

Katarzyna Bronżewska

Cooperative Compliance

A New Approach
to Managing
Taxpayer Relations

IBFD DOCTORAL SERIES

38

Cooperative Compliance: A New Approach to Managing Taxpayer Relations

Why this book?

This book analyses the concept of cooperative compliance, a relatively new style of cooperation between corporate taxpayers and tax authorities.

The growing burden of tax compliance and the inadequate resources provided by tax authorities forced the introduction of a different form of cooperation based on mutual trust, transparency and understanding, while relying on tax risk management. This alternative approach first appeared independently in Australia, Ireland, the Netherlands, the United Kingdom and the United States in the early 2000s. Since then, the concept has been implemented in one form or another in over 20 jurisdictions worldwide. The OECD took the lead on systematizing the concept and in 2008 published a study in which the concept – initially referred to as “enhanced relationship” – was introduced. A few years on, cooperative compliance is envisioned as a powerful tool to increase the effectiveness of the tax collection process and influence taxpayer behaviour, especially in the post-BEPS environment.

The book describes the beginnings of cooperative compliance in Australia, the Netherlands, the United Kingdom and the United States. It also discusses Poland, as a probing jurisdiction where no form of such cooperation has, as yet, been introduced. It defines and classifies the concept of cooperative compliance and explores the theoretical and practical issues related to its implementation. The analysis demonstrates that cooperative compliance is much more than a new legal measure and, as such, must be viewed in a much broader context, wherein historical, psychological and cultural elements play an important role.

Title:	Cooperative Compliance: A New Approach to Managing Taxpayer Relations
Author(s):	Katarzyna Bronżewska
Date of publication:	November 2016
ISBN:	978-90-8722-388-5 (Print/Online), 978-90-8722-389-2 (eBook)
Type of publication:	Print, eBook and Online book
Number of pages:	638
Terms:	Shipping fees apply. Shipping information is available on our website
Price (Print/Online):	EUR 130 / USD 155 (VAT excl.)
Price (eBook):	EUR 104 / USD 124 (VAT excl.)

Order information

To order the book, please visit www.ibfd.org/IBFD-Products/shop. You can purchase a copy of the book by means of your credit card, or on the basis of an invoice. Our books encompass a wide variety of topics, and are available in one or more of the following formats:

- IBFD Print books
- IBFD eBooks – downloadable on a variety of electronic devices
- IBFD Online books – accessible online through the IBFD Tax Research Platform



IBFD, Your Portal to Cross-Border Tax Expertise

IBFD

Visitors' address:
Rietlandpark 301
1019 DW Amsterdam
The Netherlands

Postal address:
P.O. Box 20237
1000 HE Amsterdam
The Netherlands

Telephone: 31-20-554 0100
Fax: 31-20-622 8658
www.ibfd.org

© 2016 IBFD

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the written prior permission of the publisher. Applications for permission to reproduce all or part of this publication should be directed to: permissions@ibfd.org.

Disclaimer

This publication has been carefully compiled by IBFD and/or its author, but no representation is made or warranty given (either express or implied) as to the completeness or accuracy of the information it contains. IBFD and/or the author are not liable for the information in this publication or any decision or consequence based on the use of it. IBFD and/or the author will not be liable for any direct or consequential damages arising from the use of the information contained in this publication. However, IBFD will be liable for damages that are the result of an intentional act (*opzet*) or gross negligence (*grove schuld*) on IBFD's part. In no event shall IBFD's total liability exceed the price of the ordered product. The information contained in this publication is not intended to be an advice on any particular matter. No subscriber or other reader should act on the basis of any matter contained in this publication without considering appropriate professional advice.

Where photocopying of parts of this publication is permitted under article 16B of the 1912 Copyright Act jo. the Decree of 20 June 1974, Stb. 351, as amended by the Decree of 23 August 1985, Stb. 471, and article 17 of the 1912 Copyright Act, legally due fees must be paid to Stichting Reprorecht (P.O. Box 882, 1180 AW Amstelveen). Where the use of parts of this publication for the purpose of anthologies, readers and other compilations (article 16 of the 1912 Copyright Act) is concerned, one should address the publisher.

ISBN 978-90-8722-388-5 (print)
ISBN 978-90-8722-389-2 (eBook)
ISSN 1570-7164
NUR 826

Table of Contents

Acknowledgements	xv
-------------------------	----

Acronyms and Abbreviations	xix
-----------------------------------	-----

Part I Setting the Grounds

Chapter 1: Introduction	3
1.1. Setting the scene	3
1.2. Subject of the thesis – CC between the tax authorities and the large business taxpayers	5
1.3. Research questions	10
1.4. Scope of the thesis	13
1.5. Limits of the thesis	15
1.6. Methodology of the study	16
1.7. Outline of the thesis	16
Chapter 2: Historic Introduction	19
2.1. Introduction	19
2.2. Historical background	19
2.2.1. General remarks	19
2.2.2. Taxpayers – Tax authority cooperation	20
2.3. Compliance models	27
2.3.1. Compliance	27
2.3.2. Responsive regulation	32
2.3.3. Compliance costs	36
2.3.4. Other factors impacting on compliance	40

2.4.	The OECD analysis	44
2.4.1.	OECD work in the field of an ER/CC	44
2.4.2.	Cooperation with banks	49
2.4.3.	Report on the Corporate Loss Utilization through Aggressive Tax Planning (the “Corporate Loss Report 2011”)	52
2.4.4.	OECD Guidelines for Multinational Enterprises (2011)	52
2.5.	Summary	54
Chapter 3:	The Levels of Relationship between Taxpayers and the Tax Authorities	57
3.1.	Introduction	57
3.2.	The basic relationship – Why it is not working, or is it?	58
3.2.1.	The basic taxpayer-tax authorities relationship	58
3.2.2.	The main objective of the basic relationship	60
3.2.3.	Problems that the tax authorities and the taxpayers experience at this level of relationship	62
3.3.	Advanced relationship	63
3.3.1.	General remarks and the concept of the advanced relationship	63
3.3.2.	What is the advance ruling?	65
3.3.2.1.	General remarks – Definition	65
3.3.2.2.	Who can apply for a ruling? – The objective scope	66
3.3.2.3.	For what issues may a ruling be requested? – The subjective scope	67
3.3.2.4.	Who issues a ruling?	67
3.3.2.5.	Binding effect	68
3.3.2.6.	Procedure and time	68
3.3.3.	How does the system work in countries that already have a type of CC?	69
3.3.3.1.	Australia	69
3.3.3.2.	Netherlands	71
3.3.3.3.	United Kingdom	75
3.3.3.4.	United States	78
3.4.	Why the basic relationship with the ATR is still not enough	82

3.5.	ER/CC	86
3.5.1.	Objectives of CC	87
3.6.	Conclusions	88
Part II		
Implementation of CC		
Chapter 4:	Description of Different Models	93
4.1.	Introduction	93
4.2.	The OECD Model of CC	94
4.2.1.	What is the OECD CC?	94
4.2.2.	Why CC should be introduced	95
4.2.2.1.	Benefits for a taxpayer	95
4.2.2.2.	Benefits for the tax authority	96
4.2.3.	How can the CC be introduced?	97
4.2.3.1.	Conditions to be met by the tax authorities in the OECD CC	98
4.2.3.2.	Conditions to be met by the taxpayer in the OECD CC	102
4.3.	Australia	104
4.3.1.	Introduction	104
4.3.2.	ATO – Structure and tasks	105
4.3.3.	What is CC in Australia?	108
4.3.4.	Why has CC been introduced?	110
4.3.5.	How has CC been introduced?	111
4.3.6.	Recapitulation	123
4.4.	Netherlands	124
4.4.1.	Introduction	124
4.4.2.	NTCA – Structure and tasks	125
4.4.3.	What is CC in the Netherlands?	128
4.4.4.	Why has CC been introduced?	131
4.4.5.	How has CC been introduced?	135
4.4.6.	Recapitulation	160
4.5.	United Kingdom	163
4.5.1.	Introduction	163
4.5.2.	HMRC	163

4.5.3.	What is CC in the United Kingdom?	167
4.5.4.	Why has CC been introduced?	167
4.5.5.	How has CC been introduced?	171
4.5.6.	Recapitulation	191
4.6.	United States	193
4.6.1.	Introduction	193
4.6.2.	US tax authorities	194
4.6.3.	What is CC in the United States?	197
4.6.4.	Why has CC been introduced?	201
4.6.5.	How has CC been introduced?	204
4.6.5.1.	Real-time and pre-filing issue resolution	205
4.6.5.2.	CAP	205
4.6.5.3.	New post-filing examination processes	216
4.6.5.3.1.	LIFE as an example of CC in a post-filing environment	216
4.6.6.	Summary	219
4.7.	Other countries' experiences	220
4.7.1.	EU developments in the field of CC	221
4.7.2.	Other countries' experience	221
4.8.	Summary	225
Chapter 5:	CC – Its Building Blocks and Description	229
5.1.	Introduction	229
5.2.	The building blocks of CC	229
5.2.1.	Hierarchy of the building blocks	229
5.2.2.	A successful basic relationship	232
5.2.3.	Culture and CC	236
5.2.4.	Trust	241
5.2.4.1.	Trust as a building block	241
5.2.4.2.	Trust in the CC context	243
5.2.4.3.	Trust's levels	246
5.2.4.4.	Trust as one of the CC pillars	249
5.2.5.	Culture translating into political and social acceptance of CC	251
5.2.6.	Tax culture	252
5.2.7.	Organizational culture	253
5.2.8.	Tax authority's readiness	257

5.2.9.	Taxpayers' readiness	261
5.2.10.	Legal environment	261
5.2.11.	Summary	263
5.3.	In search of a definition	264
5.3.1.	Introduction	264
5.3.2.	Description	266
5.3.3.	What is CC not?	272
5.3.4.	Classification	274
5.3.4.1.	Stage of development	274
5.3.4.2.	Common versus civil law countries	275
5.3.4.3.	Ways in which the aims may be achieved – Different models	276
5.4.	Summary	277
Part III		
Theoretical Issues		
Chapter 6:	Theoretical Issues – SWOT Analysis	281
6.1.	Introduction	281
6.2.	Strengths of CC	282
6.2.1.	Benefits of CC	283
6.2.1.1.	Benefits for taxpayers	283
6.2.1.2.	Benefits for the tax authorities	285
6.2.2.	Time scope of CC	287
6.2.3.	Subjective scope of CC	287
6.2.4.	CRM	292
6.2.5.	TCF	293
6.2.6.	Division of work (no duplication of work)	298
6.2.7.	The minimization of use of ATP versus limiting the taxpayer's planning opportunities	299
6.3.	Weaknesses of CC	300
6.3.1.	Obstacles to the introduction of CC	300
6.3.2.	Equality perception	301
6.3.3.	Administrative limitations	304
6.3.4.	Lack of transparency	305
6.3.5.	Fair share concept	307

6.3.6.	Lack of sanctions for misbehaviour	311
6.3.7.	Performance measurement	313
6.4.	Opportunities for CC	316
6.4.1.	Management of large taxpayers	316
6.4.2.	Corporate governance	317
6.4.3.	Tax risk management – Risk rating	320
6.4.4.	PR tool	328
6.4.5.	CSR	329
6.4.6.	International CC	330
6.5.	Threats to CC	334
6.5.1.	Reliance on risk rating	334
6.5.2.	Lack of tax expertise and remuneration levels at the tax authorities	335
6.5.3.	Implementation	337
6.5.4.	Social factors	339
6.5.5.	Economic factors – The economic crisis and sustainability of CC	339
6.5.6.	Internal governance of the tax authorities	341
6.5.7.	Opportunistic behaviour of both parties	342
6.5.8.	International tax competition	344
6.6.	Summary	345
Chapter 7:	Theoretical Issues – Legal Analysis	347
7.1.	Introduction	347
7.2.	Voluntary nature of the cooperation	348
7.3.	Written agreement	349
7.4.	Rule of law requirements and CC	350
7.4.1.	Rule of law	350
7.4.2.	Discretionary powers of tax authorities	353
7.4.3.	Discretionary powers and CC	357
7.4.4.	Meaning of tax avoidance and abuse of law in the CC context	364
7.4.4.1.	Abuse of law and tax avoidance in various jurisdictions	365
7.4.4.2.	The EU prohibition of the abuse of law	369

7.4.4.3.	Tax abuse versus CC	372
7.4.5.	Equality principle	375
7.4.5.1.	Legal definition of equality	375
7.4.5.2.	Equal access to CC	378
7.4.5.3.	Summary	382
7.5.	Dispute resolution within CC	383
7.5.1.	ADR in tax disputes	383
7.5.1.1.	Mediation	384
7.5.1.2.	Arbitration	386
7.5.1.3.	Six ways to reach an agreement in the CC environment	387
7.6.	Cancellation of cooperation	402
7.7.	Privacy and confidentiality	403
7.7.1.	General remarks	403
7.7.2.	Privacy and confidentiality	405
7.7.2.1.	Netherlands	406
7.7.2.2.	United Kingdom	409
7.7.2.3.	United States	412
7.8.	Professional privilege	415
7.8.1.	Legal privilege – General remarks	415
7.8.2.	Regulation of the tax profession	416
7.8.2.1.	Netherlands	417
7.8.2.2.	United Kingdom	421
7.8.2.3.	United States	423
7.8.3.	Privacy and confidentiality in CC	427
7.9.	Criminal proceedings	430
7.10.	Exchange of information	434
7.11.	Conclusions	436

Part IV
Possible Implementation of CC in Poland

Chapter 8:	Introducing CC in Poland	445
8.1.	Introduction	445
8.2.	The Polish tax authorities – Historical and legal context	447
8.2.1.	An outline of the history of the Polish tax authorities	447
8.3.	Design of the Polish tax authorities	449
8.3.1.	General information	449
8.3.1.1.	Large taxpayers’ offices	451
8.3.1.2.	Administrative courts	452
8.3.1.3.	A reform of the tax authorities	452
8.3.2.	Recapitulation – Are the tax authorities ready for CC?	456
8.4.	Culture, trust and economic climate	459
8.5.	Basic relationship in Poland	462
8.5.1.	Legal framework of the basic relationship between the taxpayers and the tax authorities	462
8.5.2.	Measures to advance the basic relationship	470
8.5.2.1.	General rulings	471
8.5.2.2.	Individual interpretations	472
8.5.2.3.	APAs	474
8.5.2.4.	Recapitulation	475
8.5.3.	Recapitulation – Is the basic relationship a successful and working one?	476
8.6.	Taxpayers’ readiness	478
8.7.	CC in Poland – Feasibility study	480
8.7.1.	Framework of CC	480
8.7.1.1.	How could CC look?	480
8.7.1.2.	Parties to the relationship	481
8.7.1.3.	TCF	482
8.7.1.4.	CRM within LTO	482
8.7.1.5.	Agreement-based cooperation versus normative model	483
8.7.2.	Legal environment	484

8.7.2.1.	Constitution and GTA	484
8.7.2.2.	Regulation of anti-avoidance	487
8.7.2.3.	ADR	491
8.7.2.4.	Privacy of taxpayer’s data	492
8.7.2.5.	Confidentiality and professional privilege	493
8.7.3.	Mental shift of approach	495
8.8.	Conclusions	497
<p>Part V Conclusion</p>		
Chapter 9:	CC and BEPS	503
9.1.	Introduction	503
9.2.	Shift towards a global tax transparency	503
9.2.1.	What do multinationals do and is it moral?	503
9.2.2.	Trust, reputation and fairness	505
9.2.3.	A brief history of the shift towards global tax transparency	506
9.2.3.1.	Main “players” actions	507
9.2.3.2.	Impact of the climate change on CC	520
9.3.	Increased compliance burden resulting from BEPS	521
9.3.1.	BEPS actions relevant from the CC perspective	521
9.3.1.1.	Mandatory disclosure rules	522
9.3.1.2.	CbCR	526
9.3.1.3.	Dispute resolution	528
9.4.	A new role for CC	529
Chapter 10:	Future of CC	533
10.1.	Introduction	533
10.2.	The status quo of CC	533
10.2.1.	Summary of the earlier discussion	533
10.2.2.	Efficiency and legitimacy of CC	538
10.3.	Conclusions – What has been achieved and what the future holds	541

Table of Contents

Annex 1	NTCA, Individual Compliance Agreement	547
Annex 2	HMRC, TCRM6100 – Business Risk Review Template	551
Annex 3	CAP Memorandum of Understanding	553
Annex 4	The Australian BISEP Model	565
Annex 5	Code of Professional Conduct of the Dutch Association of Tax Advisers [Dutch acronym: NOB] as Adopted on 2 June 2010	569
References		571
List of Tables		607
List of Figures		609

Introduction

*“In theory, there is no difference between theory and practice.
But, in practice, there is.”*

Jan L.A. van de Snepscheut/Yogi Berra

1.1. Setting the scene

In today’s challenging economic environment, governments, the tax authorities, multinational enterprises (MNEs) as well as private organizations all over the world are increasingly expected to achieve more with less: less people, less money and less time. The tax authorities are required to reduce non-compliance, maintain or improve compliance and increase revenues to the budget, all without damaging the integrity of the national tax system and appeal of the country to investment. The traditional way of improving compliance focuses on audits, the increase of enforcement methods and prosecution. Yet, in recent years, an alternative, to influence and ultimately improve taxpayers’ behaviour, an enhanced relationship¹ (ER) (now cooperative compliance (CC)), has been developed and is being implemented in a growing number of countries across the globe.

The aim of this thesis is, in the first instance, to explore the theoretical and practical issues related to the implementation of an ER and define and classify this concept. Secondly, it aims to establish whether CC is a legitimate and efficient way of cooperation between taxpayers and the tax authorities. Thirdly, using Poland as an example, it aims at addressing the questions, both practical and theoretical, that need to be answered by a jurisdiction that would contemplate the introduction of CC. Finally, the thesis discusses what has been achieved so far and what the future of an ER/CC may be taking into account the economic and social climate resulting from the financial crisis and the project of the Organisation for Economic Co-operation and Development (OECD) on Base Erosion and Profit Shifting (BEPS).

1. The term “enhanced relationship” is used interchangeably with the term “ER” or “cooperative compliance” or “CC”; *see* sec. 2.4.1. for further information.

CC is a relatively recent and specific concept of a new, supposedly mutually beneficial way of cooperation between the taxpayers (TP) and the tax authorities (TA).

In 2009, Dave Hartnett, Permanent Secretary for Tax, HM Revenue and Customs (HMRC), recommended an ER with the following words that describe its essence:

An enhanced relationship offers benefits for everyone. Taxpayers who behave transparently can expect greater certainty and an early resolution of tax issues with less extensive audits and lower compliance costs. And an enhanced relationship between revenue bodies and tax intermediaries should also yield significant benefits. And it is also not just a way of maintaining compliance and low-risk behaviour; it is about changing behaviour by ensuring there are hard-edged benefits to business occupying the low-risk space. CFOs around the world told us that what matters to them above all is certainty – no surprises from their tax departments, by disclosing potentially significant issues in real time and by revenue bodies responding proportionately. And tax administrations can't leave businesses engaged in an open relationship to fend for themselves in the tax jungle. This too is a matter of trust.²

CC may provide the answer to the problems that tax authorities in many jurisdictions have been facing for many years: lack of resources to investigate all the cases requiring a closer look, to audit taxpayers as often and as deeply as they found necessary, to respond effectively and efficiently to the changing conditions of the market and new, more advanced tax-planning opportunities resulting from globalization.

In the past, different approaches were required which suited the different business models in operation at the time. Since then, both the world economy and business models have changed. Therefore new approaches, such as the CC, are necessary. This is not to denigrate the old methods; they are simply no longer appropriate in the current conditions.

Since 2008, when the financial crisis broke out, the world of economics and tax is even more altered and turbulent than it would normally be. Governments are striving for the additional revenues and thus they are looking more closely than ever to tax-planning schemes and loopholes in the law in order to collect as much money as they can from taxpayers, both through voluntary compliance as by settlement and/or litigation. Also due to the crisis, the public's perception of the largest companies has evolved.

2. Dave Hartnett, during the Hardman Lecture at the Institute of Chartered Accountants of England and Wales, 12 November 2009.

If, in the past, people were not that concerned with the financial results and the tax paid by the multinationals, nowadays these figures are becoming increasingly important. People protest on the streets and demand that the largest businesses pay what is due to the state.³

This crisis has emphasized, inter alia, the need for more efficient tax authorities, including better tax collection and greater attention to cross-border tax avoidance and evasion. CC, although per se not impacting on the amount of the tax obligation, is a measure that has the potential to substantially improve the efficiency of the tax authorities with regard to the taxpayer groups that are covered by it.

1.2. Subject of the thesis – CC between the tax authorities and the large business taxpayers

The relationships between the taxpayer and the tax authorities play a crucial role in the proper functioning of a tax system in a country. These relationships depend not only on tax legislation and legal procedures but also on non-legal elements, such as cultural, sociological as well as historical settings. Levying taxes is the most important task of the tax authorities and it relies on the information they possess. If the information is scarce, incomplete or difficult to obtain (both in the national and the international context) the process of tax assessment is slowed down or, sometimes, never properly accomplished. The best source of information about a taxpayer is the taxpayer himself. However, the current situation in most countries consists of a basic relationship, where the taxpayers hardly engage with the tax authorities, but limit themselves to merely satisfying their legal obligations of reporting and paying. The traditional basic relationship is based on a passive and adversarial approach from both parties. They merely do what is legally required without taking the initiative to step beyond the boundaries of their legal obligations. From the tax authorities' perspective, the basic relationship consists of four major actions and the availability of legal tools to perform them. These actions aim to:

- (1) question the taxpayer about the tax return;
- (2) seek, if necessary, more information about the tax return;

3. "On an icy Sunday afternoon in January, high streets across Britain reverberated to chants of 'Pay your tax'. Protesters wielding loudspeakers and leaflets railed against alleged tax-dodging by big companies at a time when the nation was facing as much as £80bn (\$129bn) in public spending cuts." V. Houlder, *Tax: Trouble to avoid*, Financial Times, 7 February 2011, p. 7.

- (3) take enforcement measures, if necessary, against the taxpayer; and
- (4) collect the amount of tax payable.⁴

Accordingly, the taxpayers are obliged to file a tax return in which they disclose only the required minimum of information, report the amount of tax due in accordance with the tax return and pay that amount on time. The basic relationship does not require, nor encourage, them to disclose to the tax authorities how taxable income or the tax was calculated or whether they faced any questions, uncertainties or risks while preparing the return. Yet, that exact information is crucial for the tax authorities that wish to manage risks and allocate resources effectively. That basic relationship is based on several fundamental rights and obligations of the taxpayers such as the right to be informed, assisted and heard, the right of appeal, the right to certainty and the obligation to be honest, to be cooperative, and to provide accurate information and documents on time.⁵ In many countries, those rights and obligations are embedded in special charters.⁶ However, the basic relationship results only in minimal cooperation between the taxpayers and the tax authorities and, consequently, in a very limited flow of information. To break this pattern, that is only slightly altered by a system of advance tax rulings (a form of more advanced relationship), and to move toward more active behaviour from both parties, the idea of an ER was introduced. It has been developed independently in several countries and at the same time the OECD has been working on a more structured description of this phenomenon. An enhanced cooperation means a change in processes of tax compliance and in the behaviour of the tax authorities and the taxpayers that leads to open discussion, real-time working and, in effect, higher tax certainty and efficiency gains.

In 2006, after the OECD Forum on Tax Administration⁷ in Seoul, a Declaration⁸ was issued in which the benefits of trade liberalization and advances in communication technologies were set out, which have opened

4. See OECD, Tax Intermediaries Study, *Working Paper 6: The Enhanced Relationship* (July 2007), p. 2.

5. See OECD, Centre for Tax Policy and Administration, Tax Guidance Series, General Administrative Principles – GAP002 Taxpayers’ Rights and Obligations (1990) (hereinafter OECD GAP002), p. 3.

6. For instance, *Taxpayers’ Charter* in Australia, *Charte du Contribuable* in France or *Taxpayers’ Bill of Rights* in the United States.

7. The Forum on Tax Administration, a subsidiary body of the OECD’s Committee on Fiscal Affairs, established in July 2002. The Forum gathers senior tax administrators from OECD countries and, when appropriate, works together with non-member economies and businesses. See sec. 2.4.

8. OECD, *Third Meeting of the OECD Forum on Tax Administration, Final Seoul Declaration* (2006) (hereinafter OECD Declaration 2006).

the global market place to a higher number of taxpayers as well as the threats stemming from aggressive tax planning (ATP).

The OECD *Study into the Role of Tax Intermediaries*⁹ (the “OECD Study”) was initiated by this Declaration and commenced in September 2006. The OECD Study was prepared by HMRC officials and the OECD Secretariat. It broadly presents the main idea of the OECD ER and particular solutions giving the examples of three countries that have already (in 2008) introduced pilot programmes on such cooperation; namely Ireland, the Netherlands and the United States. However, the idea of changing the attitude towards taxpayers and also making them change their attitude towards the tax authorities is not limited to these three countries. Similar programmes are to be found also in the United Kingdom, Australia and New Zealand and a growing number of other countries.

The idea of ER/CC has been developed as an answer to three major issues – (i) ATP, (ii) the fact that the old approaches to levying taxes and tax compliance are no longer effective and efficient, and (iii) the evolution and changes in society that need to be embraced by the governments.

An enhanced cooperation is thought to be beneficial for the tax authorities but it is also a solution to, at least, some of the taxpayers’ problems. The main issue from a large business’ standpoint is the legal and tax uncertainty of current or future transactions. Prompt responses from the tax authorities help to reduce delays in decision-making processes and, in some cases, are a condition in the making of a business decision.

According to a Deloitte survey (the “Deloitte EMEA Survey”),¹⁰ 52% of respondents in the EMEA region (Europe, the Middle East and Africa) believe that there is tax uncertainty that influences or even damages the business operations in their country (more than 70% of positive answers were given in Poland, Hungary, Romania, but also Portugal and less than 40% in the Netherlands, Luxembourg, Switzerland, Finland and Denmark).

9. OECD, *Study into the Role of Tax Intermediaries* (2008) (hereinafter OECD Study 2008).

10. Deloitte, *EMEA Tax Certainty Survey* (June 2012), available at www.deloitte.com. The survey was conducted in March 2012 on 1,328 respondents from 24 jurisdictions in the EMEA region – Austria, Belgium, Cyprus, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Kenya, Luxembourg, the Netherlands, Nigeria, Norway, Poland, Portugal, Romania, Russia, the Slovak Republic, Sweden and Switzerland.

Businesses in the Netherlands, Luxembourg, Switzerland, Sweden and Denmark believe that tax certainty in their countries is greater than in other EMEA jurisdictions. In the Czech Republic and Belgium respondents believe that they are among the average, whilst in Hungary, Poland, Romania and Russia businesses are convinced that they have less tax certainty. This not only shows how great the need for certainty is but also that the enhanced cooperation in the Netherlands, for instance, might have contributed to the increase of certainty levels.¹¹

Another concern of corporate taxpayers pertains to the cost of the auditing process. Audits are necessary for the tax authorities to assess returns filed. However, they often take place many years after the return in question was filed, which forces the taxpayer to provide information and justification of actions taken years before. Thus, the auditing process is burdensome, costly and time-consuming for both the taxpayer and the tax authorities and often perceived as unbalanced and disproportionate. Although here, a more active attitude from the taxpayer is evident, it is only temporary and forced by circumstances and the choice between expected collaboration and longer audit. Hence, it is not the active, voluntary cooperation as in the pure CC.

Since engaging in CC requires certain commitment and effort from both parties, it is very important to clearly define the objectives and benefits of such relationship. Undoubtedly, the first objective is creation of a win-win situation, *inter alia*, through improved exchange of information between the taxpayer and the tax authorities. From this, flows the ability of the tax authorities to make a fully informed assessment of the taxpayer's situation which, in turn, should lead to more effective risk assessment, appropriate resource allocation and greater and faster certainty about the tax position for both parties. The taxpayer will also benefit from the reduction of uncertainties in reporting (as the arising issues will be solved in real time) and reduction of revenue audits. In the longer term it should result in lower compliance costs for taxpayers taking part in the programme. In more general terms, close cooperation with a certain group of taxpayers should also contribute to long-term gain for low-risk taxpayers since the tax authorities will streamline their resources to high-risk issues and such behaviours.

One of the conditions *sine qua non* for the successful operation of CC in a country is the positive result of the simple cost and benefits analysis. As long as the taxpayers do not see that the benefits resulting from closer

11. It should be noted, however, that it is not claimed in the thesis that the high level of perceived certainty in the Netherlands is due to CC only.

cooperation with the tax authorities outweigh the costs they incur, they will not be willing to enter into this relation.¹²

The idea of CC offers significant changes to the way the relations between the taxpayers and tax authorities are shaped. The OECD studies conducted so far present a general, theoretical framework that can be further developed by countries interested in entering into the CC programmes. Several countries already have a few years of experience based on pilot programmes they have launched. The new *modus operandi* is, in most cases, appreciated and seen by both taxpayers and the tax authorities as beneficial. However, there are also many areas that are uncertain or criticized in the idea and the execution of CC. The study aims at exploring those uncertainties as well as the improvements in the relations between the large business and the tax authorities that already have been achieved.

The early theoretical and more importantly, practical experiences of taxpayers and tax administrations cooperating in such an enhanced way, permit an analysis of this concept and an assessment of its usefulness and possibilities of its adoption in other countries.

The tax competition between various jurisdictions consists not only of tax and corporate laws but also of the approach that the government and its institutions, especially the tax authorities, adopt towards the large business taxpayer. The thesis will examine how the design of the legal principles and legal framework may hinder or facilitate the taxpayer-tax authorities' dealings and thus the attractiveness of a country. Further, the topic of CC relates to a broader issue, namely the relations between citizen and government and the change of the state's role toward responsive law. CC raises serious doubts as to the equality of the taxpayers. In many countries, public perception, based very often on the misinformation and/or lack of knowledge, is negative towards this type of cooperation, which is seen as "cosy" and giving unjustified benefits to the largest and richest taxpayers who (supposedly) do not pay what they owe to the state. Without deciding here the rights or wrongs of this perception, nevertheless it is crucial to address these concerns, which otherwise may hinder cooperation and be very costly to governments, not only in times of crisis.

The wider implementation of the concept of CC requires a clear understanding of its basic assumptions. Such assumptions need to be extracted from the

12. J. Freedman, G. Loomer, J. Vella, *Corporate Tax Risk and Tax Avoidance: New Approaches*, British Tax Review, No. 1 (2009), p. 86.

first years of operation of these CC programmes in different jurisdictions. This research is, therefore, not about the content of tax laws but rather about the processes used by the tax authorities. It is a sensitive topic that deals, in a broader context, with the relations between a government and its citizens.

The concept of ER attracts growing interest not only from an increasing number of countries that attempt to implement it, but also from professional organizations such as the International Fiscal Association (IFA), which has been researching the ER from 2010. The results of this study were announced in the Key Issues Report¹³ released in October 2012.

1.3. Research questions

The research is based on the assumption that the parties wish to achieve the following aims in mutual relations – the taxpayer: faster and more certainty, predictability, less audits, diminished compliance costs and reputational gains; the tax authorities: certainty about taxpayers (improved insights into taxpayer’s tax planning), better use of limited resources, shift of work to the taxpayers/third parties, and same or higher levels of revenue collected (as without CC). The general question guiding this research therefore is the following:

Is cooperative compliance a legitimate (following the rule of law) and efficient (positive cost analysis) way of cooperation between taxpayers and the tax authorities?

Immediately, it must be indicated that efficiency and legitimacy in this case are given different meanings by the relevant parties. For the tax authorities, efficiency means more efficient tax collection and thus savings on resources; for the taxpayer, efficiency is interpreted as less audits. It does not necessarily mean less compliance costs, since in practice, one category of costs may be replaced by another (more costs of internal and external audits). More importantly, efficiency refers to the ability to make business decisions quicker thanks to the legal certainty obtained from the tax authorities. Legitimacy, for the tax authorities, is understood to be a better view, resulting from disclosures, of how the taxpayers organize their tax affairs. For the taxpayers, on the other hand, it means receiving a “stamp of approval” from

13. IFA, *IFA Initiative on the Enhanced Relationship Key Issues Report*, version 3.0 (June 2012) (hereinafter IFA Report 2012).

the tax authorities. As will be demonstrated later, such legitimacy may be problematic when it is not accepted by the public.

Before moving on to the more detailed research questions, it is worthwhile taking a closer look at legitimacy itself.

“Legitimacy presupposes legality, the existence of a legal system and of a power issuing order according to its rules. But legitimacy also provides the justification of legality, by surrounding power with an aura of authority. It is a kind of a special qualification, a surplus to the (pure) force which the state exercises in the name of the law.”¹⁴ Gribnau argues that legitimate taxation consists of law (legality) and proper treatment. Adapting this to CC, one could state that a legitimate CC would mean the existence of three elements: (i) legality (rule of law, lack of changes to material law, respecting legal principles such as transparency and accountability), (ii) good governance, and (iii) proper treatment (in a mutual relationship of the two parties, but mostly the tax authorities in relation to taxpayers). Proper treatment would encompass what Gribnau describes as procedural legitimacy, which “does not concern the decision itself, but the decision making process, including complaint handling”.¹⁵ He further elaborates that procedural legitimacy may be “subdivided into the perceived justice of the procedures followed i.e. the decision making process, and interactional justice, which is equally important. The latter concerns inter-personal interaction, for example between a citizen and a Tax and Customs Administration employee in which respect and kindness play a role”.¹⁶

The second part of the question relates to efficiency, which is assessed in terms of time, effort and cost. In some countries the efficiency of the tax authorities is enshrined in the Constitution.¹⁷ To the extent possible (due to very limited data available), CC will be looked at also from this perspective. The main research question will then be answered in the last chapter.

14. J.L.M. Gribnau, *Legitimacy of the Judiciary*, in: E. Hondius, C. Joustra (eds.), *Netherlands Reports to the Sixteenth International Congress of Comparative Law, Brisbane* (Intersentia 2002), p. 29.

15. J.L.M. Gribnau, *Legitimacy in fiscal relationships: rule of law and good governance*, in: *Del Derecho de la Hacienda Pública al Derecho Tributario, Estudios en honor de Andrea Amatucci* (Editorial Temis S.A. – Jovene Editore, Bogota-Napoli 2011), p. 259.

16. Id.

17. See M.T. Soler Roch, *Tax Administration versus Taxpayer – A New Deal?*, 4 *World Tax J.* 3 (2012), *Journals IBFD*, p. 293.

Contact

IBFD Head Office
Rietlandpark 301
1019 DW Amsterdam
P.O. Box 20237
1000 HE Amsterdam, The Netherlands
Tel.: +31-20-554 0100 (GMT+1)
Email: info@ibfd.org
Web: www.ibfd.org



IBFD, Your Portal to Cross-Border Tax Expertise