Legal Academics' and Practitioners' Contribution to Tax-policy Making. Some Observations on the Subject[1]

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I would like to share my thoughts on the main topic we are discussing today and, doing this, I wish to focus on some key points. However, it should be stated from the outset that my perspective is that of a country which is part of the European Union, part of the eurozone, and above all it is a country of civil law, with a still strong heritage from the ancient Roman law. For these reasons, I'm afraid my experience can resonate much different than yours.

As regards the main question of our meeting, some distinctions should be made too, because considering only the role played by taxlawyers in tax policy-making may appear too limiting or, in some ways, misleading. Besides, in my country, the majority of academics also performs as taxlawyers, or to a lesser number, as accountants.

In my brief remarks, I prefer however to keep separate the figure of the academics from the practitioners, and to focus in particular on the first one.

As far as the role of academics and practitioners in the tax-policy making, it is a tricky problem indeed and we cannot obviously synthesize it in a few words. If you asked me if over the last 20-30 years academics made a significant contribution to tax-policy making, my first answer would be "no" and only after some deliberation it would be "maybe", but not to a large extent.

In fact, it seems to me that taxation is a particularly crowded playing field, in which many players play decisive roles.

Who are these players?

1. *Politics* and *politicians*. In this regard, I would like to raise a first question: do politicians need both academics and taxlawyers in tax matters? In other words: are they two independent worlds, or are they connected, as in the "law of communicating vessels"? We may think about the possible interactions between academics, taxlawyers and politicians in some very relevant choices of fiscal policy: when a Government claims to adopt a more open-to-business policy

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by changing the tax rate on corporations; in the tightening up of inheritance tax; in the introduction of a google tax or a flat tax; on the choice between limiting interest deductibility or/and reducing distorsions between the tax treatment of debt and equity, etc.

I should like to point out that, not at the present time, but in the recent past in Italy we had as many as four Ministers of Economics Affairs and Finance who were professors in tax matters (and three of them were also taxlawyers): Franco Gallo (1993-94), Augusto Fantozzi (1995-96), Vincenzo Visco (1996-2001) and Giulio Tremonti (1994-95, 2001-2006 and 2008-2011). That means something, I dare say!

Similarly, various tax law professors were elected to Parliament. Thanks to the combined efforts, among others, of professors Gianni Marongiu (centre-left) and Furio Bosello (centre-right) in 2000 the so-called "Taxpayer's Bill of Rights" was adopted by the Parliament, despite a strong opposition from the Tax Authorities, who feared a loss of their powers of investigation and assessment against taxpayers.

Apart from the use of their expertise in tax matters in ministerial committees or in Parliament hearings, or their role as Minister's close associates, academics and particularly qualified practitioners were especially needed on the occasion of important, long term tax reforms. In the past, it was natural to turn to academics for important tax reforms. Indeed, in some cases they anticipated them. But unfortunately things today have changed a little.

2. *Jurisprudence*. I can mention here a recent example: before 2015, we didn't have a general anti-abuse clause, but specific rules (regarding income taxes and stamp duties) only applicable to specific cases (for example, Article 37-*bis*, dpr 600/1973 laid down an exaustive list of cases, mostly regarding extraordinary operations such as mergers, acquisitions, etc.) and unsuitable for any extension via "*analogia legis*". The role of both the Italian Supreme Court and the UE Court of Justice in the introduction of a general anti-abuse clause in the Italian tax law (Art. 10-*bis* in the abovementioned "Taxpayer's Bill of Rights") was enormous, and not only in the "if", but also in the "how". In other words, the introduction of a general anti-abuse rule came primarily at the urging either of cases before the UE Court of Justice and before the Italian Supreme Court. In this regard, academics and taxlawyers have written rivers of ink, and made countless conferences, but little of what has been proposed was welcomed (although some significant improvement was made thanks to them in the final draft of Article 10-*bis*).

Not to mention the pervasive role of the jurisprudence of the European Court of Human Rights even in tax matters; in this regard I can mention the upheaval caused by the

jurisprudence on the subject of "*ne bis in idem*" (right not to be tried or punished twice, Art. 4, Prot. 7 HCHR) in countries like mine, where there is a dual-track system, namely tax administrative penalties and criminal sanctions. This system is certainly not devoid of critical elements, but it seems overall, or it seemed, coordinated, self-sufficient and functioning: now - namely after the Gande Stevens et al. v. Italy judgment (4 March 2014) and the case law following on from that judgment - we ended up in a situation of uncertainty, without being able to see the end of the tunnel.

3. *Tax administration*. In my country, tax administration and beaurocracy in general have assumed in the last years a real driving force in fiscal policy choices. It is a fact, more than a suspicion, that the Department of Fiscal Policies of the Ministry of Economics and Finance is the veritable ghost writer of many recent bills. I'm afraid that here the role of tax administration in the "making" of tax laws went to the detriment of the role scholars had in the past. We are told that the tax authorities have more expertise and are in possession of the necessary data. However, it cannot be denied that tax authorities must take into account firstly the public interest and the State cash needs; therefore their (although unofficially) intervention may appear strongly one-sided oriented.

I'm talking here about primary rules and not, of course, about the interpretation and application of the law fulfilled through circulars, resolutions etc., which we cannot qualify as piece of legislation, as well as I am not referring to acts of secondary standards (i.e. ministerial decrees), in which skills are required which specifically relate to tax administration.

Anyway, the "policy circle" mentioned by Victor Baker (*Do lawyers make a distinctive contribution to tax policy making? A view from HMRC*), proves to be of great interest and detects a protocol that would be very helpful to apply also in Italy, especially in order to avoid the "unintended consequences of laws" that have been talked about today.

4. Finally (but it should have come first, given today's theme), we find *academics and practitioners*, squeezed together into a tiny space. It is a tiny space indeed, that could and should be maximized in both the *ex-ante* and the *ex-post* phase of the entry into force of a law.

The category typically suffers from a lack or loss of authority.

There are important exceptions:

a. Taxlawyers strongly influence the jurisprudence through their daily work in taxpayer's

defense. Many legal guidelines are due precisely to their thesis accepted by judges, as well as many court decisions make reference to the fiscal doctrine, while they don't name the sources explicitly, as the basis for their judgement.

b. There are, I think, in any country, figures of taxlawyers (academics and practitioners) with particular authority. I don't want to cause embarrassment in giving the names, even of those people who are attending the present conference, but it is a fact that their words and their thinking, both contained in their writings, or exposed through the media, may affect some fiscal policy choices. But they are isolated voices, which do not represent the entire category.

So, what are the reasons of this current deficit in their authority? They can be many.

One of them is the fact that academics have mostly focused on the details of the individual cases, or on the mere exegesis of the legislation and rules, neglecting a more systematic, based-on-the-principles vision.

Another reason is that, just like a mirror image to the opposite of the tax authorities, many taxlawyers adopt a one-sided interpretation, obviously in defense of the taxpayer, and doing so they are not perceived as credible benchmarks for a more objective, institutional vision.

Again, another reason is the tendency to use a language that is difficult to understand: it is true that the legal language presents indispensable technicalities, but sometimes we use an academic jargon even to define relatively simple concepts, with the consequence of being not able to convey our ideas and views.

Anyway, there are signs that something is changing and that the category is regaining greater awareness of its role, at least at the level of opinion-makers: in Italy, for instance, commendable initiatives are carried out by both academics and taxlawyers in order to change some already obsolete parts of the "Taxpayer's Bill of Rights". In the same time, the attempt to propose a comprehensive tax code was not successful (in that we're a hundred years behind the German *Abgabenordnung*…), but it served to bring debate to a simpler and more coordinated tax law system.

We should not equally underestimate the important contribution of our journals and reviews in the field of taxation. In Italy we have really many of them, some (widely distributed among taxlawyers and accountants) with a stronger practical focus, and others, edited by academics, with a more doctrinal and thorough approach to tax law and its evolution. Especially the latters might play a significant role in the tax policymaking.

Throughout all this talk, significantly, a major player is missing, i.e. the *taxpayer*. I deliberately didn't insert him among the main proponents of a tax policy, because it seems to

me that, even today, the proposals come from the top, not from the bottom. The only chance to influence a country's fiscal policy on the part of taxpayers is, in my opinion, through their votes in the parliamentary elections (manifesting thereby their so-called "consent to taxation"), or through forms of lobbying, as recalled by Adrian Sawyer (*Reflections on the contribution of lawyers to tax policymaking in New Zealand*), although in the latter case it happens only for certain categories of taxpayers, more structured or economically stronger. However, this issue would lead us far away from today's topic.

In conclusion, as academic and taxlawyer, I strongly believe that it is appropriate to strengthen our "pioneering" role, as said by Ann Kayis-Kumar in her presentation (*The importance of legal practitioners and scholars in tax policy design and developement: An exploration and extension of the legal-economic literature*), in which she stressed the importance of legal academics' and practitioners' involvement in the design, implementation and maintenance of an institutional approach, also suggesting an interesting recovery of interaction with the economic principles. I'm also convinced that scholars could and should play a proactive, driving force especially at an *ex-ante* stage of the tax-policy making, even if they don't usually do it. In fact nowadays, scholars are very seldom taken into account when they try: at this *ex-ante* stage, the role played both by tax authorities and jurisprudence seems much stronger.

But I also believe in the importance of practical and scholarly activity in the transition from theory to practical application of a law. In other words, it is important to maintain a critical role (critical in the ancient Greek sense of the term), namely an objective judgement against controversial laws. In this, we are finally freer than the other players in the tax playground.