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The Journal of Tax Administration (JOTA) is a peer-reviewed, open access journal concerned with all aspects of tax administration. Initiated in 2014, it is a joint venture between the University of Exeter and the Chartered Institute of Taxation (CIOT).

JOTA provides an interdisciplinary forum for research on all aspects of tax administration. Research in this area is currently widely dispersed across a range of outlets, making it difficult to keep abreast of. Tax administration can also be approached from a variety of perspectives including, but not limited to, accounting, economics, psychology, sociology and law. JOTA seeks to bring together these disparate perspectives within a single source to engender more nuanced debate about this significant aspect of socio-economic relations. Submissions are welcome from both researchers and practitioners on tax compliance, tax authority organisation and functioning, comparative tax administration and global developments.

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In preparing papers for submission to the journal, authors are requested to bear in mind the diverse readership, which includes academics from a wide range of disciplinary backgrounds, tax policymakers and administrators, and tax practitioners. Technical and methodological discussion should be tailored accordingly and lengthy mathematical derivations, if any, should be located in appendices.

MESSAGE FROM THE CHARTERED INSITUTE OF TAXATION

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EDITORIAL NOTE

Emer Mulligan (Guest Editor), Lynne Oats (Managing Editor)

Co-operative Compliance (CC) has become a 'hot topic' in recent years for taxpayers and their advisers, tax administrators, and supranational bodies such as the OECD, as well as for academic researchers. This special issue had its origins in a workshop on this topic held in London in May 2017, which was organised by Lynne Oats under the auspices of the EU-funded FairTax project (see Review section for more information on FairTax).

Going beyond the pragmatic to discussions which focus on the mechanics of such things as implementation and processes in relation to cooperative compliance programmes, we can read the papers in this special issue as offering new ways of thinking about these phenomena in action in terms of both the focus of our attention and the way in which we gather our evidence. Several of the papers draw on theoretical insights from the social sciences and humanities, providing valuable examples of how we can borrow from other strands of scholarly work to improve our understanding of tax matters, and examine the wide-ranging implications of tax administration initiatives such as CC for the tax administration and taxpayers alike.

Two papers draw on the Swedish experience to inform quite different analyses, one taking a legal perspective and another drawing on moral anthropology. Not only are the two papers different in focus, they are also different in terms of the methodology employed.

Anna-Maria Hambre, a legal scholar, examines the Swedish attempt to introduce co-operative compliance that was ultimately thwarted by constitutional law. The legal framework within which regulatory policy initiatives are implemented is a significant issue. The Swedish context is carefully described, especially the careful separation between politics and administration and the long Swedish tradition of transparent government which underpins confidentiality of access to sensitive information about individuals while supporting public access to public body, including tax agency, decisions. The tension between confidentiality and transparency is pervasive in the case of the Swedish cooperative compliance programme. In addition, the capacity of an agency to act independently of Parliament to introduce administrative rules may be constrained by the legal tradition. Hambre concludes that the spread of cooperative compliance as an international norm makes the initiative too important to be dismissed and that closer attention to the legal framework would allow such a programme to be introduced in the future.

In contrast, Lotta Björklund Larsen, a fiscal anthropologist, considers the failure of the Swedish model through the lens of moral anthropology; looking at the moral reasonings as expressed by various stakeholders in the tax arena. Going beyond the legal arguments and objections to cooperative compliance in Sweden, she considers the broader philosophical underpinnings of the opinions expressed. The important point is made that proponents and opponents of the initiative appear amongst all stakeholders; there was no simple dichotomy between the tax administration as proponent and MNEs as opponents.

Two papers draw on the Dutch experience, once again to inform quite different analyses, and notably the Dutch tax administration was one of the first to introduce a CC programme. Sjoerd Goslinga and colleagues focus, in particular, on the tax control framework (TCF) that is a core component of the Dutch Horizontal Monitoring programme and is increasingly becoming embedded in CC programmes elsewhere. By means of two questionnaire-based studies,

conducted in 2011 and 2014 with senior officials responsible for tax matters in large organisations, the authors explore the relationships between the quality of TCFs, willingness to comply and certainty. The studies produced slightly divergent results, which the authors suggest may in part be attributable to the increased publicity surrounding the tax affairs of multinationals during the time elapsed between the two surveys. The study nonetheless shows that the need for certainty prompts improvements in the quality of tax control frameworks. It would be interesting to see if this has changed given subsequent events, which see an ever-increasing focus on the tax affairs of multinationals, although it seems likely that the desire for certainty among large organisations is now stronger than it was previously.

Esther Huiskers-Stoop and Hans Gribnau examine the Dutch co-operative compliance model from a legal perspective, focussing on principles of reciprocal trust, understanding and transparency. They observe that the Dutch model differs in focus from the OECD's model in its emphasis on reciprocity and conclude that there is a need for ongoing reflection and improvement in the Dutch model. The paper provides careful analyses of both the OECD model for enhanced relationships and the Dutch model, which will be a useful reference point for future scholars researching similar phenomena.

Alicja Majdanska and Jonathan Leigh Pemberton provide a comparative study, considering whether co-operative compliance in practice is consistent with principles of equality before the law and procedural fairness. They use Italy, the Netherlands and the United Kingdom as examples and suggest that in a post-BEPS world, in which tax compliance obligations are significantly increased globally, the benefits to both taxpayer and administrations of entering into co-operative compliance arrangements are increasingly attractive. Drawing on both philosophy and legal jurisprudence, the authors explore the question of equality more broadly, as well as equality before the law, before testing the efficacy of the specific programmes in the selected jurisdictions.

The final paper in this special issue considers the case of another early adopter of a co-operative compliance initiative, namely the US, whose co-operative compliance programme is known as the Compliance Assurance Process (CAP). De Widt, Mulligan and Oats draw on a framework developed under the auspices of regulation theory by Etienne and consider the motivation for entering into co-operative regulatory arrangements from the perspective of both the regulator and regulatee, and address the implications of different motivations for the success of an initiative such as CAP.

In combination, the papers in this special issue provide a rich picture of co-operative compliance in various tax jurisdictions. As the landscape in which interactions between large business taxpayers and tax authorities across the world continues to change, sometimes in unpredictable ways, there is plenty of scope for future analysis of these arrangements, especially in relation to less developed countries and those with more authoritarian administrative regimes, along with the OECD's recently announced international compliance assurance programme.

COOPERATIVE COMPLIANCE IN SWEDEN: A QUESTION OF LEGALITY

Anna-Maria Hambre[1]

Abstract

The purpose of this paper is to emphasise the importance of recognising the legal framework within which a cooperative compliance programme is to operate. This is done through the example of the Swedish cooperative compliance model, *fördjupad dialog* ("in-depth dialogue"), which has been described as somewhat of a failure by representatives from both academia and business. In this paper, the author points to certain legal issues that may explain why the Swedish cooperative compliance programme has not been a success. The focus is the principle of legality, laid down in Swedish constitutional law, which requires a legal basis in the law for public agency activities. The lack of legal basis has been a central part of the criticism concerning *fördjupad dialog*. The Swedish Tax Agency argues that there is a legal basis for *fördjupad dialog*, through the so-called service obligation provision in Section 6 of the Administrative Procedure Act of 2017. The author argues that, on the contrary, *fördjupad dialog* does not constitute a form of service under this Act. This conclusion is based on, *inter alia*, an analysis of the scope of the term "service". Therefore, *fördjupad dialog* lacks legal basis. Since it has not been possible to find another provision laid down in the law that may constitute such a legal basis, it is the author's conclusion that the constitutional principle of legality has not been met. Thus, the criticism concerning the fact that *fördjupad dialog* lacks legal basis still stands.

Keywords: *fördjupad dialog*, cooperative compliance, constitutional law, principle of legality, service obligation, administrative law, tax confidentiality

INTRODUCTION

From an overall perspective, this paper addresses the significance of recognising the legal framework within which a cooperative compliance model is to operate. Light is shed on this topic through the example of the Swedish cooperative compliance model, *fördjupad dialog* ("in-depth dialogue"). By taking part in the research project *Cooperative Compliance – Breaking the Barriers*[2] and sharing Swedish experiences of cooperative compliance within this project, it has become clear that Sweden, and its *fördjupad dialog*, serves as a vivid example of what happens when a country's legal framework is not adequately observed when implementing a cooperative compliance programme and the impact this has on the functions of the programme.

Fördjupad dialog, or rather, as it was initially termed, *fördjupad samverkan* ("in-depth collaboration"), was introduced in Sweden in 2011, but actual cooperation began in early 2012 (Skatteverket, 2011). The initiative stemmed from the work of the Organisation for Economic

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[2] *Cooperative Compliance – Breaking the Barriers* is a project headed by the WU Global Tax Policy Centre, run in cooperation with the African Tax Institute at the University of Pretoria's Faculty of Economic and Management Sciences and the Commonwealth Association of Tax Administration. For more information, visit https://www.wu.ac.at/en/taxlaw/institute/gtpc/current-projects/co-operative-compliance/.

Co-operation and Development (OECD) and the International Fiscal Association (IFA) on the "Enhanced Relationship".[3] The Swedish Tax Agency's initial report states that the purpose of *fördjupad samverkan* was to reduce the tax risks of corporations, increase the exchange of information and transparency between corporations and the Tax Agency, enhance trust between corporations and the Tax Agency, and reduce tax evasion and aggressive tax planning (Skatteverket, 2011). It is clear from the report that *fördjupad samverkan* was part of the Tax Agency's focus on more preventive measures to ensure that taxes and fees are correctly established as early as possible in the taxation process. The report states that *fördjupad samverkan* was one of several steps taken to enhance preventive measures (Skatteverket, 2011).

Early on, the initiative was heavily criticised, both by academia and by business and the Confederation of Swedish Enterprises (Sw. Svenskt Näringsliv). The criticism was mainly of a legal character, concerning conflicts with Swedish constitutional and administrative law, such as equal treatment before the law and the issue of confidentiality (Andersson, Fritsch, & Rydin, 2012; Påhlsson, 2012a; Påhlsson, 2013; Sallander, 2013; Svenskt Näringsliv, 2012-10-23).

As a consequence of the criticism, the Tax Agency reviewed *fördjupad samverkan* in 2014. Following this, the programme's name was changed to *fördjupad dialog* and guidelines (*Riktlinje för fördjupad dialog*, hereinafter referred to as "the Guidelines"[4]) for its procedures were drafted.

The purpose of *fördjupad dialog*, as worded in the Guidelines, Item 1, is to help companies report taxes and fees correctly from the outset through the Tax Agency's provision of support and information. The Tax Agency's view is that when this form of cooperation is appropriate, it facilitates the work of taxation activities and entails efficiency gains in corporate tax treatment (Guidelines, Item 1).

The Guidelines show that both companies and the Tax Agency can initiate cooperation under *fördjupad dialog* (Guidelines, Item 3). The decision to engage in cooperation is, however, taken solely by the Tax Agency, albeit in consultation with the company (Guidelines, Item 4).

Once *fördjupad dialog* has been initiated, an officer at the Tax Agency is appointed as a contact to whom the company addresses its questions (Guidelines, Item 5 and Comments on Item 5). The contact at the Tax Agency is only the company's communication channel into the Agency. The contact may not manage the company's affairs, but the company's questions are referred within the Agency's operations, more precisely, to its legal department (Guidelines, Item 7; Skatteverket, 2013; Skatteverket, 2015).

According to the Guidelines, there are three different types of activities that the Tax Agency may engage in under *fördjupad dialog*. The Tax Agency may, within the framework of the *fördjupad dialog*: (1) report its assessment of risks in terms of a company's ability to fulfil its obligations under tax law; (2) support a company in its internal work to ensure that systems

[3] The "Enhanced Relationship" was introduced by the Forum on Tax Administration (FTA, created by the Committee on Fiscal Affairs in July 2002) in 2008, in the "Study into the Role of Tax Intermediaries", which addressed the topic of aggressive tax planning and the relationship between revenue bodies, taxpayers and tax intermediaries. The study pointed to large taxpayers and revenue bodies engaging in a collaborative, trust-based relationship as a means of influencing aggressive tax planning (OECD, 2008; OECD, 2013).

[4] The first Guidelines were introduced in March 2014 (Skatteverkets riktlinjer, Riktlinje för fördjupad dialog, 2014-03-10, dnr. 131 409414-13/111), but the current Guidelines date back to June 2016, when the last changes were made (Skatteverkets skrivelser, Ändrade riktlinjer för fördjupad dialog 2016-06-23, dnr. 131-285072-16/111).

and procedures are in place so that proper data can be provided to the Swedish Tax Agency; and (3) help a company to reduce the uncertainty about liable taxes and fees by providing clear and prompt answers (Guidelines, Item 8).

Despite the fact that there are three activities in Item 8 of the Guidelines, *fördjupad dialog* could be said to consist of two parts. The first part entails a company continually submitting questions on substantial tax issues to the Swedish Tax Agency in order to receive a statement of the Agency's position. This forms, in my view, the central part of the programme. The second part consists of a company involving the Tax Agency in its internal work with tax management by being transparent about its tax management, upon which the Agency may provide a risk assessment.

Despite efforts to renew the cooperative compliance programme and the drafting of these Guidelines, criticism has continued. One example is the report written by Bernitz and Reichel (2015), in which the authors question the legality of *fördjupad dialog*.

To put it mildly, *fördjupad dialog* has not been a huge success. Not only has the programme received harsh criticism from academia, businesses have shown resistance towards it. For instance, in June 2011, during the launch of *fördjupad samverkan*, 25 of Sweden's largest companies signed a letter in which they rejected the Tax Agency's invitation to participate in the programme (Svenskt Näringsliv, 2011). The lack of success can also be illustrated by the fact that even today only a handful companies are participating in the programme.[5]

Bearing in mind that Sweden, from a general point of view, has a well-functioning tax administration that has been ranked in the top five in Sifo's annual citizen survey on public administration reputation for several years (Kantar Sifo surveys "Myndigheternas anseende") and that the Tax Agency has several different channels for direct communication with taxpayers, such as telephone panels and answering written questions, that all appear to function well, you might ask yourself why this activity – *fördjupad dialog* – is not a success in Sweden.

As has been held above, when describing the criticism directed towards *fördjupad samverkan/fördjupad dialog*, there are several issues that are problematic from a legal perspective, which could be said to be part of, albeit not the sole reason, why *fördjupad dialog* has not prospered.[6] What is addressed in this paper is, first and foremost, the question of legality. More precisely, the paper concerns the Swedish cooperative compliance model and how it fits – or perhaps rather does *not* fit – within the Swedish constitutional and administrative legal framework.

This approach demands a presentation of the Swedish model of administration describing the role of public agencies in Sweden and their relation to the Government, but perhaps more importantly, a description of the principle of legality that is laid down in constitutional law and how it introduces obstacles concerning a cooperative compliance model such as the one discussed in this paper. Furthermore, when discussing legality in the context of the Swedish

[5] In 2015, five agreements on *fördjupad dialog* were concluded, though only one of the companies participated actively (Björklund Larsen, 2015). Björklund Larsen notes that none of the agreements relate to (the time) after the programme shifted from *fördjupad samverkan* to *fördjupad dialog* (Björklund Larsen, 2015).

[6] Björklund Larsen, Ph.D. research fellow at Linköping University, Sweden, has written a report on the Swedish cooperative compliance model from a social anthropological perspective (Björklund Larsen, 2015), not primarily from a legal perspective, although legal issues are identified as problematic.

cooperative compliance model, *fördjupad dialog*, there is reason to address a special feature of Swedish administrative law called "the service obligation".[7]

Criticism directed at *fördjupad dialog* has, as previously stated, to a large extent concerned legality. However, writing a paper on *fördjupad dialog* and its failure without mentioning the topic of confidentiality would to omit one important and much debated issue. Therefore, the issue of confidentiality is also briefly touched upon.

Before embarking on the study of *fördjupad dialog*, something needs to be said concerning methodology. The traditional method of legal research in Sweden adheres to what could be called *legal dogmatics*, involving the interpretation and systematisation of the law as it stands (Peczenik, 1983). The sources that are used in such a study are legislation, preparatory works, case law and legal scholarship, here listed in the order of precedence according to the Swedish doctrine of the hierarchy of legal sources.[8]

The starting point of this study is the law – or the legislative text – as the primary source of law. Since the content of the legislative text is not clear as regards the topic of this paper, the emphasis is rather on the preparatory works. Preparatory works are seen as complementing the dominant legal source, the legislative text, in that they are used to interpret legislation, since details not included in the statutory text are often supplied in the preparatory works (Strömholm, 1996). A Government Bill (in this paper referred to as a "Bill") contains the government's proposal for new legislation and is the part of the preparatory works that is closest to the actual legislation. A Bill is often preceded by the appointment of a Committee of Inquiry, which publishes an Official Report of the Swedish Government – SOU (Sw. *Statens Offentliga Utredningar*) – in which an in-depth study of the matter is conducted.

Regarding case law, several of the provisions studied in this paper are of so-called "goal-oriented" character, which is why case law is scarce. Reference to legal scholarship is, on the other hand, made frequently, since in this case such sources facilitate the interpretation of the unclear legislation.

THE SWEDISH MODEL OF ADMINISTRATION

From a European perspective, the Swedish model of administration may appear slightly odd. Sweden is characterised by independent administrative agencies, forming a model of dualism – a separation of organisation and responsibility between the government and the administrative agencies. This dualism can be traced back to the 18th century (Bernitz & Reichel, 2014; Wennergren, 1998).

The independence of public agencies is laid down in constitutional law in the Instrument of Government from 1974, a general fundamental law which lays down the rules on how the country is to be governed. Chapter 12, Article 2 states that no public agency, including the Riksdag (the Swedish Parliament), may decide how an administrative agency settles matters regarding the exercise of public agency or regarding the application of the law. This independence is held to be the foundation and focal trait of the Swedish model of administration (Lind & Reichel, 2014; Wennergren, 1998).

[7] A more in-depth analysis of these issues, among others, is provided in Hambre (2018).
[8] This is the traditional order of precedence, although there are differences of opinion regarding the ranking (see, for instance, Strömholm, 1996; Nergelius, 2011; Peczenik, 1995).

This, however, does not imply that the government has no influence over the work of public agencies. Based on the annual state budget decided by the Riksdag, the government issues appropriation directives for the government agencies (Chapter 9 of the Instrument of Government). The appropriation directives set out the objectives of the agencies' activities and their budgets. This provides the government with substantial scope for directing a public agency's activities. However, as held above, the government has no power to interfere with agency activities involving the exercise of power or the application of the law in individual matters. Thus, the Tax Agency has rather a free rein regarding its operations within the framework of the appropriation directives (Svernlöv & Persson Österman, 2016).

This model of administration prevents individual ministers from making their own decisions about the subordinate agencies and their decisions in individual matters, which, like the independence of public agencies, is held to be a key feature of the Swedish model (Bernitz & Reichel, 2014; Lind & Reichel, 2014). What is often referred to as "the prohibition of ministerial rule" is stipulated in the provisions of the Instrument of Government (Chapter 7, Article 3 and Chapter 12, Article 1). As concerns the Tax Agency, the prohibition of ministerial rule implicates that the Minister of Finance may not interfere with the Agency's dealings in individual cases.

Hence, as regards the exercise of public authority and the application of the law, there is a clearly defined line between the government and the administrative agencies. The intention is to create an inherent slowness in the system that counteracts political whims and contributes to predictability (Bernitz & Reichel, 2014; Bill 1973:90; Wennergren, 2008). Lind and Reichel (2014) characterise the Swedish model of administration as governed by law rather than policy. The continued adherence to this distinction is also expressed in preparatory works. In Bill 2009/10:175 on public administration for democracy, participation and growth, it is held that the line between politics and administration must be clear.

The Swedish administrative system is not only characterised by the dividing lines between politics and administration but also by its long tradition of transparency in public administration through the principle of public access to information, including the far-reaching right of public access to public administration documents. This right is enshrined in Swedish constitutional law – Chapter 2, Article 1 of the Freedom of the Press Act – and has been so since 1766. When restrictions on this right are created, in other words, when provisions on confidentiality are being designed, a great deal of emphasis is placed on the right of access to public administration documents. Transparency is held to be the starting point of confidentiality legislation in Sweden (Bill 1979/80:2, part A; Bill 1975/76:160).

The field of taxation, however, is regarded as an area where information that is particularly sensitive for an individual is maintained, which is why Swedish confidentiality legislation offers a very high level of confidentiality in tax administration, protecting, for instance, information in taxpayers' tax returns from public access (Chapter 27, Section 1 of the Public Access and Secrecy Act). There are certain exceptions as regards this high level of confidentiality. Most Tax Agency decisions are, for instance, not protected by confidentiality but considered to be public information (Chapter 27, Section 6 of the Public Access and Secrecy Act), which means, for instance, that information on taxable income is public information in Sweden. Another exception from confidentiality is the Tax Agency's consulting activities (Bill 1979/80:2, part A).

How the Tax Agency's new activity, *fördjupad dialog*, fits in with the tax confidentiality legislation briefly presented above[9] has not been particularly clear. The Tax Agency's position regarding *fördjupad dialog* and confidentiality has fluctuated considerably over the relatively few years the *fördjupad dialog* programme has been running. Initially, the Tax Agency's position was that the programme did not enjoy confidentiality protection (Påhlsson, 2012a). This position changed later, whereby *fördjupad dialog* was considered to be embraced by the scope of confidentiality under Chapter 27, Section 1 of the Public Access and Secrecy Act (Hansson, Askersjö, & Landén, 2012; Skatteverket, SKV decision dnr 480 713075-12/263). The Tax Agency again changed its position following a case in the Supreme Administrative Court in 2013, where the Court concluded that *fördjupad dialog* constitutes a consulting activity and, since such activities are not protected by confidentiality according to Bill 1979/80:2, part A, the information part of *fördjupad dialog* is to be considered to be public information (HFD 2013 ref. 48). The position that the information part of *fördjupad* dialog is public information is now explicitly stated in the current Guidelines (Item 13 and Comments on Item 13).

THE PRINCIPLE OF LEGALITY

The dualistic model of administration makes Swedish public agencies independent and strong. Their independence is, however, limited by the principle of legality, which is also laid down in constitutional law in the opening Article of the Instrument of Government, which states that "public power is exercised under the law".

This implicates that an obligation imposed on a citizen by a public agency must always be based on the law. An interpretation of the wording of this provision gives the impression that it only concerns provisions laid down in actual acts of law. However, the term "law" has a wider scope than such an interpretation reveals. The term "law" does not only embrace acts of law but also ordinances and other types of provisions and practice (Bill 1973:90; KU 1973:26; Bill 2016/17:180). The phrase "public power is exercised under the law" thus holds that public agency action must be supported by an act of law or other enactment.

The meaning of the principle of legality differs slightly according to the legal field and relating to the term "law". In certain legal fields, the principle requires statutory law as a basis for agency activities, while in others, provisions in a government ordinance may be enough to meet the principle of legality.

The field of taxation is one which requires an actual act of law. It follows from Chapter 8, Articles 2 and 3 of the Instrument of Government that provisions on taxes shall be laid down in the law and that the power to approve provisions regarding taxes may not be delegated. Since delegation is not possible and the Riksdag is the sole legislator (Chapter 8, Article 1 of the Instrument of Government; Bill 1973:90), tax provisions need to be decided by the Riksdag.[10]

The principle of legality within the field of taxation is often referred to as "*nullum tributum sine lege*" – "no taxation without prior legislation" – a sort of pun related to how the principle is expressed in criminal law – "*nullum crimen sine lege, nulla poene sine lege*" ("no crime without prior legislation, no punishment without prior legislation"). The implication of the principle of legality in the field of taxation is an individual's right not to pay more tax than is

[9] For more on the Swedish tax confidentiality legislation, see Hambre (2015).
[10] Note the exception mentioned below.

stipulated in tax law (Hultqvist, 1995). In addition to this right, Påhlsson (1995) has pointed to another feature of the principle, the obligation to pay tax in that the tax prescribed by law must also be collected. The principle of legality is a factor of legal certainty for the protection of citizens against state abuse of taxation (Alhager, 1999).

There is one exception to the requirement of a legal basis and the Riksdag being the body issuing provisions on taxes, through which the Riksdag is able to delegate legislative powers directly to local agencies concerning charges and taxes intended to regulate traffic (Chapter 8, Article 9 of the Instrument of Government). This exception makes it possible for local agencies to impose parking fees and congestion charges.

Apart from this exception, the Tax Agency has restricted possibilities regarding the drafting of binding provisions. The Tax Agency may, sub-delegated by the government under Chapter 8, Articles 7 and 11 of the Instrument of Government, draft what is called *verkställighetsföreskrifter*, which is, in short, a set of rules that mainly consists of administrative provisions relating to the implementation of laws. Although such provisions may, to a certain – limited – extent, "fill out" an act of law, the main presumption is that *verkställighetsföreskrifter* may not add anything substantial to the law. It may not entail new responsibilities for individuals or new interferences as to the personal or financial circumstances of individuals (Bill 1973:90).

Hence, there are only two means by which binding provisions on taxes may be issued: a law or *verkställighetsföreskrifter*, the latter having substantial restrictions as to their contents. Apart from this, the Tax Agency has the mandate to issue non-binding provisions in the form of *allmänna råd* (general advice) and other statements. General advice falls outside the normative powers of government, which is why they are not binding either for public agencies or individuals (Påhlsson, 1995). This means that the Tax Agency, in principle, is not obliged to follow its own general advice, even in situations where higher legal sources do not provide any guidance on the matter (Lodin, Lindencrona, Melz, Silfverberg, & Simon-Almendal, 2017).

As can be seen above, the principle of legality not only stipulates a requirement for a basis in law or other enactment for public agency activity but also includes conditions as to which body may adopt which kind of provision. It has been stated that, regarding taxes, the principle implicates that provisions shall be laid down in law and that the Tax Agency has strictly limited opportunities to adopt binding provisions.

If the principle of legality requires a legal basis for public agency activity within the field of taxation, the requirement is less strict concerning administrative regulation. Previously, there was no further demarcation of a principle of legality in administrative law apart from Chapter 1, Article 1 of the Instrument of Government. However, as of 1 July 2018, a new Administrative Procedure Act has come into force, stating in its Section 5 that an agency may only take measures that have a legal basis in the legal system. The wording "the legal system" corresponds with the meaning of the term "law" in Chapter 1, Article 1 of the Instrument of Government, which is why the principle of legality in Section 5 of the Administrative Procedure Act does not require an act of law as a legal basis for agency action; instead an ordinance suffices, or binding agency regulation or even practice (Bill 2016/17:180; *c.f.* Bill 1973:90; KU 1973:26). Thus, although there is a principle of legality specifically for the field of administrative law, there is no decisive difference between this provision and what is stated in the Instrument of Government (Bill 2016/17:180).

The difference in contents of the principle of legality in different fields of law is relevant with regard to *fördjupad dialog*, in that the scope of the principle in the field of taxation has consequences in terms of how the activity must be governed. If the principle embraces only substantive tax provisions or if it also includes administrative rules that the Tax Agency has to apply in its activities, there are different requirements concerning the basis for the activity. If regulating *fördjupad dialog* falls under the tax principle of legality, a legal basis in an act of law is required, while if *fördjupad dialog* is considered to fall under the administrative principle of legality, the requirement is less strict.

The scope of the principle of legality in the field of taxation is often discussed in contexts concerning substantive tax provisions, which is why the impression may be that the requirement for a legal basis in an act of law only applies to such rules (Hultqvist, 1995, 2005, 2016; Lodin et al., 2017; Påhlsson, 2014). However, statements in preparatory works and, to some extent, case law, indicate that the interpretation should be made wider, that is, that the principle of legality with its requirement concerning legal basis in an act of law for Tax Agency activity not only includes substantive tax provisions but also administrative rules (Bill 1973:90; SOU 1972:15; RÅ 1987 ref. 21).

As for the implication of the above with regard to *fördjupad dialog*, it may be held that *fördjupad dialog* does not concern the Tax Agency's traditional activities relating to taxation. The rules on *fördjupad dialog* do not include any substantive tax provisions and no tax is levied through *fördjupad dialog*, only through a tax decision notified ex-post the completion of the transaction. The activities within *fördjupad dialog* are, however, carried out in close connection to taxation activities and the Tax Agency statements provided in *fördjupad dialog* affect a company's future taxation to a certain extent, even though the statement does not provide any direct basis for taxation since the statements are non-binding (Guidelines, Comments on Item 8). Considering this close connection to taxation and the fact that the principle of legality not only concerns substantive tax law but also administrative rules, regulating an activity such as *fördjupad dialog* should fall under the requirement of having legal basis in an act of law.

What creates legal concerns in this context of *fördjupad dialog* is that the Tax Agency has engaged in this activity on its own; it has not come into Swedish administration on the basis of an initiative from the Riksdag or the government. It is not governed by law but by the non-binding Guidelines drawn up by Tax Agency.

A consequence of the fact that the programme has been designed by, and the instructions (the Guidelines) for the procedures of the programme are drawn up by, the Tax Agency is that the Guidelines may be changed from one day to the next, without prior notification or legal inquiry, creating issues as regards predictability. This is not only a theoretical possibility but has, as described above, actually happened on several occasions regarding the issue of confidentiality.

More importantly regarding the topic of this subsection, the Guidelines themselves do not fulfil the requirement set by the principle of legality in the field of taxation, which is why you may argue that legislation is necessary. The Tax Agency, however, argues that *fördjupad dialog* does not need to be stipulated in a legislative act, because it already has a legal basis through the so-called "service obligation" that includes answering questions and guiding companies, and is regulated in the Administrative Procedure Act from 2017 which applies to all public agencies, including the Tax Agency (Kristoffersson, 2014; Guidelines, Comment on Item 1).

If the line of reasoning of the Tax Agency is correct and *fördjupad dialog* could be said to have a legal basis in the service obligation under the Administrative Procedure Act, it could be said that the issue of legality may be resolved. However, there is no given interpretation for this legal issue and this is not easily established, which will be further elaborated below.

FÖRDJUPAD DIALOG AND THE SERVICE OBLIGATION

The Administrative Procedure Act and the Service Obligation

The purpose of the Administrative Procedure Act is to guarantee a high level of legal certainty in public administration and in its dealings with citizens (Bill 1985/86:80). This Act includes provisions that apply to the way in which public agencies handle cases. It contains rules not only on the service duties of the agencies but also on the right to have an interpreter, on the filing of documents, on disqualification, on the right for citizens to submit information orally to the public agency, on the obligation for agencies to record information of importance regarding the outcome of a case, on the rights of parties to access data in a case, on a requirement that the agency involved in a decision needs to state the reasons for the outcome, on how a decision shall be notified, and other provisions. These are all meant to reinforce the legal certainty for individuals in their interactions with public agencies (Bill 1985/86:80).

As has been held above, a central aspect of the criticism concerning *fördjupad dialog* is that it lacks legal basis and therefore does not fulfil the principle of legality. To counteract this criticism, the Tax Agency argues that *fördjupad dialog* is a form of service falling under the service obligation. Since the service obligation is laid down in law, categorising *fördjupad dialog* as a service has the benefit of creating a legal basis for this activity.[11]

The part of the provision on the service obligation that is relevant reads as follows:

> The agency shall provide the individual with such assistance that he or she may defend his or her interests. Assistance shall be provided to the extent appropriate given the nature of the issue at hand, the individual's need for assistance and the agency's activities (Section 6, para. 2 of the Administrative Procedure Act, author's translation).

According to the second sentence, the Agency itself has, to a certain extent, the possibility of setting the limits of this service obligation. The Agency may, for instance, if it considers a question submitted by an individual to be too complicated, refuse to answer it (Bill 1985/86:80; Hellners & Malmqvist, 2010). Thus, the Agency is able to limit the extent of the service. It could be argued that the Agency also has the possibility to *extend* the service. If so, what the Tax Agency argues when holding that *fördjupad dialog* is part of the service obligation could be correct and then there is no issue with the principle of legality holding that provisions in the field of taxation shall be laid down in law.

There is, however, reason to investigate more closely what the service obligation entails in order to conclude whether *fördjupad dialog* could be said to constitute a form of service under this Act. Literature on the scope of the service obligation is scarce, not only from a tax

[11] The Tax Agency's claim concerning *fördjupad dialog* and the service obligation has not, to my knowledge, been a subject for discussion or debate, that is, it has not been confirmed or rejected by either academia or business. It would, however, in my view, be very important to investigate this claim further, due to its implications for the principle of legality.

perspective but also from a general administrative law perspective, and hence there is a research gap to be filled.

In the pursuit of answering the question of whether *fördjupad dialog* falls under the service obligation or not, the first task would be to demarcate the scope of the term "service" in the meaning of the Act. When the scope has been established, an analysis of whether *fördjupad dialog* fits within its boundaries can be made.

In order to demarcate the term "service", it is, however, necessary to initially address the different categories of agency activities. This is because categorising *fördjupad dialog* under these types of activities facilitates the demarcation of the term "service" and thus also helps to answer the question of whether *fördjupad dialog* constitutes a service or not. In other words, such a categorisation creates a basis for conclusions on whether *fördjupad dialog* has legal basis in the sense argued by the Tax Agency or if the criticism concerning the issue of legality still stands.

Categorising *Fördjupad Dialog* under the Administrative Procedure Act

The different categories of agency activity are:

- The exercise of public authority (Sw. *myndighetsutövning*).
- Case management (Sw. *ärendehandläggning*)
- Actual administration (Sw. *faktiskt handlande*).

There are no clearly defined lines between these categories, although what constitutes the exercise of public authority generally generates little discussion. The **exercise of public authority** is an expression of the power relationship between the state and an individual, where a public agency exercises its power by making a decision concerning a benefit, right, obligation, disciplinary punishment or other comparable circumstances in relation to an individual (Bill 1971:30). A public agency's "power to decide" in Bill 1971:30 is presumed to mean binding decisions. However, it is stipulated at the same time that the central feature is that the cases are determined unilaterally by the public agency. This concerns decisions or other measures that express the power of public authorities in relation to the citizens, illustrating an individual's dependence on the agencies, a characteristic of the exercise of authority (Bill 1971:30; Hellners & Malmqvist, 2010).

The other two categories – **case management** and **actual administration** – are, in a simplified sense, rather easy to distinguish. Actual administration embraces non-compulsory actions for an individual (SOU 2003:59; Strömberg & Lundell, 2014). Case management is, in turn, related to the agency's decision-making activities (Hellners & Malmqvist, 2010).

Common examples given to make a distinction between actual administration and case management are the university teacher giving a lecture (actual administration) and grading an exam (case management), and the physician performing surgery (actual administration) and subsequently charging the patient a patient fee (case management) (see, for instance, Bohlin & Warnling-Nerep, 2007). Driving a bus, directing traffic and extinguishing fires are other examples of actual administration (Bill 1985/86:80).

The fundamental difference between actual administration and case management is, in preparatory works, held to be that the former is characterised by the fact that the agency takes

a certain actual measure while the latter is terminated by a decision of some kind (Bill 2016/17:180). However, it does not necessarily need to be a *binding* decision; a decision *of some kind* suffices (Hellners & Malmqvist, 2010; Ragnemalm, 2014; Strömberg & Lundell, 2014). The distinction is, however, not as easily made as the above examples may suggest (Bill 1971:30; Bohlin & Warnling-Nerep, 2007).

A certain form of agency activity that provides difficulties concerning its categorisation is a consulting activity. It is held in the Government Official Report SOU 2003:59 that actual administration embraces consulting activities, while it can be concluded from SOU 2001:47 and SOU 2010:29 that consulting activities may constitute case management.

Thus, a field of tension can be identified, where an activity involving public agency consultation cannot easily be categorised as case management or actual administration. The central part of the activities within *fördjupad dialog* – answering corporate tax questions – places itself in this area of tension, which is why it would be interesting to investigate this aspect further.

As held above, case management is characterised by entailing a decision *of some kind*, albeit not necessarily a binding decision. Thus, the term "decision" is of importance when drawing the line between the two categories of case management and actual administration. This requires a demarcation of the term "decision".

There is no explicit definition of the term "decision", but guidance as to its scope can be found in both preparatory works and literature, holding that a decision regularly includes a statement from an agency that is intended to have certain effects for the person to whom the decision is addressed, or, expressed slightly differently, the idea is that the person concerned is influenced by the decision (Bill 2016/17:180; SOU 2010:29). While binding decisions, as mentioned previously, are to be regarded as falling under the category of the exercise of authority, activities leading to other forms of decision – for instance, non-binding statements – constitute case management.

There are certain statements in preparatory works that support the view that consulting activities may constitute case management. SOU 2001:47 on the procedures at the Social Insurance Agency speaks of consulting *cases (ärenden)* leading to non-binding statements (p. 460) and that contact between the Social Insurance Agency and an insured individual may constitute case management even when the contact solely pertains to advice or other services (p. 110). Thus, it is not entirely outlandish to speak of case management concerning activities entailing non-binding decisions, such as consulting activities.

A similar line of reasoning can be found in the literature. For example, according to Hellners and Malmqvist (2010), activities that include advice, information and other non-binding statements may constitute case management.

There are, however, statements that speak against such a view. It is, for instance, emphasised in SOU 2010:29 that the Administrative Procedure Act is based on the assumption that the agencies may provide advice and information as actual administration without the result constituting a decision, making the activity fall under the category of case management. More importantly, the Bill preceding the new Administrative Procedure Act states that when an agency provides information and advice under the provision on the service obligation, this does not constitute a decision under administrative law, even if the information may affect the

recipient's actions. The reason given for this view is that this includes information that the addressee does not necessarily have to comply with (Bill 2016/17:180).

Thus, the Bill appears to limit the term "decision" to only include binding decisions, excluding from its scope non-binding statements that may affect the recipient's actions. This is a deviation from the view that the term "decision" includes binding as well as non-binding statements. Such a view could be considered to lead to there not being any possibility of arguing that consulting activities, under certain circumstances, may constitute case management, since case management has been described as activities entailing decisions of some kind, but the advice provided under the service obligation according to the Bill does not constitute a decision.

However, on closer examination, the wording of the Bill gives, in my opinion, some room for considering consulting activities as *either* actual administration or case management. The reason for this is that the Bill explicitly states that advice provided *under the service obligation*, when the agency engages in actual administration, does not constitute a decision, that is, it is not held that *all* advice provided by an agency is to be viewed in this way (Bill 2016/17:180 pp. 24-25).[12]

Similarly, the statement in SOU 2010:29 that the Administrative Procedure Act is based on the assumption that the agencies may provide advice and information as actual administration without the result including a decision, making the activity a part of case management, explicitly states that agencies *may* provide advice and information as actual administration, not that all such activity necessarily constitutes actual administration.

But when is consultation actual administration and when is it case management? A distinction may be made between consulting activities as actual administration and consulting activities as case management, the difference being whether the consultation includes some form of legal opinion from the public agency. In other words, if the agency presents to the individual the different options that are available to him or her, i.e. what the individual *may* do, that would constitute consultation in the sense of actual administration, while advice containing the agencies' opinion of what an individual *should* do, in other words, with more of a normative function, would constitute consultation as case management (Påhlsson, 1995). A distinction may thus be made between consulting activities involving some form of legal position taken by the agency (consultation involving case management) and advice that does not include such action (consultation in the sense of actual administration).

The Tax Agency's answers to corporate tax questions in *fördjupad dialog* are, as mentioned previously in this paper, non-binding. Nonetheless, they contain the Agency's opinion – a legal position – on how the particular issue should be resolved. In that sense, the central part of

[12] Additionally, the statement in the Bill is, in my view, most likely not intended to establish a new scope regarding the term "decision", but is rather a way of stating that advice provided in the form of actual administration does not constitute a decision. If a "decision" was to be delimited by the binding or non-binding character of the Agency's statement, this would, according to my interpretation, lead to there being only two categories of public agency activity: the exercise of authority, on the one hand, and actual administration, on the other. In other words, if a decision is a decision only when it is binding, you automatically end up in the "exercise of authority" category when there is a decision at hand, since this category is characterised, *inter alia*, by binding decisions, and in the "actual administration" category when there is not a decision at hand. This leads to use of the "case management" category ceasing. There are other statements in the Bill, relating to a difference between the exercise of authority and case management, which, in my opinion, speak in favour of the interpretation that the intention in the Bill was probably not to establish a new scope for the term "decision" (Bill 2016/17:180).

fördjupad dialog may be held to fall under the consulting category involving case management rather than actual administration.[13]

"Service"

As held previously in this paper, the categorisation of *fördjupad dialog* under the Administrative Procedure Act facilitates the analysis of the question of whether *fördjupad dialog* falls under the service obligation or not. The latter includes an analysis aiming at a demarcation of the scope of the term "service" in the meaning of Section 6 paragraph 2 of the Administrative Procedure Act.

Examples provided in the Bill preceding the Administrative Procedure Act[14] with regard to what is included in the service obligation are instructions on how to write an application or fill out a form, and advice on which documents should be attached. It is further stated that the agency shall assist an individual with advice on necessary supplementary matters, initiate further investigation, ensure that the investigation is limited to what is necessary, and make the individual aware of the fact that there is another way to achieve what he or she is seeking to accomplish (Bill 1985/86:80). Case law shows that the service obligation includes a service in cases where an application is not clear and where the agency has to make sure what the purpose of the application is by contacting the individual (NJA 1994 s. 150).

Legal scholarship suggests that a service may encompass not only such pure service actions as mentioned above but also actions with traits of "case management" (Hellners & Malmqvist, 2010). Hellners and Malmqvist (2010) illustrate the complexity of deciding what is and what is not a service by holding that assistance consisting of, for example, filling out a form can at one point in time be considered actual administration but at another (point in time) be considered case management. If an individual contacts a public agency when wanting to initiate a matter and needs assistance with what must be attached to the application, such assistance constitutes actual administration. If, on the other hand, a case has already been initiated and the agency is assisting the individual with advice on what needs to be added to the case in terms of attachments, this is considered to be case management, not actual administration.

Since *fördjupad dialog*, in its core activity of consultation concerning tax matters, following the analysis in the foregoing subsection, may be considered to be case management, it is of interest to address the question of where to draw the line between: (1) actions that have such case management *traits* and are therefore to be considered to be a service; and (2) actions that are too close to pure case management to be considered a service.

[13] The focus of this paper is the core function of the programme, that is, the part of the programme in which the Tax Agency answers participating companies' tax questions. Another part of *fördjupad dialog* is the starting and ending of a *fördjupad dialog*. This serves as an example of the category of the exercise of authority, since the decision to start and the decision to end a *fördjupad dialog* is made solely by the Tax Agency (although the initiative to start and to end may come from the company as well as the Tax Agency). The part of the programme consisting of the Tax Agency's risk management and support regarding the company's systems and routines to ensure that the correct information is supplied serves as an example of the "actual administration" category. This activity relates to administrative action rather than to substantial legal issues and should seldom lead to legal statements with an opinion on how a particular tax issue is to be solved. (Hambre, 2018)

[14] Reference is made primarily to the Bill preceding the Administrative Procedure Act of 1986. The reason for this is that although the wording of the service obligation has changed in the new Act, the contents of it is basically the same as in the Act from 1986 (Bill 2016/17:180; SOU 2010:29).

The effort to draw this line is based on certain criteria retrieved from case law and preparatory works. Case law directly related to Section 6 of the Administrative Procedure Act is severely limited, which has been explained by the fact that the provision on the service obligation is a so-called "goal-oriented" provision that is rarely brought before the court (Bill 2016/17:180). Instead, the criteria are retrieved from tort law, namely Chapter 3, Sections 2 and 3 of the Liability Act (Sw. *skadeståndslagen*) as well as the preparatory works and case law related to these provisions. These provisions determine government agency liability for personal injury, property damage or pure financial loss caused by error or negligence when exercising public authority (Chapter 3, Section 2) and for pure financial loss caused by error or negligence when an agency provides false information or advice (Chapter 3, Section 2).

Liability under Chapter 3, Sections 2 and 3 of the Liability Act requires certain "special reasons" to be at hand. What these "special reasons" consist of is further elaborated in the preparatory works preceding these tort law provisions[15] and case law on issues related to the provisions, forming certain criteria that, I would argue, could help to set the boundaries for when actions constitute a service and when actions fall outside the scope of a service.

The preparatory works relating to these tort law provisions state that advice and information and other forms of service to the public are basically excluded from the scope of the provision by not being attributable to the exercise of authority (Bill 1972:5). In case law (NJA 2013 s. 1210), in which the court had to review damages under Chapter 3, Section 2 of the Liability Act, the court made an explicit link between this provision and the service obligation in Section 4 (now Section 6) of the Administrative Procedure Act. This reinforces the view that the preparatory works and case law regarding these provisions in the Liability Act are interesting to study in terms of understanding the scope of the term "service" under administrative law.

The first demarcation of the scope of service, however, relates not to these criteria, but to actions falling under the category of the exercise of authority. As mentioned, the preparatory works (Bill 1972:5) and case law (NJA 2013 s. 1210) hold that a service action does not comprise the exercise of authority. This is supported by statements in Bill 1971:30 preceding the Administrative Procedure Act, holding that the provisions in the Administrative Procedure Act designed to be applied in matters involving the exercise of authority do not apply in matters that exclusively entail advice and guidance – i.e. pure advice and guidance is not considered as falling under the "exercise of authority" category. If a service is not the exercise of authority, it could be held that an action involving the exercise of public authority cannot be considered a service. Therefore, actions involving the exercise of authority fall outside the scope of the term "service".

Since the core activities of *fördjupad dialog* have been categorised as falling under the category "case management", the issue of *fördjupad dialog* in relation to service and the exercise of authority does not need to be further explored. If, however, you were to argue that *fördjupad dialog* constitutes the exercise of authority, the conclusion would be – based on the aforementioned statements – that *fördjupad dialog* falls outside the scope of the service obligation.

[15] To clarify, all references to preparatory works in this subsection refer to preparatory works preceding these tort law provisions unless explicitly stated otherwise.

Since, in this paper, *fördjupad dialog* is considered to be "case management", it is of interest to turn to the criteria that may help set the boundary between: (1) actions with *traits* of case management (service); and (2) actions too close to pure case management (not service).[16]

The first criterion that helps to set the scope of the term "service" relates to **the proximity to a closed, ongoing or future case**. Following the case law (NJA 1985 s. 696 I and II; NJA 2013 s. 1210) and preparatory works (Bill 1997/98:105), this criterion may serve as a demarcation of the service obligation in such a way that the provision of advice, guidance and information which is closely connected to a closed, ongoing or future case falls outside the scope of the service obligation. If such a connection does *not* exist, the provision of information falls within the remit of the service obligation.

The second criterion concerns **the manner in which the information is provided**. This criterion is retrieved from the preparatory works (Bill 1997/98:105) and holds that it is of importance whether the information is provided in written or oral form. Information provided in written from is, according to the Bill, more likely to fall outside the term "service", while advice provided orally is, to a greater extent, considered as a service. Written guidance often gives the officer more time for reflection with regard to both the content and wording. However, the first criterion, that is, the proximity to a current or future case, appears to carry more weight, as both NJA 1985 s. 696 I and II and NJA 2013 s. 1210 concerned information provided by telephone, but the proximity to a specific case and the exercise of authority was decisive for the liability issue.

The third criterion regards **the nature of the information**. Concrete and precise information about the contents of a regulation, clear information on the agency's prospective assessment, and specific calls to the individual to act in a certain way are more likely to be considered as not being guidance of a service character (Bill 1997/98:105; SOU 1993:55; NJA 2013 s. 1210).

The fourth criterion identified is **the expression of power and authority**. Guidance and information that relates to the agency's special field of operations and has a substantial impact on the individual's choice of actions tends to be considered as involving the exercise of authority, thus not falling under the term "service" (Bill 1997/98:105; NJA 1985 s. 696 I).

The fifth criterion relates to **the person providing the information**. The preparatory works imply that information provided by specialised or experienced officers carries more weight than information from those with less knowledge and experience (Bill 1997/98:105).

To summarise, the conclusion of this paper is that the service obligation under the Administrative Procedure Act does not include actions that are considered as the exercise of authority. The characteristics of the exercise of authority are that it concerns the public agencies' unilateral management of cases, decisions or other measures that express public authority in relation to the citizens, which illustrates the individual's dependence on the public agency.

It can, furthermore, be concluded that the service obligation includes advice on how to fill out a form, but also advice where the agency provides more general information about the applicable rules in the field and information on applied practices. Such advice can result in

[16] For the purpose of this article, the author considers that a slightly condensed presentation of the criteria suffices. The criteria are further elaborated on in Hambre (2018).

advice on how an individual *may* act, i.e. situations in which the agency provides the individual with information about different options. This is different from situations in which the agency, in writing, takes a position as to how someone *should* act, or when the agency, in writing about reported facts, announces the legal consequence that, in the agency's opinion, should occur if certain action is taken. Both of the latter types of advice include the agency taking some form of legal position.

In my view, in situations such as the latter, there is, firstly, a certain level of the exercise of authority and, secondly, concrete and precise information about the content of regulations or specific requests to individuals to act in a certain way. It may also be assumed that the advice is very important with regard to an individual's future actions. If these circumstances apply, there is reason to consider the advice as a measure possessing such strong traits of case management that it is so close to pure case management that the action falls outside the scope of the service obligation.

Based on this, I argue that the *fördjupad dialog* activity consisting of the Tax Agency's answers to participating companies' substantial tax questions is not a service in the meaning of Section 6 of the Administrative Procedure Act. There is a certain proximity to a future case; it is most often provided in written form; the information is presumably concrete and precise, and concerns the Tax Agency's prospective assessment; it is most certainly an expression of power and authority; and it is provided by experts at the Tax Agency.

Hence, I do not agree with the Tax Agency arguing that there is a legal basis for *fördjupad dialog* in the service obligation in the Administrative Procedure Act. Therefore, the principle of legality cannot be said to be fulfilled through Section 6 of the Administrative Procedure Act. At the time of writing, no other kind of legal basis has been identified. The crucial point of criticism concerning *fördjupad dialog* therefore remains – the Swedish cooperative compliance model lacks legal basis, a basis that is required under the principle of legality laid down in constitutional law.

SUMMARY AND FINAL REMARKS

This paper sheds light on the importance of recognising the legal framework within which the cooperative compliance model is to operate. If a cooperative compliance model is to function properly and successfully, recognition of such issues is required. In Sweden, overlooking the importance of the legal framework – or neglecting its eminence – has had unfortunate consequences for the programme.[17] The question is whether the initial management introducing the model and the efforts to overcome the subsequent criticism has caused permanent harm to such initiatives or whether the damage may be restored, making cooperative compliance possible in Sweden.

In Sweden, the model of administration must be taken into account – separating politics from administration, thereby providing independent and strong public agencies. As stated above, the independence of public agencies is limited by the principle of legality, stating that public power is exercised under the law. As regards the field of taxation, the principle of legality requires a

[17] As mentioned earlier in this paper, I do not claim that legal issues alone explain the failure of *fördjupad dialog*. However, criticism regarding the legal aspect has repeatedly been directed at the programme from academics as well as businesses (see, for instance, Björklund Larsen's report from 2015 containing several interviews with different stakeholders pointing out legal issues and also Andersson, Fritsch, & Rydin, 2012), which is why legal issues, in my opinion, may be assumed to have played a substantial role in the failure of the programme.

legal basis for Tax Agency activities, which are held to include activities such as *fördjupad dialog*.

The Tax Agency argues that there is a legal basis for *fördjupad dialog* in the service obligation laid down in Section 6 of the Administrative Procedure Act. In this paper, I argue that this is not the case and that *fördjupad dialog* lacks legal basis, by which the principle of legality is not fulfilled. This is based, firstly, on a categorisation of *fördjupad dialog* under the three categories of public agency activity of the Administrative Procedure Act, placing the core activity, *fördjupad dialog*, within the category of "case management", and secondly, on an analysis of the scope of the term "service" under the Act which reveals five criteria that facilitate the setting of the scope. This leads to the conclusion that *fördjupad dialog* not only possesses traits of actions falling under the "case management" category but shows characteristics that instead place the key activity of providing answers to companies' substantive tax questions outside the scope of the service obligation. It is the author's view that *fördjupad dialog* must be subject to the in-depth, legal investigation that tax issues normally undergo prior to legislation.

Another issue touched upon in this paper is that of the confidentiality of the data submitted and produced within the framework of *fördjupad dialog*, which has been a hotly debated topic. The different positions taken by the Tax Agency in respect of this matter have been presented, showing that they have ranged from that of transparency, to confidentiality and then back to transparency again. Not only does this fluctuation of positions create problems as regards predictability, it also pinpoints another problem, which is based on the fact that *fördjupad dialog* is a product of the Tax Agency; that is, the Tax Agency itself has shaped this activity and designed the Guidelines governing the programme, creating obstacles when it comes to carrying out its own functions, in that companies may hesitate to participate (Björklund Larsen, 2015; Sallander, 2013; Kristoffersson, 2014).

To conclude, operations such as cooperative compliance programmes cannot simply be dismissed as being trendy, political whims. They are a far too advanced means of meeting social and international demands on tax administration efficiency, building trust, and combatting tax avoidance and tax evasion. It is probable that measures like cooperative compliance programmes will, considering the spread of cooperative compliance programmes around the world in recent years, gain more recognition as they develop and are reinforced in different tax systems. With this is mind, I believe that Sweden has to find a way to relate to such activities, to take adequate measures in order to enable cooperative compliance and similar programmes to be implemented in the Swedish system and ensure that they operate in a way that means they fulfil their purpose, instead of creating obstacles and mistrust.

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WHAT TAX MORALE? A MORAL ANTHROPOLOGICAL STANCE ON A FAILED COOPERATIVE COMPLIANCE INITIATIVE

Lotta Björklund Larsen[1]

Abstract

This article sheds light on why cooperative compliance initiatives can fail even when introduced in a country where tax compliance is deemed to be high and which has a "successful" tax administration that scores high on taxpayer trust surveys. The country in question is Sweden.

The Swedish Tax Agency aims to make taxpayers pay "the right tax", not necessarily the maximum tax, in order to increase tax compliance and thus societal trust in the Agency. One way in which to work towards this goal is to work proactively with large businesses, i.e. Multinational Enterprises (MNEs), for example, through so-called cooperative compliance initiatives. These "modern, efficient and successful" ways of working are currently in fashion among the Organisation for Economic Co-operation and Development (OECD) members' revenue authorities. However, the Swedish version of such initiatives was met with strong resistance and, today, very few MNEs participate. How can we understand this resistance given the good standing the Swedish Tax Agency is said to have among the taxpayers it serves (Skatteverket, 2013a, 2013b)?

In order to illuminate the contradiction between this "successful" Agency and the "failure" of this cooperative compliance initiative, this article explores various stakeholders' moral stances on the issue. The article obviously encompasses the views of the Agency, but also includes those of enrolled MNEs, as well as some that declined to participate and various other stakeholders, such as policymakers, tax scholars, tax advisors and corporate interest organisations. By borrowing from Didier Fassin's moral anthropological approach—not a moralising account, but an examination of moral reasoning among all stakeholders in the Swedish tax arena—we can better understand why the initiative failed. This approach is also helpful as proponents and opponents of the initiative could be found in all stakeholder categories.

INTRODUCTION

Cooperative compliance is a way of working proactively with taxpayers to ensure that information, taxes and fees are, to the fullest extent, correct as early as possible in the taxation process. It has been promoted by OECD's Forum on Tax Administration, the International Fiscal Association (IFA) and Fiscalis (EU collaborations for the exchange of information and expertise among national tax administrations), as well as various national Tax Administrations (TAs), as an efficient and modern way of working. In practice, it means that TAs and MNEs should cooperate, learn more about each other's way of handling taxation and aim to settle questionable tax issues prior to handling them in annual tax returns.

By around 2010, cooperative compliance was seen as an international success. OECD members' tax administrations were encouraged to start such initiatives and report on their

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experiences (e.g. IFA, 2012; OECD, 2008, 2010, 2013, 2014). The Swedish Tax Agency (the Agency or SKV) did not want to be left behind and Agency representatives visited, for example, the Netherlands and Ireland to learn from their national tax administrations' experiences. The Agency adopted this way of working in 2011, with the launch of *Fördjupad samverkan* (FS), or "enhanced collaboration", the main inspiration for which, it is claimed, was the "well-marketed" Dutch project, *Horizontal Monitoring*. However, it met with strong resistance and criticism from potential participating corporations and various other stakeholders—policymakers, tax scholars, tax advisors and corporate interest organisations—in the Swedish tax arena. This was quite unexpected at the Agency. It took the critique to heart, and modified and relaunched an altered initiative, *Fördjupad dialog* (FD), or "enhanced dialogue", in 2014. This did not change much; hardly any new MNEs were recruited and the initiative has now been almost entirely put on hold and has only a handful participants.

There are a number of explanations for the failure of the Swedish cooperative compliance initiatives; most noteworthy are the various legal objections (Bernitz & Reichel, 2015; Hambre, 2018; Påhlsson, 2012), but there are also other demurrals concerning fair competition, competence and project management (Björklund Larsen, 2018). Such explanations can elucidate what makes these initiatives successful or unsuccessful. As has been pointed out, these practical aspects seldom stand alone, but are drawn upon in various combinations, making both encouragement and criticism possible. Furthermore, what could not be understood by looking at such practical explanations is the stakeholders' strong resistance to it, heated discussions and moralising standpoints. These emotional criticisms demand further enquiries and explanations.

This article sheds additional light on the failure of the Swedish cooperative compliance initiative by looking at moral reasonings as expressed by various stakeholders in the Swedish tax arena. In this quest, it borrows insights from moral anthropology and especially from the work of French anthropologist Didier Fassin. The article starts out with some notes on the ethnographic methodology applied; how the material was gathered and analysed. The article proceeds by briefly describing the Swedish Tax Agency's work with tax compliance, homing in on the concept of the 'right tax'. It then looks at the Swedish cooperative compliance initiative and the aspects that would have been required in order for it to have been successful, (see also Björklund Larsen, 2018). Having set the stage, I then discuss what a moral anthropology implies. Finally, I talk about how thinking about this initiative from a moral anthropological perspective can increase our understanding of this failure.

The case I draw upon is Sweden but there is perhaps a more general argument to be made, both for looking at similar initiatives conducted in other countries and also for looking at issues of tax compliance in general. Lifting the gaze from cooperative compliance initiatives, this can also be seen as an attempt to further our understanding of what steers tax compliance in society? Perhaps it can be argued that if we—taxpayers of various kinds and the tax collecting authority—share the same moral reasonings about taxation, societal tax compliance will increase? This article does not attempt to provide an answer; rather, it provides a background for additional research into the question.

METHODOLOGY

My research approach is qualitative and inspired by ethnographic methods (cf. Boll, 2012). This has a number of implications.

First, the starting point is to take a holistic approach towards those who had an influence on how these cooperative compliance programmes worked out in practice. I engaged with all stakeholders; the focus was not only on the Swedish tax administration and participating MNEs, but also on the views of the MNEs that chose not to participate, third parties (e.g. tax advisors), interest organisations having an interest in the taxation of large corporations, policymakers and legal scholars. The material came from in-depth qualitative interviews with various stakeholders representing the above groups individually and in groups, as well as from the analysis of all documents, media articles and research reports that could be found which addressed the two initiatives (FS/FD).

Second, applying an ethnographic gaze means studying an issue from the point of view of the subjects participating. Ethnographic interviews explore matters of interest and mainly take place as conversations (cf. Spradley 1979, p.58) in a casual and explorative tone (Fangen, 2005; Kvale, 1997, p.94). I posed questions but also discussed issues at length, trying to probe into this delicate and multifaceted matter. I aimed to stimulate the discussion (Wästerfors, 2004, p.20) using increasingly intuitive knowledge for follow-up questions (cf. Flyvbjerg, 2001, p.21; Kvale, 1997, p.102). Some of the interviewees have been contacted several times. An ethnographic reading of documents (Riles, 2011; Björklund Larsen, 2015) aims to understand the views the various authors propose (Björklund Larsen, 2015, p.80) as well as to apprehend their analytical concerns (Riles, 2006). For example, many of the reports are authored by legal scholars reasoning within the realm of the law, yet most of these simultaneously voice negative opinions about FS/FD. Media materials are written with another focus (e.g. newsworthiness and sometimes to stage confrontations). The Agency's intranet articles inform (on) its' employees views, yet often conclude according to its own strategies which, in this case, support FS/FD.

Third, taking an ethnographic approach also means assessing the material inductively. It is a bottom-up approach which relates the various arguments to moral reasonings. In particular, the starting point was to categorise the arguments not by stakeholder group(s), but rather by type of argument.

I collected about 55 reports, media articles and presentations. Twenty people, representing all stakeholder categories, were formally interviewed. In addition, many informal conversations took place and several workshops were held with groups of stakeholders.

THE "RIGHT TAX"

A strategy which has long been in place at the Agency is that (all) taxpayers should report and pay "the right tax"; tax that is not only right at some point, but that is also right from the start (Skatteverket, 2005). The Agency changed strategies during the 2000s (Skatteverket, 2005; Stridh & Wittberg, 2015) and started to work proactively, with the aim of collecting the correct, and not necessarily the maximum, tax from all taxpayers. It should be the "right tax". Trust would thus be increasingly built with taxpayers when information, taxes and fees were, to the fullest extent, correct as early as possible. The application of law should be equally interpreted for all taxpayers throughout the country. As Swedish politicians from both left and right have

been seen to advocate, it is "cool to pay taxes"[2] and to avoid doing so is "limp"[3] and "unsolidaric"[4].

The emphasis on "right", added to serviceable, friendly and amenable tax administrators, and simplified tax reporting and payment procedures, is seen to have contributed to the Agency's standing as one of the most revered governmental agencies in Sweden (Arkhede & Holmberg, 2015). This standing seems to support the Agency's vision of Sweden as '[A] society where everyone is willing to pay their fair share' (Skatteverket, 2013c).

So, on the one hand, there is a revenue collector that has succeeded in gaining taxpayers' trust. However, on the other hand, it proposes a collaborating initiative with large taxpayers that works elsewhere but which, in the Swedish context, becomes a failure. What is going on?

THE SWEDISH COOPERATIVE COMPLIANCE PROJECT

The Swedish cooperative compliance initiative *Fördjupad samverkan* (FS), or "enhanced collaboration", was introduced in 2011 and the initiative was modified and relaunched as *Fördjupad dialog*(FD) or "enhanced dialogue" in 2014.

In an ethnographic study[5] of this initiative(s), I proposed eight aspects that have to be paid attention to if a successful cooperative compliance initiative is to be implemented (Björklund Larsen, 2018). These quite practical aspects seldom stand alone but are drawn upon in various combinations, making both encouragement and criticism possible.

First, a cooperative compliance initiative has to be in accordance with existing laws; in the Swedish case, this is especially relevant with regard to confidential information. Sweden is a somewhat special case when it comes to access to public records. Since 1766, when the first Freedom of the Press Act came into force, secrecy has constituted a restriction of public access to official documents (Hambre, 2015, p.122); "public access is the main rule and secrecy is the exception" (ibid., p.129). Yet there are instances when secrecy is needed for the protection of individuals and organisations. Taxation is one of these issues. Accordingly, only decisions taken at the Agency and documented in official documents are made public (ibid., p.152), such as decisions regarding annual tax returns. The key question here is, therefore, when documents should be regarded and treated as official under the Freedom of the Press Act and when secrecy should be applied. *Högsta förvaltningsdomstolen* (the Supreme Administrative Court) ruled

[2] Mona Sahlin, former leader of Social Democratic Party, in an interview on Swedish Television on 8 September 1994.
[3] Per Schlingman, former chief strategist to Moderaterna, the Swedish conservative party.
[4] ibid.
[5] This is an anthropological study of cooperative compliance initiatives and the investigation is made from a qualitative research perspective, drawing on interpretive taxation methods in analysing relevant information. Using interpretive taxation methods means that we approach taxation as an organisational, institutional, social and cultural phenomenon (Boden et al., 2010; Oats, 2012). I argue that the qualitative and holistic approach is well suited to addressing and understanding the complex unfolding of events and manifold issues that made FS/FD unsuccessful in Sweden in contrast to many other places in which cooperative compliance projects are working. More specifically, the research is conducted with an ethnographic gaze in order to understand the views and actions of all stakeholders. It is a "polymorphous engagement" (e.g. Gusterson, 1997. p.116) which took me to wherever the project was professionally carried out. Data derives from interviews with various stakeholders: with employees working with this issue at SKV, members of the Confederation of Swedish Enterprise, and with financial officers/managers at corporations that had participated or declined to participate in FS/FD. In addition, diverse documents are also used: academic articles, newspaper articles, reports, correspondence made public, legal [court] decisions and a selection of SKV's intranet articles.

that the documents produced under the auspices of FS could not be considered to be part of what should be protected by secrecy. The cooperative compliance way of working is seen as counselling, despite the Agency's said intention to make taxpayers' annual statements more accurate. Information about who participates in FS/FD and the matters addressed in the discussions between the Agency and the participants can thus be publicly disclosed if this is requested. There were numerous legal objections to the initiative from legal scholars, from corporations and, in particular, from their interest organisation, the Confederation of Swedish Enterprise, which brings attention to a second aspect, beyond specific tax laws: the larger legal framework has to be taken into consideration.

A third aspect is fairness: fair market competition and legal equality have to be assured. Information exchanged in FS/FD is thus seen as a counselling practice and is not considered part of tax confidentiality under current laws. This is crucial in terms of what is kept public and what is private. However, the reason given for the issue brought to court was that one taxpayer had asked for such information, arguing that other taxpayers, who were engaged in FS/FD, had received more advantageous decisions regarding VAT levels. The result was that the former had lost customers. Not only is the issue of fair competition at stake, these court decisions also bring us on to the issue of the unequal treatment of taxpayers. A related reason for opposing FS/FD is thus that it creates *gräddfil,* i.e. a VIP lane for certain taxpayers. Participants in FS/FD would get different—better—treatment, which is not consistent with Swedish administrative law or practice. Many decisions would be made in smaller meetings with a potential risk of accusations of *vänskapskorruption* (cronyism and what have been referred to as sweetheart deals).

A fourth aspect is that stakeholders' societal roles cannot be drastically changed. Lars, a legal expert at the Confederation of Swedish Enterprise, mused on the differences of cooperative compliance experiences between Sweden and other countries:

> Compared to many other nations, we, in Sweden, have well-defined roles between authorities and the private sector. I think many other countries would love to have similar relations. The Netherlands, for example, where the first attempts at "Horizontal Monitoring" were made, has a culture of negotiation. They are an old trading nation and, in the Netherlands, a corporation negotiates with the tax administration as to how much tax should be paid. You get to know each other by giving and taking. Denmark [the Danish Tax Authority] has also tried this with three different corporations, each with diverse results. They apparently thought there was too much room for arbitrary decisions.[6]

Lars and his colleagues at the Confederation were not the only ones to take a somewhat conservative view of different actors' roles and responsibilities within the tax arena in Swedish society. Employees of the Agency also had diverse concerns about its role in society as both arbiter and adversary in such cooperations. Their main concern was the possibility of being cheated if audit controls did not take place.

Fifth, when introducing radical changes to established ways of working, these have to be explained carefully. As with any governmental institution, the Agency has efficiency goals to live up to, which include showing results from any extraordinary projects it undertakes. It was

[6] Despite Lars's demurral, the Danish project, *Tax Governance*, is actually seen as a success by most parties involved (Boll, 2018; Boll & Brehm Johansen, 2018).

argued that, with FD, it might be easy to go after the low-hanging fruit and miss out the more elaborate tax planning schemes. Any audit only has a specific amount of time allocated to it, and the Agency has to both collect the money and show that it has spent its time on the right issues. As one of the tax experts at the Confederation of Swedish Enterprise said, "it is all according to the agenda of New Public Management".[7]

Sixth, both the participating tax authority and the taxpayer have to prove they have clear competencies. All critical stakeholders—both among corporations and at the Agency—noted that FD was deemed to be naive from a legal, practical and policy perspective. The reasoning went along the lines of: how can one of the Agency's tax auditors help and/or teach a big corporation to ameliorate its extremely complex accounting system with regards to reporting and paying the "right tax"? The Agency employees are helpful and friendly, and this goes well with private citizens qua taxpayers, yet when it comes to the more detailed, in-depth knowledge about complicated tax matters, Agency employees do not always pass muster.

The seventh aspect is that clear benefits for both taxpayers and tax administration have to be evident and recognised. In the Swedish case, it was the Agency that was proactive and seen to be the main beneficiary of such a cooperation, by learning more about contemporary tax planning, and transferring certain elements of its workload to the corporations, thus increasing the taxation workload for corporations. The corporations, meanwhile, were required to make initial investments of time and resources for which it was difficult to envision the "pay-back".

Finally, it is a matter of good project management. The proposed eighth aspect is that such an initiative must be well planned and carefully launched. In hindsight, there seems to be a consensus that the introduction of FS was too fast and somewhat sloppily executed. Several interviewees voiced the opinion that the Agency should perhaps have invited MNEs, the Confederation of Swedish Enterprise and tax advisors to discuss the initiatives in depth, so that the ideas might have been supported by stakeholders.[8]

Many of these aspects are comparable to the prerequisites for advocates of cooperative compliance initiatives, e.g. the OECD and the Institute for Austrian and International Tax Law at Wirtschaftsuniversität Vienna. Yet, although I (obviously) agree with them that the starting point is that such initiatives have to be in accordance with the legal framework, considerations have to include other aspects in order to provide the full picture. Many of the reasons articulated for opposing FS/FD could also be viewed as reasons for supporting it. One such issue was the critique posed that having an assigned contact person at the Agency could make sweetheart deals possible; yet corporations simultaneously expressed their need to have someone who "knows" them. Another criticism was that the Agency did not have the legal expertise it ought to have and that it was bringing badly prepared legal cases to court. This argument could also be turned around and instead be a sign that the Agency is not as high-handed as its opponents claim. A third argument stated that the Agency's employees were said to lack commercial awareness. When the Agency stated that one of its aims in introducing FS/FD was to make their administrators learn more about "taxation in practice" at corporations, this was rejected as letting the corporations do the work (that tax administrators ought to do).

[7] New Public Management refers to the changed way of organising and running public service organisations, in which said bureaucracies have implemented ideas from the business sector.

[8] Four information meetings were held (cf. Björklund Larsen, 2016, p.14), but the emphasis was on providing information.

These few examples could be seen as contradicting claims; I see them as an indication that there is more at play here than just the practical aspects for or against the initiative. Looking at the arguments offered by all stakeholders more closely, there are also a number of moral arguments at play.

MORAL ANTHROPOLOGIES?

A moral anthropological approach takes moral tension and debates as its objects of study, borrowing both from Emile Durkheim—"Moral facts are a phenomenon like any others" (1984 [1893], p. xxv) —and Max Weber—"It can never be the task of an empirical science to provide binding norms and ideals" (1949 [1904], p. 52). A moral anthropology deals with:

> how moral questions are posed and addressed… It concerns the creation of moral vocabularies, the circulation of moral values, the production of moral subjects and the regulation of society through moral injunctions. The object of a moral anthropology is the moral making of the world (Fassin, 2012, p.4).[9]

It is crucial to underscore is that a moral anthropology is not intended to moralise; in this case, about MNEs' willingness to participate in the initiative and thereby be seen to increase their tax compliance. I want to seriously consider all stakeholders' positions and to explore how the different stakeholders give meaning—in a moral sense—to their arguments. Thus, in the following section, I will address how different stakeholders take moral positions concerning the Swedish variety of cooperative compliance.

Questions of morality are usually given to philosophers, whereas anthropological enquiries are usually grounded in ethnographic approaches; of being there, of talking to people and seeing what they do. Although inspired by philosophy, a moral anthropology deals with empirical material that takes into account real people acting in real situations. This also means that "morality and ethics are inextricably mixed with the political, the economic and the social" (Fassin, 2011, p.485). We have to be aware of stakeholders' reasonings, not as relativising, but as trying to comprehend these reasonings in terms of the larger issues at stake.

Didier Fassin outlines three types of moralities that actors invoke, borrowing from moral philosophy (Fassin, 2011), as follows.

Deontological morality is an act or rule to be assessed according to its intrinsic value. This intrinsic value determines whether the act was performed in accordance with applicable ethical values. These values are not universal, but commonsensical, in that they follow rules and principles that the act refers to when executed. This regards how one's duty and obligations are fulfilled (Widlok, 2012, p.193). To what extent were the rules followed? In what circumstances were they declined? A deontological morality looks backwards, towards already defined rules or legal codes.

The second is the "virtuous" morality. It is an inherent sense of doing the right thing. This kind of morality is more subjective and varies between actors; it is a psychological set of making the right decisions—to do right—so that "a good life" can be led and achieved. Virtues are

[9] Whether moral behaviour can be attributed to organisations like bureaucracies, organisations and corporations can be questioned. Implicitly, such entities do not have morals like humans do. However, they are populated by humans and represented by human voices, and I argue that *the behaviour and the practices* that humans carry out can be applied to a discussion of different moralities.

often cultural (Widlok, 2012). Views on what "a good life", or more appropriately perhaps in this context, on what "a good society" is, differs between actors. What constitutes virtues moves slowly in society, yet there are certain virtues we can agree upon at any given time.

Consequentialist morality, the third type of morality, judges an act by its consequences. If an actor considers doing something, the actor tries to predict what impact this action has on other actors in society. A consequentialist morality is forward-looking and imagines what will happen given certain actions. The end seems to justify the means.

These three different moral arguments are often difficult to distinguish from one another in both particular and mundane situations. In the following, I will try to distinguish different stakeholders' use of these arguments in respect of the cooperative compliance way of working in order to illuminate the Swedish failure.

MORAL REASONINGS IN THE SWEDISH TAX ARENA

So how were different moral arguments articulated which render the Swedish failure more understandable? We will look how the different actors articulated this in turn, starting with the Agency and its vision: "[A] society where everyone is willing to pay their fair share" (Skatteverket, 2013c).

This is really a moral call and, as I read this, can exemplify all three types of morality that Fassin outlines. Do not only pay "the right tax" to follow the laws and rules defies only a deontological moral, a stance which could otherwise be expected from a governmental bureaucracy. Instead, the emphasis is on the idea that we/citizens/taxpayers also want to pay our fair share to society. We ought to share the Agency's vision of what a fair share is. This could be seen as taking a virtuous moral standpoint. Yet, in order to become such a society, we (the taxpayers and the Agency) ought to work together. We are not told exactly how this should be done; the point is that how we pay our taxes and how they are collected have consequences. One of the cornerstones of tax compliance research states that our willingness to comply depends on our belief that others do so as well. The Agency thus urges us to pay our fair share; which, translated into more legal language, becomes the "right tax".

Proponents at the Agency

Looking more closely at the reasoning for launching the FS/FD initiatives, we can see that the Agency uses entirely moral reasonings, yet mainly follows the consequentialist line.

A deontological moral approach is obviously the starting point. The FS concept was said to have been thoroughly looked into by the Agency's legal department, yet a definite clearance of the details would have been completed before the actual launch. It was stated that FS is not contrary to the principle of equality or against the uniform application of the law. All laws and tax rules apply to everybody and the Agency, like other public authorities, adjusts its handling methods and measures depending on the subjects that it serves; in this case, large corporations. Thus, a need-based service can actually be a prerequisite for equal treatment, as different taxpayers are deemed to have different needs. FS was described as being just one of many adaptations that the Agency had undertaken in its change of strategies and ways of working, alongside, for example, providing information in different languages, information directed towards newly registered corporations, and e-services. Countering the argument about the

unequal treatment of taxpayers, the Agency argued that, on the contrary, the provision of different services is a necessity so that the law can be applied equitably.

When FS was launched, it was described as a way of ensuring that the correct measures would be taken with regard to the right corporations. The Agency argued that MNEs are role models, so what they do has consequences for societal tax compliance. The idea is that other taxpayers, particularly SMEs but also employees, would increasingly comply if large corporations were seen to be leading the way by exhibiting greater tax compliance.

For example, the early guidelines (Skatteverket, 2011) stated that the aim of the initiative was to decrease aggressive tax planning among all taxpayers. In addition to the earlier stated arguments in respect of decreased tax risks and tax errors, FS would increase the flow of information between MNEs and the Agency. Communication would be more direct and transparent, and thus trust between the Agency and the participating corporations would increase.

The FS proposal can thus also be seen in a wider context of the Agency's ambition to change how the Swedish tax system should work in practice; i.e. that it should not only rest on the application of black letter law but be governed by the spirit of the law, something which could be exemplified by the Agency's chosen vision. Ingemar Hansson, the former Director General, argued that today's taxpayers, in general, are less forgiving towards tax planning; to pay tax is to show a concern for the society in which the taxpayer works and operates. Tax policy therefore ought to be part of a corporation's ethical guidelines and thus part of the overall concept of corporate social responsibility (CSR). The Director General compared taxation to environmental issues, where many corporations have greater ambitions than just following the letter of the law; to be seen as not paying "the right tax" could diminish trust in a corporation and in its brand name. Participation in initiatives such as FS would thus be a way for corporations to show societal responsibility and also to minimise the risks arising from uncertainty about taxation issues.

Opponents to cooperative compliance

Not all stakeholders in the Swedish tax arena consider tax compliance to be a virtuous moral question. Following the launch of FS, an editorial in the Swedish pink daily newspaper, *Dagens industri*, noted that cooperative compliance initiatives have to rest on a foundation of trust and that there ought to be more advantages than drawbacks in such cooperation (following the prerequisites for cooperative compliance initiatives).

The editorial's author voiced a suspicion that the Agency's intention with FS was to collect information about new tax planning schemes while offering a certification stamp with moral overtones for participating MNEs. The Agency's motto of "providing one's fair share" does not apply to corporations, it was argued; instead, the overarching aim for a corporation is to run a profitable business and to keep its costs, one of which is corporate tax, down. Compliance emphasis should be on personal income tax as this, in financial terms, provides a much larger source of revenue for the Swedish state than corporate tax. The editorial's concluding message was for Swedish institutions to keep their traditional roles: laws are passed by the *riksdag* (parliament); courts should adjudicate when taxpayers and tax collectors do not agree; and the Agency should fulfil its mission of collecting tax. Full stop. According to this reasoning, a moral actor in society's tax arena applies a deontological morality—nothing else.

Several stakeholders in the tax arena, led by the Confederation of Swedish Enterprise, brought up one legal issue after another for a thorough investigation following a deontological morality: whether documents created under cooperative compliance arrangements were confidential or public; the unequal treatment of various taxpayers creating a VIP lane for corporations participating in FS; unfair market competition between participants and non-participants; and the roles of actors in public governance according to administrative law.

Along these lines, Robert Påhlsson, Professor of Law, stated in another media article that the Agency should "not be a buddy" (Påhlsson, 2011). Påhlsson argued that the Agency and the taxpayer should retain their more separate and explicit roles in taxation issues. "We have different roles in society; diverse interests, tasks, capabilities and responsibilities. We cannot blend roles and responsibilities in a big cuddle box" said Niklas, a tax expert at the Confederation of Swedish Enterprises. Following on from these arguments, roles teased out over centuries by different societal institutions are important; such roles should be retained unless the law states otherwise.

However, in addition, the opponents do not entirely stick to the deontological moral reasoning. Two consequentialist moral issues came to fore in the above statements. First, there were several MNEs who spoke about the need to get "the right person" at the Agency. The right person is a knowledgeable employee; someone who is knowledgeable both about the issue at stake (e.g. VAT issues) and the corporation in question. Having issues handled by the right contact person would be more efficient, and provide quicker and more accurate responses. On the other hand, criticisms were articulated to the effect that that having such relationships could also create diverse types of sweetheart deals. An apt question is whether the real issue here is the concern about having such issues documented in policies and guidelines? Is it better to keep such relationships informal? Needless to say, there has always been communication and contact between the parties in the tax arena; the issue is how formalised they have been. One report criticising the FS/FD initiative concluded that the Agency's new ways of working differed from the generally accepted public management model in Sweden. As the information exchanged between participating corporations and the Agency was deemed to be counselling and not subject to tax confidentiality, this way of working ended up in an "informal grey zone" not previously encountered in Swedish administrative law. FS/FD is not applicable for a Swedish administrative authority in the usual triangulation of activities between the actual administration of issues, case handling and the exercise of public authority towards subjects (Bernitz & Reichel, 2015).

Second, it is doubtful that anyone participating in this debate wishes to return to the times when the Agency controlled and collected tax without much nuance in its practices (e.g. the way of working prior to 2000, when strategy changes were implemented.[10] But is the implication also to retain what is said to be the old-fashioned role of corporations as profit-making entities, whose sole purpose is to maximise profit and continue to hold down costs, one of which is taxes? Or should MNEs continue to take on a more responsible role in society, as several tax managers interviewed said the corporations they represent now do? Almost all of the interviewees expressed the view that tax planning activities have changed during the last ten

[10] The Agency would, from then onwards, work proactively with the aim of collecting the correct, not necessarily the maximum, tax from all taxpayers and, in this way, increase trust. These strategies were based on international research and followed a trend of working together with taxpayers to ensure that information, taxes and fees were, to the fullest extent, correct as early as possible. From this viewpoint, trust in the tax collector was seen as being dependent on the attitude that the tax collector has towards taxpayers. Trust and compliance were described as reinforcing each other; trust would increase if all taxpayers were deemed to comply (Wittberg, 2005).

years. Society around us is changing, they said, and so are views about what sustainable and fair taxation is.

For or against FS/FD—a complicated story

Finally, this is not a simple a story about, on the one hand, FS/FD proponents among initiators and tax collectors at the Agency and, on the other hand, opponents among MNEs and their interest organisations (the most noteworthy example being the Confederation of Swedish Enterprise). The Swedish cooperative compliance initiative presents a more complex mix of arguments from various perspectives and raises questions about how issues of tax compliance should be articulated in society.

The few active participants in FD seem to have chosen this route for pragmatic reasons. The Chief Financial Officer (CFO) of the most active corporation was very positive about the initiative. "Issues that before took very long are now quickly resolved; we have one contact person who has access to specialists and we have now a much larger cooperation range…," he said. "It is really a win-win situation". In addition, [the corporation] has not been subject to any audit control, an activity which requires a lot of time and effort, since 2008. However, this corporation is not treated more leniently by the Agency: "as they participate in FD, we know what they are doing and can therefore judge that an audit control is not needed" one of the Agency's experts said.

The Agency's employees' opinions about the FS/FD cooperation are divided. Internally, there seems to be fairly widespread reluctance to embrace the initiative, although this view is not publicly expressed. Those working directly with FS/FD are mostly positive about the initiative, yet they also express hesitation in interviews. There seem to be several reasons for this.

One concern is the question of what societal role the Agency will play when it acts both as an arbiter and a consultant. What will the changing societal role of a tax agency which is engaged in cooperation like FD with taxpayers be? And, if changes are made, it is not up to the Agency to change its societal role or how it acts in society; this is a matter for legislators.

Another issue is that changed ways of working always create hesitations and resistance of some sort (Björklund Larsen, Boll & Brøgger, 2018) and if the benefits from such a change are not clear-cut, a lot of resistance may be voiced. This is especially the case as the Agency is well-regarded by Swedish taxpayers as a whole—both by corporations and employees (Skatteverket, 2013a, 2013b). The Agency ranks among the most esteemed bureaucracies in Swedish society (Ekonomistyrningsverket, 2012). It is a position that employees are well aware of and a source of pride for the Agency.

A third concern was whether the Agency risked being taken to the cleaners. In an Agency intranet article, the FD project leader revealed that he had, somewhat surprisingly, overheard that the relationships between MNEs and the Agency in this initiative were being referred to by Agency employees in terms of "snuggling" (Runhage, 2012). This somewhat humorous remark was said to reflect a fairly widespread view among Agency employees that the bureaucracy risked being subject to ridicule in such collaborations; cooperative compliance initiatives provide a way for corporations to deceive the Agency. This view brings us back to the old confrontational and suspicious relationship between the Agency and taxpayers and, if translated into habits… well, the old ones die hard.

TO CONCLUDE

This article is an attempt to illuminate a failure of a cooperative compliance initiative. The case in question is Sweden, where we have followed the confrontational debate among stakeholders in the Swedish tax arena. There were certainly those in favour and those against a cooperative compliance initiative; simply put, did those opposing the initiative win? On the surface, this has been a debate mainly articulated in legal terms, where practical aspects are drawn upon in various combinations. Elsewhere, I have proposed eight aspects which are integral to whether cooperate compliance works—or fails. Yet, the undercurrent of the debate is a moral view about how ensuring that taxpayers pay the "right tax" should be achieved. MNEs are often seen as "tax minimising" actors, whereas tax administrations aim to collect, if not the maximum amount of tax, at least enough to minimise the perceived tax gap. If cooperative compliance aimed to collect a more "right tax", it begs for explanations other than economic benefits drawn, efficiency achieved and legal interpretations. The case of the Swedish Tax Agency's failed attempt to include cooperative compliance initiatives in its broad array of strategies draws our attention to the moral standpoints as articulated by the various proponents and antagonists.

By taking a moral anthropological approach to this cooperative compliance initiative, I looked closely at the reasoning proposed in debates and disputes. Behind the various arguments are people who "apprehend moral and ethical issues in their network of meaning, within their historical context and in their intricate relation with politics" (Fassin, 2011, p.489). The question is, what can be learnt by applying a moral anthropological approach to the failure of the Swedish variety of cooperative compliance? The purpose is to see how different moral arguments were articulated which render the Swedish failure more understandable. Such an approach also teases out different stakeholders' perspectives on how tax compliance among MNEs could be increased.

The Agency clearly applies all three moralities discussed here: the deontological, the virtuous and the consequentialist. A governmental bureaucracy, in particular, needs to follow laws and regulations, and thus ought to act within the deontological moral realm. But where there is room for interpretation of the law, the Agency applies a more virtuous reasoning. Its motto is worth repeating: "Our vision is a society where everyone is willing to pay their fair share" (Skatteverket, 2013c) which is a very virtuous moral stance on taxation. In order to have a society where everybody wants to do their fair share, they need to change taxpayers' views on the law and practices, so they—the Agency and MNEs—can agree on what "the right tax" is. Although the Agency is fine with courts deciding when they and taxpayers do not agree, it also applies a consequentialist reasoning—notably, this was said to be in accordance with the rules and regulations, but with the aim of having a society where actors change their views on what tax compliance means. These changed views should be in accordance with the Agency's with regard to what "the right tax" ought to be.

Opponents to the initiative kept to a deontological reasoning. Swedish institutional roles teased out over centuries should be kept and any changes in the relationship between the taxpayers and the tax administrator should be clearly stated in the law. The issue appears to be how much room for interpretation there is within the tax law. Should it be followed to the letter or should we look to the spirit of the law? Advocates for a status quo interpretation of tax law, e.g. no change to the relationship between MNEs and the Agency, also refer to a virtuous morality, although differently articulated among the actors. Here, the traditional, partly oppositional, roles are referred to. The actors should act according to defined roles. There are clear

demarcated time slots for the specific practices (bookkeeping, tax advice, preparing annual statements, carrying out assessments for audit—and eventual audits— and making tax payments) to be performed by various actors. The overlaps between the issues being mediated by different actors are minimal from this perspective. The representatives from the Confederation of Swedish Enterprise, in particular, wanted to keep the status quo and always referred to the deontological morality; to not doing anything more, or less, than required by a strict reading of the law. Cooperative compliance ways of working could thus also be made to work in Sweden, but that implies a change of the law that goes beyond the tax legal framework.

Looking into the different moralities also helps to explain why this case was not a simple dichotomy between tax collectors as proponents and corporations as opponents. There are participating corporations. There are tax officials who oppose the initiative. The issue is that they apply different moralities to the question of the role that taxation ought to play in society. The participating corporations clearly see advantages; they take a consequentialist moral standing. The reluctant tax officials share the view of the interviewees at the Confederation of Swedish Enterprise that a deontological morality is the best stance to take.

Tax morals in Sweden are deemed to be high, yet a concluding remark is that if we speak about Swedish—or any tax jurisdiction's—tax morals, it is important to recognise what kind of moralities we are talking about. This seems to suggest that if tax compliance is to be increased, all stakeholders ought to share the same type of moral reasonings about the role of taxation in society.

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COOPERATIVE COMPLIANCE, TAX CONTROL FRAMEWORKS AND PERCEIVED CERTAINTY ABOUT THE TAX POSITION IN LARGE ORGANISATIONS

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Abstract

In recent years, a growing number of tax authorities have shifted their strategies towards large organisations to include forms of so-called cooperative compliance programmes (OECD, 2013). These programmes require large organisations to have internal (or tax) control frameworks in place that assure that they can comply with their tax obligations and can also detect uncertain tax positions and disclose these to the tax authority. In exchange, the tax authority sees to it that tax matters are resolved quickly, quietly, fairly and with finality (OECD, 2007). Cooperative compliance programmes have therefore been characterised as "transparency in exchange for certainty" (OECD, 2013, p. 28).

In this paper, we discuss two studies which examine whether the need for certainty about tax matters is indeed an important driver behind large organisations developing and implementing tax control frameworks, and whether having a tax control framework of higher quality in place increases perceived certainty about the tax position. Both Study I (n=669) and Study II (n=271) use data from a (web) survey of representatives of large organisations in the Netherlands. The results show that the need for certainty and the importance attached to tax compliance have positive effects on the quality of an internal tax control framework. Moreover, both studies find the quality of a tax control framework has a positive effect on perceived certainty about the tax position. These positive associations indicate that large organisations' need for certainty about their tax positions stimulates them to improve their tax control frameworks in order to acquire such certainty.

Keywords: Tax compliance, Cooperative compliance, Tax certainty, Tax control framework

1. INTRODUCTION

In the last decade, a growing number of tax authorities have introduced voluntary disclosure programmes in addition to traditional enforcement regimes. Examples are the Risk Rating Approach in the UK (Freedman, Loomer, & Vella, 2009), the Compliance Assurance Process (CAP) in the U.S. (IRS, 2005) and the Horizontal Monitoring Program in the Netherlands (Happé, 2008). These so-called cooperative compliance programmes are open to large organisations that are willing to meet requirements of disclosure and transparency. Under a cooperative compliance programme, the tax authority sees to it that tax matters are resolved "quickly, quietly, fairly and with finality" (OECD, 2007, p.6). This quick resolution of issues

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is meant to provide an organisation with certainty about its tax position. Cooperative compliance programmes have therefore been characterised as "*transparency in exchange for certainty*" (OECD, 2013, p. 28).

Cooperative compliance programmes anticipate that taxpayers are willing to provide transparency and disclosure when this will result in increased certainty about their tax positions (OECD, 2008). The need for certainty and the willingness to comply are assumed to form the rationale for taxpayers to improve their internal control frameworks. Such an internal control framework regarding tax is called a Tax Control Framework (TCF). A TCF assures that large organisations can comply with their tax obligations and can detect uncertain tax positions and disclose these to the tax authority (OECD, 2013).

Large taxpayers themselves name the increase in certainty as one of the most important advantages of participating in a cooperative compliance programme (OECD, 2009). However, the extent to which large organisations are willing to invest in improving their TCFs in order to reduce uncertainty and increase compliance has remained largely unexplored. Beck and Lisowsky (2014) found that the likelihood of an organisation participating in a cooperative compliance programme (i.e. the CAP) is positively associated with tax uncertainty and negatively associated with tax aggressiveness. This suggests that the need for certainty and willingness to comply are drivers for participating in the CAP. Furthermore, Beck and Lisowsky (2014) found that CAP participation reduces reported uncertain tax positions (in the form of FIN 48 reserves), which implies that participation in the CAP enables large organisations to reduce tax uncertainty. This study did not explicitly address TCFs, so it provides only indirect evidence for the assumed role of a TCF.

Given the increasing importance of cooperative compliance programmes as part of the overall strategies of tax authorities, it is important to assess the validity of the underlying assumptions of these programmes. To date, it is unclear whether the need for certainty and the willingness to be compliant stimulate large organisations to improve their TCFs and, subsequently, whether these improvements in TCFs reduce uncertainty and increase tax compliance. This paper examines whether large organisations' willingness to comply and need for certainty about tax matters are indeed related to the quality and functionality of their TCFs. More specifically, we focus on their need for certainty about their tax positions and their attitudes towards tax compliance as drivers for increasing the quality of their TCFs. Furthermore, we examine whether having a better functioning and higher quality TCF in place increases an organisation's perceived certainty about its tax position.

We tested our hypotheses in two studies. Both studies used survey data and were generally similar in terms of the methodology being used and the analyses being conducted. While Study 1 generally confirmed the main hypotheses, it had some methodological issues. For example, the questions posed within the study were answered by two representatives of each organisation. Furthermore, the sample used for this study included both medium-sized and large organisations. Cooperative compliance programmes and the emphasis on the role of the TCF are considered important for large organisations and less so for medium-sized organisations. In the analyses, we controlled for differences in the sizes of the organisations, but organisations that (at the time) were designated very large by the Netherlands Tax and Customs Administration (NTCA) were not included in the Study 1 sample. Study 2, which replicated Study 1 while remedying some of its shortcomings, is presented for these reasons.

The remainder of this paper is structured as follows: section 2 provides a general theoretical background of cooperative compliance programmes, tax uncertainty and internal control, and presents the hypotheses. In sections 3 and 4, the methods, measurement and results of the two studies are described. The final section (section 5) presents and discusses the conclusions.

2. THEORETICAL BACKGROUND AND DEVELOPMENT OF THE HYPOTHESES

Cooperative compliance programmes

Cooperative compliance programmes emerged in the search for alternative and effective ways by which to improve taxpayers' compliance behaviour and the risk management strategies of tax authorities. The Organisation for Economic Co-operation and Development (OECD) is a strong supporter of cooperative compliance programmes and has been a driving force behind the international development of these programmes (Colon & Swagerman, 2015). In 2008, the OECD's Forum on Tax Administration (FTA) published the "Study into the Role of Tax Intermediaries" (OECD, 2008). This study focussed on innovative ways by which to address and reduce aggressive tax planning by large organisations and their tax advisors. The OECD suggested that there is significant scope for influencing large organisations and their demand for aggressive tax planning schemes by enhancing the relationship between taxpayers, tax advisors and tax authorities, using trust and cooperation as the organising principles of these relationships.

The tax authorities of South Africa (Taxpayers Engagement Strategy), Ireland (Cooperative Approach), the Netherlands (Horizontal Monitoring), USA (CAP), the UK (Risk Rating Approach), and Australia (Forward Compliance Arrangement) were early adopters of cooperative compliance programmes (see Holmes (2010) and Nolan & Ng (2011) for more information about these programmes). A recent survey of 24 member countries of the FTA's large business network showed that they had all developed and/or implemented cooperative compliance programmes (OECD, 2013).

Ford and Condon (2011) describe approaches such as cooperative compliance as "new governance". They observe that there is agreement in the literature on several elements central to new regulatory approaches, namely: 1) a more collaborative relationship between the State and regulated entities based on the recognition that regulation may operate most effectively when it incorporates private actors' context-specific experiences and relevant expertise; 2) giving regulated entities greater autonomy to design their own internal processes to meet broadly defined outcomes; and 3) a focus on developing regulatory strategies that place responsibility on organisations for their own compliance and that try to foster compliance-supporting internal motivations. New governance can be seen as a broad shift in regulatory preference from ex post discovery of norm violation to ex ante anticipation and to prevention and self-discovery via internal systems of compliance (Power, 2007). The more traditional deterrence model thus becomes embedded in a compliance strategy which increasingly relies on cooperation and self-regulation. Cooperative compliance programmes also fit in with the broader literature on tax compliance, in which it is recognised that the relationship between tax authority and taxpayer is not adversarial per se, and that trust and cooperation can increase voluntary compliance (e.g., Braithwaite, 2003; Braithwaite, Murphy, & Reinhart, 2007; Kirchler, Kogler, & Muehlbacher, 2014; Ventry, 2008).

Internal control and compliance

Reliance on internal control frameworks is an important characteristic of new regulatory strategies such as cooperative compliance programmes. In line with this, in 2013, the OECD introduced the concept of the TCF and highlighted the central importance of these frameworks for the concept of cooperative compliance. The OECD suggested that an essential component of cooperative compliance is the existence of an internal control system that is robust enough to give the tax authority assurance that all relevant tax risks can be disclosed in a timely manner, and that tax returns are submitted on time and are complete and correct. Accordingly, taxpayers joining a cooperative compliance programme have to be committed to improving the quality of their TCFs.

Due to several major corporate failures and bookkeeping scandals, the beginning of 21st century saw the introduction of strict corporate governance laws and regulations all over the world (Wunder, 2009). Most corporate governance regulation refers to the Committee of Sponsoring Organizations of the Treadway Commission's (COSO) Internal Control Framework as a good practice for internal control. COSO (2004, p. 4) defines internal control as: "*a process, effected by an entity's board of directors, management and other personnel, designed to provide reasonable assurance regarding the achievement of objectives in the following categories: effectiveness and efficiency of operations; reliability of financial reporting; compliance with applicable laws and regulations*". COSO (2004; 2013) distinguishes five components or steps of internal control: 1) define the objectives of the business process; 2) apply a risk assessment to the process (to define the risks that could occur and would probably endanger the achievement of the objectives of the process); 3) determine how to respond to these risks by implementing control activities; 4) communicate the information necessary for employees to run and control the organisation, and; 5) evaluate and monitor the effectiveness of internal control. These five components define the internal control structure of an organisation. The structure and the effectiveness of the internal control system will vary according to, and depending upon, the specific characteristics of the organisation (Jokipii, 2010).

COSO states that internal control systems provide reasonable assurance regarding the achievement of an organisation's objectives, including compliance with applicable laws and regulations. Scholars advocating new governance approaches (e.g. Bennear, 2007) assume that it ought to be possible to identify internal control systems that can effectively prevent misconduct in corporations and to design regulatory programmes that secure organisations to self-regulate by putting these internal control systems in place. However, whether these expectations will be realised in practice – and, if so, to what extent – is unclear (Gunningham & Sinclair, 2009). There are various reasons why internal control systems might *not* achieve policy purposes such as compliance: organisations might use their internal control just as window dressing; the improvement of internal control might be used to manage risk and as grounds for negotiation with the regulator when non-compliance is detected; there can be differences in risk appetite between the regulator and regulatee; and achieving compliance might be too difficult and resource-intensive for a corporation (Parker & Gilad, 2011). Power (2007) underlines that internal control systems are designed and implemented with the objective of facilitating core business processes in an organisation, not to achieve objectives such as compliance with rules and regulations. Similarly, Huisman and Beukelman (2007) review the literature on corporate compliance and conclude that there is little empirical substantiation for the expectations regarding regulatory approaches that rely on internal control systems to achieve desired levels of compliance. With specific regard to tax, the role of internal

control, as opposed to external control, in facilitating compliance has not been studied enough (Bauer, 2009).

In the present study, we explore the assumptions about internal control systems from the perspective of large organisations. More specifically, we study why large organisations in the Netherlands will invest in the quality of their TCFs. We focus on organisations' need for certainty about their tax positions and their attitudes with regard to tax compliance as drivers for increasing the quality of their TCFs. That large organisations are willing and able to improve their TCFs in order to increase certainty and compliance is an important assumption underlying cooperative compliance programmes. For this reason, in this study, we focus on these two (potential) determinants of the quality of a TCF.

We assume that large organisations – like other segments of taxpayers – differ in their attitudes towards paying taxes. Some organisations aim to minimise the amount of tax to be paid, while others focus on minimising the risk of having to pay more tax at a later point in time because of a lost dispute (Wunder, 2009). We expect that the extent to which organisations strive for tax certainty determines which of these goals they choose (Freedman, Loomer, & Vella, 2009). The need for certainty about their tax positions could lead organisations to adopt conservative or non-aggressive tax policies in order to prevent disputes with the tax authority. However, tax law is often ambiguous, which makes it onerous to discover whether tax authorities will accept a certain position in advance (McBarnet, 2003). In those cases, certainty can only be realised when the tax authority takes a formal stand. This line of reasoning has been corroborated by studies that explored the relationships between tax aggressiveness, tax uncertainty and participation in voluntary disclosure regimes. Studies by Beck, Davis, and Jung (2000) and De Simone, Sansing, and Seidman (2013) showed that firms that are less tax aggressive and face high levels of tax uncertainty have strong incentives to participate in voluntary disclosure regimes. Beck and Lisowsky (2014) found the same results regarding participation in a cooperative compliance programme; participation in such a programme is more likely when a firm faces high levels of tax uncertainty and scores low on tax aggressiveness.

To be able to disclose all relevant information and to receive certainty from the tax authority, a taxpayer needs to be in control of all processes, because tax issues can arise from a variety of business transactions. Therefore, a taxpayer in need of certainty – and thus striving to minimise the risks of unexpected tax payments in the future – can be expected to invest in its TCF (Gallemore & Labro, 2015). However, large organisations can have other motives for improving their TCFs, such as improving tax compliance. Improving tax compliance can relate to certainty as well – more compliance reduces uncertainty – but reputational concerns can also play a role. Having a TCF could also be perceived as a request or demand from the tax authority, especially within the context of a cooperative compliance programme. Implementing a TCF then becomes a form of compliance or a way to gain trust (and less audit activity) from the tax authority (Parker & Gilad, 2011).

In this paper, we will investigate whether stronger needs for certainty and compliance indeed stimulate large organisations to improve the functioning and quality of their TCFs.

Hypothesis 1: A stronger need for certainty about the tax position is positively associated with a better functioning and higher quality TCF.

Hypothesis 2: More importance attached to tax compliance is positively associated with a better functioning and higher quality TCF.

Tax uncertainty

The NTCA's Horizontal Monitoring (HM) programme is an example of a cooperative compliance programme. It explicitly focusses on improving the NTCA's relationship with corporate taxpayers. HM is based on three key values: mutual trust, understanding and transparency (NTCA, 2013). These key values are similar to the features the OECD (2008) describes as being necessary in order to move away from the "basic relationship" and they are meant to improve the working relationship between the NTCA and large organisations. There is a strong emphasis on consultation (also referred to as "preliminary consultation") within the HM programme. If a taxpayer and the NTCA disagree about the interpretation of certain tax issues, this could lead to uncertainty regarding these tax issues. Within the HM programme, taxpayers are expected to disclose all tax issues where there is the potential for differences in interpretation between them and the NTCA. In response, the NTCA states its perception of the legal consequences and thus provides certainty. The purpose of this (preliminary) consultation is to provide the organisation (and the NTCA) with more certainty about its tax position (NTCA, 2013).

Tax (un)certainty is an important economic factor for large businesses, affecting, for example, investment decisions (Devereux, 2016). In recent years, large businesses experienced an increase in tax uncertainty (IMF & OECD, 2017). This tax uncertainty can make large organisations reticent with regard to their economic behaviour and, thus, can negatively affect investment and trade within and between countries, and decrease economic growth. With regard to individual large businesses, tax uncertainty results from tax positions where the amount of tax that they will need to pay in future is unclear and, as such, tax uncertainty is an economic risk for such businesses (Jacob, Wentland, & Wentland, 2016). Reducing tax uncertainty is therefore an important goal for large businesses (OECD, 2009). The effects of tax (un)certainty have been included in theoretical models on tax compliance amongst individuals, starting with Friedland (1982), Reinganum and Wilde (1988), Scotchmer (1989), Scotchmer and Slemrod (1989) and Beck and Jung (1989a&b). In these models, tax uncertainty arises primarily from uncertainty about the probability of a tax audit taking place. Some studies add additional sources of tax uncertainty, such as detection probability (the probability that, given that a tax audit takes place, the tax authority will detect a tax position that it does not accept) and uncertainty about the correct interpretation of tax law (e.g. Beck & Jung, 1989b). Later on, such theoretical models also focussed on large organisations (e.g. Mills & Sansing, 2000). Beck, Davis, and Jung (2000) added to these theoretic models by allowing for the possibility of voluntary disclosure of uncertain tax positions by taxpayers. Subsequently, De Simone, Sansing, and Seidman (2013) expanded upon Beck, Davis, and Jung's model by introducing the perspective of a cooperative compliance programme (they used the term "enhanced relationship") within which voluntary disclosure can take place. These studies assume that when tax uncertainty is reported (through contingent liabilities, unrecognised tax benefits or book-tax differences), the tax authorities are more likely to respond with an audit, leading to audit costs for the taxpayer. However, there are ways by which taxpayers can lower these economic risks and increase their tax certainty; for example, through participation in a cooperative compliance programme. Within such a programme, taxpayers are less likely to claim risky tax positions and the tax authority is less likely to challenge strong tax positions, lowering taxpayer compliance costs and tax authorities' audit costs (De Simone, Sansing, & Seidman, 2013).

All these studies presume that taxpayers strive to minimise paying taxes and tax compliance costs and that a taxpayer will voluntary disclose when he is expecting to benefit. A taxpayer

benefits when the gains from uncertain tax benefits outweigh the costs based on audit probabilities, possible audit adjustments and penalties. Therefore, the willingness of taxpayers to "voluntarily" disclose is to a large degree, within this context, dependent on the enforcement activities of the tax authority. Our study relates to this in that we expect participation in a cooperative compliance programme to affect perceived uncertainty. However, our study differs from previous research because we do not expect the decision to voluntarily disclose uncertain tax positions – and/or to participate in a cooperative compliance programme – to be a straightforward cost-benefit analysis. Large organisations can have other concerns that make uncertainty about the tax position undesirable or even detrimental, such as worries about the predictability of financial limits for investments, apprehension about tax issues leading to reputational damage, a focus on yearly budgets or a need for a definitive financial year-end appropriation of profits etc. As a result of these various concerns, large organisations can have different tax certainty needs.

Our study aims to complement and extend the literature on the effects of uncertainty on tax compliance. The existing studies focus on a cost-benefit analysis of uncertainty by using a game-theoretic approach to calculate when the gains from uncertain tax benefits outweigh the costs stemming from possible audits, audit adjustments and penalties (e.g. De Simone, Sansing, & Seidman, 2013). In such an approach, the degree of tax uncertainty is a determinant of tax compliance. An exception to this is a study by Lavermicocca and McKerchar (2013), who conclude that large organisations that improve their tax risk management face lower tax uncertainty. We take this approach and do not view tax uncertainty as a given, but as an outcome that can – at least partially – be influenced by the taxpayer, for example, through participating in a cooperative compliance programme and/ or improving the quality of the TCF. As such, we allow tax uncertainty to be – at least partially – a result of (intended) tax compliance, rather than a determinant of tax compliance.

As discussed, a TCF is a key element of cooperative compliance programmes. The assumption is that having a TCF in place enables large organisations to be in control of their tax risks and this, to a large extent, guarantees that they (can) comply with tax obligations. Furthermore, a TCF permits large organisations to seek certainty regarding tax issues from the tax authorities, because having a well-functioning TCF makes it possible to disclose all relevant tax risks to the tax authority. As a result, a TCF contributes to large organisations' perceived certainty about their tax positions. Our third hypothesis concerns this last assumption:

Hypothesis 3: A better functioning and higher quality TCF is positively associated with the perceived level of certainty about the tax position.

Control variables

The need for internal control and the characteristics of effective internal control can vary according to a firm's characteristics, such as its size and organisational structure (COSO, 2006a&b; Jokipii, 2010). Therefore, in our analyses, we control for a number of key characteristics of the large organisations in our study, namely number of employees, turnover and whether the organisation is a multinational enterprise. Although potentially relevant, we did not include industry as a control variable because of the limited number of observations in some industries. Because industry correlates with the size of the organisation and with it being a multinational, at least some of the possible differences between industries are automatically controlled for. We do not control for (recent) experiences with the tax authority, such as having been in contact with someone from a tax office or being audited. Experiences such as an audit

can have a negative or a positive impact on subsequent tax compliance, depending on certain preconditions (Gemmell & Ratto, 2012). Therefore, the experience itself is not very informative as a control variable. Experiences with the tax authority translate into, or will be reflected in, a taxpayer's attitudes and motivation and will, in our study, be incorporated in the importance attached to compliance and the need for certainty.

3. STUDY I

Method

Participants and sample

Study 1 is based on a survey that was carried out by a research agency on behalf of the NTCA in 2011. A sample of 3,025 large organisations was drawn from the population of large organisations as defined by the NTCA. In 2011, the NTCA distinguished three segments of organisations based on their (increasing) tax liabilities: SMEs (approximately 1.5 million businesses, including self-employed individuals), large organisations (approximately 10,000) and very large organisations (around 1,300). Internal (tax) control only becomes a process as described in the definition of internal control by COSO (1992) in organisations of a certain size.

The segment *large organisations* consisted of profit and not-for-profit organisations in the Netherlands with tax liabilities of between 2 and 25 million euros. Approximately 10% of the Netherlands' total yearly tax proceeds originates from this segment (Stevens, Pheijffer, Van den Broek, Keijzer, & Van der Hel-Van Dijk, 2012). The sample was stratified to include equal numbers of organisations from the 13 regions of the country distinguished by the NTCA.

Procedure and response

A printed questionnaire was sent to the address of the board of each organisation. An accompanying letter explained that the NTCA commissioned the research project in order to learn about the experiences and opinions of organisations with regard to the process of taxation and the NTCA, and that responses were anonymous. The letter stated that there were questions for both the member of the board responsible for financial and fiscal affairs – usually the owner or financial director (hereafter "the board member") – and for the person in the organisation who was responsible for the contacts with the NTCA – usually the CFO or controller (hereafter "the contact person").

There were two ways in which the organisation could participate. The board member could choose to fill out his or her part of the questionnaire and hand it over to the subordinate contact person to fill out the second part, then return it by regular mail to the research agency. Alternatively, both respondents could log in to a secure internet server in order to answer the questions online. Separate website links and passwords for each official were provided in the accompanying letter.

Responses were received from 895 organisations. In 54 cases, we received information stating that the organisation no longer existed due to, for example, bankruptcy or a merger. Taking that into account, the response rate for the study was 30% (895/(3,025-54)). Of the organisations that responded, 63% used the online survey, while the others used the printed questionnaire.

Both parts of the questionnaire were not answered in all cases. 715 organisations submitted responses from both a board member and a contact person. Data about some variables was also missing because either no answer was provided or the option "I don't know" was ticked. The results presented here are based on the 669 responses which included complete data on all the variables relevant for the present study. While the sample was stratified, the data used was weighted back to the proportions of the population in order to make the results representative.

Characteristics of the respondents and the organisations

The board members were mostly male (89%) and had a mean age of 49 years. The contact persons were slightly younger (M = 46 years) and 81% of them were male. The number of employees varied between fewer than 10 to more than 1,000, and approximately half of the organisations had fewer than 100 employees in the Netherlands. Almost 60% of the organisations had turnovers (excluding VAT) of between 11 million and 100 million euros for 2010. For 11% of the organisations, turnover exceeded 100 million euros. One in four organisations was a multinational, with a mother company or branches abroad.

Questionnaire and measures

Due to the aim of the larger research project, the questionnaire was comprised of more than 60 questions and statements covering a broad range of topics (e.g. experience with and appreciation of services and support provided by the NTCA, familiarity and contacts with the tax officials, ease or difficulty of fulfilling fiscal obligations etc. We will only describe the measures relevant for the present study here. See Table 1 for the wording of all items.

All variables used in the present study were measured in the group of board members, except for the dependent variable, for which the items were scored by the contact person. Answers for all items ranged from (1) completely disagree to (5) completely agree, except for those regarding the importance of tax compliance, where answers ranged from (1) very unimportant to (5) very important. Scales were constructed based on the unweighted means of the items.

Need for certainty was assessed by four items and Cronbach's alpha for the scale is .68. The *importance of tax compliance* was measured by three items based on the three compliance indicators developed by Slemrod, Blumenthal, and Christian (2001). Cronbach's alpha for the scale was .84. This scale was previously used by Gangl, Muehlbacher, de Groot, Goslinga, Hofmann, Kogler, Antonides, & Kirchler (2013). In Study 1, two aspects of internal (tax) control were measured: *control effort* and *control quality*. *Control effort* was assessed by two items and the Cronbach's alpha for the scale was .81, Spearman's rho was .70 ($p < .001$). *Control quality* was also measured by two items and Cronbach's alpha for the scale was .74, Spearman's rho was .58 ($p < .001$). Finally, *perceived certainty about the tax position* was assessed by four items and the Cronbach's alpha was .83.

Table 1. Descriptive statistics and reliability estimates of Study 1 (n=669) a

Variable	Item wording b	M	SD	FL
Need for Certainty				
	It would harm the reputation of the organisation if tax obligations were not dealt with in the correct way.	1.71	0.70	.54
CR=0.81	It is of great importance for the organisation to know in advance what the tax consequences are of activities, purchases and investments.	1.78	0.59	.83
EV=2.06	Uncertainty about the tax position constitutes a direct risk for the organisation.	2.38	0.99	.69
AVE=0.52	It is of great importance for the organisation to have a grip on all fiscal matters.	1.68	0.53	.78
Importance of Tax Compliance				
	How important do you think it is that the tax office…			
CR=0.90	…receives tax returns from your organisation on time?	4.02	0.71	.89
EV=2.28	…receives complete and correct tax returns from your organisation?	4.27	0.68	.85
AVE=0.76	…receives timely payments from your organisation?	3.98	0.76	.87
Control Effort				
CR=0.92	The internal control of the organisation takes a lot of time and effort.	2.24	0.66	.92
EV=1.69	The tax control of the organisation takes a lot of time and effort.	2.36	0.68	.92
AVE=0.84				
Control Quality				
CR=0.88	The organisations' internal control is well-organised.	1.92	0.54	.89
EV=1.59	The organisations' tax control is well-organised.	2.02	0.54	.89
AVE=0.79				
Perceived Certainty				
CR=0.89	My organisation feels certain about tax returns that are filed.	1.79	0.52	.77
EV=2.65	My organisation receives sufficient certainty from the tax authorities regarding its tax position.	2.34	0.70	.74
AVE=0.66	The handling of tax returns provides no surprises for my organisation.	1.89	0.61	.88
	My organisation knows where it stands with regard to fiscal matters.	2.03	0.65	.86

a All items were measured on a five-point scale (1=very unimportant, 5=very important for the importance of tax compliance items and 1=completely disagree, 5=completely agree for all other items)

b All translations from Dutch by authors

CR=Composite Reliability, EV=Eigenvalue, AVE=Average Variance Extracted, M=Mean, SD=Standard Deviation, FL=Factor Loading

Results

Table 2 provides the means, standard deviations and correlations of the variables used in Study 1.

Table 2. Means, standard deviations and intercorrelations of the variables in Study 1 (n=669)[5]

	M	SD	1	2	3	4	5	6	7
1. Multinational (no/yes)	1.76	0.43							
2. Number of employees	3.21	1.60	-.07						
3. Turnover	4.01	1.28	.13**	.62***					
4. Need for certainty	4.11	0.50	.04	.03	.03				
5. Importance of tax compliance	4.09	0.62	.02	.05	.10*	.14***			
6. Control effort	3.70	0.62	.06	.08	.12**	.29***	-.01		
7. Control quality	4.03	0.48	.07	-.06	-.03	.25***	.19***	.17***	
8. Perceived level of certainty	3.97	0.50	-.03	.00	-.01	.06	.18***	-.03	.32***

** p < .05; ** p < .01; *** p < .001*

Turnover was significantly associated with the number of employees and with whether the organisation was a multinational. When the number of employees was higher, turnover was higher ($r = .62$, $p < .001$) and multinationals had a somewhat higher turnover ($r = .13$, $p < .01$) but did not differ in the number of employees. Turnover was also associated with the importance of tax compliance and control effort. When turnover was higher, greater importance was attached to tax compliance ($r = .10$, $p < .05$) and more effort was put into internal and tax control ($r = .12$, $p < .01$).

The need for certainty about the tax position correlated significantly and positively with the importance of tax compliance ($r = 14$, $p < .001$), with the effort put into the internal and tax control ($r = .29$, $p < .001$) and with the quality of the internal and tax control ($r = .25$, $p < .001$). The quality of the internal and tax control was also positively associated with the importance of tax compliance ($r = .19$, $p < .001$) and with control effort ($r = .17$, $p < .001$).

The need for certainty did not correlate significantly with perceived certainty about the tax position ($r = .06$, ns). The perceived certainty about the tax position correlated significantly with the importance of tax compliance ($r = .18$, $p < .001$) and the quality of the internal and tax control ($r = .32$, $p < .001$).

Explaining the quality of the TCF

To test the first two hypotheses, we conducted two regression analyses with the two aspects of internal (tax) control – control effort and control quality – as dependent variables. In both analyses, the independent variables were entered in two steps. First, only the background characteristics of the organisation were included, so that they could function as control variables in the next step. In the second step, we added the need for certainty about the tax position and the importance attached to tax compliance to the regression equations. The results are displayed in Table 3.

[5] *Turnover* was measured on a six-point scale with 1= ≤ €1 million, 2=> €1 million and ≤ €5 million, 3= > €5 million and ≤ €10 million, 4= > €10 million and ≤ €25 million, 5= > €25 million and ≤ €210 million and 6= > €100 million.
Number of employees was measured on an eight-point scale with 1= ≤ 10, 2= > 10 and ≤ 25, 3= > 25 and ≤ 50, 4= > 50 and ≤ 100, 5= > 100 and ≤ 200, 6= > 200 and ≤ 500, 7= > 500 and ≤ 1000, 8= > 1000.

Table 3. Results of regression analyses of Study 1 explaining the quality of the TCF (n=669)

Panel a: Control effort

	B	SE	Beta	B	SE	Beta
Multinational (no/yes)	.07	.06	.05	.05	.06	.03
Number of employees	.01	.02	.03	.01	.02	.02
Turnover	.05	.02	.09	.05*	.02	.10*
Need for certainty				.36***	.05	.29***
Importance of tax compliance				-.06	.04	-.06
F		3.54*			14.53***	
d.f.		3,665			5,663	
R^2 (adj. R^2)		.02 (.01)			.10 (.09)	

** p < .05; ** p < .01; *** p < .001*

Panel b: Control quality

	B	SE	Beta	B	SE	Beta
Multinational (no/yes)	.08	.05	.07	.07	.04	.06
Number of employees	-.01	.01	-.05	-.01	.01	-.05
Turnover	-.01	.02	-.02	-.01	.02	-.03
Need for certainty				.22***	.04	.23***
Importance of tax compliance				.13***	.03	.17***
F		1.87			14.64***	
d.f.		3,665			5,663	
R^2 (adj. R^2)		.01 (.00)			.10 (.09)	

** p < .05; ** p < .01; *** p < .001*

B=Unstandardised Regression Weight, SE=Standard Error, Beta=Standardised Regression Weight

In the first step, none of the background characteristics had significant regression weights in either of the regression models. Adding the need for certainty and the importance attached to compliance improved both models. A higher need for certainty significantly affected both control effort ($\beta = .29$, $p < .001$) and control quality ($\beta = .23$, $p < .001$). In the second step, control effort was also predicted by turnover, where a higher turnover predicted more control effort. The importance of tax compliance did not affect control effort but was a significant predictor of control quality. As expected, more importance being attached to tax compliance ($\beta = .17$, $p < .001$) predicted higher control quality. The complete models explained 9% of the differences in both control effort and control quality.

Explaining perceived certainty

We conducted linear regression analysis with the perceived certainty about the tax position as a dependent variable to test Hypothesis 3 (Table4). The independent variables were entered in three steps. First, we entered the characteristics of the organisations (number of employees, turnover, and multinational or not) as control variables in the regression equation, resulting in a non-significant model and no significant Beta weights. In the second step, we added the need for certainty and the importance of compliance to the equation. The resulting model was significant ($F(5,663) = 5.07$, $p < .001$) and explained 3% of the differences in the perceived certainty about the tax position. The only significant predictor in the model was the importance of tax compliance ($\beta = .18$, $p < .001$). In the third step, control effort and control quality were

also included. The results showed a significant effect for the quality of the internal (tax) control ($\beta = .32$, $p < .001$). The complete model explained 12% of the variance in control quality.

Table 4. Results of regression analyses of Study 1 explaining the perceived level of certainty about the tax position (standardised regression weights, n=669)

	B	SE	Beta	B	SE	Beta	B	SD	Beta
Multinational (no/yes)	-.04	.05	-.03	-.04	.05	-.04	-.06	.04	-.05
Number of employees	.00	.01	.00	.00	.01	.00	.01	.01	.02
Turnover	-.00	.02	-.01	-.01	.02	-.03	-.00	.02	-.01
Need for certainty				.04	.04	.04	-.02	.04	-.02
Importance of tax compliance				.15***	.03	.18***	.10**	.03	.12**
Control effort							-.06	.03	-.07
Control quality							.33	.04	.32***
F		0.27			5.07***			13.85***	
d.f.		3,665			5,663			7,661	
R^2 (adj. R^2)		.00 (.00)			.04 (.03)			.13 (.12)	

** p < .05; ** p < .01; *** p < .001*

To test whether the quality of the internal (tax) control mediated the effect of the importance of tax compliance on the perceived certainty about the tax position, we conducted a set of regression analyses using coefficients from 10,000 bootstrap samples (Hayes, Preacher, & Myers, 2011). The results showed that the 95% confidence interval for the indirect effect of the quality of control did not contain zero [.03, .08]. More specifically, adding the control quality as a mediator decreased the effect of the importance of compliance on the perceived certainty about the tax position (from $\beta = .18$, $p < .001$ to $\beta = .12$, $p < .01$).

In conclusion, the results generally confirmed the hypotheses. However, of the two measures used for aspects of internal tax control, only control quality had an effect on the perceived level of certainty and mediated the relationship between the need for certainty and the importance of compliance and the perceived level of certainty. We did not find these effects in respect of control effort. This might be due to the operationalisation of control effort. Higher scores on control effort could indicate that an organisation takes internal control more seriously. However, it might also indicate that the organisation is inefficient in achieving control, which might explain the somewhat low correlation between control effort and control quality. Therefore, we conducted a second study in which a more elaborate measure for internal tax control was used.

4. STUDY II

Method

Participants and sample

The data was collected in 2014 through a survey among representatives of large organisations in the Netherlands. The survey was carried out as part of larger research NTCA project aiming to shed light on the relationship between NTCA's regulatory strategy for large organisations and their tax compliance. A research agency was commissioned to carry out the fieldwork.

The population of large organisations comprised the 8,558 largest organisations in the Netherlands at the time of the study (2014).[6] The 81 largest organisations were excluded from the research population, because they receive a somewhat different regulatory treatment from the NTCA. A sample of 350 organisations was drawn from those that remained and these were invited to participate in the survey. For reasons relating to the objectives of the NTCA's research project, the sample was stratified to include larger proportions of organisations participating in the Horizontal Monitoring (HM) programme and organisations that had only recently met the criteria to qualify as large. The sample consisted of: 95 large organisations that were participating in HM; 180 that were not participating in HM; and 75 that had only qualified as large organisations since the end of 2013 (none of which were participating in HM). In our analyses, we do not differentiate between large businesses that do and that do not participate in HM and between large businesses that are in different stages of participation. Formal participation, in the form of a covenant, is often a confirmation of an already established cooperative relationship. It is, therefore, possible that large businesses that do not (yet) participate in CCPs do not differ from large businesses that do participate in them. It is also possible that large businesses that participate in CCPs do not (yet) live up to the expectations. Because of the stratification, the data was weighted so that the proportions of the three strata were representative of the population.

Procedure and response

The survey was meant for the most senior official within each large organisation who was responsible for fiscal decisions and maintaining contact with the NTCA. Usually, this was the CFO, controller or tax director (hereafter "the contact person"). The designated teams within the NTCA responsible for the treatment of large organisations knew, and had regular contact with, these contact persons. The contact persons received telephone calls from their account managers within the NTCA and official letters from the organisation to inform them about the research project and the survey. Subsequently, the research agency sent each contact person an email with a link to the web-based survey and a request to participate. The survey was anonymous to ensure the NTCA did not know who had responded and who had not. This was also made clear to the organisations.

The survey closed approximately a month after the first invitation was sent. 271 of the 350 large organisations completed it; a response rate of 77%. The respondents were mostly male (84%) and their mean age was 48 years. The number of employees working for each organisation in the Netherlands varied from fewer than 50 to more than 2000, with approximately half of the organisations having fewer than 200 employees. Fewer than 10% of the organisations had turnovers (excluding VAT) of more than 200 billion euros for 2013 and approximately half of them had turnovers of between 10 million and 75 million euros that year. One third of the organisations had branches or establishments abroad. In this study, these are labelled multinationals.

Questionnaire and measures

Due to the aim of the larger research project, the questionnaire comprised more than 150 question and statements, covering a broad range of topics (e.g. service provision by the NTCA, distributive justice, procedural justice etc. We will only describe the measures relevant for the

[6] The NTCA distinguishes large organisations from other taxpayers based on the following criteria: a) turnover exceeds ten million euros and gross wages exceed two million euros; or b) gross wages exceed eight million euros; or c) assets exceed one billion euros.

present study here. Scales were constructed based on the unweighted means of the items. See Table 4 for the wording of all items.

Need for certainty was assessed by a single item. The *importance of tax compliance* was measured using the same three items used in Study 1. Cronbach's alpha for this scale was .91. To our knowledge, no comprehensive list of items for measuring internal tax control has been proposed in the literature. For purpose of this study, measures for the different formal aspects of the TCF were derived from the process of internal control as proposed by COSO (1992). The COSO framework is considered to be the "gold standard" of internal control and is well-known (Wunder, 2009). In order to develop a measure, we drew from a study by Heeren-Bogers, Kaptein, and Soeters (2013), who developed measures for internal control in the Dutch Ministry of Defence. We adjusted these measures to better fit the tax context of our study. Our measure for the *quality of the TCF* consists of 23 items. To our knowledge, this study is the first to use such a comprehensive list of items when measuring internal tax control. We expected the 23 items to reflect the five different aspects of internal control as described by COSO (1992). However, factor analysis yielded a four-factor solution. The four factors were strongly intercorrelated and did not congruently reflect the five aspects of an internal control framework as described by COSO. For this reason, we decided to compute the final TCF measure as an average of all items save one because of a low factor loading.[7] The remaining 22 items formed a reliable scale with a Cronbach's alpha of .93.

Perceived certainty about the tax position was measured by four items and the Cronbach's alpha was .88.

[7] The item we dropped was: "In my organisation, internal control monitoring is performed by an external expert (e.g. a tax advisor)".

Table 5. Descriptive statistics and reliability estimates of Study 2 (n=271, weighted 269) a

Variable	Item wording b	M	SD	FL
Need for Certainty	It is of great importance for my organisation to get certainty about the tax position from the tax authority.	5.81	1.06	-
Importance of Tax Compliance	*How important do you think it is that the tax office…*			
CR=.91	…receives your organisation's tax returns on time?	6.26	1.04	.91
EV= 2.53	…receives complete and correct tax returns from your organisation?	6.48	0.85	.92
AVE= .77	…receives timely payments from your organisation?	6.34	1.00	.92
TCF	*In my organisation…*			
CR=.93	…the fiscal strategy is clear.	5.49	1.26	.60
EV=8.92	…the fiscal targets are clear.	5.14	1.38	.69
AVE=.38	…the fiscal targets are realistic.	5.17	1.33	.65
	…the fiscal strategy contributes to compliance with tax laws and regulations.	5.26	1.61	.67
	…unambiguous fiscal targets are derived from the fiscal strategy.	4.29	1.64	.63
	…fiscal risks are identified.	5.26	1.31	.58
	…the identification of fiscal risks is updated yearly.	3.81	1.88	.55
	…it is stated what fiscal risks must be avoided.	5.41	1.28	.59
	…processes are formally described (for example, in a manual).	4.35	1.89	.54
	…the descriptions of processes include tax risks.	3.39	1.69	.67
	…the descriptions of processes include (formal) internal controls.	4.08	1.85	.64
	…fiscal risks are controlled using (formal) internal monitoring.	4.79	1.66	.63
	…the correct operation of fiscal internal controls is subject to monitoring.	4.40	1.58	.71
	…the monitoring of internal controls is described in a plan.	3.45	1.82	.61
	…the monitoring of internal controls is performed by a separate internal audit department or an internal auditor.	3.10	2.05	.44
	… fiscal performance indicators are derived from the fiscal targets.	3.35	1.72	.55
	… fiscal performance indicators are unambiguous.	3.56	1.80	.60
	…the realisation of fiscal targets is periodically reported to the board.	3.82	1.92	.62
	…the roles and responsibilities of fiscal staff are clear.	5.01	1.58	.63
	…the roles and responsibilities of fiscal staff are formally stated.	4.01	1.81	.64
	…we invest in training and education to keep the knowledge of fiscal staff up to date.	5.54	1.20	.58
	…employees in fiscal positions are competent enough to carry out these tasks.	4.85	1.68	.55
Perceived Certainty				
CR=.88	My organisation feels certain about tax returns that are filed.	6.03	0.92	.80
EV=2.92	My organisation receives sufficient certainty from the tax authorities regarding its tax position.	5.47	1.25	.82
AVE=.65	The handling of tax returns provides no surprises for my organisation.	5.87	1.02	.90
	My organisation knows where it stands with regard to fiscal matters.	5.75	1.07	.89

a All items were measured on a seven-point scale (1=completely disagree to 7=completely agree)

b All translations from Dutch by authors

CR=Composite Reliability, EV=Eigenvalue, AVE=Average Variance Extracted, M=Mean, SD=Standard Deviation, FL=Factor Loading

Results

In order to test our hypotheses, we first examined the correlations between the variables. Table 6 presents the correlation matrix for all variables in the present study.

The need for certainty about the tax position correlated significantly with turnover, but not with the organisation being a multinational and the number of employees. When turnover was higher, organisations expressed a stronger need for certainty about their tax positions ($r = .14$, $p < .05$). There were no significant correlations between these background characteristics and the importance of tax compliance.

Table 6: Bivariate correlations (Pearson, n=271, weighted 269)[8]

	M	SD	1	2	3	4	5	6
1.Multinational (no/yes)	1.66	0.47						
2.Number of employees	5.82	4.09	-.12*					
3.Turnover	3.05	1.15	.19**	.53***				
4.Need for certainty	5.81	1.06	.12	-.08	.14*			
5.Importance of tax compliance	6.35	0.88	.00	-.05	.07	.29***		
6. TCF	4.43	1.03	.04	-.02	.03	.29***	.23***	
7. Perceived level of certainty	5.78	0.91	.18**	-.11	-.06	.45***	.32***	.38***

** p < .05; ** p < .01; *** p < .001*

The need for certainty about fiscal matters was positively associated with the importance that was attached to tax compliance ($r = .29$, $p < .001$). No significant correlations emerged between the background characteristics of the organisation and the TCF. Both the need for certainty ($r = .29$, $p < .001$) and the importance of tax compliance ($r = .23$, $p < .001$) were significantly associated with the TCF.

The perceived certainty about the tax position, the dependent variable in our study, was significantly associated with all other variables except for the number of employees and turnover. Multinational organisations reported a higher degree of certainty than national organisations ($r = .18$, $p < .01$). Furthermore, the perceived certainty about the tax position was stronger when there was a stronger need for certainty ($r = .45$, $p < .001$), when more importance was attached to tax compliance ($r = .32$, $p < .001$) and when the TCF was better functioning and of higher quality ($r = .38$, $p < .001$).

Explaining the quality of the TCF

To test our first two hypotheses, we used regression analysis with the quality of the TCF as a dependent variable. As in Study 1, the independent variables were entered in two steps: first, only the background characteristics of the organisation were entered; second, the need for

[8] Turnover is measured on a five-point scale, with 1= ≤ €10 million, 2= > €10 million and ≤ €25 million, 3= > €25 million and ≤ €50 million, 4= > €50 million and ≤ €200 million and 5= > €200 million.
Number of employees is measured on a fourteen-point scale, with 1= ≤ 50, 2= > 50 and ≤ 75, 3= > 75 and ≤ 100, 4= > 100 and ≤ 150, 5= > 150 and ≤ 200, 6= > 200 and ≤ 250, 7= > 250 and ≤ 300, 8= > 300 and ≤ 350, 9= > 350 and ≤ 400, 10= > 400 and ≤ 500, 11= > 500 and ≤ 750, 12= > 750 and ≤ 1,000, 13= > 1,000 and ≤ 2,000 and 14= > 2,000.

certainty about the tax position and the importance attached to tax compliance were added. The results are displayed in Table 7.

Table 7. Results of regression analyses of Study 2 explaining the quality of the TCF (n=271, weighted 269)

	B	SE	Beta	B	SE	Beta
Multinational (no/yes)	.05	.14	.02	.04	.13	.02
Number of employees	-.01	.02	-.05	-.01	.02	.02
Turnover	.05	.07	.05	-.02	.07	-.03
Need for certainty				.24***	.06	.25***
Importance of tax compliance				.19***	.07	.16***
F		.33			6.29***	
d.f.		3,265			5,263	
R^2 (adj. R^2)		.00 (.00)			.11 (.09)	

** p < .05; ** p < .01; *** p < .001*

In the first step, the model was not significant. In the second step, we found both the need for certainty and the importance of tax compliance to be significant predictors of the quality of the TCF. As expected, both a stronger need for certainty ($\beta = .25$, $p < .01$) and more importance attached to tax compliance ($\beta = .16$, $p < .01$) predicted a TCF of higher quality. The final model explained 11% of the differences in quality of the TCF.

Explaining perceived certainty

In order to test the third hypothesis, regarding the multivariate relationship between the variables, we conducted a regression analysis with the perceived certainty about the tax position as the dependent variable. As in Study 1, we included the independent variables in three steps: first, the background characteristics as control variables; second, the need for certainty about the tax position and the importance attached to tax compliance; and third, the quality of the TCF. The results are displayed in Table 8.

In the first step, a significant regression weight emerged in respect of whether or not the organisation was a multinational. Just as the correlation analysis showed, multinationals reported a higher perceived certainty than national organisations ($\beta = .19$, $p < .01$). The regression weights for number of employees and turnover were not significant. Only 3% of the differences in the perceived certainty about the tax position were explained by the background characteristics.

In the second step, both the need for certainty and the importance of tax compliance were found to be significant predictors of the differences in the perceived certainty about the tax position. As expected, both a stronger need for certainty and more importance attached to tax compliance predicted a greater degree of perceived certainty (Betas are .40 ($p < .001$) and .23 ($p < .01$) respectively). Adding these variables also changed the effect of turnover, which became a significant predictor ($\beta = -.18$, $p < .05$). When the need for certainty and the importance of tax compliance were taken into account, organisations with higher turnovers reported lower perceived certainty about their tax positions. Together, the variables in step 2 explained 28% of the differences in the perceived degree of certainty.

Table 8. Results of regression analyses of Study 2 explaining the perceived level of certainty about the tax position (n=271, weighted 269)[9]

	B	SE	Beta	B	SE	Beta	B	SE	Beta
Multinational (no/yes)	.36**	.12	.19**	.34**	.11	.18**	.33**	.10	.17**
Number of employees	-.01	.02	-.06	.01	.01	.05	.01	.01	.04
Turnover	-.05	.06	-.06	-.15**	.05	-.18**	-.14**	.05	-.18**
Need for certainty				.34***	.05	.40***	.29***	.05	.34***
Importance of tax compliance				.23***	.06	.23***	.19**	.06	.19**
TCF							.21***	.05	.24***
F	4.02**			21.31***			22.28***		
d.f.	3,265			5,263			6,264		
R^2 (adj. R^2)	.04 (.03)			.29 (.28)			.34 (.32)		

** p < .05; ** p < .01; *** p < .001*

The third step added the TCF, which emerged as a significant predictor of the degree of certainty over and above the background characteristics, the need for certainty and the importance of tax compliance. A higher quality TCF (β =.24, p<.001) predicted a higher degree of certainty. The complete model explained 32% of the variance.

To test whether the quality of the TCF mediated the effect of the need for certainty on perceived certainty about the tax position, we conducted a set of regression analyses using coefficients from 10,000 bootstrap samples. The results showed that the 95% confidence interval for the indirect effect of the TCF [.03, .10] did not contain zero. More specifically, including the quality of the TCF in the regression equation reduced the effect of the need for certainty on certainty about the tax position (from β = .40, p < .001 to β = .34, p < .001).

We performed the same analyses to test whether the quality of the TCF mediated the effect of the importance of tax compliance on perceived certainty about the tax position. The results showed that the 95% confidence interval for the indirect effect of TCF [.01, .08] did not contain zero. More specifically, adding the quality of the TCF as a mediator reduced the effect of the importance of tax compliance on perceived certainty about the tax position (from β = .23, p < .001 to β = . 19, p < .01).

In line with expectations, the quality of the TCF partly mediated the relationship between the need for certainty and the importance of tax compliance on perceived certainty about the tax position. With the TCF included, 32% of the differences in perceived certainty about the tax position were explained.

5. CONCLUSIONS AND DISCUSSION

This paper investigates whether a stronger need for certainty about the tax position and a stronger need or wish to comply with tax rules and regulations motivates large organisations to invest in their TCFs. It also explores whether the quality of a TCF determines how large organisations feel about their tax positions. The data from two surveys conducted among senior officials responsible for tax matters in large organisations confirmed the hypothesised associations between the need for certainty about the tax position and the quality of the TCF

[9] In additional analyses (untabulated), two dummies for the three strata were added. No significant effects of these dummies were found, nor were the other relationships in our model significantly affected.

(Hypothesis 1) and between the importance attached to tax compliance and the quality of the TCF (Hypothesis 2). Also, having a better functioning and higher quality TCF positively predicted the perceived level of certainty about the tax position (Hypothesis 3).

Although Study 1 and Study 2 provided support for the hypotheses, there were some differences in the central findings of both studies. Study 2 showed significant relationships between both the need for certainty and the importance attached to tax compliance and the perceived level of certainty, and these relationships were mediated by the quality of the TCF. In Study 1, a significant correlation emerged between the importance of compliance and the perceived level of certainty about the tax position but not between the need for certainty and the perceived level of certainty. The quality of the TCF in Study 1 significantly mediated the relationship between the importance of compliance and the perceived level of certainty about the tax position. Thus, the association between the need for certainty about the tax position and the perceived certainty about the tax position differed between the studies.

Although both studies controlled for several characteristics of the organisations (number of employees, turnover, and whether they were multinationals or not), this difference may have been be caused by differences in the composition of the two samples. The sample for Study 2 consisted of larger organisations than those used in Study 1. It may be that the correlation is stronger among larger organisations because they are more capable of converting their need for certainty into perceived certainty about their tax positions. The difference might also be due to the ways in which the need for certainty is conceptualised in the studies. Study 1 asks about the consequences for the organisation of (un)certainty about the tax position, while Study 2 assesses how important it is for the organisation to get this certainty from the tax administration. The possible negative consequences of uncertainty about the tax position can be circumvented in several ways besides getting certainty from the tax administration; for instance, by avoiding risky fiscal positions. A more refined definition and conceptualisation of the need for certainty about the tax position will benefit future studies.

Finally, the divergent results could be attributed to the fact that the studies were administered at different times. Study 1 was conducted in 2011 and Study 2 in 2014. This period is characterised by increasing public attention to the tax behaviour of, especially, large organisations, e.g. the hearings in respect of Amazon, Starbucks and Google by the Committee of Public Accounts, a committee of the British House of Commons. These hearings emphasised the international role played by the Netherlands in the tax aggressive behaviour of large organisations. The public indignation that followed was widely reported in the press. This led to more attention being paid to the tax behaviour of Dutch multinationals and, in 2013, the Dutch government stating that it wished to tackle the aggressive tax behaviour of large organisations.[10] This may have increased organisations' need for control over, and certainty regarding, tax matters (Gallemore & Labro, 2015) and, thus, may have affected the strengths of the relationships between the focal concepts of our studies.

In addition, Study 1 showed that the quality of the TCF was a significant predictor of the perceived certainty about the tax position, while control effort was not. Study 2 used a more elaborate measure for the TCF and also showed that a higher quality TCF was a significant predictor of the perceived level of certainty about the tax position. Both studies showed that the quality of the TCF partly mediated the relationship between the importance attached to tax

[10] See: https://www.rijksoverheid.nl/actueel/nieuws/2013/08/30/kabinet-pakt-internationale-belastingontwijking-aan (in Dutch, visited March 24, 2018).

compliance and the perceived level of certainty about the tax position. Additionally, Study 2 showed that the quality of the TCF partly mediated the relationship between the need for certainty and the perceived level of certainty about the tax position. These results suggest that large organisations that have a need for certainty about their tax positions and a need or wish to comply with tax rules and regulations see to it that they have effective TCFs. In line with the findings of Beck and Lisowsky (2014), the results showed that having an effective TCF strengthened the perceived level of certainty about the tax position.

Before discussing the results further, some points regarding the methodology of the two studies need to be addressed. The reasoning followed in this paper suggests that the need for certainty and the importance attached to compliance are motives for large organisations to develop and implement TCFs. This will lead to better detection of risks and the possibility of disclosing these risks to the tax authority, thus resulting in a higher perceived level of certainty about the tax position. However, the present study does not allow for a test of the causality of the hypothesised paths. It could also be that the fact that a TCF is implemented in an organisation signals to respondents that the organisation has a need for certainty concerning its tax position and has a wish to comply with tax rules and regulations. On the other hand, as Jokipii (2010) shows, organisations have different characteristics and adapt their internal control structures to deal with environmental uncertainty and to achieve control effectiveness. This supports the line of reasoning that the control system is there for a reason and – as the results corroborated – the need for certainty or perhaps the need to reduce uncertainty is an important driver for improving the quality of this control system. Further research could explore the causality of relationships further by using a longitudinal research design whereby organisations are followed over time. Alternatively, qualitative research could be done, asking key figures in organisations about their motives for improving their TCFs and the consequences thereof.

Furthermore, responses may be biased because they come from specific sources within the organisations. However, special care was taken to select the best-informed person(s) with regard to fiscal matters within each organisation. Also, as with all self-reported (and especially tax-related) surveys, we face the social desirability bias. This bias was mitigated as far as possible by having strict anonymity for responders and by asking about organisational attitudes instead of personal attitudes (cf. Nielsen & Parker, 2012). Finally, both studies were conducted in one country, the Netherlands, potentially limiting the external validity of our results. Differences in tax morale between countries, for example, might affect the relationships found in our studies (cf. Alm, Sanchez, & De Juan, 1995). However, since large businesses often operate internationally, it seems likely that country-specific effects are smaller for large businesses than for individuals. In countries where the tax authority does not offer the possibility for large businesses to consult with it, those businesses might be less willing to invest in their TCFs. The present results might be different in such countries. However, consulting with the tax authority to reduce the uncertainty of tax positions is possible in an increasing number of countries (OECD, 1999).

In line with the ideas of the new governance approaches, the OECD actively promotes cooperative compliance programmes. However, cooperative tax compliance programmes and similar new governance approaches in other domains are also criticised. The lack of empirical studies concerning the dynamics and the results or merits of internal control frameworks and cooperative (tax) compliance programmes is therefore striking (Krawiec, 2003). Colon and Swagerman (2015) found that when large organisations perceive that there are advantages to being in a cooperative relationship, their willingness to partake in a cooperative tax compliance programme increases. The present study adds to this finding by showing that the need for

certainty and the wish to be compliant stimulate organisations to improve the quality of their TCFs. This supports one of the key assumptions underlying cooperative compliance programmes as expressed by the OECD (2013). The OECD assumes that taxpayers strive for tax certainty and having a TCF in place is a way to achieve this certainty. However, the present study does not provide insights into how having a well-functioning TCF produces a stronger perceived level of certainty about the tax position. The assumption, as described by the OECD (2013) and NTCA (2013), is that certainty will result from the TCF in three ways. Firstly, the TCF detects significant tax risks and that, in itself, strengthens perceived certainty (if you can't detect the risks, you don't know whether there are risks). Secondly, the TCF enables organisations to disclose all significant tax risks to the tax authority. Organisations will be informed about the opinion of the tax authority on the disclosed tax positions and transactions, resulting in a higher degree of certainty. Thirdly, the TCF supports organisations to meet their legal obligations with regard to the submission of complete, correct and timely tax returns, and declarations and payment of due taxes. A remaining question is whether an increase in tax certainty is a consequence of tax authorities providing this certainty, as the OECD assumes when characterising cooperative compliance as "transparency in exchange for certainty", or whether the TCF can increase tax certainty for large organisations by itself.

The two studies presented in this paper provide support for the line of reasoning underlying the cooperative compliance policy as advocated by the OECD (2013) and the NTCA (2013). It appears that improving the quality of a TCF can provide an organisation with more certainty about its tax position. Cooperative compliance programmes stimulate organisations to improve their TCFs and this can benefit these organisations (cf. De Simone, Sansing, & Seidman, 2013). Whether improving the quality of a TCF also leads to improved tax compliance, and thus also benefits tax authorities, is an important question for future research to address.

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COOPERATIVE COMPLIANCE AND THE DUTCH HORIZONTAL MONITORING MODEL

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Abstract

Cooperative compliance can be defined as the establishment of a trust-based cooperative relationship between taxpayers and the tax authorities on the basis of voluntary tax compliance leading to the payment of the right amount of tax at the right time. The Dutch Horizontal Monitoring (HM) model can be defined as a means of administrative supervision based on (informed) trust, mutual understanding and transparency between individual taxpayers and the Netherlands Tax and Customs Administration (NTCA). The authors elaborate on the principles of reciprocal trust, understanding and transparency. Subsequently, they assess the trust-based Horizontal Monitoring relationship and its establishment in the light of the principles of reciprocal trust, understanding and transparency. Furthermore, they evaluate these aspects of the Horizontal Monitoring model in the light of the Organisation for Economic Co-operation and Development's (OECD's) principles of a cooperative compliance model. First, the ensuing obligations are classified with a view to the reciprocal nature of this set of obligations. Secondly, these obligations are differentiated with respect to their statutory versus voluntary and extra-statutory nature. The research shows that the Horizontal Monitoring model fits into the OECD's concept of cooperative compliance. A striking difference between the two models is that the OECD model mainly - but not only - addresses the obligations of the tax authorities. The Dutch model, however, creates obligations of a more reciprocal nature between tax authorities and taxpayers. Both models, however, aim to increase trust in the tax authorities and build a service climate in order to promote voluntary compliance. Changing views on tax enforcement, tax compliance and tax planning require continual reflection on further improvement of both the Dutch Horizontal Monitoring model and the general concept of cooperative tax compliance.

Keywords: Cooperative compliance, Dutch Horizontal Monitoring, (informed) trust, mutual understanding and transparency, extra-statutory obligations

1. INTRODUCTION

In 2005, the Organisation for Economic Co-operation and Development (OECD) launched an investigation into recent developments in the Netherlands, Ireland and the United States with regard to tax administrations' risk management and compliance strategies. According to the OECD, the rapidly evolving social environment in which tax authorities operate leaves room for (aggressive) tax-saving structures (OECD, 2007e). Within the letter of the law, companies explore tax-saving opportunities which the legislator would have prevented if he had foreseen them. International concern about the use of tax-saving structures and the aim to develop solutions by which to improve the relationships between tax authorities, taxpayers, and

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financial and tax law specialists caused the OECD to decide to investigate their mutual relationships (OECD, 2008, p. 7; see also OECD, 2007c, p. 2).

Three years and six working papers later, the OECD published its 2008 report on "Enhanced Relationships". In 2013, the OECD delivered the results of follow-up research: "From Enhanced Relationships to Cooperative Compliance". In the report(s), the OECD developed the so-called cooperative compliance or Horizontal Monitoring (HM) model for relationships between companies and the tax authorities. Under this model, it is important that taxpayers: 1) agree to voluntary tax compliance; 2) establish a cooperation with the tax authorities; and 3) are willing to work together with the tax authorities in a framework based on trust. Research into advancing technological developments and the need to also engage smaller companies in tax compliance improvement resulted in the OECD releasing a further report in 2014: "Tax Compliance by Design". In this report, the OECD developed a model based on various monitoring strategies fine-tuned to suit the specific features of a country, a tax administration, certain taxpayers, or business activities with the aim of obtaining tax-relevant information from third parties (OECD, 2014, p. 40). In 2016, the OECD released its report "Building Better Tax Control Frameworks" (OECD, 2016). This report provides guidance on the quality of a Tax Control Framework (TCF) to manage tax control for (large) companies and tax authorities participating in a cooperative compliance relationship.

The Netherlands participates in the OECD's policy formation work. The team that prepared the "Study into the Role of Tax Intermediaries" worked closely with a core group of countries, including The Netherlands, that acted as a steering group for the work, and representatives of the Netherlands Tax and Customs Administration (NTCA) participated in a mid-term review (OECD, 2008, p. 3). The Netherlands was also a member of a task group that prepared the 2014 report "Tax Compliance by Design" (OECD, 2014, p. 3). In 2014, the Netherlands hosted a meeting of delegates from the tax authorities of several OECD countries "in order to further develop the TCF" (OECD, 2016, p. 10). This participation influenced the various reports. The influence of the Netherlands on the 2013 OECD report is, for example, "reflected in the emphasis on tax control frameworks which form the backbone of the version of cooperative compliance adopted by NTCA" (De Widt & Oats, 2018, p. 262). It is, therefore, difficult to draw a clear line between the OECD approach and the Dutch approach, since the Netherlands was a driver of the OECD approach.

In 2005, the Netherlands introduced the possibility for companies to enter into Horizontal Monitoring relationships with the NTCA. The model can be defined as a means of administrative supervision based on mutual (informed) trust, mutual understanding and transparency between individual taxpayers and the NTCA (Huiskers-Stoop & Diekman, 2012a, p. 231). In exchange for providing relevant tax information on a voluntary basis, taxpayers obtain fiscal certainty about their tax liability in advance and are – in principle – no longer subject to time and effort-consuming tax audits, sanctions and prosecution afterwards (Huiskers-Stoop, 2015, p. 439). Of course, random checks and audits can be carried out by the tax inspectors.

It goes without saying that parties do not trust each other blindly. They depend on information in order to assess each other's trustworthiness. Informed trust depends on reciprocal transparency with regard to information provided by the tax authorities and taxpayer. How does the Dutch Horizontal Monitoring model work in practice, how can the NTCA be sure that it is sufficiently well-informed and does this model relate to the OECD's concept of cooperative

compliance? These questions will be answered in this paper. We will first give a brief overview of the model, and then put forward and elucidate our research question and method.

1.1 The Horizontal Monitoring model

In the 1990s, the NTCA introduced its risk assessment strategy, allocating the available scarce resources to high taxpayer service and high-risk areas. Intervention was deemed necessary only in the event of an actual risk. As a result, each taxpayer category should get the appropriate attention. Just before the turn of the millennium, the NTCA introduced its compliance strategy in order to support and strengthen the willingness of taxpayers to observe their statutory obligations. In 2005, a new kind of arrangement with multinationals was included in this compliance strategy: Horizontal Monitoring (for the factors that incentivised the Dutch tax authorities to experiment with a different type of monitoring, see De Widt, 2017, pp. 8-10).

The Dutch Horizontal Monitoring model has no specific statutory basis. That being said, the NTCA is allowed, under Dutch law, to organise the enforcement process at its discretion and may (and even should) develop policies for the use of this discretion (Gribnau, 2015a, pp. 194-195; Happé & Pauwels, 2011, p. 228;). Legal and constitutional theories may be helpful "in order to articulate concrete standards for the exercise of discretion" (de Cogan, 2011, p. 6). It is widely recognised that tax authorities have discretion that "permits an administrator to engage in settlements and tax amnesties, apply ambiguous and impractical laws in a fair and sensible way, and generally to exercise common sense where the legislation is deficient" (Dabner & Burton, 2009, p. 325; Dabner, 2012, p. 541, p. 546). The UK Commissioners for Revenue and Customs Act 2005 vests HM Revenue & Customs (HMRC) with such general discretionary power to undertake acts in relation to their responsibility for the "collection and management" of taxes and gives HMRC the power to "do anything which they think (a) necessary or expedient in connection with the exercise of their functions, or (b) incidental or conducive to the exercise of their functions" (Freedman & Vella, 2011, pp. 80-81). Discretion with regard to the enforcement process can be defined as the "elbow room" that the NTCA has to efficiently set up the taxation process in view of scarce enforcement resources and the different characteristics and risk profiles of taxpayers. Horizontal Monitoring is an enforcement strategy developed on the basis of this discretion (see also Bronzewska, 2016, pp. 357-364). In this respect, deploying scarce enforcement resources as efficiently and effectively as possible is an important consideration. The NTCA is free – within the framework of tax law – to apply supervision flexibly and to customise its approach towards taxpayers. There is a twofold check on this supervision: tax assessments and other legal decisions are subject to review by the courts, and the State Secretary of Finance is politically accountable to the Dutch Parliament.

Monitoring is all about assessing facts and their legal interpretation with regard to a possible tax liability. These facts and taxpayers' interpretations thereof are presented in the form of tax returns. The Dutch Horizontal Monitoring model transferred the NTCA's review process from carrying out checks after tax returns have been filed to monitoring taxpayers' internal procedures preceding the filing of their tax returns. The focus thus shifts from the tax return, which contains positions based on actions taken by the taxpayer, to the beginning of the process, so before the taxpayer has even performed so-called tax-relevant actions. The individual compliance agreement states that tax-relevant actions apply to matters on which a difference of opinion may arise with NTCA; for instance, where there is a different interpretation of facts or matters of law (for the text of the standard covenant, see www.belastingdienst.nl – search for "individual compliance agreement" – or see this paper's Appendix). The use of an interactive process between taxpayers and the NTCA ensures that

parties can discover their tax position faster, as it provides actual certainty with regard to tax decisions to be taken. The attention of both parties is focussed on the control of tax risks and the avoidance of errors, rather than on subsequent tax audits, sanctions and prosecution. As tax risks are discussed in advance and the taxpayer is open about his tax strategy, the tax return may be expected to contain no information unknown to the NTCA. Hence, the review of the tax return is usually a formality and a prompt imposition of the tax assessment may follow (NTCA, 2013, pp. 40-45). Nonetheless, companies in Horizontal Monitoring relationships can also be subject to tax return audits, although the frequency at which their tax returns are reviewed is substantially lower than that of companies which are not governed by Horizontal Monitoring (NTCA, 2013, p. 41).

In order to qualify for a Horizontal Monitoring relationship, taxpayers must be willing and able to comply with the tax laws and regulations (NTCA, 2013, p. 17). In addition, taxpayers and the NTCA go through a seven-step process to assess whether Horizontal Monitoring is feasible. Both the tax administration and the taxpayer can take the initiative to explore Horizontal Monitoring. The process starts with the NTCA gathering information about the relevant company and ends with an adjustment of supervision. Should parties subsequently decide to enter into a Horizontal Monitoring relationship, they confirm this by signing a compliance agreement (covenant; see Appendix). A taxpayer is free to choose whether or not to enter into Horizontal Monitoring; there is no legal obligation to do so. However, the NTCA might reject the taxpayer's request. This might happen if the NTCA has insufficient confidence in the taxpayer's tax strategy, its internal tax control system or its transparency on submission of relevant tax matters. The taxpayer will probably not, therefore, complete several of the steps preceding the conclusion of a Horizontal Monitoring covenant successfully (NTCA, 2013, p. 6; see section. 3.2). It goes without saying that most companies that do not meet these conditions will not apply for Horizontal Monitoring relationships. Thus, these steps (each with specific requirements), set out in published guidance, enable self-selection to take place among Horizontal Monitoring "candidates."

The covenant contains principles which stipulate that parties will work together on the basis of trust, mutual understanding and transparency. The covenant applies to the levying of all Dutch national taxes and the collection thereof. The agreement aims to realise customised tax monitoring, actual tax collection, actual insight into the taxpayer's tax position and a regular update of the tax compliance process (in other words, "real-time working" for both parties; see Section 3.3).

It is important to note that the covenant concerns the process (the working relationship) resulting in a tax liability and not the amount of tax to be paid. In this respect, we note that Horizontal Monitoring should not be confused with the Dutch ruling practice, under which advance agreements can be made about the position of the NTCA on international tax structures (e.g. international holding and financing activities). Bronzewska (2016) argues that a ruling practice is evidence of an advanced relationship between taxpayers and tax authorities, and is one step ahead of a minimalistic relationship which lacks a kind of communication and dialogue (pp. 65-68). In this sense, Horizontal Monitoring is one step ahead of a practice of communication and dialogue limited to providing taxpayers with certainty – for example, in the form of rulings. Horizontal Monitoring deals with the way in which parties cooperate in the taxation process – the process from the completion of possible tax-relevant transactions up to the filing of the tax return and issuing of the tax assessment – and not with the amount of the tax liability. Empirical research shows that companies with HM covenants in place perceive that they have better working relationships with the NTCA (NTCA, 2017).

Furthermore, Horizontal Monitoring fits in with the political trend for more self-responsibility, i.e. for citizens and companies who are willing and able to do so to take responsibility for their tax affairs; the idea of the "participation society" has become commonplace, both in tax matters and more widely (Huiskers-Stoop, 2015, p. 437). Thus, Horizontal Monitoring symbolises a kind of "horizontalisation" of the tax relationship – cooperation on a more equal footing than in the traditional command and control model (Gribnau, 2015b, p. 208). Furthermore, Horizontal Monitoring implies a form of de-juridification, focussing on informal interaction between tax administration and taxpayers with an eye to shared interests, rather than on formal interaction which is primarily guided by legal norms and procedures (Gribnau, 2015a, p. 184, p. 190). Horizontal Monitoring also fits into the trend in academic theory towards the government's interactive and responsive dealing with citizens. Empirical research shows that customised monitoring is more responsive to the needs and expectations of (corporate) citizens, creates more support and ensures better compliance (Huiskers-Stoop, 2015, pp. 337-354, pp. 381-384). Moreover, the voluntary character of the HM relationship provides a clear incentive for corporate taxpayers "to improve their internal tax control mechanisms, giving them greater control over their tax affairs and facilitating trust by the tax authorities" (De Widt & Oats, 2018, p. 273). Horizontal Monitoring also fits in with the international social trend in which regulatory compliance, rather than non-compliant behaviour, is increasingly the norm; it is in this sense that tax morality increasingly gains support.

Horizontal Monitoring is not "a standalone" model, as the NTCA uses the classical command and control regulation in respect of non-compliant taxpayers. Horizontal Monitoring is only one of the approaches available in the NTCA's strategy toolkit. The NTCA does not abandon traditional enforcement mechanisms (vertical supervision) but puts them on hold when dealing with compliant taxpayers who engage in Horizontal Monitoring. Enforcement of tax law cannot take place without a measure of deterrence – even in the background – after all (Shaw, Slemrod & Whiting, 2010, pp. 1115-1118). Even trustworthy tax authorities have a need for some measure of power, by way of audits and sanctions, in order to enforce compliance (Kirchler, 2007, pp. 203-205) – and rightly so, because not enforcing the law in cases where taxpayers are not compliant would be at the expense of the equal treatment of taxpayers and their trust in the NTCA. The NTCA has extensive powers under public law and can, when necessary, force taxpayers to submit relevant tax information so that it can assess them: e.g. Article 47 and, further, the General Taxes Act 1959 (*Algemene Wet inzake Rijksbelastingen 1959*; GTA). These powers compensate for the information asymmetry between the NTCA and taxpayers. The NTCA may request tax information, start an audit or – in cases where it suspects a criminal offence has taken place – enable the Fiscal Information and Investigation Service (FIOD), its investigative service which focusses on the detection of (serious) fiscal offenses, to confiscate data. These powers make legal asymmetry an important feature of the relationship between the NTCA and taxpayers. Horizontal Monitoring aims to create a more horizontal, trust-based relationship against the background of legal asymmetry – which, in itself, enables the NTCA to fall back on vertical supervision (Gribnau, 2015a, pp. 201-204). Horizontal Monitoring is one of the NTCA's compliance-enhancing tools which uses behavioural insights to promote voluntary compliance (Boer & Gribnau, 2018). Thus, the NTCA, like other tax authorities, increasingly relies on the voluntary compliance of taxpayers in the context of the use of self-assessment systems, withholding taxes and third-party information reporting. The NTCA's extensive powers to collect information in order to check tax assessments are still increasing. Tax authorities in the European Union (EU) cooperate to combat tax fraud and tax evasion (see Council Directive 2011/16/EU). Recently, reporting mechanisms have also been introduced in the fight against tax evasion and aggressive tax planning. Directive 2011/16/EU was recast to enable the (mandatory) automatic exchange of information on rulings (Directive

2015/2376/EU). The directive was subsequently reamended to provide for country-by-country reporting (Directive 2016/881/EU; see Seer & Wilms, 2016). Due to the increased international exchange of information among tax authorities and the disclosure obligations of taxpayers, the amount of information available to tax authorities which can enable them to enforce their tax laws effectively is growing dramatically. The OECD/G20's Base Erosion and Profit Shifting (BEPS) project is another driver (OECD, 2016, p. 12). BEPS Action 12 goes quite far in this respect, providing recommendations regarding the design of mandatory disclosure regimes for aggressive or abusive transactions, arrangements or structures. The EU took a significant step forward by introducing the directive on mandatory disclosure of potentially aggressive tax arrangements and the automatic exchange among member states of information about this kind of cross-border arrangement (Directive 2018/822/EU; see Cachia, 2018).

1.2 Research question and method

This paper studies the way in which the Netherlands incorporated the concept of cooperative compliance in its taxation process, and contributes to the further development of compliance strategies and their functioning in practice. More specifically, the different steps to be taken in order to enter into an HM relationship are discussed so as to gain a better understanding of the operationalisation of the underlying concept of a trust-based relationship, and the HM covenant is analysed. The covenant entails a number of obligations, based on trust, mutual understanding and transparency, in order to provide real-time certainty with regard to tax affairs. The analysis of the covenant proceeds in two steps. First, the ensuing obligations are classified with a view to the reciprocal nature of this set of obligations. Secondly, these obligations are differentiated with respect to their statutory versus voluntary and extra-statutory nature. Moreover, it evaluates the establishment and content of the standard Horizontal Monitoring covenant against the principles of the OECD concept of a cooperative compliance approach. The principal research question is:

> *"How does the trust-based Horizontal Monitoring relationship and its establishment relate to the OECD's model of cooperative compliance?"*

The paper deals with the following questions: how is the OECD's cooperative compliance model defined (Section 2); what are the different steps that need to be taken in the process of concluding a Horizontal Monitoring covenant and how do the voluntarily accepted Horizontal Monitoring covenant obligations relate to the mandatory obligations laid down in the Dutch legal tax system (Section 3); and does the Dutch Horizontal Monitoring model deliver on the principles of the OECD 's cooperative compliance model (with special attention being given to some issues of concern as voiced by the OECD) (Section 4)?

This research mainly focusses on the establishment of, and the cooperative tax relationship based on, a Horizontal Monitoring covenant, in order to set out some typical aspects of the Dutch approach and evaluate it against the OECD's cooperative compliance principles. To answer the research question, we restrict ourselves to direct Horizontal Monitoring relationships as entered into by the NTCA and large and medium-sized companies (turnover exceeds about twelve million euros, assets about six million euros and staff fifty; see Articles 2:396-397 Dutch Civil Code and NTCA, 2014, p. 34). The NTCA does not limit Horizontal Monitoring relationships to large and medium-sized companies, but is also willing to enter into such relationships with small companies (and high net worth individuals), albeit indirectly, since these small companies do not have qualifying TCFs. This indirect HM relationship is mediated through financial or tax law specialists who monitor their clients' control mechanisms

(NTCA, 2011; see Herrijgers, 2015, and Committee Horizontal Monitoring Tax and Customs Administration (hereinafter: Stevens Committee), 2012a, pp. 37-40). These indirect HM relationships fall outside the scope of this paper - apart from an isolated observation.

In respect of the description of the cooperative compliance model, we map shifting approaches in the developing OECD vision and use public reports with regard to "Enhanced Relationships, Cooperative Compliance" and "Building Better Tax Control Frameworks". For the specification of the Dutch Horizontal Monitoring model, we use traditional legal sources, such as (tax) statutes and regulations, parliamentary history, published tax guidance and relevant academic articles.

This paper aims to contribute to the literature in various ways. It offers a critical comparison between the OECD's cooperative compliance approach and the Dutch Horizontal Monitoring strategy. Moreover, in order to do so, it gives an overview of the steps to be taken in order to establish a trust basis for agreeing an HM covenant and analyses the various covenant obligations. Finally, it discusses some important issues of concern.

1.3 Core concepts

Cooperative compliance

Cooperative compliance can be defined as the establishment of a trust-based cooperative relationship between taxpayers and the tax authorities on the basis of voluntary tax compliance leading to the payment of the right amount of tax at the right time. Trust is built and maintained in the cooperative compliance relationship and is related to expectations of reciprocity. People put their trust in someone they find trustworthy. Relevant dimensions of trustworthiness in the trust-based cooperative compliance relationship are, first, competence and reliability, and, second, integrity, honesty and the commitment to concern and care. Taxpayers who are compliant and show they are willing to comply deserve more trust than taxpayers who will not or are not able to comply. Compliant behaviour evidences trustworthiness.

The cooperative compliance model

We construct the OECD's cooperative compliance model by investigating the various OECD reports on the relationship between taxpayers and tax administrations, viz. "Enhanced Relationships, Cooperative Compliance" and "Building Better Tax Control Frameworks", and define it as the voluntary tax cooperation between tax authorities and large companies based on six principles: the tax authorities must understand business activities, adopt an impartial attitude, respond proportionally, demonstrate openness and transparency - like taxpayers themselves, take enterprise-specific circumstances into account, and align supervision to the quality of a company's TCF. A TCF can be described as an instrument of internal control specifically focussed on the tax function within a company (Bronzewska, 2016, pp. 293-299; Hoyng, Kloosterhof & MacPherson 2010, pp. 19-71). Thus, the model provides a theoretical description of the major principles of cooperative compliance. In Section 2, we will discuss the model in more detail.

The Dutch Horizontal Monitoring model

We define the Dutch Horizontal Monitoring model as: a means of administrative supervision based on (informed) trust, mutual understanding and transparency between individual

taxpayers and the NTCA. The requirement of trust, understanding and transparency shows the underlying value of reciprocity. In exchange for providing relevant tax information on a voluntary basis, taxpayers obtain certainty about their tax liability in advance and are – in principle – no longer subject to time and effort-consuming tax audits, sanctions and prosecution afterwards. Thus, the model provides a theoretical description of the working of Horizontal Monitoring. In Section 3, we will discuss the model in more detail.

2. DESCRIPTION OF THE COOPERATIVE COMPLIANCE MONITORING MODEL

This chapter focusses on the question of how the OECD's cooperative compliance monitoring model is defined (see also Bronzewska 2016, p. 44-48). To answer this question, we will focus on the OECD's views on cooperative compliance as developed in two reports: "Enhanced Relationships" (2008, Section 2.1), and "Cooperative Compliance" (2013, Section 2.2).

2.1 Investing in "Enhanced Relationships" (2008)

The 2008 report "Enhanced Relationships" should, first and foremost, be considered in the light of its origins. In 2006, the OECD had noted that the rapidly evolving social environment in which tax authorities operate leaves room for aggressive tax planning. The 2008 report referred to the Seoul Declaration of September 2006 which "sets out countries'" concerns about the rapid spread of aggressively marketed tax planning, and the link between "unacceptable tax minimisation arrangements" and tax intermediaries (OECD, 2008, p. 7, pp. 9-10 ; OECD, 2006, p. 3). This is a recurring concern, as the 2013 report shows: "greater emphasis has been placed on the importance of compliance with the spirit as well as the letter of the law and this is reflected in the 2011 revision of the OECD Guidelines for Multinational Enterprises" (OECD, 2013, p. 13). As a response, the OECD embarked on research as to how tax authorities might restrain such unwanted behaviour. Possible solutions included "enhancing relationships" with taxpayers who are willing and able to comply with the tax laws and regulations, while developing a risk management system to identify tax risks and differently approach taxpayers who are unwilling to comply (OECD, 2008, pp. 39-46; OECD, 2007e, p. 3. See also Alink & Van Kommer, 2000, pp. 63-67; Alink & Van Kommer, 2009, pp. 194-195). Risk rating, however, has its drawbacks (Bronzewska, 2016, pp. 334-335, pp. 359-361). Freedman (2010) argues that risk rating, whilst initially appearing to be a purely administrative device, can become a significant application of discretion, even going as far as to become an attempt to influence taxpayers to be over-compliant (p. 118; see also OECD, 2004).

An enhanced relationship goes beyond the traditional relationship between taxpayers and tax authorities, which is characterised by parties interacting solely based on what is legally required (OECD, 2008, p. 39). Taxpayers are legally required to file tax returns that disclose a limited amount of information as required and to pay the tax due in time (OECD, 2008, p. 40). The tax authorities are legally allowed to question taxpayers about the tax returns they have filed, to obtain additional information, to adjust the amounts payable and to collect taxes. In this traditional relationship, there is no incentive to provide more tax information than is mandatory.

An enhanced relationship, however, does provide that incentive. Taxpayers voluntarily enter into individual monitoring relationships, whilst voluntary and transparent regulatory compliance is rewarded with more certainty in advance and a reduction of (possible) subsequent tax audits, sanctions and prosecution, and thus lower compliance costs (OECD, 2008, p. 40). Certainty is key indeed. A recent International Monetary Fund (IMF)/OECD

report again highlights that tax certainty is an important priority for both governments and businesses, outlining a set of concrete and practical tools that can be used to enhance tax certainty. Cooperative compliance is mentioned as one of the tools which can be used to provide early tax certainty (IMF & OECD, 2017, pp. 50-52). For an enhanced relationship to exist, it is, according to the OECD (2008), essential that tax authorities, taxpayers, and their financial and tax law specialists start to trust each other and maintain that trust (p. 39). Trust being the focus, this specifically defined institutional relationship is based on "mutually expressed intentions and not on detailed rules" (IFA, 2012, p. 18). The OECD clearly understands that trust is an important determinant of cooperative behaviour in the relationships between tax authorities and taxpayers. Trust should be granted to taxpayers who are found to be trustworthy. Therefore, mechanisms by which to establish the trustworthiness of taxpayers are required.

To distinguish taxpayers who are willing and trustworthy from taxpayers who are not, tax authorities must, according to the OECD (2007f), invest in a risk management system (p. 1). Tax authorities should establish a tax risk profile for each taxpayer (risk assessment) which should enable them to organise a taxation process in view of the scarce enforcement resources and the different characteristics of taxpayers (risk-based resource allocation; see OECD, 2007e, p. 2). Taxpayers who behave transparently and represent a lower risk can reasonably expect the tax authorities to take a more cooperative approach and, therefore, to enjoy lower compliance costs, while taxpayers who are shown to represent a significant risk can expect to attract greater scrutiny and enforcement attention (OECD, 2008, p. 24; see also De Widt & Oats, 2017).

In order to develop a so-called enhanced relationship model, the OECD used the models introduced by the Netherlands, Ireland and the United States in 2005 as examples (OECD, 2007f, p. 3). The research shows that all three models take voluntary regulatory compliance as a principle and focus on levying in (real) time, advanced tax cooperation, and fewer audits and the like after tax returns have been filed. The ultimate goal is to improve the tax regulatory environment for particularly large companies. According to the OECD (2007f), the models share two common features (p. 4):

I. the taxpayer is a large, often listed, company
II. the taxpayer has, or wants to have, a low tax risk profile.

Upon further investigation, the OECD enumerates five principles for a successful tax cooperation based on enhanced relationships:

1) a tax authority must understand business activities (commercial awareness)
2) a tax authority must adopt an impartial approach (impartiality)
3) a tax authority should respond proportionally (proportionality)
4) a tax authority should – like taxpayers themselves – be open and transparent (openness and transparency)
5) a tax authority's responses should be tailored to enterprise-specific circumstances (responsiveness).

Taxpayers will find tax authorities to be trustworthy if they meet these principles. The five principles should therefore be operationalised in practice. With regard to commercial awareness, the OECD elaborates that large companies generally undertake transactions for

commercial reasons but structure them with a view to maximising profit after tax (OECD, 2008, p. 34). Without understanding the commercial drivers, tax authorities potentially misunderstand the broader context of a transaction, and may respond in a way that results in potentially costly disputes and uncertainty. Therefore, they need to understand: i) the "business of how to do business", i.e. the broad context within which large companies operate; ii) the characteristics of the industry sector in which a particular taxpayer operates; and iii) the unique characteristics of the particular taxpayer's business (OECD, 2008, pp. 34-35). This can be achieved, for instance, through development programmes and other ways of giving tax authority personnel a taste of life in business or participation in wider community activities (OECD, 2008, p. 69, Annex 7.1: Achieving Commercial Awareness).

The impartial approach requires tax authorities to resolve disputes consistently, objectively, and solely by reference to the merits of the case and reasonable legal positions (OECD, 2008, p. 74, Annex 7.2: The Impartial Approach). Moreover, if a tax inspector cannot maintain his position in court, it is inappropriate to leave the dispute unresolved. Court litigation is often "perceived as a battle which, by nature, can only have one winner", so the other party is doomed to be the loser. The OECD points out that recent developments in the dispute resolution field have demonstrated that alternative dispute resolution (ADR) may be of assistance here. ADR refers to any form of dispute resolution that takes place separately from court litigation, such as mediation (OECD, 2008, p. 75).

Proportionality requires tax authorities to approach choices – in allocating resources, for instance – from a broad perspective which takes into account the characteristics of the taxpayer in question, the relationship between the tax inspector and the taxpayer, and the potential benefits of pursuing or not pursuing a line of enquiry (OECD, 2008, p. 35). According to the OECD (2008), proportionality can be achieved, for instance, by focussing attention on significant issues and only where there are sufficient reasons for doing so or only asking appropriately focussed questions that seek information that will lead to a conclusion of the audit (p. 36).

In addition, the OECD (2008) argues that taxpayers want to see openness and transparency from the tax authorities – for instance, with regard to advance tax ruling mechanisms in order to seek early certainty on the tax consequences of a particular set of circumstances or with regard to the tax authorities' approach to risk management (p. 36). Taxpayers also want their collective voice to be heard through consultation on changes in the tax policy and the tax administration, with engagement taking place early enough to influence final decisions (OECD, 2008, p. 37).

What taxpayers prefer most in relation to tax is early and quick certainty (OECD, 2008, p. 37). The OECD rightly argues that tax authorities should therefore be responsive. Taxpayers should receive prompt, efficient and professional responses, and they may expect a fair and efficient decision-making process and definitive resolution of issues. Tax authorities, for instance, need to ensure that decisions taken at the operational level are consistent with the instructions and guidance of senior management.

When these five principles have been met, according to the OECD (2007f), the majority of taxpayers will be able to effectively and efficiently pay the right amount of tax in time (p. 13). Although the OECD abandoned the label "enhanced relationship" in its cooperative compliance report of 2013 (see Section 2.2), it remains faithful to the five principles and even added a sixth one (OECD, 2013, p. 87):

6) companies must invest in a TCF and tax authorities must adjust their supervision accordingly (supervision adjustment to TCF).

In Section 4, we investigate whether the Dutch Horizontal Monitoring model meets these six principles.

2.2 "From Enhanced Relationship to Cooperative Compliance" (2013)

In 2013, the OECD abandoned the name "enhanced relationship". According to the OECD, the label was chosen as a term that properly distinguished the new approach from a traditional obligation-based relationship (OECD 2013, p. 14). The term "enhanced relationship", however, raised questions about connotations of preferential tax treatment (OECD, 2013, p. 14; De Widt and Oats, 2018, p. 262). Indeed, Dabner and Burton (2009) argue that "using the term "partnership" in Australia and New Zealand may have been unfortunate in that it perhaps created unreal expectations" (p. 326). They point at "the primacy of the ethical and contractual obligations of practitioners to their clients". In the same vein, some tax advisors in the Netherlands worried that their enhanced relationship with the NTCA might be perceived by their clients as "too close", in the sense that they would be seen as providing services to the NTCA, while, of course, their clients pay for their services. Although the OECD addressed the alleged unequal treatment – see Section 4.2 – the OECD abandoned the term "enhanced relationship" and replaced it with the term "cooperative compliance", which would better represent the OECD's tax compliance vision. According to the OECD:

> the term 'cooperative compliance' describes the concept most accurately as it not only describes the process of co-operation but also demonstrates its goal as part of the revenue body's compliance risk management strategy: compliance leading to payment of the right amount of tax at the right time (OECD, 2013, p. 14).

Moreover, the adjective "cooperative" emphasises the reciprocal nature of this relationship, which is aimed at enhancing compliance. Many tax professionals, however, already understood this. The 2012 International Fiscal Association (IFA) report, for example, recognises reciprocity as a common factor in enhanced relationship programmes: "Trust, mutual understanding, transparency, all with full reciprocity" (IFA, 2012, p. 17).

Key components of a cooperative compliance framework are transparency and disclosure on the part of both parties, resulting in the effective and efficient reduction of uncertainties over tax positions. According to the OECD, good corporate governance systems – supporting transparency and disclosure – have recently become more important as an integral part of cooperative compliance. Disclosure should include relevant information and tax risks. There are two key elements of disclosure and transparency by taxpayers. First, a robust, reliable TCF that gives the tax authority assurance and enables the taxpayer to know which tax positions taken are uncertain or controversial, and second, "the willingness to disclose those positions voluntarily" (OECD, 2013, p. 20-21). As a result, the extent of reviews and audits of the tax returns submitted to the tax authority can be reduced significantly. Because of the information disclosed by the taxpayer, the tax authority may rely on the returns submitted to it and trust that uncertain tax positions and other "issues of doubt or difficulty in the tax positions taken in that return will be brought to its attention" (OECD, 2013, p. 62). Of course, the tax authorities also use other sources to check the information provided by taxpayers. In this regard, international exchange of information is a growing source of such "counter-information." Good tax governance regards corporate taxpayers but also the tax authorities. Good governance within

the tax authorities themselves is therefore also a driver of cooperative compliance, comprising transparency, openness and responsiveness, including, for example, real-time working.

While the pillars of an enhanced relationship were still considered to be valid, major new issues had emerged as the approach had matured and became more widespread. This included the development of compliance risk management strategies by tax authorities that focus on effectively influencing and improving taxpayer compliancy. In order to influence taxpayer compliancy, the OECD considered it important not only that tax authorities invest in risk management systems, but also that companies invest in TCFs (OECD, 2016 and OECD, 2013, p. 14; see also van der Enden & Bronzewska, 2014). In passing, we note that there are no sharp criteria and rules for a TCF. It is generally seen as a vague and open-ended standard. Bronzewska and van der Enden (2014), therefore, argue that "tax administrations should issue guidance on a TCF. Without further guidance on a TCF, the concept of cooperative compliance will fail under pressure of ineffective and inefficient audit processes and mismanaged expectations" (p. 640).

In passing, we mention that, in 2016, the OECD published follow-up guidance with respect to the investment in a TCF: "Building Better Tax Control Frameworks". Again, disclosure and transparency are key. The latter refers to the sharing of information about the internal control system (including the design), and the implementation and effectiveness of the TCF which enables the taxpayer to be fully aware and "in control" of all the positions and issues that need to be disclosed (OECD, 2016, p. 14). Moreover, as a result of the BEPS project, it has become "even more crucial for multinational enterprises to be in control of tax risks today than when the 2013 Report was written." (OECD, 2016, p. 12). Since it is not possible to prescribe a one-size-fits-all system of internal and tax control, the OECD (2016) identifies six essential building blocks: 1) tax strategy established; 2) applied comprehensively; 3) responsibility assigned; 4) governance documented; 5) testing performed; and 6) assurance provided (p. 15). The TCF and, more specifically, the building blocks are used as a mechanism by which to support the tax authority's trust in the taxpayer. Nonetheless, regardless of whether or not a TCF is based on the aforementioned building blocks, according to the OECD (2016), tax authorities do not provide sign off on how the eventual tax return is produced and tax authorities are not obliged to approve the tax compliance process within the company (p. 24). As the focus of this paper is on the trust-based Horizontal Monitoring relationship and its establishment, we will not elaborate on the TCF (which is a key element of further cooperation among tax administrations. See the International Compliance Assurance Programme (ICAP), a programme for a multilateral cooperative risk assessment and assurance process (OECD, 2018).

Cooperative compliance is part of a broader compliance strategy developed by the OECD. In its 2014 report "Tax Compliance by Design", the OECD focusses on the compliance improvement of smaller companies and presents a broader focus on tax monitoring. Cooperative compliance is only one of the tools that can be used to improve tax compliance. Smaller companies may, according to the OECD, be better served by tax administrations gathering information directly from third parties than larger companies that can entertain individual monitoring relationships. The idea is that when regulatory compliance in the environment of taxpayers is the norm, it is also easier for them to comply with the rules and more difficult not to comply (OECD, 2014, p. 21). Two different scenarios are described: 1) establishing a secured information chain (the secured chain approach); and 2) sharing information resources (the centralised data approach). For larger and medium-sized companies,

the first system can be effective. However, for smaller companies, the second system may produce better results (OECD, 2014, p. 44).

3. THE DESIGN OF THE DUTCH HORIZONTAL MONITORING MODEL

This section focusses on the question of how Horizontal Monitoring is incorporated into the Dutch tax legal system. What are the different steps to be taken in the process of concluding a Horizontal Monitoring covenant and how do the voluntarily accepted Horizontal Monitoring covenant obligations relate to the mandatory obligations laid down in the Dutch legal tax system? To answer this question, we will first present the key characteristics of the Dutch Horizontal Monitoring model (Section 3.1), then we will focus on the establishment of a Horizontal Monitoring relationship (Section 3.2) and, subsequently, analyse tax cooperation based on a covenant (Section 3.3).

3.1 Key characteristics of the Dutch Horizontal Monitoring model

The main characteristics of the Dutch Horizontal Monitoring model are:

1) discretion as the basis for supervision
2) tax cooperation based on a covenant
3) additional rules in published guidance
4) rights and obligations pursuant to traditional legislation and regulations remain applicable.

1) Discretion as the basis for supervision

Although Horizontal Monitoring has no specific legal basis, the NTCA may arrange the enforcement process on the basis of discretion and may develop public guidelines. The Ministry of Finance and the NTCA have – within the limits of tax law, jurisprudence and general principles of law, including the general principles of proper administrative behaviour and published guidance – the flexibility to arrange the enforcement process and to apply customised supervision (Stevens Committee, 2012a, pp. 93-95).

2) Tax cooperation based on a covenant

Although general rules on Horizontal Monitoring can be found in published guidance, the individual cooperation is based on a covenant, which may be classified a private mutual agreement (Huiskers-Stoop, 2015, p. 441, p. 182). The covenant contains agreements which go beyond actual statutory rights and obligations; these additional covenant obligations have no basis in public law. By classifying the covenant as a private agreement, the additional obligations not only bind the NTCA but also the taxpayers. The possibility of an appeal to the civil court provides taxpayers with an opportunity to gain an independent assessment of the functioning of the NTCA under Horizontal Monitoring (Huiskers-Stoop, 2015, p. 441, p. 208). For example, if the NTCA does not take an important deadline for responding to a tax-relevant question submitted by the taxpayer into account, the taxpayer may appeal to the civil court (in interim injunction proceedings). Where the bar on some aspects regarding the quality of the NTCA's (extra-statutory) service is set higher – like fulfilling the covenant obligations "as soon as possible" – these aspects are not assessed by an administrative (tax) judge. The qualification of the covenant as a private law agreement allows for the civil court to assess these aspects. Nonetheless, if the NTCA and the taxpayer cannot solve problems among themselves and take

recourse to the court, the trust basis of their relationship will probably be seriously impaired, which may effectively mean the end of their Horizontal Monitoring relationship.

3) Additional rules in published guidance

For taxpayers with individual covenants, the guidance published by the NTCA is the most important communication to rely on. Good guidance plays a critical role in building trust; transparency with regard to the interaction process breeds trust in the NTCA and voluntary compliance (Kirchler, 2007, p. 203; Siglé, Goslinga, Speklé, van der Hel & Veldhuizen, 2018, pp. 13-14). Moreover, the NTCA is bound by publishing its guidance (Huiskers-Stoop, 2015, p. 441, pp. 134-135); thus, soft law becomes binding on the basis of the General Administrative Law Act. Conversely, guidance on Horizontal Monitoring, like all policy rules issued by the (tax) administration, cannot legally bind the taxpayer; a general binding character is missing (Gribnau, 2007).

4) Rights and obligations pursuant to legislation and regulations remain applicable

Not only do rights and obligations that already existed before a covenant has been concluded remain applicable, such as a granted postponement of tax payment, statutory tax rules still apply in a covenant situation. The latter leaves space for the NTCA to adjust its supervision when the taxpayer's attitude and behaviour indicate that the principle of being willing to fulfil its statutory obligations is no longer satisfied. Therefore, the soft approach is backed by sanctions, audits and the like.

3.2 The establishment of a Horizontal Monitoring relationship

The primary task of the NTCA is to levy the proper amount of tax. Nowadays, this task consists not only of levying and collecting taxes, but also of the promotion of compliance. Horizontal Monitoring is an important means by which to promote compliance. General rules on Horizontal Monitoring can be found in published guidance, while the individual cooperation is based on a covenant. Nonetheless, the relationship between the taxpayer and the NTCA is embedded in public law because the NTCA is a public body exercising a public task. Thus, the covenant has a somewhat hybrid character, merging public and private law obligations. Of course, Horizontal Monitoring itself is also a hybrid form of oversight or governance, since both the tax authorities and taxpayer are responsible for tax enforcement. Sharing responsibility is in strong contrast with traditional, vertical, tax supervision. The hybrid character of the covenant makes private law on top of public law applicable. We will return to this aspect in Section 3.3.

Taxpayers and the NTCA go through seven steps in order to enter into Horizontal Monitoring relationships (NTCA, 2013, with reference to NTCA, 2010, p. 11; see also Bronzewska, 2016, pp. 137-141; Stevens Committee, 2012a, p. 40-42; Veldhuizen, 2015, pp. 150-153. De Widt & Oats, 2017, reduce the seven steps to three steps, pp. 230-249. See also De Widt, 2017, pp. 12-15):

1) an up-to-date client profile (including strategic supervision plan)
2) a Horizontal Monitoring meeting
3) a compliance scan
4) resolution of pending issues
5) the conclusion of a covenant
6) analysis and improvement of the tax control system
7) adjustment of supervision.

The process begins with an update of the *client profile* by the NTCA gathering information on the relevant taxpayer (NTCA, 2013, pp. 10-14). On the basis of a positive client profile, the NTCA develops a strategic supervision plan. This supervision plan forms the basis of the process towards the establishment of a Horizontal Monitoring relationship and consists of four parts: obtaining an up-to-date client profile; the analysis of the client profile; the supervision strategy; and intended supervisory activities.

In this context, a case team from the NTCA gathers information about the company's tax attitude, behaviour and internal (tax) control. The determination of the desired effect on behaviour and tax control, and the selection of instruments to be deployed to achieve this effect in the most efficient manner are important in this respect. The aim of the process is to answer the question of whether the company's tax attitude, behaviour and tax control inspire the NTCA's trust. In Section 3.3, we will focus on the definition of trust in more detail. In this phase, it is important for taxpayers to demonstrate their willingness to disclose tax-relevant information, including tax planning strategies, on a voluntary basis. Even before concluding a covenant, transparency – one of the key elements of Horizontal Monitoring – is crucial.

The objective of the *Horizontal Monitoring meeting* is to explore the feasibility of implementing Horizontal Monitoring. The meeting consists of an exploration of the key principles by the NTCA, an exchange of information about favourable and unfavourable elements of the existing contracts, a mutual assessment of the tone at the top, confirmation of the responsibilities and expectations of each party, and the reaching of an agreement about the next steps in the process (NTCA, 2013, pp. 14-17). The *compliance scan* is carried out by interviewing a number of the company's key officers and yields an improved insight into the tax attitude (the willingness to comply) and the fulfilment of preconditions attached to the achievement of adequate tax control (the ability to comply) (NTCA, 2013, pp. 17-22). Topics to be discussed include: strategic objectives; internal control environment; information systems; tax function; external monitoring and advice; and the tax attitude and behaviour of the organisation.

Resolution of pending tax issues deals with issues which are known at the start of the Horizontal Monitoring process (NTCA, 2013, pp. 22-24). Settling pending issues clears the way for real-time working. As a result, the Horizontal Monitoring relationship can be laid down in a covenant (NTCA, 2013, pp. 24-28). A standard text has been developed for individual covenants (see Appendix). The standard text, however, contains no agreements regarding, for example, contact persons, procedural aspects and similar items. Such working agreements are recorded in a separate consultation report.

After conclusion of the covenant, there is still room for *analysis and improvement of the tax control system* (NTCA, 2013, pp. 28-36). The company bears primary responsibility for the improvement. However, the NTCA actively encourages and supports the company in this process. Each company has a unique TCF as part of a more extensive business control

framework (Stevens Committee, 2012a, pp. 42-44; for the relation between TCF and business control framework, see Bronzewska & van der Enden, 2014, p. 639). It is argued that the "TCF is the prime focus in the horizontal monitoring programme" (van der Enden, de Groot, & van der Stroom, 2010, p. 337). The TCF should – based on organisational factors and decisions on the required scope and quality of the internal control framework – be customised to the specific company. The NTCA has formulated eight sub-processes to optimise the tax control process (NTCA, 2013, p. 28-30). These sub-processes, however, do not provide minimum requirements for the establishment of a tax control process, but they point to the result of the tax control process; such as an overview of relevant tax events in the various segments of the company, a tax planning strategy that fits with the company's compliance strategy, and identification and management of tax risks (Huiskers-Stoop, 2015, p. 446, pp. 151-153).

The final step of the Horizontal Monitoring process is the *adjustment of supervision*. In this step, the NTCA adjusts the form and intensity of its supervision based on available information about the company. Preliminary information about the company's tax strategy, tax control and transparency (the client profile) is of particular relevance to the reduction of the tax authority's monitoring workload (NTCA, 2013, p. 40. See also Stevens Committee, 2012a, pp. 44-47).

The NTCA has been very successful in concluding covenants. It should be noted, however, that not all companies want to engage with the NTCA's trust approach and some therefore refrain from participating in joining the HM programme. In particular, foreign multinational enterprises (MNEs) originating from tax cultures with more adversarial relationships between the tax administration and (corporate) taxpayers tend to stay out of Horizontal Monitoring more frequently. Finally, due to its rapid expansion and the higher than expected administrative demands, Horizontal Monitoring "has been unable to generate clear administrative efficiencies" (De Widt, 2017, p. 22).

3.3 Tax cooperation based on a covenant

Besides the general provisions on parties, duration, commencement date, evaluation and termination, the *covenant* or compliance agreement consists of an introduction expressing the intention to achieve an effective and efficient mode of operation, basic principles and agreements.

3.3.1 Basic principles

The covenant contains three basic principles:

1) Parties base their relationship on trust, mutual understanding and transparency.
2) Rights and obligations pursuant to legislation and regulations are and will remain applicable without limitation.
3) The agreement is applicable to levying of all Dutch national taxes and collection.

The *first principle* is that parties base their relationship on trust, mutual understanding and transparency. This principle reflects the underlying value of reciprocity, since it has to be observed by both parties. Modern government leaves room for citizens and companies to bear responsibility. This is not "blind" trust, as we know in personal relationships, but a more business-like trust or "informed" trust. To trust someone in a personal relationship means to

"accept vulnerability to the actions of another party based on the expectation that the other will perform a particular action important to you, irrespective of the ability to monitor or control that other party" (Six, 2004, pp. 179-180). Accepting this vulnerability is taking a risk. A rational actor perspective on trust assumes that individuals will rationally place trust on the basis of a cost-benefit analysis (Coleman, 1990, p. 104). Gangl, Hofmann and Kirchler (2012) do not emphasise the utility maximisation dimension of trust (calculating profits and gains) that much. They use the conception of reason-based trust, which corresponds to "trust developed by a rational actor who trusts that there are good reasons to expect the other will forgo opportunistic goals" (Gangl, Hofmann & Kirchler, 2012, p. 8; "reason-based trust" results from a deliberate – i.e. rational – decision grounded on four criteria: goal achievement, dependency, internal factors and external factors). Yet another definition is provided by Baier (1995): "letting other persons (natural or artificial, such as firms, nations, etc.) take care of something the trustor cares about, where such "caring" involves some exercise of discretionary powers" (p. 105). A final, broad definition of trust is "the willingness to take some risk in relation to other individuals on the expectation that the others will reciprocate" (Walker & Ostrom, 2003, p. 382). These different definitions emphasise various aspects of trust that are relevant here, as will be shown.

Trust is an important determinant of cooperative behaviour in social relations and social organisations. Such activity requires the cooperators to do their part. The deep and important value of trust is often taken for granted (for some facets of the relationship between trust and taxation, see Peeters, Gribnau & Badisco, 2017). Indeed, trust in trustworthy people to do their bit in some worthwhile cooperative enterprise, the benefits of which are fairly shared among all the co-operators is, to most people, "an obviously good thing, and not just because we get better bread that way" (Baier, 1991, p. 110). Trust thus motivates cooperation in a worthwhile enterprise in which the trusting and trusted parties are involved (Baier, 1991, p. 111). Once trust is established, people are willing to assume greater risks, to work harder and to reciprocate (Dirks & Skarlicki, 2004, p. 27). This also requires openness when expectations are not fulfilled; to report, explain, discuss, and solve problems that arise. Indeed, trust is to be seen as a dynamic "process, of gaining, maintaining and restoring trust when it breaks down" (Nooteboom, 2018, p. 30).

Parties taking unilateral action or undertaking a transaction invest resources while running the risk that they will not receive an expected return; they make themselves vulnerable. One takes a risk that depends on the performance of another actor. Thus, trust involves "the incorporation of risk into the decision of whether or not to engage in the action" (Coleman, 1990, p. 91). Trusting someone therefore implies that there is some risk of suffering "a loss if that someone does not fulfil your trust after you have acted on that trust" (Hardin, 2006, p. 28). However, the risk to be taken concerns costs as well as benefits of possible actions. Net (long-term) benefits may be gained since individuals are willing to take risks by placing trust in others to behave in cooperative and non-exploitative ways. Proactive voluntary disclosure may involve such a risk from the perspective of a company. Trust placed in others depends on information that comes from personal experience of an individual with particular others. The choice of a partner who we decide to trust is therefore highly informed (Rus, 2005, p. 83).

Trust may, in general, be a good thing, but it is not always the right thing. Trustworthiness is therefore an important requirement, enabling one to decide whether or not to place trust in someone. Trust is granted to people we find trustworthy. There is some empirical evidence that there are at least two relevant dimensions that compose our judgments of trustworthiness. These intertwined dimensions are: (1) competence or reliability; and (2) motivation, which

consists of the following components – integrity, honesty and the commitment to "do no harm" (or concern and care). Both dimensions are related to trust based on cognitive-rational processes. The first dimension, often referred to as cognitive-based trust, entails one's competence (ability) to perform what one is trusted to do and reliance on someone being capable of performing the actions required (Hardin, 2006, p. 36). Competence can be "technical, concerning the available means, knowledge and skill" (Nooteboom, 2018, p. 33). The various aforementioned steps (Section 3.2) serve to assure the NTCA of a taxpayer's competence and reliability. For example, previous evidence collected through recent audits and the company's improved tax controls may show competence and reliability – the company is actually performing what it is trusted and expected to do. Competence requirements for tax officials regard, for example, their technical knowledge of tax regulations, communication skills, business awareness, ability to treat taxpayers as customers, network and support within the tax administration, and ability to quickly resolve issues raised by companies (Björklund Larsen, Bol, Brögger, Kettunen, Potka-Soininen, Pellinen, Brehm Johansen & Aziz, 2018, pp. 64-65). With regard to the second dimension, the motivation to perform, the commitment to do no harm (or concern and care) is sometimes replaced by "benevolence". Benevolence is defined as "the extent to which a trustee is believed to want to do good to the trustor, aside from an egocentric profit motive" (Mayer, Davis & Schoorman, 1995, p. 718; Schoorman, Mayer & Davis, 2007, p. 345). This factor is also at work in a Horizontal Monitoring relationship (see also Björklund Larsen et al., 2018, pp. 95-97). The tone at the top, for example, may show the motivation, the willingness to be (proactively) compliant and transparent, that convinces the NTCA to take further steps towards a covenant.

The two dimensions are closely related: actual behaviour expresses taxpayers' intention to cooperate (Kasper, Kogler & Kirchler, 2013, p. 4). The three components of "the motivation to perform-dimension" deserve special attention in so-called power-asymmetric relationships, such as the traditional one between the tax inspector (with extensive legal powers) and the taxpayer. In a relationship in which there is a power difference between the actors, it may be difficult to develop trust (for symmetric and asymmetric trust relations, see Coleman, 1990, pp. 178-180; Dusarduijn, 2018, p. 67). The more powerful actor's behaviour can substantially diminish trust, unless he or she reflects honesty and integrity (Gerbasi & Cook, 2009, p. 223). Note that the NTCA's client managers have to become a new type of tax official: "T-shaped knowledge experts", having an understanding of technical tax issues, the organisation and working practices of the NTCA, and "the culture and operational practices of the large corporate and the external world in which the large corporate operates." (Tuck, 2010, p. 593). This tax administrator needs to have detailed technical knowledge (competence) of the increasingly complex tax legislation (the vertical part of the T shape) and "a new broader knowledge of "soft skills" such as non-confrontational meeting skills, customer service skills, and treating taxpayers as customers, in addition to greater specialist knowledge" of multinational companies (the horizontal part of the T; Tuck, 2010, p. 594). Multinational companies are indeed becoming increasingly complex organisations with group operations worldwide, and complex internal structures and decision-making procedures. A trust approach therefore requires a rather different mindset from tax officials who are often used to relying on traditional, hierarchical interactions with taxpayers. This does not come naturally. Some staff have shown that they find it difficult to change from adopting an antagonistic approach with an emphasis on control to establishing a cooperative trust relationship (Stevens Committee, 2012a, p. 973; De Widt, 2017, pp. 21-22; see also BMF, 2016, p. 63).

Trust is linked to the concept of mutual understanding. To build trust, parties engage in actions explicitly designed to lead the other party to place trust in them. To be successful, these actions

must be based on "an understanding (intuitive or explicit) of the potential trustor's basis for deciding whether or not to place trust" (Whiting, 1998, p. 179, referring to Coleman, 1990). Mutual understanding comes quite close to empathy. Empathy is the capacity to accurately understand the position of others – to feel that "this could happen to me" (Trout, 2009, p. 21). When people empathise with others, they try to understand their inner states by placing themselves in their situation or taking their perspective. In order to judge trustworthiness and its limits, one must understand what determines actions and their outcomes. According to Nooteboom (2018), this insight enables empathy: "the ability to put yourself in the shoes of the other, to see where you can help, to prevent problems, but also to assess the risks you run" (p. 34). The principle of (reciprocal) understanding, enabling empathy, reflects the commitment to concern and care, a component of the second dimension involved in judgments of trustworthiness. One party showing a commitment to concern and care is a condition for the other party's acceptance of vulnerability to the actions of that party. In the asymmetric relationship between the tax authorities and the taxpayer, the powerful tax authorities bear special responsibility in this respect.

Note that large companies possess superior economic and political power entailing a kind of power symmetry which may (partially) counterbalance the legal asymmetry, that is, the legal power of the NTCA. "Thus, even if large organisations perceive tax authorities to be powerful, they may be less likely to feel 'threatened' by this power" (Siglé et al., 2018, p. 14). Indeed, the NTCA's aim to increase knowledge amongst tax officials about the way businesses operate and the administrative needs this generates amongst corporate taxpayers contributed to an increase in mutual professional understanding. These taxpayers reciprocate by putting effort in, making it credible to the NTCA that they hold genuine intentions of cooperating with the NTCA on the basis of mutual trust, understanding and transparency. "Hence, under HM the attitude of both corporates and tax administrators has shifted from an adversarial 'them and us' relationship, to one stronger characterised by cooperation" (De Widt, 2017, p. 31.)

Thus, in a Horizontal Monitoring relationship, the taxpayer and the NTCA do not place trust blindly. As argued, they engage in actions designed to lead the other party to place trust in them. In a tax context, these actions may, of course, consist of the exchange of information. Mutual transparency, referring to openness between the taxpayer and the NTCA, is of special importance in this respect. A taxpayer's transparency and openness with regard to relevant information (facts, actual or potential views on positions over which the NTCA may disagree, et cetera) promotes cognitive-based trust. The provision of information and services by tax authorities helps taxpayers to trust the tax authority (Gangl, Muehlbacher, de Groot, Goslinga, Hofmann, Kogler & Kirchler, 2013). Transparency in the sense of communicating openly with taxpayers in order to inform and educate them about their rights and obligations may also fortify the NTCA's trustworthiness (see Cipek, 2018, p. 1). Both taxpayers and tax authorities show their trustworthiness, that is, their capability to perform the task of providing information and, by doing so, that they can be relied on to provide one another with relevant information. It is also a matter of being open in the sense of "telling the truth about what can be expected" (Nooteboom, 2018, p. 33). Moreover, when a problem arises, one should report it immediately, explain what went wrong, offer to help to solve it, and take measures to prevent such problems from arising in the future. Furthermore, having a transparent and open attitude with regard to relevant information expresses the motivational components of integrity and honesty. When something goes wrong, one should give the other party the benefit of the doubt – be willing to listen and allow him or her to explain and make amends (Nooteboom, 2018, p. 33). Transparency is therefore a key value to be reciprocally observed in a Horizontal Monitoring

relationship. Thus, the various procedural steps to conclude a covenant are taken by the NTCA and the taxpayer in order to establish and secure a trust-based relationship.
The Horizontal Monitoring relationship illustrates that trust is related to expectations of reciprocity. To obtain the NTCA's trust, the taxpayer will reciprocate trust by fulfilling his legal obligations. Important factors affecting the cooperative decisions are the parties' capacity to learn more about each other's characteristics, viz. competence, reliability and motivation, which consists of the components integrity, honesty and the commitment to do no harm, and the ability to build reputations for being trustworthy (keeping promises and "performing actions with short-term costs but long-term benefits") (Ostrom, 2003, p. 43). Trust is thus an expectation about another's future cooperation based on reputations for trustworthiness. In short, with regard to reciprocal behaviour, "both the past (through reputations) and the future (through expectations) matter" (McCabe, 2003, p. 150).

Although the NTCA also accepts vulnerability in respect of the actions of taxpayers, relying on taxpayers' voluntary provision of tax-relevant information, under the covenant, it "trusts" by "knowing less" about the facts and figures but "knowing more" about the company (NTCA, 2010, p. 8). By receiving information from the company on its tax strategy, tax control and transparency (the client profile), the NTCA reduces its vulnerability and seeks to run (only) a reasonable risk. Here, the two dimensions of trustworthiness are at play: the taxpayer's demonstration of competence, reliability, integrity, honesty, and its commitment to "do no harm" enables the NTCA's acceptance of vulnerability to the taxpayer's actions. The NTCA calls this (degree of) trust "justified trust" and defines that as "the favourable expectations of the behaviour of the other party that have in part developed as a result of the observed behaviour and the information that is collected" (NTCA, 2010, p. 77).

Given the importance of the mutual gathering of information – to reduce the risk of damaging established trust – we prefer to use the term "informed trust". This term has no other meaning than the term "justified trust" used by the NTCA, but emphasises the mutual gathering of information as the basis for building and justifying trust, and thus establishing, reinforcing and securing the trust-based relationship. Therefore, we consider "trust" in a Horizontal Monitoring relationship as informed trust and describe it as follows (Huiskers-Stoop, 2015, p. 158): "Informed trust can be referred to when both NTCA and taxpayer accept vulnerability to actions of each other, based upon the expectation that both will perform actions important to the other, while parties try to reduce their vulnerability back and forth by gathering information from or about the other", and moreover, discuss their diverging qualifications of this information.

The NTCA describes mutual understanding as the willingness to put oneself in the other's place and to understand the other party's perspective (NTCA, 2013, p. 7). It is therefore important that the NTCA understands the commercial interests of the company and relevant deadlines. Within a Horizontal Monitoring relationship, it is also important that the NTCA understands the circumstances in which financial and tax law specialists act; these specialists must entertain good relationships with the client, on the one hand, and with NTCA, on the other (NTCA, 2013, pp. 54-56; see also Stevens Committee, 2012a, pp. 99-100). In addition, mutual understanding plays a pivotal role in the consultation of appropriate solutions; parties are expected to respond to mistakes with understanding (Stevens Committee, 2012a, pp. 97-98). This implies the parties' willingness to enter into discussion about the cause of the mistakes (and the best way to redress them) and about measures necessary to prevent mistakes from being made in the future (NTCA, 2013, pp. 51-54; see also Stevens Committee, 2012a, pp. 97-98). The challenge is to tackle mistakes while maintaining the mutual relationship. Because serious mistakes

should be fined according to the law, both the NTCA and the taxpayer may perceive a fine or another sanction as a serious threat to a good working relationship.

Mutual transparency refers to openness between taxpayers and the NTCA. The taxpayer must be transparent about its tax strategy and relevant issues, and must provide open answers to questions (NTCA, 2013, p. 7). The NTCA must be open about the background of its questions and the implementation of its supervision. The NTCA expects taxpayers with covenants to be so transparent that they always give clear presentations of their tax affairs. Indeed, empirical research shows that companies with HM covenants are more transparent, have better tax control mechanisms, and file correct and complete tax returns more often than companies without covenants (NTCA, 2017).

The *second principle* is that rights and obligations pursuant to legislation and regulations are and will remain applicable without limitation. This does not only imply that rights and obligations that already existed before concluding the covenant remain applicable, but also that statutory tax rules and partly unwritten principles of proper administrative behaviour will apply in a covenant situation (see Section 4.1).

The *third principle* is that the covenant is applicable to the levying of all Dutch national taxes and the collection thereof. To qualify for a covenant, taxpayers should be subject to one or more Dutch national taxes, such as VAT or corporation tax. The covenant, subsequently, refers to all national taxes to which the taxpayer is subject.

3.3.2 Mutual covenant agreements

In addition to the principles, the covenant contains four categories of mutual agreements:

1) agreements on the realisation of customised tax supervision
2) agreements on actual tax collection
3) agreements on actual insight into the taxpayer´s tax position
4) agreements on updating the NTCA on the taxation process (real-time working).

The agreements help to effectuate willingness towards regulatory compliance into tax behaviour and to ensure the taxpayer's and the NTCA's trustworthiness. The reciprocal proactive provision of information enhances transparency and is essential to the formation and maintenance of trust. Parties being proactively transparent (beyond what the law requires) show their capability to provide information (competence) and reliability in fulfilling their promise to do so. Actual behaviour reflects the parties' intention to cooperate. Thus, by actually providing their partner with relevant information, their motivation to perform the (voluntary) obligation of providing information comes to light and, with it, its components of integrity, honesty and the commitment to "concern and care". Thus, the cognitive and motivational dimensions that are relevant to parties' judgments of trustworthiness are "fleshed out" in concrete agreements and obligations.

The covenant contains voluntary agreements which go beyond the taxpayer's and the NTCA's actual statutory rights and obligations. These additional covenant obligations have no basis in public law; they are voluntarily agreed upon. The trust-relationship, rather than traditional tax law, is the source of parties' compliance with these extra-statutory obligations. By classifying the covenant as a private agreement, the obligations legally bind not only the NTCA but also

the taxpayers (Huiskers-Stoop, 2015, p. 441, pp. 169-182). Voluntary mutual covenant agreements are the basis for tax cooperation under Horizontal Monitoring. These agreements are discussed below.

1. Agreements on the realisation of customised tax supervision

Taxpayers are obliged to implement systems of internal control, internal audit and external audit aimed at preparing and filing acceptable tax returns. A taxpayer is statutorily obliged to keep records and books in such a way that there are clear rights and obligations for taxation at all times (Article 52 GTA 1959). The NTCA may inspect the financial administration and the taxpayer is obliged to cooperate. This cooperation does not only include making records, books and other data available, but also providing insight into the organisational mechanisms to identify and control tax risks (Parliamentary documents (*Kamerstukken*) II, 1988/89, 21 287, nr. 3, p. 12). The complete set of administrative procedures and techniques, as well as the product of the administrative process, are part of the administration (NTCA, 2013, p. 43). This obligation to have an administration under Horizontal Monitoring does not differ under the statutory legal Dutch framework. The procedures and techniques to take care of a system of internal control, internal audit and external audit are also part of the administration.

So far, with regard to the scope of the administration, there is no difference between Horizontal Monitoring and the traditional legal requirements. However, there is a difference in the level of tax control. The level of tax control is higher under Horizontal Monitoring than under the existing legal framework. Taxpayers participating in Horizontal Monitoring are assumed to bear more responsibility, which is expressed through taking additional tax control measures. "Additional" depends on the nature, size and complexity of the company. In so far as the company has to take additional tax control measures, the scope of the administration increases compared to traditional monitoring.

In addition, the corresponding obligation to adjust the form and intensity of the supervision to the quality of the system of internal control, internal audit and external audit goes beyond traditional tax monitoring and the actual statutory rights and obligations. Under traditional monitoring, the NTCA makes a risk assessment and aligns the monitoring. Under Horizontal Monitoring, the NTCA is committed to *adjust the form and intensity of the supervision to the quality* of the internal control framework, internal audit and external audit. As a consequence, under Horizontal Monitoring, the NTCA has to take additional measures in order to take enterprise-specific circumstances into account as well.

2. Agreements on actual tax collection

In our view, the agreements concerning actual tax collection do not go beyond the actual statutory rights and obligations: the obligations to ensure timely payment of tax debts and refunds are not different from traditional tax monitoring (Article 9 in conjunction with Article 2, paragraph 2, sub-paragraph e, Tax Collection Act 1990; see also NTCA, 2013, pp. 45-47).

3. Agreements on the actual insight into the taxpayer´s tax position

The agreements relating to updating the NTCA's insight into the tax position of a taxpayer go beyond the actual statutory obligations. Companies with covenants are required to disclose their actual or potential views on relevant tax issues (the HM covenant states: "view, taken or to be taken, on relevant (tax) matters") to the NTCA and the NTCA is obliged to provide

answers (NTCA, 2013, pp. 36-40). Under the agreement, taxpayers do not only have the right to submit questions to the NTCA about its view on the application of the law, but also have an obligation to – especially with regard to actual or potential views on which the NTCA may disagree. The obligation to submit relevant tax positions to the NTCA goes beyond traditional tax monitoring. Under the existing legal framework, this obligation does not exist.

In the same vein, the corresponding obligation to *(periodically) discuss (relevant) tax and other matters* submitted by the taxpayer, as far as possible *in consultation with* the taxpayer, *while relevant terms are taken into account*, goes beyond statutory rights and obligations. In addition to the traditional practice of answering legal questions, under Horizontal Monitoring, the NTCA must also discuss and answer factual and mixed questions (regarding facts and the law), while the relevant deadlines for taxpayers should be taken into account (with regard to answering factual and legal questions, see De Widt, 2017, pp. 29-30).

4. Agreements on updating the NTCA on the taxation process (real-time working)

Finally, the agreements about keeping the NTCA up to date on the tax process go beyond statutory rights and obligations. Although a taxpayer who is subject to traditional monitoring is also obliged to file a tax return and to provide information, the covenant requires that the obligations are fulfilled *as soon as possible*. The transparency-based cooperation also implies that the NTCA may expect taxpayers to deal more generously with the provision of tax relevant information. The fiscal transparency bar is higher under Horizontal Monitoring than under traditional monitoring.

Under Horizontal Monitoring, the NTCA imposes tax assessments according to the existing legal framework. For that reason, the process is similar to traditional monitoring, but this is not the case in respect of its obligation to impose assessments *as soon as possible* and *as much as possible* in consultation with the taxpayer.

In addition, the obligation to explain why certain information is requested does *not*, in our view, go beyond traditional tax monitoring, as it is comparable to the existing legal obligations (Articles 3:47 and 3:48 of the General Administrative Law Act (*Algemene wet bestuursrecht*; GALA). Under traditional tax monitoring, the NTCA must likewise underpin that the requested information might be of significance to the levying of tax of the person the information is requested from, and the request must be reasonably and clearly indisputable (Supreme Court 8 January 1986, *BNB* 1986/128). However, the obligation to determine deadlines for providing the information in consultation with the taxpayer goes beyond traditional tax monitoring. Under the existing legal framework, the tax inspector determines the deadlines (Article 49 GTA 1959).

Table 1 provides an overview of the four categories of reciprocal covenant agreements. The parts of the agreements which go beyond taxpayers' actual statutory obligations are in *italics*.

Table 1: Overview of additional voluntary covenant obligations

Categories of covenant agreements	**Additional obligations for the taxpayer**	**Additional obligations for NTCA**
1. Realisation of customised tax monitoring	To provide a system of *internal control, internal audit and external audit* aimed at preparing and filing acceptable tax returns	*To adjust the form and intensity of the supervision to the quality* of internal control, internal audit and external audit
2. Actual tax collection	To ensure timely payment of tax debts	To ensure timely payment of tax refunds
3. Actual insight into the tax position of taxpayer	To *submit its view, taken or to be taken, on relevant (fiscal) matters* to the Tax Administration *as soon as possible*	- to issue its *interpretation of the legal consequences as soon as possible* after receipt of a point of view taken or to be taken, as much as possible *in consultation with the taxpayer, while relevant periods are taken into account* - *to (periodically) discuss (relevant) fiscal and other matters (submitted by the taxpayer)*, in particular matters on which a difference of opinion may arise from the NTCA's point of view
4. Update of the taxation process	*To promote real time working:* - tax returns and declarations will be filed *as soon as possible*; and - any information requested by the Tax Administration will be provided *as soon as possible*, (*generous*) in full and unambiguously	*To promote real time working:* - assessments will be imposed *as soon as possible* after filing of tax returns and *in consultation with* the taxpayer *as much as possible*; and - to clarify and explain why specific information is requested, and *mutually agree on the response period*

Source: Huiskers-Stoop 2015, p. 166.

The additional covenant obligations have no explicit basis in public law – although, of course, the NTCA has discretion with regard to its compliance strategy. Moreover, according to current views, the NTCA is authorised to achieve goals under public law through private law (Huiskers-Stoop 2015, pp. 167-169). The individual covenant can be classified as a mutual private agreement designed to fulfil the public task of tax collection (Article 6:261, paragraph 1, Dutch Civil Code). Absent disputes, the legal qualification of the covenant does not seem to be important. It is of greater importance, however, in situations in which disputes about the voluntary obligations arise and cannot be resolved in an informal way.

The additional covenant obligations ensure that both taxpayers and the NTCA must make more effort and produce more results under Horizontal Monitoring than under traditional monitoring. This entails that the bar is set higher under Horizontal Monitoring than under the existing legal

framework. We distinguish four reciprocal covenant obligations which result in the bar being set higher than it is in the actual legal framework (Huiskers-Stoop, 2015, pp. 183-186):

1) To take (when necessary) additional tax control measures and align monitoring (more responsiveness).
2) The mandatory submission of (tax) relevant positions and the obligation to give a view on it (more transparency).
3) The consultation obligation with regard to (tax) positions, the view on submitted positions, the imposition of the tax assessment and the response period (more interactivity).
4) The speed at which not only additional covenant obligations but also the obligations arising from regular (tax) legislation must be performed (more speed).

In principle, the covenant is concluded for an indefinite period of time. However, parties are free to terminate the agreement, in which case the other party will be informed of the reasons, in writing, in advance. Moreover, termination will not take place before oral consultation. The agreement may be terminated with immediate effect.

4 HORIZONTAL MONITORING AND COOPERATIVE COMPLIANCE COMPARED

This section focusses on the question of how the Dutch Horizontal Monitoring model delivers on the principles of the OECD model of cooperative compliance. To answer this question, we investigate whether the Dutch model meets the six OECD principles for a cooperative compliance monitoring model (Section 4.1) and we will address issues of concern regarding a compliance-based monitoring model (Section 4.2).

4.1 "Testing" the Dutch model against the OECD's principles

As described in Section 2, a cooperative compliance monitoring model can be defined as voluntary tax cooperation between tax authorities and large companies based on six principles: commercial awareness, impartiality, proportionality, openness and transparency, responsiveness, and supervision adjustment to TCF. In this section, we analyse how the NTCA has fleshed out these OECD principles into the Horizontal Monitoring model.

The process of establishing a cooperative tax relationship enables the NTCA to understand the activities of companies eligible for Horizontal Monitoring. In addition, the principles of *commercial awareness* and *openness and transparency* are expressed in the principles of the individual covenant: parties base their relationship on mutual transparency, mutual understanding and trust. The process undertaken in order to enter into a Horizontal Monitoring relationship – especially the first three steps (the update of client profile, Horizontal Monitoring meeting and compliance scan) – enables the NTCA to understand the company's business activities. Thus, commercial awareness enables understanding. Companies, for their part, must also be aware that the NTCA has to levy taxes and that deadlines are inherent to the taxation process. The NTCA's commercial awareness, on the one hand, and businesses' awareness of NTCA's statutory powers, obligations, procedures and responsibilities, on the other, creates mutual understanding. The NTCA's obligation to provide *openness and transparency* is also expressed in the covenant; the NTCA is obliged to discuss and respond to tax positions declared by taxpayers. Reciprocal understanding and transparency will fortify trustworthiness and trust.

The covenant also provides for the importance that the OECD attaches to obtaining fast certainty for the taxpayer: the NTCA must give – as soon as possible after receipt details of a position taken or to be taken and, as far as possible, in consultation with the taxpayer – its view on the legal consequences of the position and take relevant deadlines into account. Taxpayers should, according to the OECD, be given responses to their questions promptly, efficiently and professionally (OECD, 2008, p. 37). This also expresses the principle of *responsiveness*, contributing to the NTCA's trustworthiness.

The principle of *proportionality* concerns a balanced use of monitoring measures (OECD, 2008, p. 35). The obligation that the NTCA must adjust the form and intensity of monitoring to the quality of internal and tax control provides for this. Additionally, the obligations to develop a qualifying TCF and for the NTCA to align its monitoring follow from the covenant. The taxpayer must provide a system of internal control, internal audit and external audit aimed at the preparation and filing of acceptable tax returns. The principle of *responsiveness* is also expressed in the alignment of supervision.

With regard to the OECD's principle of *impartiality*, we feel the Dutch Horizontal Monitoring system may fall a bit short. According to the OECD (2008), impartiality means that tax authorities should adopt an impartial approach in settling disputes and determining the tax debt (p. 35). Impartiality, or neutrality, contributes to procedural justice, taxpayers' perceived fairness of procedures in the broad sense (including their treatment and the provision of information) which, in turn, is a major factor in establishing and maintaining trust in tax authorities (Kirchler, 2007, pp. 84-87). This is not only about the perceived justice of one's own treatment but also of the treatment of others (see OECD, 2014, p. 24).

In this regard, regulatory capture is a risk of Horizontal Monitoring, for tax inspectors may lose their ability to form objective opinions. Tax officials must remain impartial and maintain a critical attitude towards the taxpayer, and the information and tax risks that it discloses. Failure to maintain a professional critical attitude could have a damaging effect on overall trust in tax authorities (OECD, 2016, p. 28. See also Gribnau, 2015a, p. 212; Stevens Committee, 2012a, p. 51). Tax officials, however, also need the room to take an impartial approach of public and private interests in relation to those to whom they are accountable. Pressing political and economic demands on the tax administration may hinder such an impartial approach (Stebbings, 2017, pp. 222-223). In this vein, Brooks (2014) argues that, in the UK, the political goal, for example, of applying "not just a light touch, but a limited touch" to business regulation and the administration of tax puts pressure on the tax authorities to favour large businesses (p. 175, quoting the former UK Chancellor of the Exchequer, Gordon Brown). In contrast, politics may also interfere when tax authorities seem to be prompted or instructed to be tough on business, eroding the trustworthiness of the tax authorities.

Moreover, the NTCA's impartiality seems to be somehow endangered, because the NTCA falls – possibly unlike tax authorities in other countries – under the direct responsibility of the Finance Minister (and, in practice, the State Secretary of Finance). As a consequence, the NTCA has to act on the instructions from the Minister of Finance or his State Secretary. This could make having an impartial attitude more difficult than, for example, when the NTCA would have been an independent agency (the legislature is also biased towards the NTCA, having a (budgetary) interest in maintaining an efficient tax administration which may go at the expense of taxpayers' interests, such as legal protection; see Gribnau, 2010, p. 162). With independent government agencies, a further political distance seems to create more room for an impartial approach of public and private interests. Though politically responsible for the

NTCA, the Minister of Finance and his State Secretary are, in principle, not allowed to interfere with the assessment of an individual taxpayer, since it is the tax inspector's statutory competence (Article 11 GTA 1959). Nonetheless, the possibility of political interference, especially with regard to the Horizontal Monitoring relationship with multinational companies, cannot be dismissed out of hand. Integrity of government officials is, however, high on the political agenda. Alink and Van Kommer (2009) rightly argue that breaches of integrity undermine citizens' trust in the government and may adversely impact compliance (pp. 30-35). With regard to political influence, the Netherlands seem to be situated somehow between, on the one hand. Anglo-American countries and Scandinavia, "where the public sector is most amenable to political control", and, on the other, countries with "a strong state and a high prestige-bureaucracy, for example Germany, Japan and Spain" (Hague & Harrop, 2007, p. 367, referring to Hood, 1996). Moreover, there is a strong and centralised bureaucracy in the sense that each government department is largely autonomous (Andeweg & Irwin, 2009, p. 179).

Nevertheless, Dutch tax laws and regulations – as well as "the general principles of proper administrative behaviour" (*algemene beginselen van behoorlijk bestuur*) – governing the NTCA's actions provide (legal) protection to ensure that the NTCA takes an impartial attitude in the settlement of disputes and determination of the tax liability. The NTCA must apply the law objectively, even if it results in the levying of lower taxation than could have been levied on the basis of a subjective opinion. After all, the NTCA represents the public interest and not a private interest. Correctly applying the law also implies that a covenant partner is not treated more favourably than other taxpayers in similar circumstances. The equality of treatment is another aspect of the requirement of impartial application of the law. Consequently, the NTCA's actions must not only have a statutory basis (by virtue of the principle of legality) but the exercise of its powers is also bound by unwritten legal standards, like the mentioned principles of proper administrative behaviour. These principles of proper administrative behaviour originate in case law and are further developed by the judiciary. Some of these principles have been codified. They offer legal protection to the citizen with regard to administrative bodies' improper actions and decisions. These principles comprise procedural norms but also substantive norms and provide extra legal protection to taxpayers in addition to the protection embodied by statute law (Happé and Pauwels, 2011, pp. 247-248; Gribnau, 2015a, pp. 205-207; Gribnau, 2007, pp. 301-308).

International initiatives and regulations may also add to the NTCA's impartiality. Moreover, several international initiatives have been taken to map existing national practices and identify good practices of efficient and effective tax administration. The European Commission has published various documents with regard to tax authorities' benchmarking resulting in increased EU scrutiny of national tax administrations (Végh & Gribnau, 2018, pp. 58-60). The NTCA should also act impartially by abstaining from the preferential treatment of particular taxpayers as part of international tax competition. There are initiatives designed to counter harmful tax competition among states in order to promote a level playing field. Tax authorities may give favourable tax rulings allowing a particular sector to operate with a lower effective tax rate than other sectors (see Van de Velde, 2015). The OECD and the EU, in turn, try to counter these harmful tax practices (OESO, 2015b; European Union, 2015).

Given the analysis above, the Dutch Horizontal Monitoring model meets the basic principles for a successful tax cooperation as formulated by the OECD; the Dutch Horizontal Monitoring model is also governed by concepts such as trust, mutual understanding, impartial attitude, proportionality, fiscal transparency and responsiveness. A striking difference is that the OECD's model mainly – but not only – addresses the obligations of the tax authorities. The

Dutch model creates obligations of a more reciprocal nature between tax authorities and taxpayers. The ways in which parties act with regard to the agreements and to fulfilling their obligations enable reciprocal judgments of trustworthiness, which fuel both parties' trust in the actual cooperative quality of their relationship.

4.2 Addressing issues of concern to a compliance-based monitoring model

In Chapter 3 of the 2013 report, the OECD expressed its view on issues of concern regarding a compliance-based monitoring model (OECD, 2013, pp. 41-57):

1) the wider compliance strategy
2) overcompliance by persuasion
3) settlement of disputes
4) alleged conflict with the principle of equality.

We discuss below how both the OECD and the Dutch Horizontal Monitoring model address these issues of concern.

1. The wider compliance strategy

In response to the 2008 report, the OECD was criticised about the disclosure of information beyond what taxpayers are statutorily obliged to provide ("wider compliance"; OECD, 2008, p. 41. Compare Björklund Larsen, 2016, p. 37). A taxpayer's compliance strategy should include all information necessary for the tax authorities to undertake a fully informed risk assessment. The commitment to be transparent should be reflected in a risk management system (OECD, 2013, p. 57). In order to create a situation of transparent tax information, the OECD considers it important that companies invest in qualifying TCFs. A qualifying TCF enables a company to report tax risks and voluntarily submit them to the tax authority (OECD, 2013, p. 20 ; OECD, 2016). In addition, qualifying TCFs help companies to bear responsibility for the timely, correct and complete submission of tax returns, and the timely payment of the taxes due. Furthermore, TCFs give the tax authorities trust regarding the accuracy of tax returns. In the Dutch situation, the taxpayer's obligations to build and use a qualifying TCF and the NTCA's obligation to align supervision follow from the covenant. It also follows from the covenant that companies must be transparent and provide tax-relevant information liberally. This means that companies voluntarily provide more tax-relevant information than they are statutorily obliged to.

2. Overcompliance by persuasion

In response to the 2008 report, the OECD received firm criticism about the allegedly insufficient attention paid to the interpretation of the law. Dabner and Burton (2009), for example, believe that when tax authorities encourage taxpayers to voluntarily settle and pay the right amount of tax, this is the amount of tax from the perspective of the tax authorities (pp. 318-319). If taxpayers do not wish to accept the tax authorities' views, they are considered to be noncompliant, or at least less compliant. But what should be understood as the "right" amount of tax? The law can be interpreted in different ways, with taxpayers and tax authorities having opposite interests. According to Dabner and Burton, a tax authority's goal is to maximise government revenue (to our minds, however, it should be to collect the right amount of tax), whilst a tax professional's/taxpayer's goal is to minimise it. Dabner and Burton criticise the OECD with regard to whether there is room for differences of opinion and how possible

disputes about legal interpretation should be resolved. In the same vein, Freedman (2011) argues that the "use of persuasion to encourage compliance beyond that which might be required by law could result in unequal or disproportionate burdens on taxpayers who are not actually disobeying the law" (p. 637).

It should be noted that the NTCA aims to levy the "the right amount of tax." This aim may contribute to its legitimacy. Björklund Larsen (2018), for example, argues that the Swedish revenue collection agency has acquired legitimacy by levying and collecting "the 'right' – not the maximum – tax and minimising taxpayers errors" (p. 12). In the same vein, D'Ascenzo (2018) refers to the "proper and impartial administration of the tax law" (p. 248).

In response to the interpretation issue, the OECD indicates when "tax planning" should be addressed:

> Planning involving a tax position that is tenable but has unintended and unexpected tax revenue consequences. Taking a position that is favourable to the taxpayer without openly disclosing that there is uncertainty whether significant matters in the tax return accord with the law (OECD, 2013, p.48).

In the first situation, there is tax planning that, according to the OECD, does not violate the letter, but the spirit of the law. In passing, we note that the OECD apparently uses the term "letter of the law" as shorthand for tax planning that exploits the technicalities or differences between tax systems by making use of "a bewildering variety of techniques (e.g. multiple deductions of the same loss, double-dip leases, mismatch arrangements, loss-making financial assets artificially allocated to high-tax jurisdictions)" (Piantavigna, 2017, p. 52; see also Gribnau, 2015, pp. 234-236). In the second situation, there is tax planning that may be contrary to the letter of the law, while no openness has been given. Moreover, from a taxpayer's perspective, a more neutral definition of tax planning, in the sense of taking into account the tax consequences of one's actions, would make sense. It may well be argued that, given the complexity of the tax system, companies, like all taxpayers, have to engage in some kind of tax planning. They want to know the impact of taxation and tune their behaviour to account for this impact as they want to be in control of their finances (Gribnau, 2015, pp. 226-227).

The OECD's view that companies should not only act in accordance with the letter but also in the spirit of the law has been firmly criticised. Freedman (2011) argues that abiding by the "spirit of the law" may simply mean compliance with the proper intention of the legislature as found by the courts by purposive construction. But that is altogether different from the spirit of the law as something that "may be found outside the decision of the courts, in terms of what is acceptable to the revenue authorities or current government, or perhaps even non-governmental organisations" (Freedman, 2011, p. 635). The upshot would be a lack of space in which to disagree on the interpretation of the law by the tax authorities. Consequently, companies working within a cooperative compliance model would have to pay more tax than taxpayers not participating in cooperative compliance programmes. As shown above, according to critics, implementation of a cooperative compliance model would lead to "over" compliance (see also OECD, 2013, p. 48.) The complexity of business operations and tax laws is such that there is room for legitimate differences of opinion about what constitutes "aggressive tax planning" and which tax outcome is truly consistent with the spirit of the law (OECD, 2013, p. 49). If cooperative compliance does not allow for such differences of opinion and access to the courts to settle disputes, taxpayers entering into covenants with the tax

authorities are effectively agreeing to accept that, in instances of conflict, the tax authorities´ views prevail.

In response, the OECD (2013) indicates that there must be room for taxpayers and tax authorities to have differences of opinion on the proper tax treatment of some transactions (p. 50). This can be accommodated within the framework of cooperative compliance, as long as the taxpayer is open and transparent about its position. Essential to the relationship is, therefore, the disclosure of those occurrences when the taxpayer has taken a position in the tax return that is contrary to the view of the tax authorities. Although court proceedings could interfere with the mutual relationship, the OECD deems that, in practice, the number of disputes that arise in the context of a cooperative compliance relationship is likely to be self-limiting.

A taxpayer that takes up a series of positions that conflict with the view of the revenue body, pursues those positions through the courts, and loses most or all of the cases, is likely to rapidly reassess its tax strategy. By the same token, a revenue body that frequently challenges positions taken by the taxpayer but is frequently unsuccessful before the courts will have to adjust its view of the law (OECD, 2013, p. 50).

To what extent is there room for interpretation of the law in the Dutch Horizontal Monitoring model? In the OECD's view, tax planning should be addressed if it does not violate the letter, but the spirit of the law. In the OECD's view, tax planning should also be addressed when it may be in violation of the letter of the law, while no openness is given. The requirement that, in the event of possible violation of the letter or the spirit of the law, openness must be given, goes beyond traditional Dutch tax monitoring. In the existing legal framework, a taxpayer may not act in a way which is contrary to the letter of the law, but no openness has to be given in case of doubt. Openness must, however, be given under Horizontal Monitoring. That follows from the voluntarily concluded covenant. It also follows from the covenant – at least from the risk of termination in cases of (ongoing) aggressive tax planning – that companies should not structurally violate the spirit of the law (Gribnau, 2015a, pp. 213-214. See also Bronzewska, 2016, pp. 372-374). The flexibility that companies have for tax planning under Horizontal Monitoring is, therefore, limited compared to the flexibility that companies which do not participate in HM relationships have (Huiskers-Stoop, 2015, p. 441, p. 304). Tax planning in accordance with the spirit of the law is allowed; however, aggressive tax planning with the aim of paying a minimal amount of (corporate income) tax should be avoided due to the risk of the covenant being terminated (see, in this respect, Minister of Finance (2010, p. 3)).

Thus, the covenant leaves considerable room for tax planning – even for some aggressive tax planning – as long as the taxpayers proactively inform the NTCA. Nonetheless, taxpayers may sometimes feel persuaded to comply beyond the level which they think is required by substantive tax law. They may perceive this as being a reasonable price to pay for a Horizontal Monitoring working relationship which is, overall, attractive. However, the relationship will be out of balance if they feel persuaded to take tax positions that they would rather not take. As a result, the trust base will be weakened since over-compliant taxpayers may find the NTCA to be less trustworthy and to lack understanding (commitment to concern and care).

3. Settlement of disputes

Even when in a cooperative compliance relationship, taxpayers and tax authorities should be able to submit disputes to court. According to the OECD, there are two types of disputes (OECD, 2013, p. 51):

- disputes that already exist when entering into the relationship
- disputes that arise afterwards.

Entering a cooperative compliance relationship implies that existing disputes are resolved as far as possible. This can be done by concluding agreements (OECD, 2013, p. 52). In order to settle disputes that arise afterwards, the OECD explicitly points to the Dutch possibility of a so-called *agree to disagree* appeal: in a situation where there is no difference of opinion on the facts and only the interpretation of the law divides parties, the parties may jointly consult the tax court (OECD, 2013, p. 52; see also Stevens Committee, 2012a, pp. 99-100). In addition, in a situation of non-compliance with the additional covenant rights and obligations, parties may also appeal to the civil court (Huiskers-Stoop, 2015, p. 441, pp. 189-192). Covenant parties may ask the civil court to impose fulfilment of the additional covenant obligations and, in exceptional cases, compensation of damage – but, of course, structural failure to comply with voluntary obligations probably shows that the trust base of their relationship has been seriously eroded.

4. Alleged conflict with the principle of equality

The principle of equality entails that citizens in the same situation should be treated in the same way and any differences of treatment should be the rational result of objective differences in the circumstances of a particular case (OECD, 2013, p. 45). With regard to Horizontal Monitoring, the question of whether there is a conflict with the principle of equality if certain taxpayers are treated according to the principles of a cooperative compliance model and other taxpayers are not arises (cf. Björklund Larsen, 2016, pp. 38-39 and Bronzewska, 2016, pp. 375-382). The OECD concludes that there is no conflict with the principle of equality. The common goal of tax cooperation based on cooperative compliance strategies is to secure the timely payment of the correct tax. The OECD does not think that this raises any issues in terms of equality before the law, as the outcome of cooperative compliance – in terms of the tax that is payable by a company – should be the same as that when a more traditional audit or enquiry approach is taken (OECD, 2013, p. 46). Regarding the other benefits offered by cooperative compliance, such as obtaining certainty faster or reducing tax compliance costs, the OECD thinks that the decision to offer cooperative compliance to taxpayers who can demonstrate they are of low risk is an integral part of the risk assessment process – a process that is consistent with the principle of equality (OECD, 2013, p. 47). According to the OECD, the existence of an effective TCF together with a taxpayer's explicit willingness to meet the requirements of disclosure and transparency that go beyond their statutory obligations provide an objective and rational basis for a (procedurally) different treatment. The tax authority can place a justified reliance on the tax returns it receives from taxpayers who meet the requirements, and can be confident that material tax risks and uncertainties will be brought to its attention (OECD, 2013, pp. 46-47).

Is there a conflict with the principle of equality in the Dutch case, as taxpayers who are willing and able to comply with the laws and regulations are treated procedurally differently from taxpayers who are not able to and/or will not comply? Horizontal Monitoring is a strategy aimed at deploying scarce enforcement resources as efficiently and effectively as possible, and is based on differentiating between non-compliant (representing a high risk) and compliant taxpayers (representing a low or negligible risk) as part of the NTCA's compliance risk management strategy. Where two taxpayers are in identical situations in fact and legally, in principle they are both entitled to a covenant or not (identical cases). Insufficient trust in the anticipated willingness to comply voluntarily may, for the NTCA, however, be a reason to

enter into an agreement with one taxpayer and not with another (actual inequality) (Huiskers-Stoop, 2015, p. 445). The actual unequal treatment can be objectively justified by the (informed) trustworthiness of taxpayers (Gribnau, 2015a, pp. 210-212). Again, this differentiated treatment should not lead to a different, more favourable outcome in terms of the tax payable by a taxpayer (Boer & Gribnau, 2018, pp. 232-233). Therefore, the principle of equality is (theoretically, at least) not violated when Horizontal Monitoring is applied (see also Filipczyk, 2017, pp. 333-334; Gribnau 2015a, pp. 210-212; Stevens Committee, 2012a, p. 96). Moreover, the principle of equality is served by the NTCA's HM guidelines to guarantee uniform treatment. However, transparency is lacking in this respect, for the confidentiality principle (fiscal secrecy) applies to tax affairs, entailing a lack of information with regard to the actual execution of the NTCA's general compliance strategy and its treatment of taxpayers ((anonymised) court cases are, of course, an exception). This sometimes makes it difficult to assess the NTCA's actual behaviour – also in the HM framework (Bronzewska, 2016, pp. 381-382). The Stevens Committee, which evaluated developments relating to Horizontal Monitoring at the request of the Minister of Finance, also looked into the principle of equality. The Committee reported that its discussions and the information it received have not revealed any solid evidence to substantiate the conclusion that preferential treatment has been an issue (Stevens Committee, 2012a, p. 50; discussing and giving recommendations with regard to the "risk of regulatory capture", a loss of a professional critical attitude). This is important, as media coverage sometimes suggested the existence of "sweetheart" deals, which might have an impact on the general public's trust in the NTCA. It may also affect the perceived power of the NTCA to enforce the law and, consequently, have an impact on taxpayers' intended tax compliance (Kasper, Kogler & Kirchler, 2013). In addition, state aid rules help tax authorities not to give away "presents" by favouring certain groups of taxpayers over others (European Union, 2016). When a tax measure confers certain companies with favourable tax treatment which improves their financial situation compared to other taxpayers who are in the same position and there is no justification for this, there is an issue of prohibited state aid. Preferential treatments would also not encourage traditional tax officials who take hierarchical and antagonistic approaches to change their mindsets and endorse cooperative trust relationships. The NTCA would be well advised to pay attention to the field of tension between professional ethics and trust in order to avoid regulatory capture (BMF, 2016, p. 67).

The NTCA's trust is based on positive expectations of the taxpayer's behaviour: "a good client profile". Being a "good client" assures the NTCA that it will receive current and actual information about the company's tax strategy, tax control and transparency. "These are the elements of the NTCA's client profile of the relevant organisation. This information enables the NTCA to adjust its supervision and restrict its activities solely to those required to validate Horizontal Monitoring" (NTCA, 2013, p. 6). To counter arbitrary treatment of taxpayers, the "good client profile" should be capable of being assessed objectively. In our opinion, with sub-processes to optimise the tax control process (next to four general control objectives) and the details of the expectations regarding the outcome of these processes, the NTCA meets the requirement for more (objective) clarity to sign up to Horizontal Monitoring (Huiskers-Stoop, 2015, p. 446; NTCA 2013, pp. 28-30; OECD 2016, p. 15; Stevens-Committee 2012a, p. 51). The policy to treat companies who are willing and able to comply with the tax law and regulations (by having their internal and tax systems up to standard and behaving responsibly with regard to taxation) differently from taxpayers who cannot or will not comply does not conflict with the principle of equality (actual inequality) (Huiskers-Stoop, 2015, p. 441; Stevens-Committee 2012a, p. 93, pp. 96-97). In order to be a trustworthy partner, a company must adopt a willing attitude towards the voluntary disclosure of tax-relevant information,

should not use tax aggressive or minimalistic structure (at the risk of termination the covenant), and must meet the requirements for a qualifying TCF (NTCA, 2013, pp. 28-32).

5. CONCLUSION AND DISCUSSION

This paper summarises how the OECD's cooperative compliance model can be defined, how Horizontal Monitoring is incorporated in the Dutch legal tax system and enforcement process, and how the Dutch Horizontal Monitoring model relates to the OECD's view on cooperative compliance. The principal research question is:

> *"How does the trust-based Horizontal Monitoring relationship and its establishment relate to the OECD model of cooperative compliance?"*

We have examined this question on the basis of three sub-questions, which we answer as follows.

1. How is the OECD's cooperative compliance model defined?

The OECD's monitoring model for cooperative compliance can be defined as the voluntary tax cooperation between tax authorities and large companies based on six principles: commercial awareness, impartiality, proportionality, openness and transparency, responsiveness, and supervision adjustment to TCF.

2. What are the different steps to be taken in the process of concluding a Horizontal Monitoring covenant and how do the voluntarily accepted Horizontal Monitoring covenant obligations relate to the mandatory obligations laid down in the Dutch legal tax system?

Taxpayers and the NTCA follow seven steps to get a Horizontal Monitoring relationship. These steps fit in well with two dimensions of trustworthiness: first, competence and reliability, and, secondly, integrity, honesty and the commitment to concern and care. These dimensions enable the assessment of the trustworthiness of a party which, in turn, enables the other party to place trust in that party. The process begins with an update of the client profile by the NTCA gathering information about the taxpayer and ends with adjustment of supervision. The basis for tax cooperation between the taxpayer and the NTCA is the individual covenant. Besides the general provisions on parties, duration, commencement date, evaluation and termination, this covenant consists of an introduction expressing the intention to achieve an effective and efficient mode of operation, basic principles and agreements. The principles stipulate that parties should base their relationship on (informed) trust, mutual understanding and transparency, that rights and obligations pursuant to legislation and regulations are and will remain applicable, and that the covenant is applicable to the levying of all Dutch national taxes and collection. The covenant agreements are designed with the aim of realising customised tax supervision, actual tax collection, actual insight into the tax position of taxpayers, and an update of the taxation process (real-time working), which may help to convert willingness towards regulatory compliance into actual compliant behaviour and ensure the taxpayer's trustworthiness (NTCA, 2017, finds that enterprises with covenants are less focussed on tax avoidance – and are, therefore, more compliant – than enterprises without covenants).

What characterises the Dutch model is the absence of an explicit statutory basis and the discretion of the NTCA as the basis for the Horizontal Monitoring model. The covenant

expresses both parties' willingness to cooperate, and commitment to trust, mutual understanding and transparency. In addition, the published guidance gives the taxpayer certainty with regard to the behaviour of the NTCA under Horizontal Monitoring. The principle that rights and obligations pursuant to traditional tax monitoring remain applicable enables the NTCA to adjust its supervision when the taxpayer's attitude and behaviour indicate that the principle of willingness to fulfil statutory obligations (voluntary compliance) is no longer satisfied.

The covenant contains agreements which go beyond the actual statutory rights and obligations. These additional covenant obligations, which have a reciprocal nature, have no statutory basis in public law. The additional voluntary obligations entail that both taxpayers and the NTCA must provide more commitment and effort, and produce better results, under Horizontal Monitoring than under traditional monitoring.

3. How does the Dutch Horizontal Monitoring model deliver on the principles of the OECD's model of cooperative compliance?

The Dutch Horizontal Monitoring model meets the principles for a successful tax cooperation as formulated by the OECD. Both the OECD and the Dutch Horizontal Monitoring model address issues of concern about the wider compliance strategy, (forced) over-compliance by persuasion, the settlement of disputes, and alleged conflict with the principle of equality. In the Dutch Horizontal Monitoring model, it follows from the covenant that companies must be transparent and provide tax-relevant information liberally. In addition, the flexibility for tax planning under Horizontal Monitoring is more limited than under the existing legal framework. Tax planning in accordance with the spirit of the law is allowed; however, consistently aggressive or minimalistic tax planning should be avoided at the risk of termination of the covenant. Moreover, in a situation where there is no difference of opinion on the facts and only the interpretation of the law divides parties, the parties may jointly appeal to the tax court, starting a public law procedure (they "agree to disagree"). Furthermore, covenant parties may ask the civil court to impose fulfilment of the additional covenant rights and, in exceptional cases, compensation of damage. Finally, the policy to treat proactively transparent companies who are willing and able to comply with the tax law and regulations (by having their internal and tax systems up to standard and showing a responsible attitude towards taxation) differently from taxpayers who cannot or will not comply does not conflict with the principle of equality (actual inequality with regard to compliance).

Based on the above, we give the following answer to the principal research question:

> *A cooperative compliance model is defined as voluntary tax cooperation between tax authorities and large companies based on six principles: the tax authority must understand business activities, adopt an impartial approach, respond proportionally, demonstrate openness and transparency (like taxpayers themselves), take enterprise-specific circumstances into account, and align supervision to the quality of the company's TCF. The Dutch Horizontal Monitoring model qualifies as a cooperative compliance model and is based on voluntary cooperation between the NTCA and taxpayers based on (informed) trust, mutual understanding and transparency, which does not, in itself, have a specific statutory basis but which is derived from the discretion of the NTCA to efficiently establish the tax enforcement process – in view of the scarce resources. The willingness to cooperate and the major voluntary obligations are laid down in an individual*

covenant. The NTCA provides transparency with regard to its view on the Horizontal Monitoring relationship in published guidance.

The research shows that the Dutch Horizontal Monitoring model meets the basic principles for a successful tax cooperation as formulated by the OECD. The Dutch Horizontal Monitoring model fleshes out principles and concepts such as trust, mutual understanding, impartial attitude, proportionality, fiscal transparency and responsiveness. The issues of concern, as discussed and addressed by the OECD (Section 4.2), do not present insurmountable problems in the Dutch model. A striking difference between the two models is that the OECD model mainly – but not only – addresses the obligations of the tax authorities. The Dutch model, however, creates obligations between tax authorities and taxpayers of a more reciprocal nature (Section 4.1). The voluntary nature of the HM relationship incentivises companies to improve their internal tax controls facilitating trust by the NTCA. When the principles of the cooperative compliance model have been met, according to the OECD, the majority of taxpayers will be able to effectively and efficiently pay the right amount of tax in time. Taxpayers, in turn, find tax administrations to be trustworthy if they meet these principles, so the principles should be operationalised in practice to underpin this trust (Section 2.1).

Concluding a covenant with the NTCA is not easy. With taxpayers showing their willingness and trustworthiness to comply with the tax laws and regulations voluntarily, the NTCA may enter into tax cooperation relationships based on trust, mutual understanding and transparency. In our opinion, the seven-step model offers the tax authorities sufficient guarantees to judge a taxpayer's willingness to voluntarily comply with the tax laws and regulations (Section 3.2), to assess the trustworthiness of the taxpayer, and thus to establish and secure a trust-based relationship (Section 3.3) and to trust that acceptable tax returns will be filed by the company. As described, the NTCA's trust is based on positive expectations of the taxpayer's behaviour: a good client image. In our opinion, with various sub-processes to optimise the tax control process and the details of the expectations regarding the outcome of these processes, the NTCA meets the requirement for more (objective) clarity to join horizontal tax monitoring (Section 3.2). The sub-processes are currently published in public policies which only bind the tax authorities and not the taxpayers themselves. The disadvantage is that taxpayers might see the published requirements as maximum requirements, which might diminish their motivation to optimise the tax control process.

The decision of the NTCA, however, to trust a taxpayer and to conclude a covenant could be further substantiated by providing more clarity about the requirements for tax control (De Widt, 2017, p. 21; Burgers & Van der Meer, 2018, p. 389). The NTCA rightly differentiates with regard to the trustworthiness of taxpayers, but taxpayers, of course, want to know what they can expect and which conditions they have to fulfil in order to qualify for a covenant. Additional guidance on the design of the so-called tax control framework, will enable companies to better assess for themselves whether they qualify for Horizontal Monitoring on the basis of an individual covenant or not (enabling self-selection). Given, in addition, that a relatively large number of covenants have already been concluded by the NTCA, resulting in a high demand for the NTCA's resources, it is expected that access to the Dutch Horizontal Monitoring model will not be unlimited. Hence, it is also important for the NTCA itself to have a clear view on the level of tax control required for an individual cooperative tax relationship in order to draw a line between taxpayers who may opt for individual covenants and those who may enter into indirect covenants mediated through financial or tax law specialists.

In addition, international guidance, such as that provided by the OECD or the EU based on their experiences in other countries, will help tax administrations to further improve the concept of cooperative compliance. Compliance programmes have the common aim of increasing trust in the tax authorities and providing high-quality services in order to promote voluntary compliance (Enachescu & Kirchler, 2018). However, public perceptions of compliance strategies of tax administrations should not be underestimated. The Horizontal Monitoring model and its goals should therefore be properly explained and understood by citizens; the focus on reciprocal cooperation and mutual trust, understanding and transparency could otherwise be misperceived. Misinformed citizens might associate Horizontal Monitoring with corruption and sweetheart deals between taxpayers and the NTCA. This would eventually erode trust in the tax authorities.

In conclusion, a voluntary cooperative tax relationship on the basis of trust, mutual understanding and transparency not only offers benefits for the tax authorities, enhancing the payment of the right amount of tax at the right time, but also offers benefits for particularly large companies, leading to them having greater certainty about their tax positions and maintaining better relationships with the tax authorities. Nevertheless, in the light of changing views on tax planning, mandatory disclosure, international information exchange, tax compliance and impartial enforcement, permanent reflection is required for the further improvement of both the Dutch Horizontal Monitoring model and the general concept of cooperative tax compliance.

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APPENDIX: INDIVIDUAL COMPLIANCE AGREEMENT (COVENANT)

Parties

This Agreement is concluded between:

- *[COMPANY]*, established in …… [address], represented by ……*[name]*

And the Netherlands Tax and Customs Administration (referred to as the Tax Administration), represented by

- …….*[name, position, Tax Administration]*

This agreement also applies to entities which are controlled by *[COMPANY]*. Parties have mutually agreed on the entities concerned. Together they will be referred to as *[X]*.

Introduction

Parties want to achieve an effective and efficient mode of operation. They aim for permanent actual insight into relevant events and fast decisions in order to increase legal certainty. The basic principles and the desired form of cooperation are laid down in this agreement.

The original Agreement is in the Dutch language and the Dutch text shall prevail.

1. Basic principles

- Parties base their relationship on trust, understanding and transparency.
- Rights and obligations pursuant to legislation and regulations are and will remain applicable without limitation.
- This Agreement is applicable to levying of all [X]'s Dutch National Taxes[1] and collection.

[1] Where appropriate this may include the application of the VAT Compensation Fund.

2. Agreements between [X] and the Tax Administration

[X]:

- Provides a system of internal control, internal audit and external audit aimed at preparing and filing acceptable tax returns[2];
- Ensures timely payment of tax debts;
- Submits its view, taken or to be taken, on relevant (tax) matters to the Tax Administration as soon as possible. This applies to matters on which a difference of opinion may arise with the Tax Administration, for instance on a different interpretation of facts or matters of law. *[X]* actively provides the Tax Administration insight into all facts and circumstances, its views and its interpretation of the relevant legal consequences thereof;
- Promotes real time processing. Tax returns and declarations will be filed as soon as possible after the end of the tax period. Any information requested by the Tax Administration will be provided as soon as possible, in full and without ambiguity.

[2] An acceptable tax return conforms to legislation and regulations and contains no material misstatements.

The Tax Administration:

- Adjusts the form and intensity of its supervision to the quality of internal control, internal audit and external audit;
- Ensures timely payment of tax refunds;
- Issues its interpretation of the legal consequences as soon as possible after receipt of a point of view taken or to be taken, as much as possible in consultation with *[X]*;
- Takes the relevant periods into account when giving its interpretation of the legal consequences;
- Discusses (relevant) fiscal and other matters with *[X];* in particular matters on which a difference of opinion may arise from the Tax Administration´s point of view;
- Will clarify and explain why specific information is requested from *[X]*, and mutually agree on the response periods;
- Promotes real time processing. Assessments will be imposed as soon as possible after filing of tax returns and in consultation with *[X]* as much as possible.

Parties have found solutions for or agreed on issues relating to fiscal and other relevant matters from the past presently known to *[X]* and/or the Tax Administration in accordance with legislation and regulations, or have agreed on procedural arrangements.

3. Duration, regular evaluation and termination

This Agreement is made for an indefinite period of time. The Agreement will be evaluated periodically by *[X]* and the Tax Administration. If one of the parties wishes to terminate this Agreement, the other party will be informed in writing in advance of the reasons. Moreover, termination will not take place before oral consultation, this Agreement may be terminated with immediate effect.

4. Commencement date

This Agreement commences when both parties have signed.

On behalf of [COMPANY]	On behalf of the Tax Administration
(Name)	(Name)
(Position)	(Position)
(Date)	(Date)

DIFFERENT TREATMENT, SAME OUTCOME: RECONCILING CO-OPERATIVE COMPLIANCE WITH THE PRINCIPLE OF LEGAL EQUALITY[1]

Alicja Majdanska[2], Jonathan Leigh Pemberton[3]

Abstract

The paper discusses whether the concept of co-operative compliance is consistent in practice with legal equality and administrative fairness.

The theoretical framework of the discussion is provided by an analysis of the principle of legal equality. We base our analysis on a comparison of how the principle is enshrined in the constitutions of Italy, the Netherlands and the United Kingdom. In choosing these jurisdictions, we took into consideration the following criteria: legal tradition, the existence and maturity of their respective co-operative compliance programmes, and their personal scope.

Based on this analysis, we identify basic criteria for assessing the compatibility of these programmes with the principle of legal equality in the three selected jurisdictions. We determine that programmes limited to procedural treatment should not violate the principle of legal equality. As large business taxpayers are differentiated by the complexity of their tax affairs and are usually the biggest contributors to revenues, designing a special programme that fits their needs and helps them to be compliant is reasonable and justified in the light of general rules of tax procedure and the objective of the enforcement of tax liabilities and tax duties. Nonetheless, if programmes involve some economic advantages (e.g. a reduction of a tax liability), they may be seen to be disproportionate and inconsistent with the overall goals of good tax administration. As a result, they may not be consistent with the principle of equality.

Keywords: co-operative compliance, equality, tax compliance, large business taxpayers

INTRODUCTION

The fight against aggressive tax planning, tax avoidance and evasion remains a priority for policymakers, tax administrations and civil society. The focus of the Organisation for Economic Co-operation and Development (OECD) and G20 project on Base Erosion and Profit Shifting (BEPS) has shifted from policy-making to implementation. To support that implementation effort, the OECD's Forum on Tax Administration (FTA) has mobilised the Joint International Tax Shelter Information & Collaboration Network (JITSIC Network).[4] The

[1] We would like to thank Prof. Dr. Alexander Rust LL.M. (NYU) from the Vienna University of Economics and Business, Prof. Mr. Dr. J.L.M. Gribnau from University of Tilburg, Mr. dr. E.A.M. Huiskers-Stoop from the University of Leiden and the reviewers for their valuable comments.
[2] Institute for Austrian and International Tax Law, Vienna University of Economics and Business.
[3] Institute for Austrian and International Tax Law, Vienna University of Economics and Business.
[4] JITSIC was originally established in 2004 by a small number of countries as the Joint International Tax Shelter Information Centre to combat cross-border tax avoidance. In 2014, it was re-established as the JITSIC Network under the FTA and is open to all 46 members of the Forum. Recently, co-ordinating the response of its members to the revelations in the "Panama Papers" has been a priority. For more details, see: http://www.oecd.org/tax/tax-administrations-ready-to-act-on-panama-papers.htm.

effort also extends beyond the core OECD/G20 membership to include developing countries.[5,6] In the European Union, countries agreed on the Anti-Tax Avoidance Package.[7] The BEPS Action Plan aims to restore the coherence of the international tax system by re-establishing the link between substance and taxation, and increasing the transparency of multinational enterprises' (MNEs') reporting, particularly in terms of where they do business and pay tax (Cracea, 2013). Some of the planned BEPS actions will increase compliance costs for large taxpayers. The package of measures does not explicitly include tools designed to encourage voluntary compliance. However, the concept of co-operative compliance is one which allows countries to reconcile the objectives of achieving improved tax compliance, greater transparency and a tax system that offers compliant MNE taxpayers greater tax certainty and lower compliance costs.

The OECD (2008) developed the concept of co-operative compliance as a response to the impact of aggressive tax planning on tax administrations (p. 5). Initially, the idea was described as an "enhanced relationship" with large corporate taxpayers, who were recognised as the principal market for aggressive tax planning. The enhanced relationship concept was developed as a way in which to discourage MNEs from entering into aggressive tax schemes, particularly those that depended on non-disclosure of the controversial positions taken in a tax return. It did so by offering taxpayers increased tax certainty if they were willing to be fully transparent. The concept was refined and renamed "co-operative compliance" in order to address any misconceptions about the nature of the relationship; this is not about offering selected taxpayers a tax advantage or special favours (van der Hel-van Dijk & Poolen, 2013, p. 675). However, it does offer an opportunity for both parties to gain benefits. The ultimate goal is to create a win-win situation[8] for the tax administration and large corporate taxpayers. For the tax administration, implementing co-operative compliance should result in the payment of the right tax at the right time and have a number of collateral benefits (increased commercial awareness, better tax risk management, better allocation of resources and improved real-time information about commercial developments). For the taxpayer, the main benefits are earlier certainty about its tax liabilities and reduced compliance costs, including fewer and more focussed tax audits.

The concept was conceived with large business taxpayers in mind. Due to the complexity and scale of their affairs, tax compliance by large business taxpayers usually demands a different management approach than tax compliance by small and medium-sized business taxpayers. This may be a good operational reason for developing a compliance programme for large business taxpayers but, nonetheless, the programme favours selected taxpayers over others who cannot access the programme. This raises some legal questions. In particular, is a programme that is only available to a select group of large business taxpayers compatible with the principle

[5] The BEPS Project refers to the OECD work based on a BEPS Action Plan endorsed by the G20 in July 2013, which identified 15 key areas to be addressed. For more details, see: http://www.oecd.org/ctp/beps-2014-deliverables.htm.

[6] For more details on the OECD new strategy for strengthening the engagement of developing countries in the BEPS Project, see: http://www.oecd.org/tax/developing-countries-and-beps.htm.

[7]The Anti-Tax Avoidance Package is part of the Commission's agenda for fairer, simpler and more effective corporate taxation in the EU. It contains several measures: Anti-Tax Avoidance Directive, Recommendation on Tax Treaties, Revised Administrative Cooperation Directive and Communication on External Strategy. For more details, see: http://ec.europa.eu/taxation_customs/taxation/company_tax/anti_tax_avoidance/index_en.htm. The Council adopted the Anti-Tax Avoidance Directive (ATAD) on July 12th, 2016, see: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L1164&from=EN. On February 21st, 2017, Member States agreed on a directive amending ATAD (so-called ATAD 2), see: http://europa.eu/rapid/press-release_IP-17-305_en.htm [Accessed 27.03.2017].

[8] In contrast to "you win, I lose", as under the traditional enforcement methods used by tax administrations. See Owens (2012, p. 518).

of equality before the law, which is fundamental to most legal frameworks? Furthermore, does the fact that access to a co-operative compliance programme is conditional on criteria set by the tax administration violate the principle of equality before the law as between large business taxpayers, even if it is acceptable to treat large taxpayers differently from small and medium-sized enterprises (SMEs)?

This issue of legal equality and co-operative compliance was discussed in the OECD's 2013 report, "Co-operative Compliance: A Framework: From Enhanced Relationship to Co-operative Compliance" (pp. 45–48). The report argues that co-operative compliance does not breach the principle of equality since large corporate taxpayers are distinguished by the complexity and scale of their operations, which demand a different organisational approach than is appropriate to the management of small and medium-sized corporate taxpayers (OECD, 2013, pp. 45–48). This conclusion is reasonable enough in the context of an abstract discussion of the concept. When it comes to an analysis of specific practical implementations of the concept, the way in which the line is drawn between those taxpayers that are eligible to enter the co-operative compliance programme and those that are not may be more problematic. The issue boils down to how the segment of large business taxpayers should be defined in order to ensure that the co-operative compliance programme does not violate the principle of legal equality.

The purpose of this paper is to analyse what impact the principle of legal equality may have on the design and implementation of co-operative compliance programmes. How should policymakers implement the concept in the institutional and legal framework of the tax system so that it is compliant with the principle of legal equality? The existing literature on co-operative compliance has not paid much attention to this topic.[9] This paper aims to help to fill that gap.

The analysis of the principle of legal equality is limited to a generic discussion; differences in the legal systems of countries influence the precise way in which the principle is given effect in any given legal system. This discussion is, however, essential because, in most countries, the principle of equality has a constitutional rank. A co-operative compliance programme in a specific country will have to comply with the constitutional requirements of that country. This paper does not address all these country-specific differences in understanding the principle but offers some generic recommendations for tax policymakers.

The starting point is a description of the concept of co-operative compliance as a model tax measure codified by the OECD. Next, we discuss the role of legal equality in designing tax measures and identify basic criteria for assessing their compatibility with the principle of legal equality. Selected co-operative compliance programmes implemented in certain countries are discussed by reference to these criteria. Finally, we make some recommendations about the design of co-operative compliance programmes so that these programmes comply with the principle of equality.

[9] As explained, the issue was discussed in the OECD's 2013 report. Otherwise, it has only been mentioned marginally, e.g. in Freedman (2011, pp. 649–650).

CO-OPERATIVE COMPLIANCE PROGRAMME AS A TAX MEASURE PROMOTING CO-OPERATION ABOVE DETERRENCE

Of all the tools designed to counter aggressive tax avoidance by taxpayers, the co-operative compliance programme is the one that focusses on improving the relationship between the tax administration and taxpayers the most. It is not based on deterrence but aims instead to encourage voluntary compliance. It can be thought of as a form of tax incentive, under which taxpayers obtain some benefits in exchange for greater transparency.

The concept was defined within the work of the Forum on Tax Administration and the OECD.[10] It was explained as a special type of relationship between the tax administration and the taxpayer that is based on trust, transparency and mutual understanding. It represents a shift from a retrospective and primarily repressive control to a relationship based on ongoing discussion of the tax treatment of key transactions in real time, or even prospectively (Leigh Pemberton & Madjdanska, 2016, p. 253). The rationale for this kind of relationship is consistent with the overall aims of a compliance risk management strategy. Under such a compliance strategy, the tax administration adjusts its enforcement tactics to reflect the tax risk profile of the taxpayer. This enables the tax administration to manage its (scarce) resources in a more efficient way. Co-operative compliance is just one of a suite of measures that are applied to taxpayers depending on their record of compliance and the tax risks they pose. Usually, only taxpayers who are willing to be compliant and to co-operate are invited to enter into co-operative compliance relationships. Co-operative compliance constitutes part of a broader compliance strategy.

The essence of the co-operative compliance model is an exchange of transparency for certainty. The taxpayer is expected to offer full disclosure in respect of its tax position, while the tax administration should provide the taxpayer with certainty about its tax treatment, ideally in advance and certainly earlier than might otherwise be the case. In order to achieve this, the relationship between the taxpayer and the tax administration is based on an ongoing dialogue about issues of doubt or difficulty, preferably in real time and sometimes even prospectively. The desired outcome is improved compliance by taxpayers signing up to the co-operative compliance model at a lower cost for both parties (van der Hel-van Dijk & Siglé, 2015, pp. 760–783).

Co-operative compliance was defined by the OECD in its reports as a concept built on seven pillars (OECD, 2008, p. 39; 2013, p. 19). These are transparency and disclosure, which are expected from taxpayers; and commercial awareness, impartiality, proportionality, openness and responsiveness, which are required from tax administrations.

For the taxpayer, disclosure and transparency are obligatory. It means that a taxpayer should be ready to discuss its tax position and disclose all facts relevant to the tax assessment. It should not invoke legal privilege to avoid disclosure of information that will assist the tax administration in fully understanding the tax positions taken in a return. Adequate transparency and disclosure are dependent on the taxpayer having a sufficiently robust system of internal control.[11] An internal control system makes it possible to validate the outputs the taxpayer

[10] Three fundamental reports addressing the concept of co-operative compliance: OECD (2008); OECD (2013); OECD (2016).

[11] van der Enden and Bronzewska (2014, p. 568). The need for the tax control framework also explains why the concept of co-operative compliance generally covers large business taxpayers only. However, the Netherlands included small and medium-sized business taxpayers in its programme, but the Dutch tax administration relied on

provides to the tax administration. This system is known as the tax control framework. It should manage, control and monitor the correctness of reported tax positions. Tax control frameworks ensure that tax administrations can trust the information provided by taxpayers. To put it simply, a tax control framework serves as an objective justification for the trust that is central to the concept of co-operative compliance (van der Enden & Bronzewska, 2014, p. 572).

For the model to work, tax administrations also need to meet some specific requirements. First of all, tax administrations should have a good understanding of the commercial drivers that are behind the transactions and activities undertaken by taxpayers. Commercial awareness is necessary in order to understand the broader context of an activity or transaction. Second, tax administrations should be impartial. In that context, impartiality should be understood broadly: it should apply equally to the substance of decisions taken, the way in which cases are selected for audit and the conduct of the audit itself. In addition, the task of dispute resolution should be approached with a high level of consistency and objectivity. Tax officials should maintain a professional and critical attitude towards the large business taxpayers they deal with and the information they obtain in the course of their dealings with those businesses. They should act fairly and not primarily in a revenue-oriented manner (Soler Roch, 2012). Third, actions of the tax administration have to be proportionate. Proportionality is concerned with the decisions the tax administration makes about any issues that do arise in the course of its dealings with a taxpayer, including the allocation of resources to investigations and issue resolution. It is obviously related to the notions of impartiality and of reasonableness. Last but not least, openness and responsiveness should characterise the behaviour of tax administrations engaged in co-operative compliance relationships. According to the OECD (2008), these attributes are important if constructive relationships are to be established with taxpayers and make it much easier to handle tax issues with the taxpayer in real time. Real-time working is the most effective way by which to achieve early certainty, which benefits both parties and is highly valued commercially.

Participation in a co-operative compliance programme will tend to limit the number of disputes between the taxpayer and tax administration, as both parties will have a shared understanding of the facts and the tax issues at stake. Even if the parties cannot agree on the correct tax outcome and need to resort to the courts to resolve matters, court proceedings are likely to concern issues of interpretation of law only, rather than the establishment of facts. This is because the tax control framework, which is a precondition for participation of a taxpayer in a co-operative compliance programme, ensures that questions of fact can be readily resolved. When disputes do arise, the process of resolution should be much speedier.

To summarise, co-operative compliance is expected to offer benefits to both taxpayers and tax administrations. Taking into account the benefits the concept brings to taxpayers, it could be seen as a type of tax incentive. In particular, in the post-BEPS world, with increased tax scrutiny, an increased number of tax obligations, and increased compliance costs and tax uncertainty, the benefits to taxpayers and tax administrations are even more attractive. Consequently, it is even more important to ensure that a co-operative compliance programme's design is compliant with relevant legal principles. Specifically, if access to co-operative

tax intermediaries to provide the required level of control. In the case of small and medium-sized business taxpayers, the Dutch tax administration signs a covenant with a tax service provider. It could be argued that this design does not fully embody the values promoted by the concept of co-operative compliance, namely trust, mutual understanding and transparency. There is no direct co-operation between the Dutch tax administration and small and medium-sized business taxpayers taking part in the programme, so the primary focus is the relationship with the intermediary. However, given the numbers of SMEs, some form of intermediation is probably inevitable.

compliance is limited to certain taxpayers, that must not represent unjustified discrimination and incompatibility with the principle of legal equality.

IMPACT OF THE PRINCIPLE OF LEGAL EQUALITY ON TAX MEASURES DESIGN

General remarks

The principle of equality in tax matters is an expression of the general principle of equality (J. L. M. Gribnau & Saddiki, 2003, p. 27). Legal equality is perceived to be one of the main underpinning principles of modern legal systems, as well as a value that is important in modern society. Some scholars claim that law which does not fulfil certain requirements of equality cannot be labelled law (J. L. M. Gribnau, 2013). As such, legal equality is not the product of the will of some law-making institutions (J. L. M. Gribnau & Saddiki, 2003, p. 66) but its origins lie "in a sense of appropriateness developed in the profession and the public over time" (Dworkin, 1978, p. 40). It is often presented as one of the fundamental principles that function as a check on legislative power (Vanistendael, 1996, p. 5), protecting citizens against arbitrary interference in their lives (H. Gribnau, 2013).

For the purpose of tax law, but not only tax law, the principle of equality is usually perceived as being a methodological instrument (H. Gribnau, 1999, pp. 31–32). As such, it does not have a specific content and is not exhaustively incorporated in the positive law, but it generates standards for treatment, i.e. it sets limits on what constitutes legitimate discrimination between parties in law. It is able to adapt to changes in the content of the tax law over time.

Although the principle of equality has a dynamic character due to its indeterminacy and openness, it does not mean it is entirely meaningless. It derives its meaning from normative standards that precede it. In order to have meaning, the principle has to incorporate external values that determine which persons and treatments are alike. The principle acquires its specific meaning in a particular society and legal culture. In the case of tax law, the tax regulation and tax consequences establish the relevant framework. Therefore, the practical application of legal equality is unique to each jurisdiction (H. Gribnau, 1999). It very often depends on place and time.

Regardless of differences in the exact meaning of the principle of equality in the concrete situation, the common thread underlying the principle of equality is that legal subjects have equal rights before the law. In many countries, the principle has been codified in the constitution. However, even those countries that have not codified their constitution in a single legal instrument still recognise legal equality as a fundamental principle of their law.[12] But what exactly does "equality" mean in this context?[13] In the theory of law, four conceptions of the principle of equality have been developed that attempt to answer that question. Perhaps the best known are the formal and substantive conceptions of the principle of legal equality. These two conceptions describe the scope of the principle of legal equality. They do so by addressing the impact of the principle on the content or operation of the law. There are some other conceptions that focus, instead, on the way the principle of equality affects certain actors. These conceptions distinguish between the principle of equality as a postulate affecting the legislator

[12] We will demonstrate this below when describing the UK tax system.
[13] See the general discussion on legal equality: Gosepath (2011).

and as one that affects the administrator, in our case, the tax administration. Below, we examine each of these four conceptions and present how they have been embodied in tax law.

Different conceptions of the principle of equality and co-operative compliance programmes

Formal and substantive principle of equality in tax law

Of the four conceptions of the principle of equality that we deal with in this paper, the formal one seems to be the oldest. The concept of the formal principle of legal equality can be traced back to Aristotle (Barker, 2006-7, p. 5). According to Aristotle:

> things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unalikeness. (…) Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal (Aristotle, 1925, vol. 3.1131a-1131b) (W.D. Ross, Trans.).

The formal principle of equality acknowledges that persons are not equal. We should give the same rights and impose the same obligations only to the extent that individuals are in equal positions. That is why application of the formal principle of legal equality requires comparison (Tobler, 2005, p. 20). Those that are not equal can be treated differently, but different treatment needs to be applied proportionally. The formal principle of legal equality determines behaviour through applying rules and procedures consistently (Wesson, 2007, p. 751). This is also the reason why it is sometimes seen as an empty shell (Westen, 1982).

In the context of tax law, the formal conception of the principle of equality requires a uniform application of tax law (Sousa Pinto, n.d.). Personal features of taxpayers are not relevant. For example, persons in receipt of the same income shall pay the same amount of tax. Procedural obligations also need to be imposed equally across all taxpayers. For instance, the obligation to file a tax return should be imposed equally on all taxpayers.

What do we mean, then, by substantive conception of the principle of legal equality? In opposition to the formal principle of legal equality, the substantive principle of legal equality relies on an assumption that all subjects of law should be equal (Rabe, 2001, pp. 290–293). It was developed with the advent of the idea of natural rights and the belief that all men are created equal (Rosenfeld, 1986, p. 1702). It aims to provide substance to the concept of equality. So, in light of the substantive principle of legal equality, the distribution of rights or obligations should be arranged in a way that achieves an equal result. In this way, the substantive principle of legal equality may benefit those who, at least initially, are less privileged. The concept has been promoted mainly by egalitarians who believe in substantial government intervention to bring about equality. In this sense, the principle of equality requires the elimination of inequalities from the system (Chemerinsky, 1983, p. 586).

The substantive doctrine does not always amount to a commitment to actual equality but may instead focus on equality of opportunity. So, we can find the substantive principle of equality in the works of Locke (1690/1980), who argued that all human beings have the same natural right to both (self) ownership and freedom. With respect to contributions to the cost of government, Locke said that "it is true governments cannot be supported without great charge, and it is fit every one who enjoys his share of the protection should pay out of his proportion

for the maintenance of it" (Locke, 1690, Chapter XI.140). Locke saw equality as a natural attribute of people. He said:

> (T)he execution of the law of nature is in that state put into every man's hands, whereby every one has a right to punish the transgressors of that law to such a degree as may hinder its violation…. For in that state of perfect equality, where naturally there is no superiority or jurisdiction of one over another, what any may do in prosecution of that law, every one must needs have a right to do (Locke, 1690/1980, p. 7).

He postulated that they should be still equal when they enter society. It is a libertarian vision of equality that applies to rights, not necessarily to property. Rights are inalienable (Harrison, 2010, p. 43). In order to protect them, humans agreed on a social contract and established government. Government is restrained by the natural rights of humans. Under these circumstances, humans are presumed to be capable of taking care of themselves. They may compete. Additionally, they have a right to the produce of their own labour (Russell, 1945/1967, p. 634). However, an ability to accumulate money leads to economic inequalities. Locke accepted that fact and did not suggest taking preventive measures (Russell, 1945/1967). In fact, economic inequality is a result of equal and natural rights.

In opposition to Locke, Rousseau was against economic inequalities. He saw private property as a source of inequalities and a source of all evil as well. For Rousseau, private property was theft rather than the reward for labour (Capaldi & Lloyd, 2016, p. 18). He said:

> How many crimes, wars, murders, how many miseries and horrors mankind would have been spared by him who, pulling up the stakes or filling the ditch, had cried out to his kind: Beware of listening to this impostor: You are lost if you forget that the fruits are everyone's and the Earth no-one's (Rousseau, 1754).

In this way, Rousseau postulated a communitarian ethic. So, he believed that the taking of property by government is just, because it is owned only by the few. In this way, Rousseau valued equality, even at the expense of liberty (Russell, 1945/1967). It distinguishes him from Locke, for whom equality meant the recognition that individuals have equal rights, including to liberty. Rousseau promoted welfare rights which impose an obligation to provide goods, benefits and means. For Rousseau, equality requires equality of outcome (Capaldi & Lloyd, 2016).

In (direct) tax law, the substantive principle of equality has been reflected in the ability to pay principle (Påhlsson, 2014, p. 151). According to the ability to pay principle, every person should contribute to the public burden in proportion to his "ability" (Englisch, 2014, pp. 439–464). The ability to pay principle reflects a desire to achieve a degree of equality in the outcome which, in this case, means the fair distribution of the effective tax burden. It sets the standard for horizontal tax equity, because it requires that all taxpayers with the same ability to pay should bear the same tax burden (Bammes, 2012, p. 22). It has been used as a justification for progressive taxation as well as redistributive policy tools that favour the poor.[14] Although it is primarily relevant only to the taxation of individuals, it could be reflected in corporate taxation as well (Englisch, 2014, p. 461).

[14] Englisch (2014, p. 443). In addition, the ability to pay principle is often seen as drawing a dividing line between taxation and expropriation of property. See Greggi (2011, p. 369); Vukčević (2014). There are some scholars who advocate against the ability to pay principle. See Gassner and Lang (2000, p. 643 (at 644)).

As we see, both dimensions of the principle of legal equality, the formal and the substantive one, have some implications for tax law. The difference between the two can best be illustrated by way of a compatibility test. In the case of the substantive principle of equality, it is necessary that taxpayers who are better off are not allowed to achieve benefits unavailable to others. By contrast, the formal principle of equality offers a justification for different treatment on the grounds that there are material differences in the circumstances of the taxpayers affected.

Equality and equality before the law

The substantive conception of equality has implications for the content of tax law, while the formal conception of equality seems more relevant to procedural questions affecting the application of the law. Another way of looking at this is to consider who is subject to the doctrine. The different conceptions of equality may be seen as imposing obligations on different actors. We can distinguish the principle of legal equality as a postulate directed at the legislator (sometimes called equality in the law) from equality as a postulate directed at the law's administrator (equality before the law) (Hopkins, 2015, p. 18).

This conception of legal equality from the standpoint of who the principle is addressing stems from works of Kelsen (J. L. M. Gribnau, 2003, p. 19). Kelsen distinguished a principle of legal equality that relies only on fair application of the law. Kelsen (2012, sec. 23) stated:

> And now what of the special principle of so-called equality before the law? All it means is that the machinery of the law should make no distinctions which are not already made by the law to be applied. If the law grants political rights to men only, not women, to citizens only, not aliens, to members of a given race or religion only, not to members of other religions or races, then the principle of equality before the law is fully upheld if in concrete cases the judicial authorities decide that a woman, an alien, or the member or some particular religion or race, has no political rights. This principle has scarcely anything to do with equality any longer. It merely states that the law should be applied as is meant to be applied. It is the principle of legality or legitimacy which is by nature inherent in every legal order, regardless of whether this order is just or unjust.

The principle of equality before the law is a postulate addressing the law's administrator. It is preserved if law is applied in the same way to all its subjects. The aim is to assure that law is applied in a consistent manner. In this sense, equality before the law protects citizens from arbitrariness in the application of the law (Miguel, 1997, p. 373; Sadurski, 2008, Chapter 3). However, it accepts the rules encoded in the law on their own terms. The content of law is irrelevant. It is only concerned with the process of applying the law. In this sense, it is sometimes seen as an aspect of the principle of legality (Miguel, 1997, p. 374). It should result in equal and impartial administration. The opposite to the principle of equality before the law is inequality before the law. Inequality before the law is mirrored in political abuse or otherwise imprudent exercise of power (Zemach, 2011, p. 147). When, and to whom, does the principle of equality before the law apply? It is relevant to any proceedings of government bodies. In the tax law system, it is a postulate directed at the tax administration. The tax administration should apply the law equally.

By contrast, the content of law is a direct concern of the notion of equality in, rather than before, the law. It is the principle of equality in the law that calls for a fair legislation. It is a postulate addressing the legislator. It says how the legislator should draft the law to meet requirements

of legal equality. It does not deal with how the law is applied. It asks instead if the content of the law is fair.

Different conceptions of the principle of legal equality and co-operative compliance programmes

So, there are different conceptions of the principle of legal equality and each of them has some relevance to tax law, including procedural tax law. Co-operative compliance programmes are a form of procedural tax law. Which of the conceptions of legal equality that we have discussed are relevant to co-operative compliance programmes?

To address this question, first, we look at the conception of the principle of equality in terms of who is obliged to apply it; whether it is the legislator or the tax administrator. In other words, we ask whether the introduction of a co-operative compliance programme is the matter of equality in the law or before the law? In the context of co-operative compliance programmes, it is not clear that the principle of equality as a postulate to the legislator has any relevance. As we said, co-operative compliance programmes usually build upon the existing legislation. It means that their implementation is not dependent on the will of the legislator. The implementation of these programmes usually does not involve any changes in the law. This is so because they are not, generally, intended to affect the amount of tax payable, only the process of arriving at the correct result.[15] In co-operative compliance programmes, it is equality before the law that is at issue: has the tax administration applied the law in compliance with the principle of equality?

As it is equality before the law that matters in the context of co-operative compliance programmes, it is compliance with the formal conception of the principle of equality that needs to be considered. By contrast with the substantive conception of the principle of equality, which looks at the content of law and, as such, is addressed at the legislator, the formal conception imposes obligations on the administrator. It is so because the formal principle of equality deals with the way the law is applied. It requires consistency in administration and application of the law. It tests whether the administrator designs and calibrates the scope of a specific programme to reflect legal and factual differences between taxpayers. In the case of co-operative compliance programmes, it means that the principle of equality requires tax administrations to design and apply them in accordance with factual and legal differences between the taxpayers concerned.

Our a priori conclusions are supported by factual observations. Most existing co-operative compliance programmes are based on the procedural legal framework. They acknowledge differences between taxpayers and aim to tailor legal instruments to achieve better results and to improve the efficiency and effectiveness of tax administration. We say, however, "in most cases", because recently some countries have chosen to implement co-operative compliance programmes through legislation.[16] This, in turn, suggests that an examination of the principle of equality as a postulate to the legislator is required. However, although in these cases a postulate of equality is addressing the legislator, it is still directed at the procedural rights and obligations. Even when co-operative compliance programmes are legislated, they form a part

[15] However, in some legal systems, the process is regulated by the law. That is why special processes require specific legal provisions that are introduced into the legal system. This is, for example, the case in Italy.

[16] For instance, Russia, Italy and Croatia implemented co-operative compliance programmes by the means of Acts of Parliament.

of the procedural law system. This means that it is still the formal conception of equality that needs to be examined.

These are, however, exceptional cases. Most co-operative compliance programmes are developed by the tax administration within its discretionary power. As a result, they should be tested against the formal conception of the principle of legal equality as applied by the tax administration. The principle of equality in this context should work as a limitation imposed on its conduct. It should protect taxpayers from arbitrary actions by the tax administration. In any case, the concept of co-operative compliance does not aim to change the law. So, co-operative compliance programmes should not do that either. The test of legal equality should examine how the tax administration applies the law. The issue at stake is whether the tax administration applies the law in compliance with the principle of legal equality; specifically, with the formal principle of equality before the law.

The principle of legal equality in different jurisdictions

The sources of the principle of legal equality.

The principle of equality may be applied in different ways by the courts of different countries to limit the power of the legislator or to limit the discretionary power of the tax administration (in case of equality before the law) (Vanistendael, 1996, p. 6). In order to reveal differences and similarities in approaches to this principle, we briefly analyse three different experiences. The Dutch, Italian and UK systems illustrate the role the principle of legal equality plays in different legal frameworks, in particular, in the context of tax law.

The source of the principle of legal equality is usually the constitution. The principle is sometimes reiterated in taxpayers' rights charters or administrative principles. However, in some cases, the international legal framework serves as a source of the principle of equality.

All three countries, the Netherlands, Italy and the UK, are EU Member States[17], parties to the European Convention on Human Rights (ECHR), World Trade Organization (WTO) rules and the International Covenant on Civil and Political Rights (ICCPR). In addition, each of the analysed countries has an extensive double tax treaty network that includes non-discrimination clauses.[18] This international legal framework has had an impact on domestic tax laws. The scope of equality (and, in some cases, non-discrimination clauses) differs in each of these agreements.

In the following analysis, we do not focus on the international framework and its relationship with the principle of legal equality. Such an analysis would go beyond the scope of this paper. However, we refer to the international framework to show how it supports the development of the domestic principles of legal equality.

[17] Nonetheless, in case of the United Kingdom, the EU law may not be applied soon. On March 29th, 2017, the UK Prime Minister, Theresa May, triggered the Article 50 exit clause of the Treaty on the European Union. This started the UK's exit procedure from the EU. This is a result of the referendum held on 23 June 2016 when the majority of UK citizens who voted opted to leave the EU. The terms of the UK exit and its impact on the UK's legal framework are unknown at the time of writing this article.

[18]The principle of legal equality and non-discrimination clauses are, however, separate concepts. The principle of equality is a positive concept, while the non-discrimination principle is a negative concept.

The principle of legal equality in the Netherlands.

At the domestic level, there are two sources of equality before the law in the Netherlands. These are the Dutch constitution and the principles of proper administrative behaviour. Besides these two sources, there are a number of international commitments that have had an impact on the form of the principle of equality in the Netherlands.

As far as the Dutch constitution is concerned, the principle of equality is laid down in Article 1. It reads as follows: "All parties in the Netherlands are treated equally in equal cases. Discrimination on the grounds of religion, philosophy of life, political persuasion, race, sex, or any other basis is not permitted." The principle of equality is fundamental to the Dutch legal framework. However, its application is subject to significant limitations in the Dutch legal system, as explained below.

The second domestic source of the principle of equality is the principles of proper administration. They were developed in jurisprudence as a response to the limited scope of constitutional principles affecting the operations of the tax administration. They are perceived as a fundamental limitation of the discretionary power of the Dutch tax administration. Although some of these principles have been codified in the General Administrative Law Act (J. L. M. Gribnau, 2015, p. 206), some of them are still derived from case law. Among them, there is a principle of equality (van den Nieuwenhuijzen, 2010, p. 510). The principles of proper administrative behaviour have to be weighed against the principle of legality (H. Gribnau, 2014; H. Gribnau, 2008). Hence, the principles of proper administrative behaviour play an important role in the Dutch tax system. The Dutch tax administration has to comply with them.

The principles of proper administrative behaviour address improper actions and decisions of the administration in the application and enforcement of the law. Tax law is part of administrative law, so they apply to the tax administration. They should counterbalance the ever-growing power of the Dutch tax administration. With respect to the different conceptions of the principle of equality, the principles of proper administrative behaviour embody the principle of equality before the law (J. L. M. Gribnau & Saddiki, 2003, p. 67).

Unlike the constitutional principle that covers both the principle of equality before the law and the principle of equality in the law, the principles of proper administrative behaviour address only the application of the law and so are concerned solely with the principle of equality before the law. They are not able to affect the wording of laws, just the practice of tax law enforcement by the tax administration.

In terms of the procedural aspects of enforcing the principle of equality in the Netherlands, the Netherlands does not have a constitutional court. This is the result of a ban on judicial review of the conformity of domestic law and treaties, which is laid down in Article 120 of the Dutch Constitution. Courts are not allowed to test Acts of Parliament against the constitutional norms.[19] However, all the courts[20] have jurisdiction to test lower regulations against higher regulations and against the principles of proper administrative behaviour. Taxpayers may recall the principles of proper administrative behaviour in proceedings before the court regardless of

[19]Art. 120 of the Dutch Constitution bans the constitutional review of Acts of Parliament. Article 120 reads as follows: "The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts".

[20] In the Netherlands, there are three types of courts: the Court (Rechtbank), the Court of Appeal (Gerechtshof) and the Supreme Court (Hoge Raad). See: https://www.government.nl/topics/administration-of-justice-and-dispute-settlement/contents/the-dutch-court-system.

the existence of the discretionary power of the Dutch tax administration. Taxpayers have recourse to the principles of proper administrative behaviour, despite the fact that the inspector's decision may not conflict with the strict application of the law (J. L. M. Gribnau, 2015, p. 206). As a result, the principle of equality before the law is, in practice, quite strongly protected while acts of the legislator cannot be tested against the constitutional principle of legal equality.

As regards Acts of Parliament, the Dutch Supreme Court applies the special constitutional provision that provides that no national regulations may conflict with treaty provisions.[21] In other words, the Dutch Supreme Court is authorised to test Acts of Parliaments only against the principle of equality as enshrined in some international conventions. This results in an indirect constitutional review of the legislation (J. L. M. Gribnau & Saddiki, 2003, p. 71).

This means that the international legal framework plays a part in enforcing consistency with the principle of legal equality in Acts of Parliament in the Netherlands. In the Dutch context, international law has had a significant impact on the domestic legal framework.[22] Taxpayers can invoke self-executing treaty provisions in court (Barkhuysen, den Ouden, & Schuurmans, 2012). As we said, the Netherlands is an EU Member State, party to the ECHR, WTO rules and the ICCPR. Each of these legal systems has a potential impact on the Dutch principle of legal equality. Some case law in the Netherlands has been decided upon on the basis of a direct application of Article 26 of the ICCPR.[23]

In accordance with the principles of proper administrative behaviour, the Dutch courts apply the formal principle of legal equality (although only with respect to secondary regulations and not Acts of Parliament). In general, the principle of legal equality is violated when there is unequal treatment of equal cases and there is not a reasonable and objective ground for that unequal treatment. Reasons of simplicity and efficiency or practicability and verifiability are examples of accepted objective and reasonable justification of differentiation. The Dutch courts also recognise there has been a violation of the principle of legal equality when different treatment of unalike cases is not proportionate. In addition, the Dutch courts recognise indirect discrimination as a violation of the principle of legal equality. This can arise when a regulation contains a feature that, in itself, is not discriminatory but the practical application of which bears disproportionately on one group of taxpayers.

The principle of legal equality in Italy.

In Italy, the principle of equality is also recognised at the constitutional level. Article 3 of the Italian Constitution concerning the principle of legal equality reads as follows: "(...) all citizens have the same social dignity. They are considered equal before the law without any difference of sex, race, language, religion, political opinion, personal or social condition." This principle is applied in tax law (di Pietro, 1999, p. 118). The supplement to the principle in the Italian tax system is Article 53, according to which everyone must contribute to public expenses in proportion to his ability to pay. Article 3 and 53 of the Italian constitution together create the concept of equal capacity of contribution. In this way, the principle of equality in the Italian system offers effective protection against discriminatory policy. These constitutional provisions underpin the principle of equality as a postulate addressing the legislator. In Italy,

[21] Article 94 of the Dutch Constitution.
[22] Articles 93 and 94 of the Dutch Constitution.
[23] de Blieck, 2004. See also cases: HR, 8 July 1988, No. 24964, BNB 1988/302 (Study room was not violation with Article 26 of the ICCPR). See, more recently, H. Gribnau (2013).

the examination of whether the legislator and, as a result, the law is compliant with the constitutional principles lies in the hands of the Italian Constitutional Court. The competence to examine the laws includes the competence to test the compatibility of those laws with the principle of legal equality.[24] The Italian Constitutional Court can review abstract issues as well as concrete issues connected with a specific controversy pending before another court (J. L. M. Gribnau & Saddiki, 2003, p. 89). It applies the principle of legal equality both to direct and indirect tax laws. It covers sanctions and the regulation of legal protection in the tax system.

In addition, the constitutional principles (most of them) are, in a way, self-executing too. Every judge (not only those in the Italian Constitutional Court) can directly apply them when deciding cases too.

In addition to the principle of legal equality as a postulate addressed to the legislator, the Italian constitution enshrines the principle of equality before the law. Article 97 of the Italian Constitution reads as follows:

> (Public offices)
> (1) The organization of public offices is determined by law ensuring the proper and fair operation of public affairs.
> (2) Areas of competence, duties, and responsibilities of public officials must be defined in regulations on public offices.
> (3) Appointments for public administration are determined by public unless otherwise specified by law.

According to Italian scholars, this provision should be read as specifying that any public administration must behave impartially, with efficiency and effectiveness in the public interest (Greggi, 2011). With respect to operations of the public administration, it is the first and the most important provision (Einaudi, 1948, p. 661). Taking this into account, the Italian Constitutional Court is allowed to test the organisation and the functioning of the tax administration against the principle of the equality before the law.

In the administration of the tax system, the principle of equality before the law has a very practical application. Specifically, it affects the process of choosing taxpayers to submit to tax controls. In this procedure, the Italian tax administration has to follow general criteria and indicia of tax risks, taking into account relevant and objective clues of tax evasion or tax avoidance. For the purpose of direct taxation and VAT, criteria are fixed annually by the Minister of Finance in a decree. The Minister takes into account the operative capacity of the tax administration (La Scala & Tenore, 2010, p. 373).

In addition, like the Netherlands, Italy is party to many international agreements that impose the obligation on the legislator and administration to act in compliance with the principle of equality. Taking into account the extensive scope of the domestic principle of legal equality, the courts, unless required to by the facts of the case, do not have to make reference to the international framework.

[24] According to Salermo: "on the basis of the principle of equality, the Court may carry out an evaluation of the reasonableness of the law in terms of symptomatic figures that are mostly similar to those adopted by the administrative jurisdiction— i.e., when the law has flaws relating to its internal logic, to the contradictions between means and ends, to the groundlessness of motives that justify exceptions or differences of treatment, and so forth". See Salerno (2011, p. 121).

The Italian Constitutional Court applies the formal principle of legal equality. This means that the existence of the principle does not exclude the possibility that the Italian legislator may choose unequal solutions in designing tax laws. The Italian Constitutional Court recognises the discretionary power of the legislator in pursuing the state's interest in the payment of tax (di Pietro, 1999, p. 123). Since it is recognised as the manifestation of the public interest, it can prevail over the principle of equality. Much importance is attached to the financial goals of the state. Existing analysis of the practice of the Constitutional Court proves that the court refuses to consider cases of unequal treatment if the legislator recognised them as important (J. L. M. Gribnau & Saddiki, 2003, p. 91). In that context, it is worth emphasising the role played by Article 81 of the Italian Constitution. The provision qualifies the financial interest of the state as deserving protection in the law. This has been mirrored in the Constitutional Court practice which pays attention to the balance between the protection of equality and budget imbalances.

The Constitutional Court pays a lot of attention to the purpose of tax law aims. As long as a tax choice is consistent with its purpose, even if it is objectively discriminatory, it is not generally to be set aside. However, in order to balance the interest of the state in tax revenue against the interest of the taxpayer in an equal distribution of the fiscal burden, the Italian Constitutional Court limited the legislator's discretionary power by establishing the principle of reasonableness. In this way, the Constitutional Court protects taxpayers from abuse in tax law (di Pietro, 1999). The principle of reasonableness works as a guarantee that the equality principle of the constitutional law is complied with. It means that unequal tax regimes applied to similar situations are discriminatory if they are not reasonable (di Pietro, 1999, p. 122). The analysis of the case law of the Italian Constitutional Court proves that instances in which the provisions of laws are held to be discriminatory are highly exceptional (di Pietro, 1999). The Constitutional Court gives the legislator a certain margin of appreciation. In cases in which it has to decide whether a justification is objective and reasonable, it differentiates between individual or fundamental aspects and commercial aspects. In the former case, it takes a more rigid approach.

The principle of legal equality in the United Kingdom.

The position in the United Kingdom is rather different from the positions in the other two countries we have examined. There is only sparse evidence in the literature about the principle of legal equality in the UK (J. Jowell, 1994, p. 2). Why is that so?

The differences do not necessarily result from the fact that the United Kingdom represents the common law tradition. The United Kingdom does not have a written constitution in a modern sense. It has an unwritten or – more properly – uncodified constitution (Bogdanor, 2003, p. 5). The United Kingdom constitution consists of constitutional rules that are located in a variety of sources (most prominently, Magna Carta from 1297, the Bill of Rights of 1688, and the Parliament Acts of 1911 and 1949) which include, inter alia, Acts of Parliament, case law and binding political practices (Ryan & Foster, 2007, p. 21). "The British constitution is therefore a patchwork constitution, but a constitution nonetheless" (J. L. Jowell, Oliver, & O'Cinneide, 2000, p. 3).

The role of the doctrine of parliamentary sovereignty seems to be particularly relevant in the context of an analysis of the principle of legal equality in the United Kingdom. It has been central to thinking about the British constitution. As a result, no constitutional court has been established in the United Kingdom. In addition, it created a perception that duly enacted

legislation of Parliament cannot be challenged on any grounds, including the grounds of inequality (Baker, 2003, p. 167).

However, in recent years, this perception has been slowly changing, mainly in the area of tax law. The principle of legal equality as a tool restricting Acts of Parliament is beginning to take root in the United Kingdom taxation system (Baker, 2003, p. 167). This is thanks to international commitments. In common with the Netherlands and Italy, the United Kingdom is an EU Member State, party to the ECHR, WTO rules and the ICCPR. In its double tax treaties, the UK usually includes a non-discrimination clause. There are some concrete examples of how the international framework has affected tax law in the UK. For instance, the case of *MacGregor v. United Kingdom*[25] resulted in a change in the law. There are already international obligations in place that have made it possible to challenge Acts of Parliament on the grounds that they violate the principle of equality. That has allowed notions of equality derived from non-tax international law to affect the operation of UK tax law, albeit that, ultimately, Parliament remains sovereign.

In contrast to the principle of legal equality as a postulate directed at the tax legislator, the principle of equality before the law seems to be well established. A constitutional theorist, Albert Dicey, is seen as the one who initiated the discussion of the principle of the rule of law and, as a result, of the principle of equality before the law (Syrett, 2011, p. 39). Although some scholars present his model of the rule of law as descriptively inaccurate[26], his works are of historical value in understanding the evolution of English public law (Syrett, 2011, p. 47). His model of the rule of law relies on four pillars.[27] One of them refers to the principle of equality. According to Dicey, every man is equal before the law. He said that no person (including public officials) should have special immunities or privileges.[28] This applies the requirement of equality before the law. In addition, Dicey's rule of law indicates that the law should be applied equally to all, "save to the extent that objective differences justify differentiation". This equates to formal equality before the law.

For decades, the UK courts repeatedly took the view that discriminatory behaviour by public authorities could constitute grounds for successful judicial review[29] (J. Jowell, 1994). In *Nagle v Fielden*[30], a decision of the Jockey Club to refuse a horse trainer's licence was held to be

[25] Decision of the European Commission, 1 July 1998, No. 30548/96. The case concerned the additional personal allowance granted to a husband who cared for an incapacitated wife. The allowance was not granted in a opposite situation when it was a wife who cared for an incapacitated husband in similar circumstances. Given that, Mrs MacGregor took her challenge to the European Commission of Human Rights on the grounds that lack of allowance, in her case, was discriminatory. Mrs MacGregor won the case and the United Kingdom amended the law.

[26] William Robson was one of the first critics of Dicey's model of the rule of law in 1928, followed by W. Ivor Jenning in 1933. See Jennings (1959); Robson (1928).

[27] "… no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint (…)We mean ... when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals (…) The general principles of the constitution … are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts." See Dicey (1952, pp. 188–196).

[28] This formulation was primarily concerned with formal access to the courts. See Craig (2005).

[29] See e.g. *Scala Ballroom Ltd v Ratcliffe* [1958] 1 WLR.105.

[30] (1966) 2 QB 633.

against public policy. In the *Edwards v. SOGAT* [31], a case on trade union rights, Lord Denning said: "The courts of this country will not allow so great a power to be exercised arbitrarily or capriciously or with unfair discrimination, neither in the making of rules nor in the enforcement of them".

Interestingly, in many cases, the UK courts do not refer explicitly to the principle of equality before the law. Instead, it has been more often "a well-disguised rabbit to be hauled occasionally out of Wednesbury hat" (J. Jowell, 1994). The standard of Wednesbury, also called a standard of unreasonableness, is a separate concept from the principle of equality before the law, albeit the two have some similarities. It is applied in judicial review of a public's authority decisions. A reasoning or decision is Wednesbury unreasonable (or irrational) if it is so unreasonable that no reasonable person acting reasonably could have made it.[32] There are cases where it is apparent that the ground of unreasonableness was used for the purpose of application of the principle of legal equality; for example, the case *R. v. Port Talbot BC ex parte Jones*[33]. The case concerned a councillor in Port Talbot who was allowed to jump the housing queue in order to be in a better position to fight the local election from her own constituency. The decision was held to be unlawful because it was unfair to others on the housing waiting list, who were adversely discriminated against. Although the principle of legal equality was not mentioned directly, it was applied.

As a result, the United Kingdom has a legal system that strongly promotes the principle of equality before the law. When exercising their functions, public authorities need to act in a way that accords with the principles of the rule of law and respects the fundamental values of human dignity and equality, and parliamentary democracy (Feldman, 2009, p. 318). Lord Hoffman, speaking in the Common Law tradition in a case heard by the Privy Council, summarised the position as follows:

> Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational.[34]

Mixed experience – common features

The analysis proves the relevance of the principle of legal equality in different legal frameworks. The principle of equality before the law is a standard in all jurisdictions, while the principle that the legislator has to respect the principle of equality is only explicit in Italy, but supranational and international legal instruments have the effect of applying the principle in the UK and the Netherlands too.

In many countries, there is a constitutional court that is specifically tasked with testing the compatibility of national law with the constitution. In some countries, this mechanism does not exist, and that is the case in the United Kingdom and the Netherlands. However, this does not

[31] (1971) Ch. 354.
[32] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* (1948) 1 KB 223.
[33] (1988) 2 All ER 207.
[34] *Matadeen and Others v. M.G.C. Pointu and Others (Mauritius*) [1998] UKPC 9: see J. Jowell (1994b).

exclude the possibility of testing legislation against the principle of legal equality. In the Netherlands, although national law cannot be tested against the principle of equality as stipulated in the Constitution, taxpayers are allowed to argue that an Act of Parliament, or its application by the tax administration, violates international conventions, the international principle of equality or the general principles of proper administration in the case of unequal application of the tax law. In the United Kingdom, constitutional arguments can be made in the court system, for example, by way of judicial review. So, while there is not a separate constitutional court, constitutional issues can be litigated.

What is striking is that, despite them having different legal frameworks, legal histories and legal cultures, the content of the principle of legal equality is virtually the same in all democratic countries (Nykeil & Sek., 2010, p. 89). Courts, when testing the tax law or sometimes even its application, apply the general definition: "alike cases should be treated alike and unalike cases should be treated unalike."

Most of the legal systems boil down their principle of equality to four questions. First, does the tax measure in question result in different treatment? Different treatment may refer both to procedural as well as material aspects. Second, it has to be decided whether taxpayers subject to that law who are treated differently are in comparable situations. The processes of comparability do not mean that compared taxpayers have to be completely equal. It could be difficult to find identical cases or identical taxpayers in the real world. Therefore, a certain perspective has to be taken into account (J. L. M. Gribnau & Saddiki, 2003, p. 66). This requires an appropriate reference framework.

In the case of the law, it is the purpose of regulation that matters. For example, that may be the framework of provisions aimed at enforcing tax law obligations (procedural tax law). Equal cases are those that share the same legal consequences in the light of certain features that are relevant to the purpose of the regulation. In this process, the courts are testing compatibility with the formal, and not the substantive, conception of the principle of equality. For example, the courts may compare the cases of taxpayers that are subject to the same procedural requirements.

The third step in the equality test considers whether there is any justification for the different treatment of taxpayers who are in comparable situations. Usually, this is concerned with the question of whether there are reasonable and objective grounds for unequal treatment. The final question to address is whether the applied tax measure is proportionate to the goals it is aiming to achieve.

Only situations in which taxpayers are treated differently, despite being in comparable situations from the perspective of the purpose of the tax law, will be seen to potentially breach the principle of legal equality and treat taxpayers unequally before the law. In such a case, it is necessary to ask if there is any objective or reasonable justification for the unequal treatment. The justification also has to be relevant from the perspective of the tax law and its purpose. The measures that differentiate taxpayers due to an objectively or reasonably justifiable reason will be permissible in the tax system. Courts seem to be generally quite lenient with respect to accepting justification grounds. In relation to tax law, general economic and socio-political aims can serve as justifications.

DESIGNING THE CO-OPERATIVE COMPLIANCE PROGRAMMES AND THE PRINCIPLE OF LEGAL EQUALITY IN TAX LAW

General remarks

To design a co-operative compliance programme that is compatible with the principle of legal equality, we first need to answer the question of whether we are applying the formal or the substantive conception of the principle of legal equality. Taking into account the fact that, in most jurisdictions, courts apply only the formal principle of legal equality, the analysis needs to acknowledge three steps: a different treatment test (identification of an advantage); a comparability test; and a justification test together with a proportionality test.

The second question is whether we aim at compatibility with the principle of equality in the law or of equality before the law. A brief presentation of the concept of co-operative compliance seems to suggest that the implementation of a co-operative compliance programme does not usually require changes in the tax law. These programmes are implemented by means of administrative guidelines and practice. As a result, it is the practice of the tax administration that must be compatible with the principle of equality, rather than the actions of the tax legislator. That means that co-operative compliance programmes need to take into account the principle of equality before the law, rather than the principle of equality in the law. This has direct practical implications in some jurisdictions. In the Netherlands and the United Kingdom, the tax legislator is only constrained by international agreements and not by a domestic constitutional principle of equality. However, the tax administration is constrained by the principle of equality before the law when it implements the tax laws passed by the legislator, and that includes the way in which it adopts the co-operative compliance model. The position is somewhat different in a country that chooses to implement co-operative compliance in legislation, as is the case in Italy. However, as we have seen, even in Italy, the primary concern is the application of the principle of equality before the law.

As a result, in our analysis, we refer only to the formal principle of equality before the law. However, where necessary, we also refer to the principle of equality as a postulate directed at the legislator.

Co-operative compliance as a measure providing benefits to selected taxpayers

A different treatment of selected taxpayers due to the application of a tax administration measure might be seen as a clear sign of a lack of compatibility with the formal principle of equality.

At the outset, we recognised that co-operative compliance offers some important potential advantages to the taxpayer. Access to these programmes is, however, usually limited to the largest taxpayers. Even among the largest taxpayers, not all of them are allowed to benefit from the programme. From the perspective of compatibility with the principle of legal equality, the question of whether the benefits available under co-operative compliance unduly discriminate in favour of participating taxpayers by comparison with those outside the programme arises.

In theory, participation in co-operative compliance should lead to improved tax certainty and lower compliance costs, thanks to the improved relationship with the tax administration. In this way, the programme should facilitate tax compliance. As the OECD report from 2013 makes plain, the concept does not aim to deliver a different or more favourable tax outcome for the

taxpayer (OECD, 2013, p. 45). It is compatible with the purpose of tax law, since it should secure the timely payment of the correct tax. It addresses the way in which the tax administration and taxpayers work together to achieve that end. It aims at injecting trust, mutual understanding and transparency into this relationship. Although these advantages seem to strengthen the tax system without giving any economic advantages to taxpayers, there are some collateral benefits that might have a quantitative effect on the taxpayer's financial position, e.g. decreased compliance costs and increased tax certainty, which will reduce the need to make financial provision for uncertain tax positions. What is important is that the model does not imply any direct tax advantages.

The OECD report from 2013 explicitly admits that the programme is designed only for the largest taxpayers. It also implies that its benefits are available only to a select group of taxpayers who are allowed to apply for participation in the programme (OECD, 2013, p. 47). Taking into account the fact that these benefits are not available to other taxpayers, co-operative compliance might be perceived as a tax measure resulting in the different tax treatment of selected taxpayers, implying a potential conflict with the principle of legal equality. This raises the question of whether the select group of taxpayers qualified to participate in a co-operative compliance programme is in a comparable situation to other taxpayers denied access to the programme. The point of reference for that question is the purpose of the tax law, i.e. to assess and collect tax duties.

The taxpayers participating in co-operative compliance programmes are usually selected on the basis of three criteria: they are among the largest taxpayers (quantitative criterion); they are taxpayers who are willing to be compliant and with a good record of past tax compliance (qualitative criterion); and they have tax control frameworks that underpin their commitment to disclosure and transparency in place (qualitative criterion).

The OECD report from 2013 recognises that large business taxpayers are distinguished by the complexity and scale of their tax affairs (OECD, 2013, p. 47). According to the OECD, this means that a different organisational approach than is appropriate in the case of small and medium-sized taxpayers is required. The 2013 report does not specify which taxpayers should be treated as large.

The second criterion, the decision by a revenue body to offer a co-operative compliance programme to taxpayers that can demonstrate that they are compliant and low-risk, is unobjectionable from the perspective of the purpose of tax law. The assessment of a taxpayer's readiness to comply is an integral part of the overall compliance risk assessment process and can be applied objectively to all taxpayers by reference to a set of indicators of good compliance and compliance risk. Each taxpayer is able to meet the requirements of being compliant and showing their willingness to be compliant. However, it is interesting to note that not every country restricts access to co-operative compliance to low-risk taxpayers. For example, the United Kingdom even seeks co-operative relationships with high-risk taxpayers.

The third criterion, which refers to the tax control framework, is an objective requirement that addresses the internal governance of a taxpayer. The tax control framework requirement ensures that the taxpayer is able to fully meet the obligation of disclosure and transparency that is central to the co-operative compliance model. The existence of an effective tax control framework is something that can be demonstrated objectively by taxpayers.

The OECD (2013) concludes that the co-operative compliance programme does not result in the different treatment of taxpayers in comparable situations (p. 47). Large taxpayers are not comparable with medium-sized or small taxpayers. The scale and complexity of the tax issues they have to confront justifies the special measures that are applied to them. Since they are not comparable to other taxpayers, a tailored approach is required. A review of some of the legal obligations imposed by many countries on large taxpayers tends to confirm this. Usually, large taxpayers have to meet higher legal standards and bear substantial compliance costs. In its 2013 report, the OECD outlined a number of features distinguishing large taxpayers from everyone else. However, the criteria suggested by the OECD are not entirely clear-cut, even if they make intuitive sense. For example, how is the complexity of tax issues to be measured? The features that distinguish large taxpayers should be precise and make it possible to draw a clear line between those who are large taxpayers and eligible to participate in a co-operative compliance programme and those who are not. In practice, many countries achieve this clarity by defining their large taxpayer segment by reference to some financial criteria (such as turnover or size of balance sheet) and the inclusion of specific high-risk or complex sectors (banking and finance, for example).

The two remaining admission criteria, i.e. being a low tax risk and having a tax control framework in place, are objective criteria that are unproblematic. They distinguish between taxpayers in different legal situations: those who are willing to be tax compliant and those who are not, and those who have effective tax control frameworks in place and those who do not.

The analysis provided by the OECD in its 2013 report examines co-operative compliance from a theoretical standpoint. In practice, countries can choose which benefits they provide to taxpayers participating in co-operative compliance programmes and the criteria used to decide who can access the programmes. The UK, Italian and Dutch programmes serve as examples of the different approaches countries can take when designing co-operative compliance programmes. The overview of these programmes is based on a two-step approach. First, the benefits unique to the particular programme's participants are presented. This is followed by a discussion of the criteria used to decide which taxpayers are eligible to participate in the programme.

Benefits available to taxpayers in the selected co-operative compliance programmes

The first question to be considered when examining the compatibility of the programmes with the formal principle of legal equality is whether they confer benefits on participants that constitute different treatment.

The Netherlands was one of the first countries to introduce a co-operative compliance model. The programme, known as horizontal monitoring, was initiated in 2005, firstly as a pilot, and was preceded by the introduction of six principles of appropriate supervision: autonomous, professional, transparent, selective, decisive and co-operative supervision (Committee Horizontal Monitoring Tax and Customs Administration, 2012, pp. 21–23). The programme offers a whole range of benefits but none affect the tax burden of the taxpayer directly. Taxpayers can expect feedback from the tax administration with regard to the application of certain provisions of the tax code or how they are being administered. The programme involves an ongoing dialogue between the taxpayer and the tax administration, which improves tax certainty. As a corollary of that, taxpayers can expect less burdensome audit processes and reduced compliance costs. The programme's benefits are available only to its participants. So, as we have said, the programme does not provide any economic advantages to taxpayers

directly. Moreover, for the purpose of this analysis, it is crucial that the programme was implemented as a part of compliance risk management strategy, alongside vertical supervision (including traditional audit), as an element of a balanced enforcement policy (Committee Horizontal Monitoring Tax and Customs Administration, 2012, p. 5). Its implementation did not require any changes in the law. It was based on the principle of proper administration.

The Italian programme, on the other hand, was implemented by way of new legislation in 2015.[35] The formal programme was preceded by a pilot project to aid the design of a framework for implementing the full programme. Taxpayers participating in the Italian co-operative compliance programme can benefit from certain specified advantages, as well as a better relationship with the tax administration. The first of these is a special penalty system. If a taxpayer participating in the programme communicates its tax risks before the submission of the tax return, a concession is provided to limit penalties to half of the maximum penalty payable (a 50% haircut on penalties). Tax risk refers to instances in which the taxpayer and the tax administration do not share the same view with regard to the correct tax treatment of a transaction (Braccioni, Accili, Gioia & Sacerdote, 2015b). Moreover, in Italy, a taxpayer participating in the co-operative compliance programme can benefit from a fast-track ruling procedure. In comparison with the normal procedure, deadlines for the tax administration are shortened significantly. The tax administration provides feedback about the suitability of the request and enclosed documentation within 15 days, instead of a maximum of four months under the normal procedure. The term for issuing a ruling is also shortened – in some cases – by more than half of the regular term (Cleary Gottlieb, 2015). In addition, taxpayers participating in the programme do not have to provide any guarantees in order to obtain tax refunds.

The last of the programmes examined, the UK programme, is, like the Dutch one, a relatively mature programme. It was implemented in 2006 as part of "Tax Compliance Risk Management" and is based on a Customer Relationship Management model.[36] Since then, it has been subject to many improvements. In 2016, it was amended and supplemented by the Framework for Co-operative Compliance. The Framework for Co-operative Compliance was included as Annex B to a consultation response document published alongside the 2016 Finance Bill.[37] The new framework sets out principles governing how HM Revenue & Customs (HMRC) and large businesses should work together, which influences HMRC's approach to risk management. Continued compliance with the framework serves as an indicator of lower risk behaviour and non-compliance with the framework as an indicator of higher-risk behaviour.[38] In terms of benefits granted to large business taxpayers participating in the UK programme, they do not have any direct effect on the tax burden. The UK programme aims to build a relationship between the tax administration and the taxpayer based on trust, mutual understanding, openness and transparency. To achieve that, the tax administration provides large business taxpayers with greater certainty in relation to tax exposure and the decisions taken by the tax administration. For the tax administration, there is a corresponding increase in certainty with respect to forecasting tax yield. In addition, taxpayers participating in the programme may anticipate less audit intrusion from the tax administration, since the audit and

[35] Delega fiscale, Law 11 March 2014 n.23.

[36] The details of the programme were published in the guidance on the HMRC's website: https://www.gov.uk/government/publications/large-businesses-customer-relationship-management-model/large-businesses-customer-relationship-management-model [Accessed: August 9, 2016].

[37] Annex B available: https://www.gov.uk/government/consultations/improving-large-business-tax-compliance.

[38] See more details in: https://www.gov.uk/government/consultations/improving-large-business-tax-compliance [Accessed: August 9, 2016].

enforcement focus will be biased towards those not committed to high compliance standards. As a result, it should lead to a reduced level of compliance costs.

All three examples demonstrate that countries usually grant benefits to participants in co-operative compliance programmes in economic terms, even if they are hard to quantify (reduced compliance costs for the most part, together with earlier certainty and, therefore, lower provisions for uncertain tax positions). A distinction should be made between those benefits that represent a direct reduction of the tax burden (including tax-related penalties) and those that do not affect the quantum of the tax liability itself but deliver other, indirect, benefits. All in all, co-operative compliance programme participants are expected to be put in better economic positions in comparison to other taxpayers. Whether or not those benefits, particularly the indirect benefits, are realised in practice is an interesting question in its own right, but one that is beyond the scope of this paper.

Taxpayers allowed to access co-operative compliance programmes

With respect to the different treatment of co-operative compliance programme participants in comparison to other taxpayers, it is crucial to assess whether the two groups are in comparable situations. In order to answer this question, it is necessary to identify the taxpayers who are allowed to participate in co-operative compliance programmes. In circumstances where equivalent cases are treated differently, possible justification grounds and proportionality of the tax measures applied should be considered.

Most of the programmes examined restrict access to co-operative compliance relationships by providing a few preliminary conditions. These conditions are determined differently. Programmes often build upon a mix of quantitative and qualitative criteria. Usually, the quantitative criteria narrow the scope of eligible taxpayers to the largest businesses.

The Netherlands designed a special programme not only for large taxpayers but also for medium-sized and small taxpayers. In this way, the Dutch tax administration offers all taxpayers the possibility of entering into co-operative compliance arrangements. So far, it has been the only programme to extend its scope to the domain of small and medium-sized taxpayers (van der Hel-van Dijk & Poolen, 2013, p. 674). The programme was designed to address a legal situation of taxpayers, based on the principle of proportional enforcement (Committee Horizontal Monitoring Tax and Customs Administration, 2012, p. 36). In particular, the higher demands of corporate governance, including the obligatory statement on the effectiveness of the internal control, compelled the tax administration to develop the programme for large taxpayers first. Separate programmes for small and medium-sized taxpayers followed.

The programme for large taxpayers addressed the "Very Large Business" segment. It is made up of the following types of taxpayer: those listed on the Amsterdam Stock Exchange, or with a standard weighted fiscal worth exceeding €25 million, or with a foreign parent company with its own standard weighted fiscal worth exceeding €12.5 million, or with at least five foreign subsidiaries each with a standard weighted fiscal worth exceeding €12.5 million (Committee Horizontal Monitoring Tax and Customs Administration, 2012, p. 36). This group of taxpayers was selected based on the higher corporate governance standards with which they have to comply. The compliance obligations imposed on these taxpayers include the US Sarbanes-Oxley Act, *Tabaksblat* and supervision by the Netherlands Authority for Financial Markets (van der Hel-van Dijk & M. Pheijffer, 2012). It is also worth mentioning that large business

taxpayers contribute more than 50% of the state's total tax revenues, which might be an important reason for creating the special programme for them (Committee Horizontal Monitoring Tax and Customs Administration, 2012, p. 36). In addition, in order to participate in the programme, taxpayers have to meet qualitative criteria. They have to prove their willingness and ability to work with the tax administration within the framework of co-operative compliance. The tax administration assesses willingness based on the tax attitude of the taxpayer. The proof of an ability to comply is a tax control framework reflecting the taxpayer's size and the complexity of its issues.

The programme design for medium-sized taxpayers is, in principle, identical. Only the quantitative criterion is different. The tax administration defines the segment of medium-sized taxpayers by reference to a tax size. In order to participate in the programme, a tax size should be higher than €2 million and less than €25 million (Committee Horizontal Monitoring Tax and Customs Administration, 2012, p. 36).

The programme for small taxpayers differs significantly. This segment gathers entrepreneurs that are too small to qualify as large or medium. Due to their size, neither individual compliance agreements or tax control frameworks are appropriate instruments. Therefore, the basis for the programme is the work of external tax consultants and auditors (tax intermediaries). The tax administration signs compliance agreements with tax intermediaries instead of with taxpayers directly. Moreover, taxpayers do not have to set up tax control frameworks. Instead, the financial service providers should use their internal quality systems to govern admission to the programme and the compliance processes (Committee Horizontal Monitoring Tax and Customs Administration, 2012, p. 44).

As this short description shows, the Dutch programme ensures that all taxpayers have access to co-operative compliance's benefits (although only with respect to national taxes). As such, it seems to be compatible with the principle of legal equality. Both large, medium-sized and small businesses may apply to participate. However, although the Dutch programme provides all taxpayers with access to co-operative compliance, different conditions apply depending on the size of the taxpayer. There are two different variants of the programme.[39] The basis on which taxpayers are eligible to participate in the two variants are objective factors, e.g. the size of small and medium-sized taxpayers, the complexity of their tax issues and the compliance burden imposed on the largest taxpayers. However, it is less clear whether these criteria are sufficient to explain the different treatment of taxpayers within co-operative compliance in all cases. Specifically, it is striking that differences in business size is the only justification for offering individual compliance agreements to medium-sized enterprises but not to small enterprises. This might give rise to discriminatory treatment of small enterprises in comparison to medium-sized enterprises. As a result, the different treatment within the Dutch co-operative compliance programme might be perceived as incompatible with the principle of legal equality. As such, there is no legal reason for the different treatment. It seems that both medium-sized and small enterprises are in legally comparable situations. That brings us to the question of whether there is any objective and reasonable justification for the differing design of the programme for small business taxpayers. The tax administration cites the importance of balanced compliance risk management decisions, which need to take into account financial importance, complexity of tax issues and the size of taxpayers, and these factors might serve as justification for unequal treatment. It seems that, as long as the signing of individual

[39] Only the programme for large business taxpayers relies on direct cooperation between the tax administrations and taxpayers. The programme for small and medium-sized business taxpayers involves tax intermediaries.

compliance agreements by large taxpayers does not affect tax outcomes by comparison with the indirect process in place for small and medium-sized taxpayers, the programme should not conflict with the principle of legal equality. The indirect process involving tax intermediaries is a pragmatic way by which to offer numerous small taxpayers the benefits of co-operative compliance.

In Italy, the programme has been devoted to large taxpayers that are defined as: (i) those with an annual turnover higher than €10 billion; (ii) those with an annual turnover higher than €1 billion who adhered to the pilot project on co-operative compliance launched by the Italian revenue agency in 2013; or (iii) those that realise investments in excess of €30 million as a result of a spontaneously initiated ruling procedure.[40] At the moment, medium-sized and small corporations are not eligible to apply to participate in a programme (Braccioni et al., 2015a). Moreover, participating taxpayers should have good track records of timely and proper traditional tax compliance. They should also establish good governance and efficient internal control systems which determine a clear attribution of duties and tasks to internal functions. They should have efficient procedures to spot, measure and manage tax risks at all company levels and efficient procedures to allow remedial actions to be taken in a very short time frame in place. Among these criteria, the quantitative one merits particular attention. It clearly divides taxpayers into two groups, based on the size of their annual turnover. As such, taxpayers with an annual turnover lower than specified in the threshold are excluded from applying for participation in the programme. It is difficult to determine the difference in the legal situation of these two groups of taxpayers. Although the OECD referred to the complexity of tax issues faced by large corporate taxpayers, it is questionable why the boundary between taxpayers is set exactly at this level of turnover. A quantitative criterion does not explain what the difference in the legal situation of taxpayers with a turnover only slightly lower than €10 billion and those whose turnover is equal to or higher than this amount is. It is doubtful whether this type of criterion, which does not refer to a difference in the legal situation (e.g. additional obligations) of taxpayers but only to an arbitrary numerical indicator of size, is compatible with the principle of legal equality. If no legal feature can be recognised behind the quantitative criterion of the level of turnover, tax measures based on this criterion would appear to violate the principle of legal equality. A court would have to decide whether there is sufficient justification for this differentiation between comparable taxpayers by reference to turnover alone. Among the possible justifications could be a desire to incentivise the compliance of the largest taxpayers and to influence the tax behaviour of taxpayers who are in a position to abuse the tax system aggressively. Additionally, it will be necessary to decide whether the applied measure is proportionate to the achievement of its goals.

Besides the criterion of turnover, it is noteworthy that there is also a group of taxpayers whose eligibility for the programme is based on a criterion of making an investment in Italy of a certain value. They are identified by reference to a special type of investment tax ruling. This

[40] The taxpayers who are eligible are those who request tax rulings available for companies that intend to invest in Italy. The new system aims to provide them with certainty about the income tax and indirect tax consequences arising from their investment plans. The investor, either resident or non-resident, must file a business plan, detailing the amount of the investment, the industry, the timing and implementation phases, and the expected number of new hires. The ruling may include, among other aspects, the likelihood of application of abuse of law or other anti-avoidance measures, tax profiles of reorganisations and whether certain asset purchases will amount to a going concern. The procedure applies to investments of not less than €30 million. The tax authority should provide the investor with a written answer within 120 days, which is binding as long as the facts and circumstances set out in the application do not change. The procedure was implemented by Article 2 of Legislative Decree No. 147 of September 14, 2015 and the implementation rules were set out in a decree by the Ministry of Economics and Finance.

ruling does place these taxpayers in a different legal situation. To issue it, the Italian tax administration reviews the tax effects of the planned investment. In this way, the Italian tax administration acquires substantive knowledge about the taxpayer's business. What is important is that any taxpayer who makes an investment of the qualifying size may apply for this ruling. However, two aspects do raise some questions. First, the ruling cannot be issued with respect to past investments. So, taxpayers who have already carried out comparable investments are excluded. Second, some may wonder how the size of the qualifying investment was arrived at.

In contrast to the Italian programme, almost all large business taxpayers are eligible to access the UK programme. It is available to all taxpayers recognised as large business taxpayers in the UK tax system. The UK co-operative compliance programme is open both to low-risk taxpayers and those who are not low-risk. Taxpayers that are low-risk need to meet certain requirements with respect to their approach to co-operation with the HMRC, governance, delivery of tax outputs and tax strategies. They need to be open and transparent with HMRC in real time. Not having low-risk status does not exclude a taxpayer from co-operation with HMRC. Nevertheless, such a taxpayer may expect more regular meetings, reviews and assessments, which should help them to improve their risk status. In cases of serious breaches of tax law obligations, HMRC may decide to withdraw the low-risk status and its benefits immediately. Since 2016, there has been an additional requirement for large businesses to publish their tax strategies relating to, or affecting, UK taxation.

This short description of the personal scope of the UK co-operative compliance programme shows that the concept of co-operative compliance guides interactions between HMRC and, substantially, all large business taxpayers. It does not involve any direct economic advantages. It only affects the way in which HMRC and large business taxpayers co-operate in achieving tax compliance. Differences in treatment are based on two types of criteria: size (quantitative criterion) and the level of compliance (qualitative criterion). Both criteria are related to how the tax enforcement system in the UK is built. It relies on a segmentation of taxpayers by size and compliance level. This may then be compliant with the rule: "alike should be treated alike, and things that are unalike should be treated unalike". The chosen criteria differentiating taxpayers reflect the principle of the UK tax system, which is to segment taxpayers and recognise large business taxpayers as a distinct group. Unlike the Italian programme, which selects only some large business taxpayers out of the segment of large business taxpayers, the UK programme is available to the whole segment and supports the aim of achieving more efficient and effective tax law enforcement. One of the distinguishing features of the large taxpayer segment is a different, i.e. more stringent, regulatory regime. However, the differences in regulatory burden do not necessarily correspond to the way in which HMRC distinguishes between large and medium-sized businesses, which is on the basis of size. Consequently, there is a degree of arbitrariness in the scope of the UK programme and that requires justification.

JUSTIFICATION GROUNDS FOR THE BREACH OF LEGAL EQUALITY

Although the provided analysis proves that the programmes are largely compatible with the principle of equality, in some cases the programme design may raise some doubts. In that case, it will be necessary to provide reasonable and objective justification of the breach of the principle.

When thinking about possible justification grounds, it helps to refer to the overall aims of the co-operative compliance model. The main goal of co-operative compliance is to improve tax

compliance by seeding trust, mutual understanding and transparency. The values promoted by co-operative compliance are crucial to good governance and may have a positive spillover effect on other areas of legal obligations. Co-operative compliance might be perceived as a way of improving the quality of governance and corporate citizenship[41] and strengthening democracy. The main pillars of co-operative compliance, which are impartiality, proportionality and responsiveness, are fundamental values of a democratic state. Implementing the co-operative compliance programme might be justified by the need to enhance the legitimacy of taxation. It might also contribute to better communication of tax policy to wider society by providing a better understanding of how businesses are held to account for their taxes. In this context, it is important to recall that co-operative compliance, with some exceptions, addresses only the largest business taxpayers and, generally, only those who are compliant or willing to be compliant. Moreover, the size of the contribution large business taxpayers make to total tax revenues is another distinguishing factor. In addition, as the OECD mentions in its 2013 report, the operational model of large businesses enables this special type of supervisory tax instrument. The smaller enterprises have different needs and require a different form of programme, such as that developed the Dutch.

In addition, the benefits obtained by the tax administration could form part of the justification for co-operative compliance programmes. Thanks to co-operative compliance, the tax administration can improve its capacity management. The tax administration can rely on the internal governance framework of co-operative compliance's participants and limit the number of audits. It is able to shift the focus to high-risk cases and high-risk taxpayers. Moreover, thanks to better access to data, it is able to improve its risk assessment. This should result in a more effective and efficient tax administration.

In general, co-operative compliance is not only a valuable tax measure for taxpayers but also for the tax administration and the state. As such, proving its relevance to the tax system and providing an objective and reasonable justification should be relatively straightforward based on the considerations we have discussed. However, any applied measure also has to be proportionate to the aim it is going to achieve. Countries should consider this when designing their programmes. The number of benefits provided within the programme should be balanced and should not go beyond what is generally achievable by other taxpayers. In particular, if the programme directly grants some economic advantages, it might be questionable whether this is necessary in order to enhance compliance. However, as long as the programme does not grant any direct economic advantages, it should be a proportionate measure.

[41] For more about links between taxation and good governance, see Brautigam (1991).

Country

Criterion	The United Kingdom	Italy	The Netherlands
Different treatment	Yes, but limited to procedural benefits. E.g. - direct contact with a tax official designated only to their tax affairs.	Yes, both economic and procedural benefits. E.g. - a 50% haircut on penalties, - fast-track tax rulings procedure.	Yes, but limited to procedural benefits. E.g. - improved contact with tax officials, - lower number of comprehensive audits.
Comparability	Yes Taxpayers chosen arbitrarily based on size of turnover.	Yes Taxpayers chosen arbitrarily based on size of turnover.	No Taxpayers participating in the programme chosen based on standard weighted fiscal worth that differentiate taxpayers with higher law obligations.
Justification	Yes	Yes	Yes
Proportionality	Yes	Questionable	Yes

CONCLUSIONS

Implementation of a co-operative compliance model should deliver benefits for the tax administration, taxpayers and also for the state. It should contribute to increasing tax revenues by promoting tax compliance and making tax compliance easier. Developing the programme

can significantly contribute to securing the timely payment of the correct tax. From the state's perspective, co-operative compliance may also promote good governance more widely. As such, it is a tax measure that, on the one hand, incentivises tax compliance and, on the other, supports the tax administration's ability to tackle non-compliant taxpayers.

Although the concept of co-operative compliance generally does not result in a different or more favourable tax outcome for the taxpayer (OECD, 2013, p. 45), the benefits it offers may have an indirect impact on the finances of the taxpayer. Some countries (e.g. Italy) do grant additional benefits within their co-operative compliance programmes that have a direct effect on the tax liability of the taxpayer. Taking into account the fact that the programme's benefits are available only to its participants, there is a risk that the principle of legal equality, fundamental to most legal frameworks, may be violated. In particular, programmes that provide direct economic advantages require special scrutiny.

The examination of co-operative compliance programmes should be focussed on compliance with the formal conception of the principle of equality. This is so because the concept of co-operative compliance builds on the procedural legal framework and it is usually introduced by tax administrations as a matter within that framework.

In many countries, courts are allowed (and actually obliged) to apply the principle of equality before the law. They can test whether a tax administration applies the law in accordance with the principle of legal equality. This means the courts in most countries could examine how a tax administration applies its co-operative compliance programme whether it is stipulated in the law or introduced by means of administrative guidelines. Nonetheless, where a co-operative compliance programme is implemented by means of a statute, the courts in some countries (for instance, the Netherlands) would not be allowed to examine whether the legislator acted in accordance with the principle of legal equality. This is so because, in some countries, courts are not allowed to apply the principle of equality to Acts of Parliament. However, the principle of equality enshrined in some international agreements could affect that if those agreements have primacy over domestic law, as is usually the case.

Our study focussed on the design features of co-operative compliance programmes that should be informed by the formal principle of equality. It showed that when designing a co-operative compliance programme, countries should pay particular attention to the criteria determining access to the programme. These should be designed in a way that permits objective and reasonable justification of any eventual difference in treatment of taxpayers within and outside the programme. Last but not least, countries should think carefully about the type of benefits granted to participating taxpayers.

In terms of the criteria determining access to the programme, countries should consider how to define large business taxpayers. Choosing criteria related to their legal obligations might make it easier to explain the rationale for special treatment. The comparability test, required under the principle of legal equality, has to take into account the purpose of tax law. Taxpayers' situations should be compared by reference to the general rules of tax procedure and the objective of the enforcement of tax liabilities and tax duties. Although the OECD points to the complexity of the legal affairs of large taxpayers as a differentiating factor, the question of how to precisely define "large" taxpayers remains. Where is the boundary between large taxpayers and other taxpayers to be drawn? The answer to this question may be crucial to the assessment of whether a programme is compatible with the principle of legal equality or not. Applying quantitative thresholds that do not correspond to any particular legal obligations seems

questionable, even if alongside the quantitative threshold, there are also some qualitative requirements. That does not alter the fact that only taxpayers meeting the quantitative threshold would be allowed to access the programme. All criteria applied should be compatible with the principle of legal equality. By comparison, the qualitative criteria do not raise any problems. They appear to be an appropriate basis for differentiating between taxpayers.

The overview of the different programmes provides some examples of possible justifications for limiting access to the programme to the largest taxpayers. Increased regulatory pressures and heavier supervisory burdens could provide grounds for different treatment. The example of corporate governance requirements, as used in the Dutch programme, shows how the scope of a programme can be limited by reference to something other than a crude monetary limit. In any case, taking into account the advantages the concept brings to taxpayers, tax administrations and states, it is clear there are some reasonable and objective justifications for limiting the programme to large taxpayers. The concept of co-operative compliance strengthens good governance and supports the tax administration in investigating cases that truly require investigation.

Last but not least, countries should make sure that benefits granted to taxpayers within co-operative compliance programmes are proportionate to the aim of enhancing tax compliance. In the light of this principle, programmes that offer some direct economic advantages might be seen as controversial. It seems that, as long as benefits from co-operative compliance are limited to procedural treatment, programmes should be found to be proportionate.

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THE US COMPLIANCE ASSURANCE PROCESS: A RELATIONAL SIGNALLING PERSPECTIVE

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Abstract

Cooperative compliance programmes have been introduced in various tax jurisdictions, with its pioneers including Australia, Denmark, Ireland, the Netherlands, the UK and the US. Such programmes are part of a wider trend in regulatory systems that emerged in the 1980s, and attempt to better balance interests between the tax authority and corporate taxpayers, and seek to reflect a more collaborative working method, as promoted by the Organisation for Economic Co-operation and Development (OECD). This paper examines the US cooperative compliance arrangement, known as the Compliance Assurance Process (CAP), and probes the nature of the relationship that ensues between the regulator and regulatee under CAP, the motivations of each party to the arrangement, and the manner in which the relationship is (or is not) sustained. This paper sheds light on such matters pertaining to CAP by examining its evolution and operation through the lens of regulation theory, drawing in particular on the work of Etienne (2013), who develops a typology of ideal type interactions and relational signals in regulatory settings. It is also informed by interview data from two separate studies involving interviews with senior in-house tax executives/advisors. Drawing on Etienne's typology facilitates a better understanding of the limits of cooperative compliance in the context of large businesses, particularly in the US environment. This paper shows the importance of adequately capturing the motivations of regulator and regulatee, demonstrating they do not carry equal weight nor have they remained stable over time, and addresses the implications of these differences for the success of an initiative such as CAP. It also demonstrates that interactions between regulator and regulatee follow multiple logics, and highlights and critiques the high level of interaction required, especially during the initial stage of responsive regulation-based relationships. The paper concludes with some broader considerations around regulator-regulatee relationships, including the potential role for recent technological innovations in this context.

Keywords: cooperative compliance, Compliance Assurance Process, responsive regulation, Etienne

INTRODUCTION

Together with some other Organisation for Economic Co-operation and Development (OECD) countries, including Australia, Denmark, Ireland, the Netherlands, and the UK, the US can be seen as a pioneer in reconfiguring regulatory relationships in the field of corporate taxation into

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one that better balances interests between the tax authority and corporate taxpayers. Whereas the relationship between tax administrations and taxpayers has traditionally been strongly characterised by power asymmetry, cooperative compliance programmes aim to realise a more cooperative relationship, in which compliance should be enhanced by mechanisms other than strict control-and-punishment. Often in parallel with trends across other parts of the public sector, such as New Public Management (NPM) type modernisations, tax administrations have started to introduce enforcement mechanisms that are more responsive to specific profiles of corporate taxpayers, with the expectation that this would generate efficiencies and other benefits for both tax administrations and corporate taxpayers.

In relation to corporate tax administration, the more collaborative working method, strongly promoted by the OECD and initially referred to as the "enhanced relationship" model (OECD, 2008), was renamed and rebranded "cooperative compliance" in 2013 (OECD, 2013). This paper examines one particular form of cooperative compliance arrangement, namely the Compliance Assurance Process (CAP) programme in operation in the US. This programme was introduced in 2003 and differs from similar programmes in other countries by being both voluntary and prescriptive. CAP carves out a particular segment of the taxpaying population – large corporate taxpayers – and creates a distinctive form of regulatory interaction with that group. While the structure and history of CAP is reasonably well understood by practitioners and others with knowledge of tax regulation processes, little research has attempted to probe the nature of the relationship that ensues between the regulator and regulatee under CAP, the motivations of each party to the arrangement, and the manner in which the relationship is (or is not) sustained. This paper sheds light on such matters pertaining to CAP by examining its evolution and operation through the lens of regulation theory, drawing in particular on the work of Etienne (2013), who develops a typology of ideal type interactions and relational signals in regulatory settings. It is also informed by interview data from two separate studies involving interviews with senior in-house tax executives/advisors. By using Etienne's typology to probe the operation of CAP, we are able to better understand the limits of cooperative compliance in the context of large businesses, particularly in the US environment.

The paper is structured as follows. In the next section, we review the broader field of responsive regulation and describe Etienne's framework as a basis for evaluating the CAP programme. This is followed by a brief history and description of CAP, before we analyse its operation by reference to Etienne's model and draw some conclusions about the differences in motivational drivers between regulator and regulatees, and the implications of these differences for the success of an initiative such as CAP.

REGULATORY INTERACTIONS AND THEIR MOTIVATIONS

The area of tax administration has turned out to be one of the most fruitful areas for the practical application of "responsive regulation". Ayres and Braithwaite set out their regulatory view most comprehensively in their foundational work "Responsive Regulation" (1992). This work provides a "third alternative" (Ayres & Braithwaite, 1992, p. 3) to both the free market and government regulation, and attracted instant interest from practitioners in regulatory bodies. Ayres and Braithwaite's "Responsive Regulation" (1992) and the substantial amount of subsequent elaborations, however, dedicate limited attention to the underlying motivations of regulators and regulatees throughout their interactions. Scholarship outside the area of responsive regulation demonstrates that motivational factors are critical in order to explain the evolution of relationships between actors (Dijksterhuis & Aarts, 2010; Lindenberg, 2001).

This article identifies major differences in motivational drivers between regulator and regulatees. Arguably, an underestimation of these motivational differences accounts for many of the difficulties occurring in, for example, the Dutch cooperative compliance programme titled Horizontal Monitoring (De Widt, 2017), and it is instructive to consider the CAP programme from this perspective. To identify the relevance of different motivational factors, we draw upon a framework developed by Etienne (2013), which is described in more detail below. A major strength of Etienne's framework compared to other frameworks is that it does not take a preferred view of either side in the regulatory relationship, but can be equally applied to map regulatory relationships from the perspectives of the regulator and regulatee.

The rise of cooperative compliance programmes in tax administrations is part of a wider trend in regulatory systems that emerged in the 1980s. Incentivised by both increasing pressures on regulatory resources and a wish to make the public sector more service-oriented, regulatory systems developed, adopting a more responsive approach towards those being regulated. Ayres and Braithwaite (1992) provided a ground-breaking conceptualisation of the phenomenon. In J. Braithwaite's (2006) own words, "[t]he basic idea of responsive regulation is that governments should be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is needed" (p. 886). Hence, a gradual sanctioning regime, referred to as the "enforcement pyramid", should enable regulators to make more effective use of their resources and bring regulation more in line with regulatees' risk profiles. Regulatees with low-risk profiles would be subjected to less scrutiny and would enjoy a reduction of administrative burdens (Ayres & Braithwaite, 1992; Lodge, 2015).

Another critical feature of responsive regulation is that regulation is deemed to be more effective if regulated parties do not know exactly what to expect from the regulator. Ayres and Braithwaite (1992) refer to this as the "benign big gun", indicating that, whilst going up in the enforcement pyramid, regulators "bluff" greater power than they actually possess. The uncertainty this subsequently generates amongst regulatees regarding the severity of sanctions that might be imposed upon them is expected to improve regulatees' rule compliance. The idea of responsive regulation has found widespread popularity in tax administrations. A pioneering role was fulfilled by the Australian Tax Office (ATO), which introduced the ATO Compliance Model in 1998 (Murphy, 2004).

While many public administrations put effort into developing a more responsive regulatory style, responsive regulation has faced several criticisms. First, the model has been criticised for being too state-focussed, which may have resulted in inadequate awareness amongst regulators of the mindsets of regulatees, including the manner in which the institutional environment and performance of the regulatory regime affects regulatees' behaviour (Black & Baldwin, 2010). Second, the model pays limited attention to the implementation of responsive regulation, not addressing questions such as what the administrative prerequisites for both regulator and regulatee are and how they are meeting them. Third, responsive regulation has been criticised, on more principled grounds, for providing a regulatory model that would go against generality and equality of rule enforcement (Westerman, 2013). These criticisms also apply to the implementation of responsive regulation by tax administrations. In most responsive regulation-based tax monitoring approaches, including cooperative compliance programmes, the dominant perspective of researchers is that of the regulator, i.e. the tax administration. The recent substantial stream of research which takes a behavioural perspective in order to explain tax compliance concentrates almost exclusively on the tax compliance of individuals (e.g. Kirchler, Hoelzl & Wahl, 2008). Hence, we know little about the behavioural factors that underlie interactions between corporate taxpayers and tax administrations.

It can be assumed that motivational factors play an important role in regulatory interactions, even more so when regulatees are free to join a regulatory arrangement, such as a cooperative compliance programme, like the CAP in the US. However, most research on the relationship between motivations and rule compliance by businesses has been conducted outside the domain of tax. For example, substantial research has been done on motivations underlying environmental behaviour, e.g. for farming (Atari, Yiridoe, Smale, & Duinker, 2009). The literature on environmental regulation suggests three motivations underlying rule compliance. First, rule compliance may follow from the regulatee's expectation of being detected and the likelihood of receiving a fine when demonstrating noncompliant behaviour (Becker, 1968). Second, rule compliance may have a social background and be sustained by shared norms combined with the desire to earn the approval and respect of significant others (Levi, 1988). Finally, rule compliance will be influenced by a regulatee's ability to comply (Winter & May, 2001).

The translation of motivational factors into practical behaviour has been referred to as "motivational postures"; or styles of engagement through which regulatees give meaning to the regulator's message (V. Braithwaite, 2009, p. 20). Hence, motivational postures exhibit the extent to which a regulatee "accepts the agenda of the regulator, in principle, and endorses the way in which the regulator functions and carries out duties on a daily basis" (Braithwaite, Murphy, & Reinhart, 2007, p. 138). Due to this, trust and respect between the regulator and regulatee, and the degree of agreement they share regarding the ends and means of regulation, are fundamental for achieving rule compliance.

A major limitation of motivational frameworks is that they strongly reason from the perspective of either the regulator or regulatee. For example, in the case of risk-based regulation, Power's (2004) work focusses on the regulatees, whereas Black (2005, 2006) and Rothstein, Huber, and Gaskell (2006) take the perspective of the regulator. Due to this, motivational theories not only miss out the regulator's or regulatee's perspective, but are also rather static, lacking analytical concepts by which to analyse how the interactions between regulator and regulatee affect each party's regulatory stance. Etienne (2013), however, provides a framework that puts equal emphasis on the regulator and regulatee, and incorporates the impact of relationship dynamics. Etienne (2013) takes a relational signalling approach to these interactions. The idea of relational signals is derived from Lindenberg (2000); they comprise information exchanged in repeated interactions that may be either positive or negative, and serve to allow each party in the relationship to infer the other's interest, "making certain behaviours meaningful and others less so'" (Etienne, 2013, p.35). Etienne observes that regulatory relationships are imbued with ambiguity requiring sensemaking on the part of both regulators and regulatees. He develops a model of ideal types that distinguishes between five different motivations, dynamics or rules of interaction that focus on "which rules of interaction might hold sway in stable, ongoing regulator-regulatee relationships" (Etienne, 2013, p. 36). The five ideal types are as follows:

- *Self-interest:* Relationships of self-interest are built around a shared focus on resources, or gains and cost. In a self-interested relationship, the respective positions of regulator and regulatee are determined by "how resourceful they are and by their ability to put these resources to effective use" (Etienne, 2013, p. 37). Self-interest as a motivation for engagement may not be stable and a relationship built upon this alone may need "continual renegotiation of expectations". Self-interest relationships also tend to discount other motives, for example, "[c]alls to public interest or moral values [which] are considered hypocritical".

- *Legality:* In the case of legality, regulator-regulatee relationships are strongly determined by legal rules, which both the regulator and regulatee are expected to follow. Interactions are built on status, with regulator and regulatee in the positions of superior and inferior respectively. Relationships grounded in legality generally tend to be stable over time, given that it is the legal nature that prompts compliance rather than the content of specific rules.

- *Authority:* Authority relationships are built on status and, like legality relationships, ostensibly put regulator and regulatee in positions of superior and inferior respectively (Etienne, 2013, p. 37). As Lukes (1990, p. 214), quoted by Etienne (2013) states, authority is "a command reason that reduces the significance of other reasons that would otherwise prevail, and removes the point of weighing them". A relationship sustained by authority addresses unwritten rules and facilitates unquestioned obedience.

- *Judgement:* Another sustaining factor of regulator-regulatee relationships is judgement, in which case the relationship is determined by morality or science, and considerations of truth or right dominate (Etienne, 2013). Values are a critical element of judgment relationships. Here, cooperation is focussed on the content of what each party is expected to do, with disagreements capable of settlement through reasoned argumentation.

- *Solidarity:* Solidarity relationships are horizontal relationships based upon trust, in which "neither party can dictate to the others what she must do" (Granovetter, 2002, p. 40). The elements relevant to solidarity relationships display many similarities with judgement relationships, but solidarity relationships are entirely based upon trust, itself emerging from repeated positive interactions (Blau, 1986).

Having identified five types of motivation for regulatory relationships, Etienne then outlines several hypothetical relational signals derived from empirical literature and theory, observing that these signals are context-dependent in terms of the manner and timing of presentation and expectations of reciprocity. The relational signals identified by Etienne are as follows (with several collapsed for the purpose of this paper):

- *Regulatory relief*: the regulator provides relief from regulatory requirements.
- *Favours*: may take the form of gifts, or bribery.
- *Formalism*: formalising the nature of the relationship through, for example, contracts and other documentation which constrains behaviour.
- *Third-party involvement*: regulatory relationships are dyadic, but it is possible to introduce a third party for a variety of purposes.
- *Monitoring*: implies surveillance, which may be routine or exceptional.
- *Argumentation and bargaining*: as forms of dispute resolution.
- *Threats and sanctions*: most commonly imposed by the regulator.
- *Claims of authority*: again, most commonly imposed by the regulator.

As noted earlier, rather than taking the perspective of either party, Etienne's ideal types allow us to consider "which rules of interaction might hold sway in stable, ongoing regulator-regulatee relationships" (Etienne, 2013, p. 36). Depending upon their behaviour, actors can either support or undermine these relationships by sending positive or negative relational signals. Whether the signals are perceived as positive or negative depends on the underlying

relationship type. For example, a formalistic approach would strengthen a regulator-regulatee relationship that is focussed on legality, whereas the exchange of gifts would undermine this relationship. While Etienne does not provide an empirical application of the framework, it is to be expected that, in practice, we will more likely find blurred rather than pure versions of the ideal types. In this article, Etienne's framework, alongside other insights deriving from responsive regulation theory, is used to analyse the extent to which relationship features do account for the evolution and operation of CAP. Before analysing CAP, the following section briefly describes CAP and outlines its perceived costs and benefits. Its legal aspects constitute one of the main controversies over cooperative compliance arrangements in the tax arena. The discussion on this concentrates on the model's proposed differentiated approach towards regulatees, which would be at odds with basic assumptions about the generality and equal application of rules (cf. Westerman, 2013).

THE COMPLIANCE ASSURANCE PROCESS (CAP) PROGRAMME

Introduction of US CAP

CAP constitutes the primary cooperative compliance initiative introduced by the US Internal Revenue Service (IRS), with other initiatives, including Limited Issue Focused Examination (LIFE) and Advanced Pricing Agreements (APAs). CAP was introduced in December 2005 in the IRS's Large and Mid-Size Business Division (LMSB) which serves corporations and partnerships with assets greater than $10 million. The Large Business and International (LB&I) Division of the IRS was established as a new division in the IRS in 2010, superseding LMSB.[5] CAP started as a pilot programme with 17 voluntary participators.[6] CAP superseded a previous programme, the "Pre Filing Agreement Program" (PFA), which had operated since 2000 for large taxpayers and allowed for negotiation of specific issues not yet disclosed in a tax return. CAP is consistent with responsive regulation theory, as noted by Osofsky (2012), "a shift away from an adversarial approach towards cooperative compliance partnerships', who also observes that the "list of CAP users is becoming a veritable who's who of major corporations" (p.122-123).

The US tax system of filing returns and paying taxes relies heavily on self-assessment, and filing of tax returns can be followed by auditing by the IRS. Holmes (2011) suggests that the IRS is significantly outgunned by large multinationals in particular, observing "[o]ften understaffed and outwitted, IRS agents have resorted to using every penalty, sanction, procedural tactic, threat and common law doctrine available in their arsenal to capture the elusive [large business entity] income base for the US Treasury chest" (p.1417-1418). Noting the high monetary stakes, Holmes (2011) further characterises the engagement between the IRS and large entities as a game that has developed considerable mistrust and resentment over a long period of time.

A major driver for the implementation of CAP was the increasingly time-consuming process between filing and the closing of a company's tax position for an accounting period, which was perceived as unacceptable both from the perspective of business and government. The Commissioner of the IRS in 2003, Mark Everson, stated that it took the IRS five years to complete an audit of a corporate tax return, which drained IRS resources and capacity

[5] https://www.irs.gov/uac/irs-realigns-and-renames-large-business-division-enhances-focus-on-international-tax-administration. For background to the US large corporate environment and, in particular, the role of in-house tax executives, see Mulligan and Oats (2015).
[6] https://www.irs.gov/businesses/corporations/compliance-assurance-process; accessed January 2017.

(Bronzewska, 2016). In an attempt to reduce this time, the IRS expanded the PFA process to accelerate corporate income tax audits. As Opper (2011) observes:

> The PFA process was designed to resolve the tax treatment of a specific item before the filing of the tax return in which the tax treatment of the item appeared. If the IRS agreed with a taxpayer's PFA request, the IRS engaged in fact-finding for the item. The taxpayer and the IRS then sought to agree on the return position for the item. If the IRS and taxpayer agreed, and if the taxpayer reported the position in accordance with the agreement, the issue was spared any post-filing review. The taxpayer thus was certain about the tax treatment of the item.

The then IRS Chief Counsel, Donald Korb, asserted the "ultimate pre-filing agreement" would exist if the pre-filing concept could be applied to all material tax items occurring during a taxable year. From 2003 onwards, the Compliance Assurance Process (CAP) programme was developed as a test of Korb's concept. The LMSB undertook a comprehensive business process review, seeking advice from external stakeholder groups which established guidelines for encouraging collaboration and minimising taxpayer burdens with a single point of contact in the IRS (Nolan, 2006). CAP was then introduced in 2005 on a pilot basis. Corporates could join the CAP pilot on a voluntary basis, following invitation from the IRS. According to Nolan, then Commissioner of the IRS Large and Mid-Size Business Division, the CAP approach leveraged the then new corporate governance and reporting requirements imposed by the Sarbanes-Oxley Act of 2002 (Nolan, 2006). She explained the motivation for the introduction of CAP as originating in the lengthy delays associated with post-filing examinations in which "taxpayers often have to sift through years of old financial and tax records in an effort to provide the requested information or to reconstruct the circumstances leading up to particular business decisions and transactions" (Nolan, 2006, p. 26). An independent research firm commissioned by the IRS to survey CAP taxpayers reported in mid-2005 that the IRS's commitment to CAP was strong and most respondents expressed a desire to continue in the programme.

The pilot period lasted for six years, after which CAP became a permanent feature of the IRS's compliance operations with effect from 31 March 2011.

Main features of US CAP

As of August 2016, there were 181 taxpayers participating in the permanent CAP programme and a critical difference between this and the pilot is that taxpayers have to go through a rather rigorous application process before they are allowed access to the programme. Following the pilot phase, two additional features were added to CAP: first, a roadmap was published of the steps required for gaining entry into CAP; and, second, a new CAP maintenance programme intended for businesses participating in CAP that had fewer complex issues and could demonstrate a track record of working cooperatively and transparently with the IRS was announced. Hence, three stages exist in the programme: Pre-CAP, CAP and Compliance Maintenance.

A taxpayer participating in CAP is expected to work collaboratively with an IRS team to identify and resolve potential tax issues before their tax return is filed each year. In this real-time resolution approach, taxpayers are subject to a shorter post-filing examination period with fewer contentious items to be dealt with. As noted in the CAP Memorandum of Understanding (MOU), which is signed by both the IRS and the corporate taxpayer, the objectives of CAP are

formulated as: to "achieve federal tax compliance [-], to achieve an acceptable level of assurance regarding the accuracy of the Taxpayer's filed tax return and to eliminate or substantially reduce the need for a traditional examination". Importantly, however, the CAP pre-filing review conducted by the IRS does not constitute an examination or inspection of the taxpayer's books of account as part of a routine compliance check.

A core feature of CAP is that it focusses on issue identification and resolution through transparent and cooperative interaction between taxpayers and the IRS. CAP requires a contemporaneous exchange of information related to the proposed return position of a corporate and its completed events and transactions that may affect its federal tax liability. An Account Coordinator is appointed to be the point of contact, review prior tax history, and identify risks and compliance issues. "Throughout the process, the Account Coordinator and IRS Counsel work together to resolve CAP issues and taxpayer concerns" (Nolan, 2006, 30). After the first year of the pilot, CAP teams apparently reported an average of eight issues per taxpayer. Corporates participating in CAP are ostensibly able to achieve tax certainty sooner and with less administrative burden than in the traditional post-filing examination programme, allowing them to better manage tax reserves and ensure more precise reporting of earnings on financial statements. Whilst there is some overlap between the three main phases of the CAP programme in terms of processes and procedures, the following section provides an overview of each phase.

The *Pre-CAP phase* has its own application process and eligibility criteria, including the company having assets of $10 million or more and not being under investigation by, or in litigation with, the IRS or other federal or state agency that would limit the IRS's access to current corporate tax records.[7] A successful Pre-CAP application ends in a signed Memorandum of Understanding (MOU) by the company and the IRS which defines specific objectives, sets parameters for the disclosure of information, describes the methods of communication, and serves as a statement of the parties' commitment to good faith participation in the Pre-CAP. Both the IRS and the corporate must provide a list of designated personnel to act as points of contact for gathering information and resolving questions or issues. The MOU outlines the requirements for taxpayer disclosures in the following terms:

> The IRS and the Taxpayer will work together to develop an action plan to complete all required examinations within an established timeframe. During the Pre-CAP phase, the Taxpayer must exhibit the same level of transparency and cooperation that is required of taxpayers in the CAP phase. The Taxpayer must identify the existence of transactions, its return reporting position, and a description of the steps within the transactions that have a material effect on its federal income tax liability. Further, the Taxpayer must disclose any other item that has a material effect on its federal income tax liability and its return reporting position with regard to those items. It must provide relevant information within the established timeframes. The Taxpayer disclosures described in this paragraph will be in writing.
>
> In addition to transactions, description of steps within a transaction and other material items described above, the Taxpayer will provide the IRS with: the industry overview, current legal, accounting and tax organizational charts

[7] Examples are the company: having assets of $10 million or more; being a publicly held entity with a legal requirement to prepare and submit Forms 10K, 10Q, 8K or 20F or other disclosure type forms to the Securities and Exchange Commission; and not being under investigation by, or in litigation with, the IRS or other federal or state agency that would limit the IRS's access to current corporate tax records.

> reflecting all related entities and the flow of relevant information involving those entities, financial performance information, information on any significant events that affected reporting for the tax year, access to accounting records and systems, and necessary resources for disclosure of requested information.
>
> The Taxpayer will provide information and documentation proactively and as requested by the TC [team coordinator]. The TC will promptly review all relevant information provided and will communicate to the Taxpayer whether (1) additional information is required; (2) the IRS disagrees with the Taxpayer's tax treatment; or (3) the tax treatment is appropriate.

Interestingly, the IRS and taxpayers will jointly determine the scope of the Pre-CAP examinations, including materiality thresholds. Materiality thresholds are used as a guide by both parties in determining the transactions to review. However, the ultimate decision of identifying transactions, items and issues for the Pre-CAP examinations remains within the discretion of the IRS. The Pre-CAP phase ends when the taxpayer is eligible for the CAP phase, is terminated from the Pre-CAP or decides to discontinue participation in the Pre-CAP.

The *CAP phase* has the same eligibility requirements as above but additionally, if currently under examination, the taxpayer must not have more than one filed return that has not been closed in examination and one unfiled return for the year that has most recently ended, the return for which is not yet due. Applications for CAP must be completed annually. An annual CAP MOU must be signed by both parties. The IRS and taxpayers will work together during the CAP stage to identify and review material transactions and issues, and regular meetings are standard practice (these could be weekly, monthly or quarterly). At the end of the annual CAP phase, and pre-filing of the tax return, the IRS issues the taxpayer with a Full or Partial Acceptance Letter depending on the extent of compliance with the MOU and resolution of matters raised. In cases where a Full Acceptance Letter is issued, the goal for completing the post-filing review of the filed return is within 90 days of the filing of the return, which is a prompt completion timeline for a taxpayer. Importantly, the IRS may reduce the level of review based on the complexity and number of issues, and the taxpayer's history of compliance, cooperation and transparency in the CAP. Arguably there is reward for "good behaviour" within the CAP framework by way of reduced administrative costs and levels of scrutiny. Notably there are additional provisions within CAP in the area of transfer pricing, which involves significant liaison with the relevant IRS departments.

Upon completion of two full successful CAP cycles, a taxpayer can apply for the *CAP Maintenance Phase*. Companies can apply for the CAP Maintenance Phase annually, together with the annual completion of an MOU, and eligibility depends upon the meeting of expectations as set out in the annual MOUs. Participation in the Maintenance Phase means a lower level of review by the IRS, although disclosure requirements remain unchanged. Depending on the complexity of transactions and volume, it is feasible for a taxpayer to move back and forth between CAP and CAP Maintenance status, and the annual application process facilitates this happening.

The CAP programme has specific provisions governing the termination (by the IRS) or withdrawal from any of the above three phases of the programme. The above phases of CAP put high demands on IRS resources – not only in terms of the number of staff dedicated to deal with CAP cases but also the larger degree of expertise required by IRS staff when interacting on a real-time basis with large, mostly complex, businesses.

Future trajectory of US CAP

Despite CAP now having been in place for more than ten years, there has been limited evaluation of the programme. While the programme is generally considered by the IRS to have been successful at first, its extension to a larger number of corporate taxpayers is not feasible due to resource constraints (Harvey, 2011).

Notably, one review was conducted in 2013 by the Treasury Inspector General Tax Administration (TIGTA), which conducts independent oversight of IRS activities. The review concluded that whilst there was some favourable feedback about the programme, additional analysis of cost and benefits was needed (TIGTA, 2013). The TIGTA review found out that audits under CAP consume substantially more staff hours than those under the traditional audit process, with the hourly revenue rate collected under CAP being around a third of the hourly rate collected under traditional audits ($2,939 under CAP versus $8,448 under traditional supervision). Processes and procedures, however, were observed as being followed adequately. Overall, the Treasury Inspector's review suggests CAP represented a very significant drain on IRS resources and charged the IRS's LB&I Division with delivering an evaluation plan. The IRS agreed to do this. The Treasury Inspector also directed LB&I to consider CAP as an IRS user fee source. A user fee can be applied by the IRS to recover the cost of providing certain services to the public that confer special benefits to the recipients.

The most significant recent development, however, happened in September 2016, when the IRS stopped accepting any new businesses into the programme. This "hold" was announced by the IRS in the context of the current comprehensive review which all three phases of the CAP programme are undergoing. According to the IRS, the assessment of CAP is required "given today's challenging environment of limited resources and budget constraints, combined with a business need to evaluate existing programmes to ensure they are aligned with LB&I's strategic vision".[8] As the review continues, only taxpayers in the current CAP and Compliance Maintenance phases may apply for their annual participation in CAP, whilst current Pre-CAP taxpayers may remain in the Pre-CAP phase. Current CAP taxpayers may be moved into the Compliance Maintenance phase. This review was presumably, at least in part, the IRS's response to the 2013 review by TIGTA. Considering there are fewer than 200 corporates participating in CAP, perhaps the IRS does indeed need to refocus resources. For example, should more resources be directed to those taxpayers not opting into CAP and who are more likely to be non-compliant? However, in response to the IRS's review announcement, KPMG (2016) has stated that CAP exposes the IRS to "extremely useful understanding and visibility concerning the current business and economic environment and transactions that are actually being conducted within specific industries". Of course, such unique knowledge and insight obtained through CAP can be transferred and therefore enhance IRS performance well beyond the CAP programme.

Somewhat unsurprisingly, in September 2018, presumably on the back of the IRS carrying out the evaluation of CAP as requested by TIGTA, the IRS issued a discussion document on CAP recalibration[9], clearly recognising the resource-intensive nature of CAP to date and the need for change. Interestingly, it calls for changes to be made by both the IRS and the taxpayers involved. Such changes include the need for greater consistency and accountability on both

[8] https://www.irs.gov/businesses/corporations/irs-continues-comprehensive-assessment-of-the-cap-program.

[9] https://www.irs.gov/pub/irs-utl/CAP_Recalibration.pdf. Interestingly, both Ireland and the UK have recently also "recalibrated" their respective co-operative compliance models; the former has relaunched co-operative compliance and the latter is piloting a new business risk review model.

parts, and greater adherence to the requirements of CAP. With no new applicants being accepted for 2019, the changes suggest new applicants in 2020 must be publicly held C-corporations and have certified tax control frameworks in place. Such changes certainly suggest operational inefficiencies and potentially some breach of the requirements of CAP on both parts heretofore. The suitability of taxpayers for participating in the recalibrated CAP will be based on certain taxpayer behaviour and the IRS provides explicit examples of what would not constitute such behaviour, e.g. failure to disclose a tax shelter, and not engaging in meaningful or good faith issue resolution discussions. This is evidence for trying to ensure the applicants most suitable to CAP are actually accepted, so there is an apparent renewed and greater emphasis on eligibility. The application process will be more rigorous and include a comprehensive Initial Issues List to ensure that there is a greater chance that CAP will succeed and ultimately not be more resource-intensive than the normal post-filing examinations of similarly sized companies. Timeliness of response by the IRS is a critical dimension of the changes required, so a key change will be the introduction of a 90-day target to develop and resolve issues; once the return has been filed, the goal is to review it within 60 days. Training on this recalibrated CAP is ongoing, and the IRS has committed to ongoing monitoring and is open to further changes for improvement of CAP in the future.

Dolan and McCormally (2018) explain the extension of the CAP programme, observing that "[t]he costs of CAP are not insignificant. The programme is extremely resource-intensive for both taxpayers and the IRS, and the effort required upfront (during Pre-CAP and on an ongoing basis) may dissuade some taxpayers from applying for, or remaining in the program" (p.2).

Whatever one sees as the advantages and disadvantages of CAP, it appears that CAP, by virtue of rolling out a recalibrated version as outlined above, has become embedded in the mechanisms by which the IRS seeks to verify federal income tax returns efficiently. It will be interesting to monitor the uptake of this initiative in 2020 and important to see if the eventual evaluation concludes it is perceived to be a success for both parties. The following section considers the evolution and operation of US CAP to date through the lens of Etienne's (2013) typology of regulator-regulatee relationships.

CAP: MOTIVATIONS AND RELATIONAL SIGNALLING

The following analysis of CAP by reference to Etienne's typology is informed by two sets of empirical data. The first (Study 1) is a series of interviews by one of the present authors, which was conducted in the US in 2015. Nine semi-structured interviews were conducted with very senior in-house tax executives/advisors, covering a range of issues related to tax planning and compliance by MNEs. The second set of empirical data is derived from a large project (Study 2), which involved two of the present authors. As part of a larger country comparative research project, five additional interviews were conducted during 2015 and 2016 with tax officials and senior in-house tax executives who had either been involved with the implementation of CAP or had engaged with the IRS in discussions about joining CAP. While the evaluation of CAP was not the exclusive focus of the empirical studies, the CAP-related findings reveal some interesting and relevant insights from participants.

Notwithstanding the somewhat uncertain future of CAP in terms of opening up to new applicants, it currently remains part of a suite of approaches to relationships between the IRS and some large corporate taxpayers. CAP represents a particular form of regulatory intervention that goes against the grain of the IRS tradition of adversarial regulation (see, for

example, Sakurai (2002)). It appears to be an outlier, the adoption of which may have been motivated by simultaneous developments in other countries.

In terms of Etienne's ideal type motivations, *self-interest* would appear to be the prime motivator for entry into, and continued participation in, the CAP programme. Both sides experience potential resource savings, both quantifiable (e.g. timely settlement of outstanding disputes) and non-quantifiable (increased certainty). The ability to acquire faster and greater certainty whilst being in CAP motivates corporates to make the extra effort that is required under CAP in the direction of the tax authority. For the IRS, objectives are more pluriform, but the expectation of realising administrative efficiencies has been a prominent one. CAP's long pilot period and slow roll-out show cautiousness on the side of the IRS to implement a programme when the costs and benefits of that programme are difficult to evaluate from a tax administration perspective. One interviewee said: "It turned out to be extremely personnel intensive. [The IRS] just don't have the people. And it's a burden on companies too" (Study 2: US01).

By viewing the CAP relationship as one primarily of self-interest, we can explain how bargaining is a positive relational signal – used to resolve disputes by way of settlement – and that claims of authority, particularly by the IRS, may not hold much sway. This is consistent with De Simone, Sansing and Seidman's (2011) depiction of CAP from a game theoretic perspective, focussing on the extent of disclosure by the taxpayer to the IRS and finding that, theoretically, a cooperative compliance approach can be beneficial even in the absence of sanctions for violating agreed upon terms of engagement. Regulatory relief is also a positive signal in a self-interest relationship, and is manifested, in the case of CAP, as reduced post-filing audits.

The CAP relationship is governed by a formal Memorandum of Understanding which brings *legality* into the picture, albeit not as strongly as when a statutory mandate exists. Despite the focus of the IRS in CAP on the process by which tax returns are being produced by corporates, CAP has not, in formal legal terms, changed how the IRS determines corporate tax compliance. With the focus on the accuracy and timeliness of the regulatee's tax returns, the same criteria are applied as were in use prior to the implementation of CAP. The key difference for CAP participants is extra-legal benefits in terms of speedier dispute resolution and reduced audit scope, which benefit both taxpayers and the IRS. The MOU requires that the parties interact on a regular basis and that they will "collectively discuss and provide feedback on the level of cooperation and transparency from each Parties perspective".

Beck and Lisowsky (2012) find that CAP participants report larger uncertain tax benefits in their financial statements before entering the programme than non-participants and that participants subsequently experience a reduced magnitude of reported uncertain tax benefit. Formalism is a relational signal with positive connotations in a legality relationship; in the case of CAP, this is represented by the signing of the MOU. Indeed, formalism can serve to protect the regulatee from IRS capriciousness. As the focus of a legality relationship is the law per se, signals such as regulatory relief, favours and threats are negative signals. Monitoring serves as a reminder of hierarchy and is expected, and therefore viewed positively, in legality relationships.

Authority appears to be of less importance in this particular instance of co-operative compliance. The adversarial undertones of interactions between large corporate taxpayers and the IRS have been described as "cat and mouse", with neither side respecting the other's

authority, and it is not entirely clear that those participating in CAP are different in this regard to those who are not participating. One Study 1 interviewee showed a lack of confidence in the IRS's ability to deliver on certainty – i.e. a lack of respect for the regulator's authority – stating: "We can't not do something for months while [the IRS] thinks about it" (Study 1: US01).

Monitoring is viewed as a positive signal in an authority relationship and where regulatees acknowledge the authority of the IRS, accelerated monitoring in the form of real-time disclosures will be more likely to be tolerated.

Judgement is important in the sense that reaching agreement on current and past disputed issues requires a level of compromise from both sides. Reflecting on the introduction of CAP, one of our interviewees said: "When it first started out, it took a long time for each of the two sides to figure out exactly how to deal with each other. In other words, from the company's side, 'How much do I tell these people? What do I do?' And from the IRS side, it was more, 'Am I allowed to ask them for things?"' (Study 2: US01). A Study 1 participant, when asked "would you participate in it?", said "No… there's an agent sitting there. I've got to tell him all the details, run everything through and go over the whole thing, my position, how I arrived at that, the whole works, forget it, I'll do it on audit" (Study 1: US02).

In judgement relationships, the use of third-party intervention, such as expert advice, can be viewed positively in recognition, for example, of a need for additional technical expertise. Threats, sanctions and monitoring, on the other hand, are perceived as negative signals, undermining the mutual respect arising from the exercise of judgement in what is a highly complex technical environment.

Finally, with respect to *solidarity*, trust is an essential element of the underlying ethos of any co-operative compliance arrangement. Given that new entrants to CAP were those taxpayers with good records of compliance who were willing to be transparent, solidarity in the form of mutual trust that the relationship will benefit both parties is clearly important. Trust includes a measure of acceptance of the difficulties faced by the other party in the relationship. One corporate interviewee commented on the resource constraints faced by the IRS, stating: "These are great programmes in theory but the execution on the ground just isn't happening. The IRS… are not getting the resources they need to effectively execute these programmes" (Study 1: US03). One of the interviewees in Study 2 had chosen not to participate in CAP and observed: "We've had some discussions with others that have signed up to the CAP programme, and they've generally found it positive, so we've always kept thinking about it… But overall, I suppose, we've not seen the benefit of doing it" (Study 2, UK25). In solidarity relationships, threats and sanctions are perceived as negative relational signals. This may explain why, as reported in De Simone et al. (2013), although the IRS has identified firms that are not transparent, no taxpayer has been asked to leave the programme.

In summary, and as predicted by Etienne (2013), categorisation of a live responsive regulation programme (here, CAP) into a single ideal type of motivational position is not possible and is almost certainly not desirable. A complex mix of motivations can be seen, and once relational signals are brought into the picture, the purity of the typology is muddied. The point, however, is not to try to demonstrate a goodness of fit between CAP and Etienne's typology, but rather to use the typology to interrogate the practical features of CAP and illustrate the need for sensitivity to this, more nuanced, picture of regulator-regulatee relationships in designing new policy interventions.

CONCLUSION

The application of Etienne's (2013) framework in this article demonstrates that interactions between regulators and regulatees follow multiple relationship logics. Although motivations are plural, they do not carry equal weight nor have they remained stable over time.

Twenty-five years after the publication of Ayres and Braithwaite's "Responsive Regulation" (1992), responsive-based regulatory systems have further expanded and more empirical information has become available about their performance. In tax administration, responsive regulation is prominent in the area of corporate taxation, with several countries significantly restructuring interactions between the tax administration and corporate taxpayers in line with its principles.

CAP, when analysed drawing on Etienne's model, shows the importance of adequately capturing the motivations of regulator and regulatee, and illuminates the unlikeliness that their interests will synchronise. This can make the successful introduction of initiatives like CAP problematic.

It can be expected that an adequate implementation of a responsive regulatory tax system requires more, rather than less, administrative capacity from the regulator and regulatee, at least during the initial period – an upfront investment of time and resources. To reduce administrative costs on both sides, it is crucial that both the regulator and regulatee develop systems enabling them to deal effectively and efficiently with the high degree of interaction that takes place within responsive regulation-based arrangements. This high level of interaction will occur, in particular, during the initial stage of responsive regulation-based relationships, when a relatively large number of regulatees is likely to be found at the lower end of the regulatory pyramid in the compliant category and hence only need more feedback to improve their level of fiscal control. Ayres (2013) supports Etienne (2013) in her contention that there is inherent ambiguity in how regulatory signals will be received, but also notes that "theory can only go so far in resolving the ambiguities and in predicting their likely interpretation" (p.149).

Obviously, there is no universal responsive regulatory model and specific choices underlie the design of CAP. Despite its specific features, CAP demonstrates many similarities to responsive regulation, such as the emphasis on one-to-one relationships between regulator and regulatees. The CAP case shows that this emphasis is both a strength and weakness of the model: it enables flexibility and relationships based on professionalism, but it also demands a high administrative capacity and potentially causes risk of regulatory capture in the event that Account Managers (in the tax administration) become too close to their respective taxpayer regulatees.

A promising way by which to circumvent some of these weaknesses is to improve aggregate data systems about regulatees, which may help regulators to validate their discretionary decision-making using big data. It would also enable regulators to provide more and better feedback to regulatees, focussing both on features that increase and features that reduce a regulatee's risk of non-compliance. In addition, albeit not addressed here specifically, clearly there is an important role for scholars to play in terms of analysing how recent technological innovations in different countries and industries have and will affect regulator-regulatee relationships.

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FURTHER RESEARCH ON CO-OPERATIVE COMPLIANCE

Lynne Oats[1]

The papers in this special issue are indicative of the scholarly interest in co-operative compliance programmes. Two particular centres of research activity are described below.

1. GLOBAL TAX POLICY CENTRE, VIENNA UNIVERSITY OF ECONOMICS AND BUSINESS (WU)

A team of researchers at WU are researching co-operative compliance in close collaboration with industry and several tax authorities. The project has been running for several years and examines the legal, administrative and political constraints on getting more countries to adopt a relationship between tax administrations and MNEs based on trust, openness and constructive dialogue. It examines why this is the case, how some countries have managed to overcome these constraints and what can be learned from their experiences. Particular attention is being paid to less developed countries and how they could benefit from taking a co-operative compliance approach, including how to deal with BEPS-related issues.

The research is supported by a number of pilot studies in Africa and Asia. This project brings together groups of researchers from all over the world, and includes governments, MNEs and representatives from international organisations. It is being carried out in co-operation with the Commonwealth Association of Tax Administrations (CATA) and the Inter-American Center of Tax Administrations (CIAT), and since 2019 has also been carried out in association with the International Chamber of Commerce (ICC).

An overview of the work can be found here: https://www.wu.ac.at/fileadmin/wu/d/i/taxlaw/institute/WU_Global_Tax_Policy_Center/cc/Cooperative_Compliance_Text.pdf

Related published work by WU researchers:

Leigh Pemberton, J., & Majdanska, A. (2016). Can Cooperative Compliance Help Developing Countries Address the Challenges of the OECD/G20 Base Erosion and Profit Shifting Initiative? *Bulletin for International Taxation, 70*(10), 595-600.

Szudoczky, R., & Majdanska, A. (2017). Designing Co-operative Compliance Programmes: Lessons from the EU State Aid Rules for Tax Administrations. *British Tax Review, 2017*(2), 204-229.

2. THE FAIRTAX PROJECT

Co-operative compliance is one of the topics being researched by an international consortium of researchers funded by the European Union's Horizon 2020 research and innovation programme, 2014-2018. Titled "Revisioning the Fiscal EU: Sustainable, and Coordinated Tax and Social Policies", FairTax, is a cross-disciplinary, four-year research project. The consortium consists of 10 partner universities from 8 countries and the project coordinator is Professor Åsa Gunnarson (Umeå University, Sweden). Two of the research strands within

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FairTax are concerned with co-operative compliance initiatives. One, led by Lotta Björklund Larsen, focusses on the implementation of co-operative compliance programmes in Nordic countries, and the funding covers research in Sweden, Denmark and Norway. This FairTax team is also collaborating with a group of Finnish researchers who are investigating the implementation of co-operative compliance in Finland. The other team, led by Professor Lynne Oats, examines developments in the UK and the Netherlands. Both use ethnographic techniques to investigate how developments in each jurisdiction are playing out in practice.

The following are abstracts from the working papers produced by project participants, which are available on the FairTax website (https://www.umu.se/en/fairtax).

Björklund Larsen, L. (2015) *Sweden: failure of a cooperative compliance project?* (FairTax: Working Paper Series, 07).

This report outlines the Swedish cooperative compliance project Fördjupad samverkan - FS (enhanced collaboration) introduced in 2011, and the modified initiative, relaunched as Fördjupad dialog – FD (enhanced dialogue) in 2014. It describes how the Swedish Tax Agency proposed an initiative that carried with it international success stories from similar projects, but in the Swedish version and context met with strong resistance and is now put on hold awaiting proposed changes in the law. This chronological trajectory teases out issues that impact tax compliance among large corporations and perhaps also among ordinary taxpayers in Swedish society. Based on these issues, I suggest eight aspects that have to be paid attention to when implementing cooperative compliance initiatives. These aspects seldom stand alone but are drawn upon in various combinations, making criticism possible.

De Widt, D. (2017). *Dutch Horizontal Monitoring: The Handicap of a Head Start* (FairTax: Working Paper Series, 13).

This report outlines the Dutch model of Horizontal Monitoring (HM), which is widely regarded as one of the first examples of a cooperative compliance program. It describes how, since 2005, the Netherlands Tax and Customs Administration (NTCA) developed a monitoring regime that has significantly altered the relationship between the Dutch tax authority and corporate taxpayers. The report demonstrates that under HM the attitude of both corporates and tax administrators has shifted from an adversarial 'them and us' relationship, to one stronger characterised by cooperation. Despite the widely identified benefits of HM, including increased ability of corporates to acquire fiscal certainty, the monitoring regime faces major challenges. It has proven particularly difficult to quantify the model's impact on revenue collection and the tax authority's administrative resources. The report concludes that if HM is to subsist, it is vital to increase formalisation and transparency of the risk monitoring techniques as applied by the tax authority, and develop more advanced metrics than have been available hitherto.

Boll, K., & Brehm Johansen, M. (2018). *Tax Governance: Corporate experiences with Cooperative Compliance in Denmark* (FairTax: Working Paper Series, 17).

This working paper presents an analysis of the experiences of Cooperative Compliance in Denmark. Cooperative Compliance denotes a specific kind of collaborative program for the regulation of large corporate taxpayers by the tax authorities. Cooperative Compliance programs have been implemented in several countries worldwide. In Denmark the program is called Tax Governance. Tax Governance has been studied using qualitative method and the analyses of the working paper build on an extensive base of in-depth interviews— primarily

with tax directors from corporations participating in the program. The working paper shows as a general stance that the corporations are supporting the ideas behind Tax Governance and are generally satisfied with their participation. However, the working paper also shows that most of them explain to be stretched between this willingness to participate and the different challenges and contradictions they told to experience in the everyday work practices related to the Tax Governance program. The working paper zooms in at these various everyday experiences from the corporations. Yet, it also zooms out and shows that the Tax Governance program in different ways relate to wider international trends within tax administration, especially concerning the development of risk assessments and internal control in the corporations and a greater focus on monitoring of these elements by the tax authorities. Overall, the working paper concludes that Tax Governance as a model for a collaborative regulatory relationship between Skat and large corporations comes with both possibilities and challenges.

Brøgger, B., & Aziz, K. (2018) *The setting for collaboration about tax compliance in Norway* (FairTax: Working Paper Series, 18).

The concept of "cooperative compliance" has been used by the Organisation for Economic Co-operation and Development (OECD) as a guideline for reform of tax administrative practices in many countries (OECD, 2013, 2014). The purpose of this working paper is to give a description of the institutional context for the adaptation of the guidelines in Norway, describing viewpoints from each stakeholder group.

The data is based on analyses of project documents from the Norwegian Tax administration, annual reports, white papers, tax memos and tax strategies from large companies and tax advisors, and 31 interviews with tax officials, tax managers and tax advisors.

Findings are that the motivations for paying or avoiding taxes vary, both within the stakeholder groups and between them. The national tax administration is concerned with compliance as the transparency and fairness of taxpayer treatment, measured in terms of the filing and assessment procedures. The companies are concerned with tax compliance as paying what it costs and fair competition, while the tax advisors balance commercial and legal aspects of different compliance alternatives. Regardless of differences in positions and tasks done, the infrastructure for collaboration and the normal process of work that feeds into it, the common denominator is pragmatism, working out a way to handle tax administration with as little fuss as possible and with as limited use of resources as possible.

Potka-Soininen, T., Pellinen, J., & Kettunen, J. (2018) *Enhanced Customer Cooperation: Experiences with cooperative compliance in Finland* (FairTax: Working Paper Series, 19).

This report examines the experiences with a collaborative compliance project – Enhanced Customer Cooperation (ECC) – introduced by the Finnish Tax Administration. The ECC was introduced by the Large Taxpayers' Unit of the Finnish Tax Administration at the beginning of 2013, and it ran as a pilot until the end of 2015. Since the start of 2016, the ECC has been a part of the permanent operations of the Large Taxpayers' Unit. Based on the interviews with tax officers, corporations participating in the ECC and tax lawyers and tax consultants, the ECC is bringing about a cultural change in the administrative practices and ways of communicating between tax authorities and taxpayers. In general, the ECC's objective of increasing cooperation between tax administration and taxpayers has been welcomed. There were, however, some concerns about the impartiality towards taxpayers, efficiency in the use of human resources and the possible retrospective involvement of the Tax Recipients' Legal

Services Unit. In addition, because predictability was described as one of the key aspects of taxation for companies, many questions have been raised regarding whether the ECC can deliver more predictability in taxation practices.

Björklund Larsen, L., Boll, K., Brögger, B., Kettunen, J., Potka-Soininen, T., Pellinen, J., Brehm Johansen, M., & Aziz, K. (2018). ***Nordic Experiences of Co-Operative Compliance Programmes: Comparisons and Recommendations*** **(FairTax: Working Paper Series, 20).**

For the last decade a major trend within tax administrations has been to shift from a roughly one size fits all approach—where close to all taxpayers experience a deterrence approach—to a more responsive and collaborative approach as in co-operative compliance programmes. Such programmes build on the idea that the participating corporations disclose relevant information including their tax risks and are transparent to the tax administrations and in return will tax administrations provide real-time predictability and clarity concerning taxation issues of relevance for the corporation. In brief, co-operative-compliance builds on the slogan: "…certainty in exchange for transparency" (OECD 2016, 7). Co-operative compliance has increasingly become a core concern and way of organizing the relation between tax authorities and large corporate tax payers when it comes to securing tax compliance.

The aim of this working paper is to provide a comparison of the experiences in four of the Nordic countries: Denmark, Finland, Norway and Sweden and to propose recommendations.

The Nordic countries are considered similar and so were the co-operative compliance programmes that were implemented in each country, yet the outcomes were very different.

We thus dealt with various case characteristics (Flyvbjerg 2006) where the outcomes hinged on a complexity of elements. We argue that the Swedish case is an extreme case due to its turbulent life and concomitantly with only a handful of participants that have very little activity. The Norwegian case, in contrast, is an example of a maximum variation case because of the much longer history of collaborative relationships and the outcome of the work with tax risk. The combination of a collaborative way of working and systematic risk management and monitoring may either reflect a most likely scenario of future tax administration—or perhaps the least likely. Lastly, we argue that the Danish and Finnish cases represent paradigmatic cases because both of these align largely with the standards set by the OECD and because they therefore present more ordinary or regular ways of working with co-operative compliance. Analyzing a wide variety of case characteristics means that our findings can be of general interest, beyond the Nordic countries.

Oats, L., & De Widt, D. (2019). ***Co-operative Compliance: The UK case – playing the long game*** **(FairTax: Working Paper Series, 22).**

The UK approach to interactions between HMRC and large businesses is incremental. The origins of co-operative compliance pre-date the merger between the former Inland Revenue and Her Majesty's Customs and Excise to form HMRC, but were given impetus by the formation of the combined large business unit, now the Large Business Directorate.

Over the course of the last 13 years, a number of shifts have occurred including additional regulatory requirements and increased public scrutiny and political attention, all of which have influenced the trajectory of co-operative compliance regime. This study draws heavily on

information provided by knowledgeable interviewees who shared their views with us during 2015, 16 and 17.

We find that initial enthusiasm for co-operative compliance was shared by both HMRC and large businesses for whom speedier processes and more collaborative working represented efficiency gains. The increased publicity around the tax affairs of large corporates and the performance of HMRC subsequent to 2012, however, precipitated a number of legislative and procedural changes that served to dampen the enthusiasm, particularly from the business point of view. These include the Senior Accounting Officer regime and the requirement to publish a Tax Strategy, the former concerned with the internal control processes of large corporates and the latter to trigger behavioural change through public exposure with reputational consequences.

2018 sees a recalibration of the risk review process that will facilitate reconsideration of the terms of engagement between large business and HMRC. We anticipate that co-operative compliance, like many regulatory initiatives, will continue to evolve in response to pressures both internal and external to HMRC, and that the role of technology will be both a blessing and a curse in the quest for continued collaboration.

De Widt, D., & Oats. L. (2019). *Co-operative compliance: views of large business in the Netherlands and the UK* (FairTax: Working Paper Series, 23).

This working paper presents the findings of a study of Co-operative Compliance in the Netherlands and the UK. These two countries were early adopters of Co-operative Compliance as a mechanism for managing the relationships between large business taxpayers and the tax authorities, mediated to various degrees by tax advisers. The juxtaposition of these two cases provides interesting insights into how policy initiatives come into being and evolve, as well as how regulators learn from each other in subtle, and not so subtle ways. Policy learning in this context is promoted by the intervention of the OECD as promulgator of best practices in tax administration.

Our focus is on Co-operative Compliance in these two jurisdictions in practice. We examine how highly skilled actors perceive the programme in retrospect and prospect, by reference to their lived experiences derived from interviews. We also chart the emergence and subsequent adaptations of the programmes through the lens of official pronouncements and policy documents. The project started in 2013 and is generously funded by Horizon 2020. Over the course of the project, the objects of study were constantly moving within and between the countries we study, as was the backdrop of global events and developments in other jurisdictions. Capturing the essence of such a dynamic environment has been challenging but rewarding.

Sections 2 and 3 of this report provides a brief background to the project and an explanation of our methodology respectively. This is followed by descriptions of the working practices in both jurisdictions in Sections 4 and 5. Section 6 is the heart of the report that builds on the background provided in earlier Sections and presents the views of large businesses of various dimensions of Co-operative Compliance in both countries. In Section 7 we offer a discussion of our findings together with our conclusions.

Related published work by FairTax researchers:

Björklund Larsen, L. (2018). Sweden: Failure of a Cooperative Compliance Project? In E. Mulligan & L. Oats (Eds.), *Contemporary Issues in Tax Research: Volume 3* (pp. 7-50). Birmingham, UK: Fiscal Publications.

Boll, K. (2018). Securing Tax Compliance with Collaboration: The Case of Co-operative Compliance in Denmark. In N. Hashimzade & Y. Epifantseva (Eds.), *The Routledge Companion to Tax Avoidance Research* (pp.212-224). Abingdon, UK: Routledge.

De Widt, D., & Oats, L. (2018). Cooperative Compliance in Action: A UK/Dutch Comparison. In E. Mulligan & L. Oats (Eds.), *Contemporary Issues in Tax Research: Volume 3* (pp. 260-277.) Birmingham, UK: Fiscal Publications.

De Widt, D., & Oats, L. (2017). Risk Assessment in a Cooperative Compliance Context: A Dutch-UK Comparison. *British Tax Review, 2017*(2), 230-248.

REVIEW OF RECENT LITERATURE

John D'Attoma[1]

A selection of recently published papers is reviewed below. The aim is to bring together tax administration-related papers from the diverse range of outlets in which they are published. The review is necessarily selective, and the Journal welcomes suggestions for inclusion of papers in subsequent reviews.

AUDITS

DeBacker, J., Heim, B.T., Tran, A., & Yuskavage, A. (2018). The Effects of IRS Audits on EITC Claimants.

The study provides empirical evidence of the compliance patterns of earned income tax credit (EITC) claimants and investigates the impact of audits on subsequent taxpayer declarations (on both intensive and extensive margins). Exploiting both data from the universe of filers and from a program of randomized audits (National Research Program), the authors show that being subject to audit increases the average gross income (AGI) of EITC recipients by more than 6 percent for at least six years. There are other margins over which EITC claimants might distort their declarations: first, the size of EITC credit claimed; second, the number of dependents reported – which is positively related to the credit that may be claimed; and, third, the filing status – with married households reporting split returns typically achieving lower total tax liability. The evidence presented in the article shows that, upon audit, EITC claims fall by 6 percentage points and that the likelihood of reporting multiple dependents or head-of-household status drops at similar rates. Finally, the results suggest that EITC participants draft their declarations strategically, with misrepresentations most likely to happen in the regions of the EITC schedule delivering higher reduction of liabilities. However, taxpayers do not seem to be driven entirely by EITC incentives; while evidence of sizeable bunching is found at a spot of the EITC schedule that maximizes the amount of the credit, the second kink point only displays limited bunching behavior.

COMPLIANCE

Lozza, E., & Castiglioni, C. (2018). Tax Climate in the National Press: A New Tool in Tax Behaviour Research.

Considerable evidence has been provided in the scientific literature on the importance of a country's tax climate in shaping compliance behavior. In this article, the authors present a novel methodology by which to assess the tax climate: "lexicographical analysis". The study focuses on tax-related articles on newspapers from two regions that, despite their geographical proximity, display marked differences in terms of compliance: Italy and the Italian-speaking Canton of Ticino (Switzerland). Interpreting the results through the lens of the "slippery slope" framework, the authors show that an antagonistic tax climate (coercive power of authorities and distrust in the tax system) appears to prevail in Italy, while a synergistic tax climate

[1] Lecturer in International Politics and Business, University of Exeter. Individual reviews were also provided by Duccio Gamannossi degl'Innocenti and Antoine Malézieux, both postdoctoral research fellows at the Tax Administration Research Centre, University of Exeter, Trang Nguyen, doctoral candidate, University of Barcelona and Hoaran Sun, doctoral candidate, University of Durham.

(legitimate power of authorities and trust in the tax system) characterizes the Canton of Ticino. The paper provides an illustration of the tax climate evolution in the two regions during the period 2010-2016. As argued by the authors, the possibility of monitoring the dynamic of the compliance climate may prove useful to policymakers when designing better fiscal and deterrence policies.

Alm, J. (2018). What Motivates Tax Compliance?

This paper is a survey of what we have learned about what motivates individuals to pay – or to not pay – taxes. First, it discusses how theory shows that enforcement matters, but an individual does not always behave as assumed in the standard economic approach and may be influenced by group considerations. Second, the author reviews empirical and experimental findings, showing that individuals are motivated by financial considerations (e.g., audits and penalties) as well as non-financial considerations (e.g., sympathy, empathy, guilt, shame, and morality) and social considerations (e.g., social norms, public goods, voting, and neighbor behavior). The author finally concludes on the necessity to consider the great heterogeneity across individuals and makes policy recommendations based on this survey.

Givati, Y. (2018). Of Snitches and Riches: Optimal IRS and SEC Whistleblower Rewards.

In the US, hundreds of millions of dollars are paid out to whistleblowers by the Internal Revenue Service (IRS) and the Securities and Exchange Commission (SEC) as rewards for the provision of information about violations. In this paper, the author develops an economic model to capture the deterrent effect of whistleblower rewards. The paper includes an analysis of the regulations that guide the IRS and SEC in setting the rewards. Policy recommendations are made based on the model, which suggests, counter-intuitively, that less severe violations may deserve greater rewards, different whistleblowers may be given different rewards for the same information, and a greater likelihood of a successful false report may require greater reward.

Wynter, C.B., & Oats, L. (2018). Don't worry, we are not after you! Anancy culture and tax enforcement in Jamaica.

This paper explores the role of culture in tax enforcement practices in the context of property tax collection in Jamaica. The analysis is informed by semi-structured interviews with a wide range of participants, including politicians, tax administrators, tax payers and non-payers. Anancy culture is found to shape the practice of tax administrators leading to selective enforcement strategies. The paper provides insights into the unique culture of Jamaica, in which democracy co-exists with resistance to the established order deriving from colonial history.

CONSUMPTION TAXES

Feldman, N., Goldin, J., & Homonoff, T. (2018). Raising the Stakes: Experimental Evidence on the Endogeneity of Taxpayer Mistakes.

When a tax is not included in the displayed price of a commodity, it modifies buyers' subsequent decision-making processes. People buy more when it is included. This effect is called the salience effect. The present paper studies the impact of the magnitude of the tax being levied (8% vs. 22% tax rate) on the salience effect. The results show no evidence that the salience effect declines as the tax rate increases. It is rather the reverse here; higher taxes

make consumers less attentive. This last result might come from a confirmation bias, where customers disregard information that is not concordant with their intentions of buying.

DIGITALISATION

Hodzic S. (forthcoming). Tax Administration Challenges of the Digital Economy: The Croatian Experience.

This article addresses the digital economy with respect to the tax administration challenges in Croatia. The biggest taxation problems in the single market are tax avoidance and aggressive tax planning. As a result of Croatia's accession to the European Union of 1 July 2013, the tax administration encounters even greater challenges. These include harmonization with the approach taken by the European Union, along with its targets of fairness, competitiveness, integrity of the Single Market, and sustainability. Following a discussion on the importance and characteristics of the digital economy and e-Government model in Croatia, the author focuses on analyzing the implementation of new electronic services in Croatian Tax Administration through a SWOT analysis. The results show that, in addition to some strengths and potential opportunities, there are a number of weaknesses, namely absence of monitoring of key performance indicators, data security problems, delays in informatization in relation to the European Union Member States etc., accompanied with threats such as insufficient funds for modernization, brain drain, no reward system for employees and so on.

James, S., & Sawyer, A. (forthcoming). Digitalization of Tax: Comparing New Zealand and United Kingdom Approaches.

The article discusses the digitalization of tax administration, comparing New Zealand and the United Kingdom's approaches. Using comparative case study methodology, the authors investigate the approaches applied in these two countries i.e. New Zealand's "Business Transformation Programme" and the United Kingdom's "Making Tax Digital" project. These projects are considered to be ambitious and are expected to transform the way in which taxpayers (and their agents) interact with the revenue authorities. The revenue authorities (New Zealand's Inland Revenue (IR) and the United Kingdom's HM Revenue and Customs (HMRC)) face considerable challenges, including delays in progress and "teething issues" with the elements being operative. Taxpayers may have trouble using the new digital framework, resulting in challenges for these revenue authorities in terms of disseminating the digitalization to the large population. Moreover, multiple risks arise, such as the overall effect on morale, results caused by the shortage of personal engagement with taxpayers and, in particular, the inescapable reality of the limited success rate of IT (and related) projects, primarily attributed to ineffective project management. However, the digitalization projects under examination are still incomplete and it is thus expected that a more extensive review will be undertaken in the near future.

DISPUTE RESOLUTION

Cai, Q. (2018). Behind Sovereignty: Concerns about International Tax Arbitration and How They May be Addressed.

Sovereignty looms large in international tax matters, not least in the realm of dispute resolution. In this paper, the author draws on lessons from international investment arbitration, which has raised a number of serious concerns that are evaluated. The implications for tax arbitration are

then considered and recommendations are made for reform. Objections to arbitration based on sovereignty arguments are found to be largely empty; what is of significance are the practical implementation difficulties. Overcoming these difficulties is important in the face of the increasing strain being placed on traditional dispute resolution mechanisms. Included in the analysis is a case study of TRIBUTE, a relatively recent initiative.

EVASION

Cockfield, A. J. (2017). Policy Forum: Examining Canadian Offshore Tax Evasion.

This paper reviews academic and government studies that assess the magnitude of Canadian offshore tax evasion. Each approach has its own flaws, but it suggests that Canadians maintain hundreds of billions of dollars of undisclosed financial wealth offshore. The author points to the recent measures taken to limit offshore tax evasion: a whistleblower program, disclosures of cross-border transfers of $10,000 or more, cross-border tax information exchanges, and enhanced audit resources. Finally, this article recommends ways to improve the system for investigating and prosecuting offshore tax evaders, like strengthening the coordination among different federal departments and agencies, publishing the names of successfully prosecuted offshore tax cheats, amending corporate law statutes and providing detailed annual reports on revenue collection with respect to offshore tax cases.

Alm, J., Liu, Y., & Zhang, K. (2018). Financial constraints and firm tax evasion.

This paper studies firm tax evasion using data from the Business Environment and Enterprise Performance Survey (World Bank). It shows that more financially constrained firms are more likely to be involved in tax evasion activities, because evasion helps them to deal with financing issues created by financial market constraints. Financial constraints are heterogeneous across firm ownership, firm size, and firm age. Firms evading taxes are found to be more likely to reduce information disclosure in the banking system, more likely to conduct business in cash in order to avoid paper trails of transactions, and more likely to lobby the government for a lower probability of tax audit.

Chan, E.Y. (2018) Exposure to national flags reduces tax evasion: Evidence from the United States, Australia and Britain.

In this paper, the author draws on social identity theory to test the hypothesis that exposure to one's national flag can serve to reduce income tax evasion. Both indirect and direct evidence in support of the hypothesis is presented. Three experiments are conducted drawing on three national samples; in the US (using Amazon Turk), in Australia (using undergraduate students) and in the UK (using Prolific Academic). Across the three experiments, the author finds consistent and converging evidence that exposure to national flags can reduce tax evasion, most likely because such exposure makes national identity salient. National identity is arguably one particular form of social identity that links most closely with taxpaying/non-taxpaying behavior.

PENALTIES

Gemmel, N., & Ratto, M. (2018) The Effects of Penalty Information on Tax Compliance: Evidence from a New Zealand Field Experiment.

The article studies the effect of penalties on compliance decisions using a field experiment based on New Zealand's goods and service tax (GST). The field experiment investigates how taxpayers with overdue GST liabilities respond, in terms of repayment, to being provided with three levels of detail regarding the penalty regime and to being offered a reduced penalty rate if they entered an agreement to repay by installments. Since the experiment consisted of an initial phone call followed by attempts to obtain payment (immediate or delayed), the paper can disentangle the effect of the treatment on the taxpayer's immediate stated intention from the impact on actual behavior. The results presented suggest that the experimental intervention increases taxpayers' intentions to pay back GST liabilities but has no statistically significant effect either on the probability of a taxpayer entering an installment arrangement or on immediate repayment. Evidence provided by the authors suggests that strategic considerations might be driving the observed difference between intention and behavior, and that individual taxpayer characteristics associated with their perceived probabilities of enforcement or the cost of borrowing have an impact on observed compliance.

Keen, M. (2018). Competition, Coordination and Avoidance in International Taxation.

The article provides a discussion of the economic linkages between avoidance, competition and coordination in international taxation. The author observes that the intense coordination projects/debates currently undertaken worldwide raise questions about the adequacy of the international tax architecture and calls for a deeper analysis of the underlying trade-offs shaping the different proposals. Defining "tax coordination" as the international agreement on rules about national tax policies and "tax competition" as a form of game among countries on the definition of their tax system directed toward the attraction of tax base, the author illustrates how the two are necessarily co-existent. First, because coordination is one of the many means that a state may use to pursue national self-interest in tax matters and, second, because coordination is usually "partial", affecting only a subset of the available tax instruments. One especially relevant implication of the latter point is that the effects of collective action in reducing avoidance by coordination on a subset of tax instruments may be (more than) offset by national decisions on instruments left unconstrained (e.g., lowering the statutory tax rate). Hence, coordination efforts might lead to an intensification of tax competition, leaving the final impact of the coordination activity on national well-being ambiguous. Finally, the author argues that the implementation of effective minima is a promising measure in dealing with tax competition (for taxes levied on a source basis), also representing an appropriate response to preferential regimes (relative to insisting on uniform treatment).

PROFESSION

Apostol, O., & Pop, A. (2018). 'Paying taxes is losing money': A qualitative study on institutional logics in the tax consultancy field in Romania.

In this paper, the authors examine the role of the tax consultancy industry in Romania, drawing on institutional theory, in particular, institutional logics. Semi-structured interviews with tax consultants and with tax inspectors working in the large business directorate are used for data collection. It is found that commercial logic dominates, within which compliance work plays a

larger role than avoidance. Interestingly, the authors found no signs of an ethical logic with the tax consultants, which is consistent with other studies in western countries.

SHARING ECONOMY

Brandon Elliot, C. (2018). Taxation of the Sharing Economy: Recurring Issues.

The author describes the current challenges faced by the government when collecting direct and indirect taxes in the sharing economy. The issue presented in relation to direct taxation is profit-shifting by large worldwide platforms, such as Uber and Airbnb. The author argues that there are two types of transactions which are considered for VAT purposes: intermediary services provided by the platform and the services provided to end users. The decision is made depending upon whether the provider is regarded as a taxable person. Furthermore, the author argues that goods or services supplied in return for reward-based crowdfunding fall within the VAT regime if the goods or services are identified at the time of the contribution. The author also details four types of tax opportunism in the sharing economy and suggests that lack of visibility of the provider's activity is the main issue when collecting tax.

Bornman, M., & Wessel, J. (forthcoming). The tax compliance decision of the individual in business in the sharing economy.

The authors argue that individuals who newly enter the sharing economy cause the most pressure on tax compliance. Extending and revising the framework developed by Kamleitner, Korunka and Kirchler (2012) for small business owners to the analysis of home-sharing industries by individuals, this article presents a four-dimensional concept that includes personal characteristics, perceived opportunity, knowledge requirement, and decision-making. The authors propose to use this novel framework for the analysis of tax compliance decisions and risks for individuals participating in the sharing economy.

Migai, C., de Jong, J., & Owens, J. (forthcoming). The Sharing Economy: Turning Challenges into Compliance Opportunities for Tax Administrations.

This article details the challenges and opportunities for tax authorities in the face of the increasing role played by the sharing economy. To address how fiscal policies should be designed, the authors separate the role of end users on the digital platforms and the digital platforms themselves. They conclude that, on the one hand, the sharing economy may boost the size of the informal sector by either cash transactions or cryptocurrencies. On the other hand, the digital nature of the sharing economy may create a new source of public revenue and unique tax compliance opportunities with properly designed regulations and use of technologies. The article contains numerous examples of businesses within the sharing economies in various countries, with carefully referenced details of their operations, sizes, and treatment for tax purposes.

TRANSFER PRICING

Hofmann, P., & Riedel, N. (2018). Transfer Pricing Regimes for Developing Countries.

Recently, governments all over the world have increasingly paid attention to international profit shifting, especially as it relates to transfer pricing. This article focuses on the challenges facing developing and emerging countries in terms of transfer pricing regime design and

administration. First, the arm's length principle applies in less developed countries to protect their domestic corporate tax bases. Second, it is difficult to find comparable transactions required for transfer pricing, due to weak public reporting requirements. Third, given the complexity of transfer pricing regimes partly related to the OECD/G20's base erosion and profit shifting (BEPS) initiative, the appropriate administration and enforcement of complex transfer pricing systems requires additional tax authorities' resources, both in terms of the number of employees and their education. Finally, the evaluation of transfer pricing in these countries is subject to a variety of potentially different objectives, resulting in behavioral responses, i.e., corruptive behavior etc. In the article, the authors also suggest viable options by which to address these challenges. "Direct" responses counteract a lack of tax authority capacity via capacity-building measures and counteract the lack of comparable data by permitting the use of indirectly comparable data in order to construct arm's length prices. Another option is to foster the availability and use of advance pricing agreements (APAs) between one or more taxpayers and one or more tax administrations. It is also suggested that developing countries implement the comprehensive safe harbor provisions into transfer pricing regimes in order to relax the arm's length principle and the more formulary international apportionment of the income of multinational enterprises (MNEs). These proposals may help to lower compliance and administration costs as well as reduce the scope for corrupt behavior.

Collier, R. (2018). The Impact of the OECD/G20 Base Erosion and Profit Shifting Project on the Task for Developing Countries of Applying the Arm's Length Principle in Practice.

In this paper, the author reviews the history of OECD engagement with developing countries and highlights the difficulties now faced, particularly by developing countries, as a result of the new transfer pricing analyses required by the BEPS project. It is noted that the BEPS project has led to the "single biggest rewrite (and rethink) and expansion of the Transfer Pricing Guidelines since their introduction". Much more attention is now paid to the actual conduct of the parties, going behind the contractual terms, which makes the process of finding appropriate arm's length prices considerably more difficult and therefore onerous.

Collier concludes that, notwithstanding the considerable guidance provided, for example, by the Platform for Collaboration on Tax, the challenges facing developing countries will continue to grow and expand, calling into question the sustainability of the current system for allocation of corporate profits for tax purposes.

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