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

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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

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[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

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[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

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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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