1994).

¹¹⁶ According to Komesar, "Imperfect alternatives," supra n. 92, at 19, implementing social goals requires the operation of complex and imperfect decision-making processes, like the market, the courts, the political process, and to understand how these processes unfold requires comparative institutional analysis. Within this approach allocation efficiency is not viewed as the single goal of public policy because a range of goals that substitute for or complement efficiency. For example in posnerian EAL courts allocate efficiency decisions to the market, and where the market does not work the courts make the efficiency determination themselves; but the problem is that efficiency as a goal tells us virtually nothing about which policies should be taken, while comparative institutional analysis make it possible to consider transaction costs and decision-making procedures.

¹¹⁷ Fletcher, supra n. 35, at 695, for example provides a list of alternative models arising from comparative analysis in respect to tort, criminal and constitutional law.

¹¹⁸ Webber and Wildavsky, "A history of taxation and expenditure in the western world," (1986), is a very general account.

The fiscal institutions studied by static comparative taxation are based on the procedural understandings about how questions in connection with the main tax issues should be settled¹¹⁹. These kinds of fiscal institutions include not only the public procedures for the creation of binding tax rules, but also settlements and adjudication.

In the time span considered by static comparative taxation, fiscal institutions become the most stable part of the system, continuously generating binding rules to solve cases, so that they acquire a generative-constitutive function of law-in-action. *Static comparative taxation* thus studies tax systems' fundamental structure and operates on the *synchronic plane* by describing such structure as it exists today and looking backwards to understand the links with the past. The analysis here is concerned with stabilized institutional outcomes of a previous process of tax change. In these cases the time span of the evolution is quite long and may cover several decades: *static comparative taxation* and *history of taxation* may overlap¹²⁰. As suggested by the seminal work of Watson, studies could be devoted to check whether or not in tax matters legal transplants are the "most fertile source of development" of legal institutions in the medium-long term¹²¹.

As a consequence, a static approach can be used to study on the comparative plane the basic features of different tax systems, such as: the principle of tax legality, due process of law in taxation, the system of legal sources for taxation, constitutional review in tax matters, basic patterns of tax control and enforcement, tax judicial review, tax avoidance, evolution of tax doctrine, the reconstruction of tax cryptotypes¹²², tax bureaucracies.

The wider the object of comparative analysis, the stronger the elements shared by current tax systems: tax systems have very profound similarities in respect to these basic features. A interesting issue would be, for example, to verify whether jurisdictional tax review has evolved through different paths within the Western legal tradition¹²³. Another interesting topic of research would be, to verify whether the combination of the foundational tax elements constitutes the very *common core* of tax systems of countries adopting market economy. Should that be the case, we could formulate a theory according to which these tax systems form a "*tax family*" in the sense of the Western legal tradition of comparative studies¹²⁴.

The point of such a theory would be that, in tax matters, the allegiance to a legal tradition (such as civil law as opposed to common law), or other general features of the legal systems (such as the allegiance to a structure of administrative law or the constitutional architecture) are not relevant to determine whether a tax system belongs to a tax family, as the determinant factor could allegedly be the sharing by different countries of the basic elements. In summary the starting point of such a

¹¹⁹ A principle of "institutional settlement" is implicit in the procedures, and provides that decisions which are the result of established procedures are binding, so that tax law can be viewed as the binding outcome of institutions: each particular tax decision is the product of a particular kind of procedure. Hart and Sacks, *supra* n. 110.

¹²⁰ Gordley, "Why Look Backward," 50 *Am. J. Comp. L.* 657 (2002).

¹²¹ Watson, "Legal Transplants," *supra* n. 77.

¹²² See for example: Thuronyi, "Comparative Tax Law," *supra* n. 1, where an attempt is made to address these static comparative law issues.

¹²³ In continental Europe tax courts are generally a result of administrative justice, while in the Anglo-Saxon area there are different patterns.

¹²⁴ On foundational elements constituting the common core of tax systems, see Vanistendael, "Legal framework for taxation," in Thuronyi, "Tax law design and drafting," *International Monetary Fund* (1996); Thuronyi, "Comparative Tax Law," *supra* n. 1, at 13 and 25. On legal families in general: Malmstrom, "The System of Legal System. Notes on a Problem of Classification in Comparative Law," *Scandinavian Studies in Law*, 127 (1976); Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems," 45 *Am. J. Comp. L.* 5 (1997); Oderkerk, "The importance of context: selecting legal systems in comparative legal research," 48 *Netherlands International Law Review*, 293 (2001).

research would be that basic elements of the tax systems stem from the political dimension which taxation has taken in the last two centuries. The research question would thus be worded as follows: is it true that once taxation has become one of the features of Western legal tradition, it generated the features of the tax-administrative state?

Dynamic comparative taxation studies the rapidly evolving regulatory structures of different tax systems over a pre-set period of time and therefore operates on the *diachronic plane* by describing such evolution. It mainly applies to regulatory areas of tax law which are subject to continuous and intense change, such as personal and corporate income taxes. In these cases the time span of tax evolution can be relatively short (it can just covers few years, usually no more than a decade). The evolutionary method here is particularly important and dynamic analysis is concerned with current domestic tax reforms driven by circulation of “tax models”.

We can sketch now the basic outlines of an approach based on circulation of models. We have clarified above that a “*tax model*” is a combined set of structural elements which circulates among countries, while a “*tax mechanism*” is the implementation by a given country of a tax model in the form of an actual set of regulatory arrangements. Tax models thus tend to have a general purpose, serve as a paradigm for tax policy discussion¹²⁵ and circulate among different countries through their tax reform. This process can be denominated as “*circulation of tax models*”¹²⁶. Thus, while at the superficial level tax systems exhibit strikingly different regulatory structures (which can be defined as “tax mechanisms”), at the deep level they are quite similar: in spite of an apparent divergence, there is effective convergence.

A dynamic comparative approach can be used to study the basic aspects of corporate taxation, such as tax treatment of corporate distributions, limitations to the deduction of interest, tax treatment of corporate reorganizations, consolidated corporate taxation, aspects of domestic taxation of transnational income, etc¹²⁷. Outside corporate taxes, an important area of dynamic comparative taxation is the study of value added tax in the EU.

Dynamic comparative taxation can also be used to study the evolution of very specific regulatory structures, embedded in wider taxing structures; for example one can focus the analysis on specific tax incentives, tax deductions, anti-avoidance rules, or any a other peculiar context-bound aspect of taxation. Such an analysis requires that each time the specific aspects of the tax mechanism be connected to a tax model, reconstructing the circulation of such model. Dynamic comparative taxation is therefore a flexible tool and can be used to discuss virtually any topic of taxation. This could lead to an array of new practice-oriented research.

b. Five challenges for comparative taxation (evolutionary analysis, tax transplants; tax convergence/ divergence, EU tax common core, EU taxation of group of companies)

Dynamic comparative taxation mainly looks at the current process of tax convergence/divergence while static comparative taxation is specifically concerned with deep common core. And is thus

¹²⁵ See, for example: Denzau and North, “Shared mental models: ideologies and institutions,” 47 *Kyklos*, 3 (1994); Swank, “Tax Policy in an Era of Internalization: An Assessment of a Conditional Diffusion Model of the Spread of Neoliberalism,” (2004).

¹²⁶ The analysis of the circulation of models is an extension of the study of legal transplants; see for example: Agostini, “La circulation des modèles juridiques,” *Rev. intern. dr. comparé*, 461 (1990); Guarnieri, “La circulation des modèles au cours des deux derniers siècles,” in “Rapports nationaux italiens au XIIIe Congrès International de droit comparé,” (1990); Sacco, “Circolazione e mutazione dei modelli giuridici,” *Il Dig. Disc. Priv.* 365 (1992).

¹²⁷ See for example: Ault, *supra* n. 1, at 271 and 345; Warren, *supra* n. 115.

concerned with evolutionary analysis of tax convergence, particularly when this occurs through legal transplants. A formant approach can be used in dynamic comparative taxation to study the dissociation of formants, while the common core approach sheds light on the basic structure of common corporate problems, particularly at EU level.

Dynamic comparative taxation indeed opens up a new set of scholarly issues as it focuses on tax change, interdependence of tax systems and circulation of tax models. These issues, combined together, contribute to set the agenda of future research and can be summarized as the “*five challenges for comparative taxation*”.

The *first challenge* is to provide a *theoretical framework for comparative evolutionary analysis* (“CEA”) and apply it to taxes, by considering *three different levels*: the *deep level*, where there is a *common core of tax systems* of countries in relation to basic tax problems; the *intermediate level*, where there is *circulation of tax models* among different countries, and the *surface level*, where there is *regulatory articulation of domestic tax mechanisms* as responses to tax problems.

The *second challenge* is the *analysis of tax change through the technique of legal transplants*. It is emphasized here that there are three types of tax change: internal processes leading to local and original solutions (*domestic evolution*), importation of tax mechanisms (*tax transplants*), and legal innovation inspired by common policy without actual transplants (*autonomous evolution*)¹²⁸. Most part of tax convergence is attained through legal transplants that, while in domestic and autonomous evolution tax convergence can just be a by-product of similar local policies.

The *third challenge* is related to *how* tax evolution effectively unfolds, and basically addresses *tax convergence* (attained through *stabilizing selection*) and *tax divergence* (attained through *disruptive selection*), as well as the strategic equilibrium between tax change and tax continuity. The framework of the of tax evolutionary process through stabilizing and disruptive selection is *competition among tolerably fit tax models*. Within this approach it would be necessary to consider the structuring of optimal tax design at the level of each country in connection with the choices made by other countries and this could lead to the assessment of evolutionary pressures on domestic tax policies.

The *fourth challenge* is the analysis of circulation of tax models among EU countries with the specific aim to reconstruct an *evolutionary map* for EU corporate taxes; this could demonstrate that at multi-country level there are macro-models of European tax law, as the common core project has evidenced with respect to European private law. An interesting case study are corporate taxes in EU countries; such taxes have not been harmonized as of yet, but research may show evolutionary patterns indicating that there is an underlying common core. This research would constitute a “bottom-up” approach to tax integration (opposed to the “top-down” approach of the few existing direct tax directives)

The *fifth challenge* is related to the taxation of groups of companies, and is aimed at verifying whether there is a potential “bottom-up” predominance of a tax consolidation model¹²⁹ to be implemented at EU level through reinforced cooperation. The current situation reveals partial divergence at the level of domestic models of tax consolidation, but a full convergence at the level

¹²⁸ Domestic evolution is similar to autonomous evolution because in both cases tax change occurs at domestic level without actual transplants of legal structures from other countries. Domestic evolution however differs from autonomous evolution: while the former occurs in isolation without looking at the solutions adopted by other countries, the latter is inspired by the same policy aims of other countries.

¹²⁹ In the tax consolidation model profits/losses of companies can be offset with profits/losses of companies belonging to the same group, and this may extend also to profits/losses of foreign companies.

of common core tax problems, and this suggests that further research can possibly show the existence of a *EU common model of tax consolidation* on which agreement can be reached through reinforced cooperation at EU level. This situation also indicates that a EU model of tax consolidation, such as Home State Taxation (“HST”)¹³⁰ or Consolidated Common Corporate Tax Base (“CCCTB”)¹³¹ should be modelled after the structure of the common core of the domestic tax mechanisms of consolidated taxation.

¹³⁰ In the HST model the head company offsets profits/losses of companies belonging to the same group resident in other EU countries adopting the tax law of its country of residence, but the taxable base is apportioned to the EU countries where these companies are located, in accordance with a specific formula.

¹³¹ In the CCTB model a uniform corporate tax would be introduced at EU level and the head company would compute a common EU taxable base, which would be apportioned to the EU countries where the companies of the group are located, in accordance with a specific formula.