LUISS

Master thesis in “Regulatory Innovation”

Regulatory Innovation to Nudge Tax Compliance of Small and Medium Enterprises:

Possible Scenarios for Reducing Tax Risk in the Italian Tax System

Supervisors

Prof. Dr Sofia Hina da Silva Ranchordás

Dr Elisabetta Tatì (co-supervisor)

Candidate

Lorenzo Pistone

Academic Year 2022-2023

TABLE OF CONTENTS

Introduction

CHAPTER 1 – STRUCTURAL FEATURES OF COOPERATIVE TAX COMPLIANCE

1.1 Tax Compliance and the Coercive Models of Tax Enforcement
1.2 The Rationale and Goals of Co-operative Tax Compliance
1.3 The Studies of International Organisations on Cooperative Tax Compliance
1.4 The Tax Control Framework
1.5 The Establishment and Implementation of Cooperative Tax Compliance
1.6 Tax Audits and Dispute Settlement in the Presence of Cooperative Tax Compliance

CHAPTER 2 – COOPERATIVE TAX COMPLIANCE: A LEGAL AND POLICY ANALYSIS

2.1. The General Legal Framework Concerning the Involvement of Taxpayers in the Determination of the Tax Due
2.2. The Italian Legislation Introduced by Legislative Decree 128/2015
  2.2.1. General Features, Scope and Requirements
  2.2.2. The Commitments of the Parties, rather than Their Rights and Obligations
  2.2.3. The Application
  2.2.4. The Fast-Track Advance Ruling
  2.2.5. The Other Effects on Tax Procedures
2.3. A comparative legal analysis with other regimes of cooperative tax compliance
  2.3.1. Scope and Methodology
  2.3.2. The Dutch System of Cooperative Compliance
  2.3.3. The United Kingdom Cooperative Compliance Programme
2.4. The International Compliance Assurance Programme
2.5. The European Union Tax Compliance Framework
2.6. A Critical Assessment of the Italian System of Cooperative Tax Compliance
2.7. Extending cooperative tax compliance to SMEs from a policy perspective
2.8. The Italian Act of Empowerment for the Tax Reform
  2.8.1. General Issues
  2.8.2. Strengthening *adempimento collaborativo* - Art. 17 (1) (g) (1) of the Act of Empowerment for the Tax Reform

2.8.3. The Ex-Ante Agreed Tax Assessment for Smaller Taxpayers – Art. 17 (1) (g) (2) of the Act of Empowerment for the Tax Reform

2.9. Outlining Potential Avenues for the Application of Cooperative Tax Compliance to SMEs in Italy

CHAPTER 3 – MANAGING THE RISK OF TAX NON-COMPLIANCE BY SMEs IN THE FRAMEWORK OF COOPERATIVE TAX COMPLIANCE

3.1. Does Cooperative Tax Compliance Make Sense from a Business Management Perspective?

3.2. The Current Public Finance and Regulatory Framework for SMEs

3.3. The Organisational Set-Up of SMEs

3.4. Business Management Capacity and the Requirements Presupposed by Cooperative Tax Compliance

3.4.1. Improving Business Management in Connection with Tax Risk Management

3.4.2. Cooperative Tax Compliance and the Medium-Sized Business

3.4.3. Micro-SMEs: No Organisational Structure

3.4.4. Small SMEs: a Case for a Minimum Organisational Structure

3.5. Can a Remodelled TCF Work for SMEs?

Conclusions

Introduction

This master thesis focuses on the impact of regulation on taxation, with special emphasis on tax compliance. It applies the approach of regulatory innovation theoretical studies to Italian tax law with a main research focus on the extension of co-operative tax compliance to small and medium enterprises.

Regulation is hard to define from a legal perspective,[1] but its implications in the field of taxation are crucial for understanding the extent to which the State intervenes in affecting the behaviours of taxpayers, including in particular of enterprises. Such intervention goes beyond the need to secure sufficient revenue to run the State budget, which it presupposes, and reaches out for potential implications as to how much the State wants to nudge desirable behaviours and discourage the undesirable one. This is what is commonly referred to as the regulatory purposes of taxation.[2]

The specific research focus of this master thesis is not connected with how much taxes regulatory intervention by the State might request taxpayers to pay, but rather with how the State requests the payment of taxes and what compliance burden might be suitable to create an environment that prompts taxpayers to engage in making voluntary payments.

It regards easing the tax compliance burden as an expression of regulatory innovation, which might achieve desirable goals for both taxpayers and tax authorities, and explores the extent to which cooperative tax compliance might be extended to SMEs, either along the pattern of the existing regimes, or with a new form based on an ex ante estimated assessment of income.

Various elements confirm experimental nature of this master thesis. First, it is possibly one of the first studies of regulatory innovation applied to tax law ever conducted in Italy. Second, the timeframe of this research largely coincides with a comprehensive reform of the Italian tax system. This fortunate coincidence makes the output of this thesis particularly interesting, as it reviews the ongoing developments and critically assesses their merits in the light of regulatory innovation. Third, the research is conducted in cooperation with a group of professionals that is currently working at the

[1] In this sense, see Morgan, B., and Yeung, K., An Introduction to Law and Regulation: Text and Materials, Cambridge University Press, 2007, p. 3. Scholarship (see Hood, C. et al., The Government of Risk, Oxford University Press, 2001, p. 23) suggests that three elements might be used to define regulation, namely the capacity of standard-setting, information-gathering and behaviour-modification.

[2] Avi-Yonah, R., Taxation as Regulation: Carbon Tax, Health Care Tax, Bank Tax and Other Regulatory Taxes, in University of Michigan Law School Scholarship Repository, available at https://repository.law.umich.edu/articles/1644.

development of a tool for monitoring the risk of tax non-compliance.[3] Such tool is essentially based on the methodologies that commonly apply to entrepreneurial risk auditing.

As a general caveat, it should be noted that the analysis of the Italian tax system is not exclusively based on the law in force, but largely examines the content of the Act of Empowerment for the Tax Reform (*Legge Delega per la Riforma Fiscale*).

In particular, research started at the time of submission of the Draft by the Italian Government to the Parliament on 11 April 2023 in the framework of the Economic and Financial Document (DEF – *Documento di Economia e Finanza*). Considering that, at time of drafting this master thesis, the tax reform has not been enacted yet, the analysis contained herein is more than a policy study and should be regarded as a preliminary legal assessment of the potential of regulatory innovation embedded in the said reform.

While the drafting of this master thesis was being completed, the Government had received the empowerment by the Parliament to carry out the Tax Reform, by Law 9 August 2023, n. 111. The implementation process is expected to take place during the following 24 months and, at time of completion of this thesis, the committees of technical experts on the Reform, appointed by Ministerial Decree on 4 August 2023, is completing its work by 20 September 2023. From that moment on, the Government will proceed further with the issuing of the Decrees of implementation of the Tax Reform, presumably in a time framework that might follow the date of the public defence of this thesis for the specific aspects of cooperative compliance that are addressed herein. This master thesis only considers the developments of the ongoing tax reform as they were made publicly available until 7 September 2023.

From a regulatory innovation perspective, the interest for co-operative tax compliance of small and medium enterprises arises due to the circumstance that Article 17 (1) of the Act of Empowerment for the Tax Reform intends to apply to such context this approach, which has instead been used so far predominantly only for large enterprises.

The main research question will verify whether and how this extension might successfully take place, including along the lines of the two different methods proposed by the Government. The manuscript will combine the analysis of such methods and their application to SMEs with the implications that it might have, from the perspective of Art. 17 (1) (g) of the Act of Empowerment, for the administrative procedures concerning the assessment of tax and tax audits.

[3] The group of professionals is working for Assoholding and the interaction was made possible by the traineeship conducted during the master studies at LUISS Guido Carli.

Whether or not the application of cooperative tax compliance to SMEs can constitute a regulatory sandbox,[4] it is a matter that requires prior technical analysis on tax matters. This is a relevant element for this thesis to explore. In principle, cooperative tax compliance has already been thoroughly explored, as Chapter 2 will indicate; in practice, its application to SMEs is still unchartered territory.

From the perspective of the theory of regulation, it is important to understand what the State might want to achieve with this fundamental reform of tax compliance. Since regulation should be understood in this context as the state's intervention in the economy, scholars have indicated the importance of explaining why the legislative standard was changed.[5] The thesis will explore the assumption that in this case the interaction between public and private actors has shown the need for state intervention with two main goals, reducing the burdensome nature of tax compliance and of the open-ended exposure to tax audits for taxpayers and reducing the cost of managing tax procedures on the side of tax authorities.

The ongoing tax reform is expected to have an impact on what this master thesis defines as the main problem of tax compliance, namely that the current tax rules generate an excessive burden especially for small and medium enterprises (hereinafter also: SMEs) and generate unsatisfactory management by tax authorities.

The excessive nature of the burden is not addressed by this thesis just in terms of how much taxes those enterprises pay, but also and especially from the perspective of how burdensome tax compliance is in the actual system and how the ongoing reform can bring it within more acceptable boundaries, which also enhance the effectiveness of tax procedures on the side of Italian tax authorities.

In the present scenario of Italian tax procedures, the main approach to tax compliance overwhelmingly relies on *ex post* tax audits, hardly admitting any form of agreed *ex ante* assessment of the relevant facts that trigger the liability to tax. In the current context, tax officials devote a relevant number of hours to verify the validity of taxes assessed by the taxpayers, frequently issue tax audits, which generate long contentious administrative and judicial procedures, together with a relevant degree of legal uncertainty until a settlement or a final judicial decision is reached.

By contrast, the ongoing tax reform flips the approach to tax compliance. Article 17 (1) (g) of the Act of Empowerment for the Tax Reform expressly mentions the need for implementing measures that

[4] This terminology is in common usage by scholars of regulatory studies for indicating regulatory experiments. Ranchordás, S., Experimental Regulations and Regulatory
Sandboxes – Law Without Order?, in Ranchordás, S., van Klink, B. (eds.), Special Issue Experimental Legislation in Times of Crisis, Law and Method, 2021, p. 3 ff. criticises the use of regulatory sandboxes in legal matters, especially when it comes at determining the broader implications of the experimental legal regimes.

[5] See Morgan, B., Yeung, An Introduction to Law and Regulation: Text and Materials, cit., p. 16.

promote voluntary compliance by taxpayers. This new philosophy will therefore involve a much large number of business taxpayers not just in the assessment of facts, but also in the final determination of their consequences for tax purposes. By doing so, it will shift tax audits from being the axis of tax compliance to a different dimension, which merely supplements agreed tax compliance. The expected repercussions will reduce the need for contentious procedures, speed up the final collection of taxes and produce concrete benefits for both tax authorities and SMEs.

Co-operative tax compliance is per se not an innovative domain for the Italian tax system, as it was introduced some years ago in the form of the so-called *adempimento collaborativo* by Legislative Decree 128/2015. However, the profound reform of the rules, embedded in the Act of Empowerment, make it interesting to shed some light on how this might contribute to change the philosophy of tax compliance and the relations between taxpayers and tax authorities. The main research question of this manuscript will address those issues also in the light of comparative tax law analysis, which will single out best practices in other tax systems. The comparative analysis will include the tax system of the Netherlands, which might be the forerunner of this type of approach to tax compliance, but also of other countries, including inter alia the United Kingdom. This type of analysis constitutes a research subquestion of this master thesis. Another research subquestion will focus on tax risk assessment, verifying the extent to which the methodologies for auditing entrepreneurial risk of companies may be used also in this context.

The structure of the master thesis is articulated in three main chapters.

Chapter 1 will introduce the analysis of cooperative tax compliance by looking at the pursued goals and address its rationale to promote trust-based interaction with taxpayers as main axis for the implementation of taxes. These issues will be addressed also in the light of the studies conducted under the auspices of the OECD and of the ongoing debate at international level in connection with the OECD tax control framework. In such context, it will also verify how the involvement of all business functions can help achieving a comprehensive assessment of the tax control framework by tax authorities, as well as the extent to which a possible involvement of the board of directors of the different enterprises might become engaged in dynamics that reduce the exposure to tax audits and non-compliance.

Chapter 2 will mostly focus on qualitative legal and policy analysis. After reviewing scholarly analysis of the involvement of taxpayers in tax procedures, it will look at the Italian legislation in force on cooperative tax compliance (Legislative Decree 128/2015 on the so-called *adempimento collaborativo*) and compare it with the corresponding legislation of a selected number of European countries, including especially the Netherlands. Comparative analysis can help detecting specific

critical issues in the Italian tax system and this might be the starting point to verify the extent to which cooperative tax compliance could be concretely expanded to SMEs (and, in any case, below the current threshold of 1 billion euro of revenue) and, in the affirmative, to address possible scenarios involving SMEs. This will create ideal conditions for this chapter to assess the validity of the criteria and goals that have been formulated in the DEF for the expected reform of the Italian tax system. This analysis will constitute an original contribution of the master thesis to the development of law and policy studies on taxation matters.

Chapter 3 will contain a further original contribution to the theoretical and practical study of how regulatory innovation applies to tax law. Its content will address the reduction of the tax compliance burden from a management perspective, taking into account the potential differences that arise between large enterprises, on the one hand, and small and medium enterprises, on the other hand. When addressing such issues, differences might be recorded between the latter enterprises with potential implications for the reform of cooperative tax compliance might apply to SMEs, based on the two types of measures envisaged in Art. 17 (1) (g), respectively (1) and (2) of the Act of Empowerment for the Italian Tax Reform. This analysis might explore concrete scenarios, such as the ones of (1) medium-size business currently fulfilling its tax compliance obligations with the ordinary bookkeeping requirements, and (2) small-size single proprietorship subject to simplified bookkeeping requirements for tax purposes.

Chapter 3 will also address ancillary issues connected with tax incompliance risk assessment (involving tax advisors) and the possible cost-benefits analysis connected with the management requirements presupposed by cooperative tax compliance. Moreover, it can outline how the proposed reform might be introduced and how it can affect the dynamics of administrative tax procedures with a view to enhancing the good management of public administration in conformity with Article 97 of the Italian Constitution and Article 41 of the EU Charter of Fundamental Rights.

The research output is twofold.

First, it applies regulatory innovation to tax law. By doing so, it brings useful elements for scholars to develop the awareness of the impact of regulation on taxation, with special emphasis on tax compliance. This might allow to conduct future research in connection with comprehensive reforms even in highly technical areas, such as tax law.

Second, it conducts an original comparative research on tax law matters, which benchmarks the ongoing Italian tax reform with the experiences of other countries, drawing conclusions for the future of tax compliance in the Italian tax system.

CHAPTER 1 – STRUCTURAL FEATURES OF COOPERATIVE TAX COMPLIANCE

1.1 Tax Compliance and the Coercive Models of Tax Enforcement

Tax compliance concerns the procedural and administrative actions needed to satisfy a taxpayer's obligation under the applicable tax rules.[6] As a phenomenon, tax compliance might be addressed differently according to whether one looks at the perspective of the addressees of this obligation, i.e., the taxpayers, or of the holders of the power to enforce taxes, i.e., tax authorities. However, considering the instrumental nature of the powers held by tax authorities to implement the law, compliance should be equated with the fulfilment of obligations in a given context in line with the requirements established by law,[7] rather than with what tax authorities might want them to be.

Primarily, compliance recalls the concept of the fulfilment of an obligation. The emphasis is therefore on what taxpayers must do to secure the payment of taxes imposed by a State in the exercise of its sovereignty. Since non-compliance means violating the requirements established by law, it triggers the negative consequences applicable within a given legal system to those who infringe the law. Unlike violations of private obligations, in the case of tax non-compliance there is a collective interest of the community to secure correct fulfilment of the obligation to pay taxes. Consequently, tax compliance is inextricably bundled with tax enforcement, i.e., the activity of the State geared at obtaining tax collection in conformity with the legal framework. Tax enforcement is an essential part of the sovereign power to impose taxes and entails coercive powers for tax authorities, which might go as far as depriving taxpayers of their belongings to secure an effective compliance of their tax obligations.

Throughout the 20th century the authoritative philosophy of state regulation has dominated the relations between States and taxpayers. This is especially visible in some European continental countries, whose procedural tax law has developed as a branch of administrative law. According to such philosophy the prevailing collective interest of the State to enforce its laws on matters of taxation can justify the compression of the rights of taxpayers, relegating them to a secondary role, which has often justified interpretative trends favouring tax authorities, also known as *in dubio pro fisco*, or judicial tolerance for exercise of power with restrictive effects on taxpayers.

[6] This is the definition of tax compliance contained in the IBFD International Tax Glossary, IBFD, Amsterdam, available on https://research.ibfd.org/#/glossary (consulted on 2 June 2023).
[7] See International Fiscal Association, Key Issues Report: Initiative on the Enhanced Relationship, 2012, p. 17, available in http://www.ifa-jb.com/media/ER%20Key%20Issue%20Report%20final.pdf (consulted on 2 June 2023).

Such philosophy of command and control has nourished the concept of tax procedures as an instrument to primarily secure the enforcement of taxes, relegating tax compliance to the role of the object of such procedures. Accordingly, insofar as tax authorities have the power to enforce taxes, they also have the power to determine when taxpayers have correctly complied with their obligation to pay such taxes and to exercise their coercive powers in respect of possible violations.

This command-and-control framework has prompted an authoritative shaping of the relations between tax authorities and taxpayers. Initially, the assessment of taxes remained entirely in the hands of tax authorities, characterising taxpayers' compliance as a mere matter of paying what tax authorities requested them to. At a later moment, tax assessment was at least partially shifted in the hands of taxpayers, giving rise to the tax enforcement model that is still currently predominant in Italyt and many countries of the world. This enforcement model relies on the reporting of facts in tax return filed by taxpayers with the provisional assessment and corresponding payment of taxes due. Tax authorities then verify tax compliance through tax audits and, in case of violations, issue administrative notices which determine the final assessment and enforcement of such taxes, if needed also through coercive measures.

This framework shows a confrontational relation, whereby tax authorities, acting as holder of the collective interest to enforce taxes, enjoy a superior position that allows them to exercise their power to adversely affect the sphere of taxpayers to collect taxes. The need to secure consistency with the requirements of the due process of law and the right to fair trial unavoidably added more complexity to tax enforcement with the establishment of judicial scrutiny of all administrative acts issued by tax authorities.

Accordingly, the traditional model for tax enforcement can entail up to three main phases: 1) the obligation of tax compliance for taxpayers, which involves several formal and material requirements (in some cases also for other private parties); 2) the power of tax authorities to audit taxpayers for verifying whether they have correctly assessed and paid taxes, and, in the negative, to issue administrative acts that lead to the correct enforcement of taxes; 3) the administrative review and judicial appeals, which, in cases of discrepancies between taxpayers and tax authorities, determine - with binding effects for both parties – the taxes due.

The procedural dimension of the combination between tax compliance and tax enforcement shows a certain degree of complexity that requires no further comment, but which is essential to avoid any possible arbitrariness. In fact, the gradual recognition of fundamental rights of taxpayers has secured a more reasonable balance in their relations with tax authorities, which confirm that the interest to secure the payment of taxes may not justify an open-ended compression of such rights.

When looking at this model, its flaws are easy to identify, and it might be meaningful to look at them in a more granular way from the different perspectives of taxpayers and tax authorities.

Seen from the perspective of the taxpayers, the predominance of tax enforcement over tax compliance exposes taxpayers to legal uncertainty for a period that is not insignificant. Facts occur in one year, are reported in the following one and are then exposed to tax auditing and the related procedures. The time framework for conducting (the different types of) audits varies, and in some cases might take place also several years later. Furthermore, when the taxpayer questions the outcome of tax auditing, administrative and judicial contentious procedures follow before the final enforcement of taxes. Such procedures - which in some countries (but not in Italy) must be activated consecutively - might last years. Especially from a business perspective, this model generates legal uncertainty for a prolonged period and absorbs significant resources. This is quite evident if one considers the formal requirements imposed by the State on taxpayers to secure the correct levying of taxes, the exposure to tax audits, which often entails additional filing of documents and always requires time, the need for investing further time and energy in defending the taxpayer's own rights. Being the specific focus of this master thesis on small and medium enterprises, these problems have a much more fundamental impact on the ordinary course of business. Even though the legislator applies simplified rules for such taxpayers, the problems remain and are, from a business perspective, a growing source of concern and a burden, which runs against competitiveness.

Seen from the perspective of tax authorities, the same facts create a time delay for tax enforcement and a notable investment of human resources, which run against the predicates of efficient management. Managerial theories of running public finance have gradually gained weight across the world and, from a legal perspective, in Italy they also reflect the requirement of sound public administration, enshrined in Article 97 of the Italian Constitution.[8] From a managerial perspective of public finance, the threats to the efficient enforcement of taxes mainly arise in connection with the need to secure an effective protection of taxpayers' rights. However, the rule of law requires balanced solution between those two conflicting interests. Therefore, when taxpayers challenge the validity of a tax audit, the power of tax authorities to provisionally enforce taxes is limited by the one to prevent that such enforcement adversely affects the legal sphere of taxpayers without an effective legal remedy. Access to justice may not be made conditional upon the obligation for the taxpayer to pay the contested tax. This right gradually faded out the so-called "*solve et repete*" principle, according to which taxpayers wishing to challenge the validity of an act issued by tax authorities first pay and then have the right to claim their money back after a final decision in their favour. In principle,

[8] Article 97 of the Italian Constitution refers to "*buon andamento*" (i.e. sound management) of public administration.

challenging the validity of an audit does not stop the enforcement process, but in practice the existence of legal remedies often postpones the collection of taxes, except for cases of totally ill-founded claims. In such context, the length of administrative and judicial instances constitutes a major threat to efficient tax management by tax authorities. This is clear insofar as one considers that going through the procedural tax instances – in Italy there are three judicial instances – might take several years, during which tax authorities must actively engage in following these procedures.

The structural deficiency of this coercive vision is that it makes the effectiveness of tax enforcement strongly dependant on the quality and intensity of tax audits.

Such context forces tax authorities to deploy more human resources to conduct tax procedures, raising the overall cost of tax enforcement for the community. Since tax authorities lack the capacity of auditing all taxpayers, they pursue a more efficient management by optimising the way in which tax procedures operate. During the past decades, tax authorities have increasingly made use of automated systems to verify the consistency between tax returns and the corresponding payments of taxes, as well as to make sure that any claimed tax reduction is backed up by due evidence of the entitlement to it. Artificial intelligence and blockchain might soon open new avenues for tax authorities to target their activity, but the overall line of direction of the coercive vision shows clear signals of unsustainability, which require a comprehensive rethinking.

Relaxing the standards of tax auditing and relying on voluntary tax compliance is not an option either, as it might give taxpayers the impression that their wrongdoing will unlikely be caught. After all, the repeated tax amnesties granted in Italy since the last quarter of the 20th century have undermined the overall credibility of strict tax enforcement, making harsher sanctions and more aggressive tax audits less impactful than they would otherwise be. In such context, taxpayers end up in fact waiting for the next amnesty to regularise their violations.

Managerial theories have also prompted the introduction of other measures to shorten the timelapse for enforcing taxes. A comprehensive analysis of those measures falls out of the scope of this master thesis, but a few more comments on them might be meaningful with a view to singling out their limits from the perspective of achieving balanced solutions.

A good example is the agreed settlement of disputes, which operates in Italy both at the administrative and judicial or quasi-judicial level, reducing the applicable sanctions in exchange for the settlement. Even though it speeds up tax collection, the reduction of sanctions upon settlement, especially when the amount of sanctions would otherwise be very high, ends up putting taxpayers to face the dilemma of whether to protect their rights – and in this case face a full exposure to the applicable sanctions –

or to give that up in exchange for milder, but certainly applicable, negative consequences for their legal sphere.

From a strict legal perspective, the taxpayers' consent to the settlement agreement prevents possible violation of rights from arising. However, from a policy perspective, this type of solution may provide a fully satisfactory response to efficient tax management, but not to the taxpayers' rights. In the long-run, and especially insofar as this type of measures operates in combination with high levels of tolerance by the judiciary for poorly motivated tax audits, this context might undermine the consistency of tax enforcement with the requirements of the rule of law.

Similar problems arise in countries, other than Italy, than allow tax authorities to negotiate the amount of taxes due in the framework of tax audits, ending up in giving discounts on the liability to tax in exchange for a settlement. The non-disposable nature of tax obligations, which operates in Italy as a corollary of several constitutional principles,[9] does not prevent an agreed assessment of facts.[10] However, both from a policy and legal perspective, the latter type of measure goes in the right direction, being the agreed assessment of facts the way to reconcile fair tax compliance with effective management with more limited room for the coercive exercise of power and a less evident potential compression of the right to access justice.

The same type of dynamics is shared by the mechanisms that allow taxpayers to ask tax authorities for a binding interpretation of tax law and application to a given situation. This type of mechanisms is generally known under the label "tax rulings", and can operate through manifold measures, including the so-called advance pricing agreements.[11] Also in this case, from a legal perspective, the ruling issued constitutes an expression of the coercive model; however, from a policy point of view, those measures nudge correct tax compliance and enhance tax enforcement, by preventing potential disputes from arising. Moreover, the binding nature of the ruling for tax authorities – subject of course to a fair illustration of the relevant facts by the taxpayers and not hindering the right to audit any

[9] Namely, the principles of equality (Art. 3 of the Italian Constitution), legality (Art. 23 of the Italian Constitution) and ability to pay (Art. 53 (1) of the Italian Constitution). See further on this Guidara, A., Riserva di legge e indisponibilità del tributo, in I Quaderni Europei, Settembre 2012, n. 44, p. 33 ff.; Fantozzi, A., La teoria dell'indisponibilità dell'obbligazione tributaria in M. Poggioli (eds), Adesione, conciliazione ed autotutela, CEDAM, Padova, 2007, pp. 49 ff.

[10] The main legal instrument for achieving an agreed assessment of facts is the so-called *accertamento con adesione*. However, this expression, which in essence indicates the consent to the tax audit, still reflects the command-and-control philosophy, which keeps the power of tax authorities to remain in control of the assessment of taxes. For a comprehensive analysis of *accertamento con adesione* in the Italian tax literature see Marello, E., L'accertamento con adesione, Giappichelli, Turin, 2001.

[11] Advance pricing agreements operate in the Italian tax system at the conditions indicated in Art. 31-ter of the Decree 600/1973.

different situation occurring in practice – can be the source of legitimate expectations for the taxpayers that have requested the ruling.

The crisis of coercive models of tax enforcement needs no further evidence for the purposes of this master thesis. However, as indicated in the problem definition, the precise identification of the reasons for which this crisis has emerged is only the start of a long process to apply regulatory innovation to tax law and secure in this way an effective solution to the context in which tax compliance creates excessive burden for taxpayers and tax enforcement is not sufficiently effective for tax authorities. This process leads this master thesis to explore the avenues that have prompted studies to propose alternative paths to tax compliance and enforcement, including especially co-operative tax compliance.

1.2 The Rationale and Goals of Co-operative Tax Compliance

An interdisciplinary approach to tax compliance is of fundamental importance to conduct a constructive criticism to the existing coercive models of tax enforcement, which creates an excessive burden for taxpayers and is hard to sustain for tax authorities.

After the turn of the millennium behavioural studies have questioned the validity of enforced tax compliance, suggesting that also additional factors might significantly contribute to it, such as the taxpayers' perception of the likelihood of effective tax enforcement and the existence of a constructive dialogue with tax authorities.[12] Scholarly analysis has stressed that such alternative models are more likely to thrive when regulators adopt a view of taxpayer compliance more focused on socio-psychological implications than on the expected utility.[13]

Such studies have paved the way for exploring new avenues to tax enforcement, shifting away from the coercive model, and nudging voluntary compliance by taxpayers. This conceptual framework is prima facie hard to reconcile with tax enforcement as exclusive prerogative of the State but looks at

[12] The seminal study is the so-called "slippery slope" framework elaborated by a famous group of tax psychologists, on which see Kirchler, E., Hoelzl, E., Wahl, I., Enforced versus voluntary tax compliance: The "slippery slope" framework, in 29 Journal of Economic Psychology, 2008, p. 210 ff. This theory suggests that the perception by the taxpayer of the power of tax authorities and the trust in them are exercising a decisive influence over voluntary tax compliance.

[13] See Quiñones, D., Determinants of corporate tax behaviour and co-operative compliance: A comparative study of the UK and Colombia, PhD thesis, Oxford University, 2019, p. 48. According to the author the expected utility theory regards taxpayers as rational utility-centred actors that model their compliance by trying to maximise the utility of their economic operations against the probability of having non-compliance detected and penalised. By contrast, the socio-psychological theory considers that compliance is not only influenced by economic return, but also by psychological and social factors, such as social norms, trust in the administration and the overall idea of fairness of the tax system.

tax compliance from a management perspective in no different way from that which generally characterises corporate strategies to secure effective collection of outstanding credits.

It should therefore not surprise that large corporations have become the main field for verifying the validity of alternative tax compliance dynamics. From a management perspective, the exposure to legal uncertainty as to the existence and size of a debt over a prolonged period is – within limits of reason - more detrimental than the certainty of the obligation to pay it. Good business common sense might thus prompt large corporations to engage in a dialogue with tax authorities geared at securing an effective payment of taxes. This creates a converging interest between parties that would otherwise have opposite stances in the coercive model of tax enforcement.

The conceptual framework of co-operative compliance was developed - under the initial name of enhanced relationship - as a concrete expression of the theory of responsive regulation[14] along the lines of this win-win situation, pursuing a client-focused approach, which makes tax authorities perceived as fair and legitimate by taxpayers.[15] Accordingly, it can be classified as an expression of the so-called better regulation.[16] After its introduction in Australia in 2001,[17] various other countries, including especially the Netherlands in 2005, have gradually introduced it.[18] Its dissemination through the studies of the international organisations have then facilitated a worldwide spreading.

The application of the responsive regulation theory to tax matters steers tax enforcement towards persuasion rather than coercion, giving the latter a residual role in the framework of enforced self-

[14] In this sense, see Majdanska, A., An Analysis of Cooperative Compliance Programmes: Legal and Institutional Aspects with a Focus on Application in Less Developed Countries (IBFD 2021), Books IBFD, sec. 2.1 (accessed 1 June 2023). The theory of responsive regulation was developed by Ayres and Braithwaite to suggest that private stakeholders cooperate with the state and hold each other accountable in matters of public interest. See Ayres, I., Braithwaite, J., Responsive Regulation: Transcending the Deregulation Debate, Oxford University Press, Oxford, 1992.

[15] See Alm, J. et al., Taxpayer information assistance services and tax compliance behavior, in 31 Journal of Economic Psychology, 2010, p. 577 ff.

[16] The expression "better regulation" is used in the technical idiom of studies on regulation. See Baldwin, R., 'Better Regulation: The Search and The Struggle', in Baldwin, R.; Cave, M., Lodge M., 2010, Oxford Handbook of Regulation, p. 10, available at DOI:10.1093/oxfordhb/9780199560219.003.0012.

[17] The introduction of cooperative compliance in Australia was conducted with the name of "annual compliance arrangement". This name reflects the underlying dialogue framework, which plays a particularly important role for a successful implementation of cooperative compliance. See further on this Black, C., Co-operative Compliance Programmes in Australia: Working Towards Justified Trust, in Co-operative Compliance and the OECD's International Compliance Assurance Programme pp. 35-57 (R. Hein & R. Russo eds., Kluwer L. Intl. 2020).

[18] In 2005 also Ireland introduced a cooperative compliance programme and in 2006 the United Kingdom did so too in the framework of the Tax Compliance Risk Management Programme.

regulation.[19] In such context, the role of tax authorities is to foster and encourage tax compliance, rather than simply to seek out for those who fail to comply and punish them.[20]

In general, the common feature of cooperative compliance programmes is to give tax authorities access in real-time to the taxpayer's book and establish a constant dialogue on technical matters concerning the levying of taxes as they occur in the specific context of business. This makes it possible for tax authorities to give pre-tax return filing clearance as to the tax assessment choices made by the taxpayer, reducing the specific tax risk of non-compliance. In such circumstances, tax authorities can reasonably reduce the need for tax auditing and enhance the effectiveness and efficiency of tax enforcement; taxpayers have the benefit of obtaining earlier legal certainty as to the correct compliance with their tax obligations and achieve a swifter management of critical issues, which would be harder and more expensive to affirm in the context of contentious tax procedures connected with tax audits. Accordingly, this clearance can align objective and perceived risk[21] of tax non-compliance for both tax authorities and taxpayers, enhancing legal certainty and reducing the need for an ex post approach to such issues.

The regulatory goals of nudging compliance are by their own nature hard to reconcile with the legal framework within which taxes may be levied. Any agreement or consensus of taxpayers simply cannot operate in a way that is disconnected from the principle of legality. Therefore, from a conceptual perspective, the transposition of the theory of responsive regulation into cooperative tax compliance must find some limits within the boundaries established by the law. In other words, the regulator might seek rules that promote voluntary compliance, but only insofar as this is determined by law. This raises the additional question as to the actual content of the law. In the Italian constitutional framework, this question must be answered by looking at the principles of equality and ability to pay, enshrined in Articles 3 and 53 (1) of the Italian Constitution, as the main sources to counterbalance the goal of securing good management of public administration, contained in Article 97 of the Italian Constitution. These legal constraints also enhance the framework of legal certainty, which, by itself, constitutes a fundamental goal for cooperative compliance to achieve, especially if

[19] See Osofsky, L., Some Realism About Responsive Tax Administration, in 66 Tax Law Review, 2012, p. 307 (2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2018905 (accessed 1 June 2023).
[20] See Vazquez-Caro, J., Bird, R., Benchmarking Tax Administrations in Developing Countries: A Systemic Approach, International Center for Public Policy Working Paper 85, p. 14 (2011), available at http://scholarworks.gsu.edu/icepp/85 (accessed 2 June 2023).
[21] The difference between objective and perceived risk has been the object of attention in literature, which has singled out the importance of measures of risk government by the State. See on this Garland, D., The Rise of Risk, in Risk and Morality, edited by Doyle, A. and Ericson, D., University of Toronto Press, 2003, p. 61,

one considers the shortcomings of the coercive models that have been outlined earlier in this master thesis.[22]

These considerations show that the alternative models for nudging tax compliance ascribe more importance to the perception of the two elements of the slippery slope theory, i.e., fairness of the tax system and likelihood of being caught in case of violations, than the traditional coercive models, but may not otherwise substantially alter the legal framework.

This should mean concretely that a real shift towards-cooperative compliance cannot be done in complete isolation from a fundamental reform of the dynamics of a tax system. Accordingly, it does not make sense to introduce cooperative compliance in a tax system that otherwise remains governed by coercion, includes extremely complex rules, relies on tax audits with a significant degree of intrusiveness in the taxpayers' ordinary business activities.

This master thesis will address the concrete implications of these considerations for the cooperative compliance regimes from various perspectives. The focus will be on the context of their introduction in the Italian tax system in 2015 and in the ongoing tax reform. However, both will compare with the situation of tax systems of other countries, including the Netherlands[23] and the United Kingdom, where cooperative compliance has so far functioned in a very successful way.

1.3 The Studies of International Organisations on Cooperative Tax Compliance

The studies by the international organisations, and especially of the OECD, were the real thrust of cooperative tax compliance across the world. On the one hand, they have developed awareness of the implications of a shift towards this new line of philosophy in the relationship between tax authorities and taxpayers; on the other hand, they have been the major source of inspiration for various national regimes of co-operative tax compliance, including the one introduced in Italy in 2015.[24]

Before addressing them, it is important to consider them from the strict perspective of regulation beyond and above the State. This phenomenon is being addressed by literature among the implications of legal globalisation,[25] which has stressed the pressures and opportunities for external regulatory norms influence on domestic legislation,[26] outlining an international patchwork of rule-makers and

[22] See sec. 1.1.
[23] In the Netherlands, cooperative compliance is also known as horizontal monitoring, which is the expression first used for the pilot project that led to its introduction in 2005.
[24] Namely on the so-called *adempimento collaborativo*, introduced by Legislative Decree 128/2015, and significantly influenced by the 2013 OECD report. See further on this in Chapter 2.
[25] See Morgan, B., Yeung, K., An Introduction to Law and Regulation, cit., p. 303.
[26] See Morgan, B., Yeung, K., cit., p. 311.

rule-takers. In such context, government officials that contribute to set the international standards then also act as conveyors of their diffusion across the States.[27] This might very well be the case of how international studies on cooperative tax compliance have influenced the development of a new philosophy for nudging taxpayers to pay taxes, which could replace the traditional coercive models more heavily relying on tax audits.

The comprehensive analysis of the problems arising in the taxpayer-administration relations, contained in the 2008 OECD Report on Tax Intermediaries, was the starting point of a structural reform process for enhancing such relationship along a different pattern.[28] The concept of enhanced relationship relies on mutual understanding and trust. In such context, tax authorities should go beyond their traditional goal of securing effective tax enforcement and collection and demonstrate understanding for business dynamics, facilitating such activities. As for taxpayers, their conduct should show full willingness to disclosure and transparency. The approximation between the two parties of the relationship should constructively contribute to tax compliance with a joint effort that should replace the respective traditional priorities, i.e., tax enforcement for tax authorities and tax minimisation for taxpayers.

The international awareness of the need for a change was further enriched by studies which have prompted tax authorities to address non-compliance by looking at its causes, rather than merely at the effects.[29] Such line of research was conducted in parallel with the behavioural studies that proved the relevance of a deeper psychological insight on taxpayers' non-compliance.[30]

Relevant studies were conducted in that period also under the auspices of the International Fiscal Association, which issued a report in 2012.[31] The report essentially reflected the other international studies, adding relevant elements on the obligation of each party to comply with the applicable procedural law in case of disagreement concerning the facts and the corresponding tax due.[32]

Shortly thereafter, the 2013 OECD Report marked the conceptual consolidation of this change turning the enhanced relationship into what would from that moment on be called cooperative compliance,

[27] In this sense Raustiala, K., The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law, 2002, UCLA School of Law, Research Paper No. 02-26, p. 5, available at SSRN: https://ssrn.com/abstract=333381 or http://dx.doi.org/10.2139/ssrn.333381

[28] OECD, Study into the Role of Tax Intermediaries, Paris, 2008.

[29] Russell, B., Revenue Administration: Developing a Taxpayer Compliance Program p. 8 (IMF 2010), available at https://www.imf.org/external/pubs/ft/tnm/2010/tnm1017.pdf (consulted 3 June 2023).

[30] See for instance, Kirchler, E., Holzl, E., Wahl, I., Enforced versus voluntary tax compliance: The "slippery slope" framework, in 29 Journal of Economic Psychology, 2008, p. 210 ff.

[31] International Fiscal Association, Key Issues Report: Initiative on the Enhanced Relationship, 2012, available in http://www.ifa-jb.com/media/ER%20Key%20Issue%20Report%20final.pdf.

[32] IFA, Key Issues Report, cit., p. 12.

reflecting the terminology used in Ireland.[33] The changed denomination reflected various type of issues, including the perception that the prior one might give the wrong impression that large taxpayers would have a preferred treatment as compared to all others. The 2013 OECD Report introduced the concept of tax control framework, which refined the prior studies in a way that better reflected the need to enact a real-time and continued monitoring of tax risks.[34]

Furthermore, the 2013 OECD Report also addressed fundamental issues concerning the reasons for which large taxpayers are not identical to all other taxpayers. Recalling these arguments might be meaningful for the purposes of this master thesis, which focuses on the extension of co-operative tax compliance to SMEs.

The 2013 OECD Report stressed, among others, that large taxpayers have more awareness of the control framework, that the complexity of the issues involving them[35] is often addressed by dedicated units of tax authorities, with a much higher degree of technical specialisation, which could in fact as a "second pair of eyes" of the internal corporate bodies.[36] Further arguments include the more frequent relevance of cross-border tax issues, inextricably linked with the global value chains enacted by MNEs, which prompted the OECD to recommend the establishment of a multilateral cooperative compliance framework.[37]

This line of reasoning can justify the need for focused attention and a higher degree of technical specialisation, but not go as far as to indicate that other taxpayers are by their own nature not suitable for co-operative tax compliance.

Moreover, there is no real violation of the principle of equality if tax systems decide to follow a separate track for assessing the compliance of large taxpayers, as compared to the one that would otherwise operate. This is true insofar as the applicable mechanisms will eventually secure that all taxpayers are liable to pay the tax that corresponds to their ability to pay and to the extent that the real-time monitoring of taxpayers entitled to co-operative tax compliance does not alter the evidence requirements. The latter element should be addressed in a more granular way.

---

[33] OECD, Co-operative Compliance – A Framework: From Enhanced Relationship to Co-Operative Compliance, Paris, 2013, p. 23.
[34] OECD, Co-operative Compliance, cit., 2013, p. 57.
[35] The argument of the complexity of tax compliance issues related to large taxpayers has also been pointed out by literature. See Coglianese, C., Mendelson, E., Meta-Regulation and Self-Regulation, in Cave, M., Baldwin, R., Lodge, M. (eds.), The Oxford Handbook of Regulation, Oxford University Press, Oxford, 2010, p. 3 and Braithwaite, J., Meta Risk Management and Responsive Regulation for Tax System Integrity, in 25 Law and Policy, 2003, p. 1.
[36] OECD, Co-operative Compliance, cit., 2013, pp. 65-70. For a comprehensive overview of the implications of the Tax Control Framework in the OECD Study see Bronżewska, K., van der Enden, E.M.E., Tax Control Framework – A Conceptual Approach: The Six Nuances of Good Tax Governance, 68 Bull. Intl. Taxn. 11 (2014), pp. 635 ff.
[37] OECD, Co-operative Compliance, cit., 2013, pp. 14 and 33-34.

One of the effects of co-operative tax compliance and especially of the real-time monitoring by tax authorities is that it dramatically reduces the potential risk of non-compliance, by stopping it there where it might arise. In such circumstances, a lower risk unavoidably implies a lower need for tax audits, but by no means an immunity from them. In other words, as the studies conducted by the international organisations have demonstrated, co-operative tax compliance neither obliges taxpayers and tax authorities to agree on all circumstances, nor prevents tax authorities from issuing tax audits whenever the circumstances so require.[38]

In substance, cooperative tax compliance shifts the bulk of the tax auditing function to the phase of real-time monitoring, producing a structural change of philosophy for tax authorities from chasing taxpayers to accompanying them in the interest of securing tax compliance. In such context, it enables the taxpayer to be part of the process of constructing regulation, preserving the effects of the law and acting at the level of its effective implementation.[39] By doing so, cooperative tax compliance prevents most tax violations instead of countering them *ex post* once they have occurred.

For the purposes of this master thesis, that the legislator may switch the philosophy of tax enforcement to that of nudging cooperative tax compliance also on a more general basis. When doing so, the legislator must however make sure that the change also generates a corresponding adjustment in the formal requirements and in the overall tax auditing function, which may not duplicate what has already been done by cooperative tax compliance, especially in the absence of an actual risk of tax violation.

The emphasis on risk was put by the third OECD report, released by the OECD in 2016.[40] The 2016 OECD Report focused on the establishment of a tax control framework, formulating six recommendations that were addresses to business and tax authorities. Such recommendations include the need for having an established tax strategy, applied comprehensively with clear assignment of responsibility, documentation of governance, dedicated testing and assurance.[41] The Report also prompted tax authorities to share experiences and best practices, with a view to creating international synergies. Such synergies were then tested in a pilot multilateral cooperative compliance programme.[42]

[38] As Quiñones, D., cit., p. 75 indicates, co-operative compliance reduces "the likelihood of accidental or intentionally breaking the rules" but does not "reduce or increase the applicable tax obligations".
[39] In this sense Quiñones, D., cit., p. 79.
[40] OECD, Co-Operative Tax Compliance: Building Better Tax Control Frameworks, Paris, 2016.
[41] OECD, Co-Operative Tax Compliance, cit., 2016, pp. 13-20.
[42] The pilot multilateral programme took place in Washington DC on 5-6 June 2017. See further on this Martin, J., Tax Officials Crafting Plan to Jointly Identify Large Multinationals with Low Risk of Tax Avoidance, MNE Tax Multinational

The test showed the merits of pursuing a cross-border consistence approach to tax compliance of MNEs, but also the problems that arise when tax authorities and taxpayers act on reporting and procedural matters across the borders, applying different rules. Possibly, this test raised the global awareness of approximating reporting standards of different countries to achieve global solutions in respect of global problems. However, it also showed that the approximation of procedural rules is an extremely difficult goal to achieve.

An important legacy of this test was to open the path to a more structured multilateral action for an international risk assessment initiative, which eventually created in 2018 the so-called ICAP, i.e. the International Compliance Assurance Initiative.[43] The goals of ICAP are essentially to promote an *ex ante* approach to issues that create risks of non-compliance in cross-border situations and that generate legal uncertainty in connection with the different reactions by tax authorities. The establishment of ICAP was bundled with a broader set of measures facilitating cross-border practices and joint operations, including the so-called Joint International Tax Shelter Information Centre (JITSIC) and the Large Business International Programme of the OECD Forum on Tax Administrations. A more granular analysis of ICAP[44] is not necessary for the purposes of this master thesis, except for mentioning that ICAP is an important initiative for enhancing the efficiency of management of tax compliance in international relations, it applies to large MNEs only[45] and has an important impact on transfer pricing documentation. For the latter reason ICAP relies on the so-called country-by-country reporting, which has also developed in the framework of Actions 13 of the OECD BEPS (Base Erosion and Profit Shifting) Project.[46]

1.4 The Tax Control Framework

Together with trust and transparency, the tax control framework represents a cornerstone of cooperative tax compliance.

Tax & Transfer Pricing News (2017), available at http://mnetax.com/tax-officials-crafting-plan-jointly-identify-large-multinationals-low-risk-tax-avoidance-21592 (accessed 3 June 2023).

[43] See OECD, OECD International Compliance Assurance Programme (ICAP), available at https://www.oecd.org/tax/forum-on-tax-administration/international-compliance-assurance-programme.htm.

[44] See OECD, International Compliance Assurance Programme. Handbook for tax administration and MNE groups available at https://www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-handbook-for-tax-administrations-and-mne-groups.pdf.

[45] ICAP is applied by countries on a voluntary basis and only to assess compliance of large MNEs, i.e. with an annual consolidated group revenue of EUR 750 million in the prior tax year.

[46] On Action 13 of the BEPS Project see OECD, BEPS Action 13 Report, available in https://www.oecd.org/tax/beps/beps-actions/action13/#:~:text=Under%20BEPS%20Action%2013%2C%20all,jurisdictions%20in%20which%20it%20operates .

In its 2013 Report, the OECD stressed the importance for tax authorities to focus on risk management and to take action only in the presence of a real risk of non-compliance.[47] In such context, it envisaged the tax control framework, on which it then provided ample content in its 2016 Report.

The 2016 Report gave reasons for the relevance of the tax control framework when assessing the risk of non-compliance and set the standard that could allow the establishment of a constructive dialogue between tax authorities and business taxpayers. The recognition of the relevance of the tax control framework marks a change in the dynamics of the implementation of taxes, which had seen tax authorities and taxpayers opposite goals.

In essence, the tax control framework is a system of internal control that ensures that the tax returns are accurate and complete, and that the transactions reflected therein do not give rise to material tax uncertainty[48] that could give rise to tax non-compliance. In other words, the tax control framework is the core of the procedural and substantive framework for reducing the tax risk. Together with the taxpayers' commitment to meet the requirements of disclosure and transparency going beyond the statutory obligations, the enactment of a suitable tax control framework reassures tax authorities that any potential critical issue of tax compliance will be flagged and brought to their attention.

In the context of cooperative tax compliance, tax risk management therefore becomes a new typical feature of risk management within the enterprises, which requires a dedicated in-house manager with a precise tax technical knowledge. Considering that cooperative tax compliance was conceived as a new framework for tax risk management of large corporations, this feature might possibly constitute a sound development to minimise also this kind of risk without outsourcing it entirely to external consultants by developing an internal tax control framework.

In the presence of an agreed set of rules that determine how business assesses and monitors the risk of tax non-compliance, tax authorities can thus focus their attention on whether the taxpayer has enacted the control. In such circumstances, the lower risk of tax non-compliance might justify a less intrusive tax auditing while still achieving reasonable levels of tax enforcement. This is important to support the view that cooperative tax compliance does not create any form of immunity from tax audits (which would clash with the principle of equality), but rather turns them less necessary to secure the correct tax enforcement.[49]

The key issue is defining the thin dividing line between what comes within the spirit of the law and what should instead be flagged. The answer to this question requires prior granular analysis of the tax

[47] See OECD, Cooperative compliance, cit., 2013, p. 42.
[48] See OECD, Cooperative compliance, cit., 2013, p. 46.
[49] In this sense, also see OECD, Co-operative tax compliance, cit., 2016, p. 7.

control framework, to determine when dispute can arise, what could their content be, whether cooperative compliance can give rise to forms of overcompliance and other related issues. Contextual analysis of these issues is important also considering that the enactment of cooperative compliance took place in parallel with the BEPS project, perhaps the most important expression of international tax coordination, which has notably sharpened the reaction to base erosion and profit shifting by multinational enterprises.

From a conceptual perspective, the OECD characterises the tax control framework with three main components - namely enterprise, tax and risks – and links it with the need for management to establish an internal control framework, putting it in a dimension that goes beyond the legal dimension and reaches out for the moral and ethical values of management.[50] Moreover, the OECD suggests the effectiveness of the tax control framework be monitored and measured by selected elements, such as the detection and disclosure of tax related risks and opportunities; the prevention of tax related errors, as well as their detection and correction, and the creation of a learning cycle that improves the functioning.[51]

The essential features of a tax control framework rely on six principles, namely 1) the establishment of a tax strategy at the level of the board of directors; 2) its comprehensive application in the day-to-day management of business; 3) the clear assignment of responsibility to the tax department; 4) the documentation of governance; 5) the regular monitoring, testing and maintenance; 6) the ability to give assurance to external stakeholders, including tax authorities.

The existence of those elements shows the trend to shift disputes on technical business merits to a procedural level, which allows a classification of taxpayers by reference to their level of risk of tax non-compliance. Also, it aims at preventing possible isolated or hidden attempts of engaging in tax non-compliance, which the internal control framework would easily detect and flag. In such circumstances, the acceptance to grant tax authorities access to data concerning the business management would allow tax authorities to have sufficient elements to make their decision and intervene in real time, with reasonable chances to prevent tax non-compliance from happening.

These features characterise the tax control framework as a similar mechanism to the ones that apply to business risk assessment. This is a relevant element for this master thesis, which addresses the issue of tax non-compliance from the perspective of regulatory innovation. The point can be made here that

[50] See OECD, Co-operative compliance, cit., 2013, p. 57.
[51] See OECD, Co-operative compliance, cit., 2013, p. 61.

the creation of the tax control framework and the establishment of cooperative tax compliance represents a first fundamental regulatory innovation in tax law across the world.

This can represent a starting point for this thesis to review the position held by the OECD in 2013, according to which the differences between large enterprises, on the one hand, and small and medium enterprises, on the other hand, prevent from applying cooperative compliance to the latter entities.[52] Among the possible reasons for this position, one might consider that internal control framework may exist in SMEs, especially in the case of medium-size enterprises, but might not necessarily have the same importance that it has in large enterprises.

The absence of an internal control framework implies indeed that there is no reliable source of assessing the risk of tax non-compliance within the enterprise. This implies on turn that tax authorities do not find suitable conditions for relaxing their tax audits to find out potential forms of tax non-compliance.

Therefore, it is reasonable to assume that whenever SMEs introduce some form of internal control framework, nothing would prevent them from also meeting the requirements of the tax control framework. In such circumstances, there should be no a priori exclusion of cooperative tax compliance for such entities. It might be meaningful to consider that the international quality certifications for business have rapidly spread throughout the world, also gaining weight among SMEs. Accordingly, ISO 9001 operates as an internationally recognised standard for quality management system, showing the ability to provide products and services that meet the customer and regulatory requirements. Its 2015 revised version applies to any organisation, regardless of the size, and helps organising the processes and improving their efficiency. Among others, its specific sections contain information on responsibilities or management consistently with quality management principles and monitor the processes through activities like internal audits. Chapter 3 of this thesis will further explore the possibility to introduce management tools that could pave the way for broadening cooperative compliance to SMEs. In such context, it will also indicate that the introduction of an internal control framework might represent an immediate cost for all those enterprises that either chose not to have it, or for which its introduction might imply an excessive cost, when compared with the potential benefits that it might have. In such circumstances, the point can be made that the need to improve the relations between tax authorities and taxpayers cannot represent a hidden additional cost of tax compliance for the latter ones.

[52] See OECD, Co-operative compliance, cit., 2013, pp. 45-48.

1.5 The Establishment and Implementation of Cooperative Tax Compliance

The concrete establishment and implementation of cooperative tax compliance presupposes trust and transparency but concretely requires an agreement between tax authorities and taxpayers.

The nature of the cooperative tax compliance agreement and its effects require a more granular analysis for the purposes of this master thesis. The more general aspects of this analysis will be conducted in this chapter. Such aspects include the content of the agreement, its judicial review, the rights and obligations arising in connection with it, the assessment of business decision-making by tax authorities, the obligation of motivation for the parties, the potential implications arising in case of violations by the parties and the enforcement of the agreement.

Their positive dimension in different tax systems, will be the object of examination in Chapter 2.

In principle, tax authorities do not need the taxpayer's consent for accessing accounting books but can do that in the ordinary exercise of their control and auditing powers. After all, the rights and obligations under the applicable legislation remain applicable without any limitation, also considering that cooperative tax compliance agreement cannot be meant to create any immunity for taxpayers from the exercise of powers by tax authorities. It reduces instead the potential for risk and for tax audits.

What makes cooperative tax compliance is that taxpayers and tax authorities agree on the criteria to be followed in the ordinary conduct of business and in the extraordinary operations, and that tax authorities are duly informed about them at beforehand.

Countries may establish different procedures for the contractual agreement to activate cooperative tax compliance, which might even involve the adoption in a dedicated administrative act. Regardless of how this concretely occurs, the right to establish the agreement and the conditions contained therein should be subject to a possible judicial review. This might prevent possible unjustified denials by tax authorities, i.e. rejection of the proposal to establish a cooperation agreement that is not founded on technical arguments reflecting the assessment of tax risk. The judicial review should therefore ensure that tax authorities exercise their powers to enter the contractual agreement with taxpayers in conformity with the requirements established by law. In some countries, like for instance Italy, this type of issue arises also in connection with other measures, such as the agreed assessment of facts for tax purposes – aka *accertamento con adesione* – that do not give taxpayers an immediate legal protection.

The criteria established in the contractual agreement set in motion a procedure that allows clear identification of decision-making governance on tax planning, the persons responsible for them for their implementation. However, the contractual agreement usually also sets a substantial standard of consistency with the object and purpose of the applicable tax rules, which all business transactions must comply with.

Accordingly, when agreeing the framework for implementing cooperative tax compliance, taxpayers should follow higher standards of communication and transparency, which make tax authorities feel more comfortable with the likelihood that tax risk will be correspondingly reduced.

In such context and at such conditions the priority for tax authorities turns from detecting possible violations to verifying whether taxpayers comply with the procedural and substantial rules that were agreed upon in advance.

This apparently easy framework for cooperation is in practice far more complex. Tax risk managers implement decision made by the executive board, by developing an action plan that pursues them in line with the requirements concretely agreed by the cooperative tax compliance contractual agreement and with the internal tax control framework. The action plan should identify risks of tax non-compliance, analyse them, identify priorities that must be met once assessed a concrete risk, define the procedures to manage them and produce an assessment. The outcome of the work conducted along such lines is submitted to internal audit and shared with tax authorities.

Critical issues can arise at all times of implementation and enforcement of business decisions, leading to possible reputational risks in case of divergent views with tax authorities, which should not be underestimated.

The point is also that business decision-making requires subjective choices that pursue profits. Such decisions might in some cases also achieve a desirable goal only after going through periods of losses. Likewise, losses might arise from wrong business decisions, which were meant to produce profits. In the international context, and especially for large multinational groups of companies, decision-making often also concerns where it is more desirable for such groups to have profits, sometimes even at the cost of making losses in one or more countries, or to fund the penetration of other markets by adding costs to companies established in others. A more detailed analysis of such issues is not indispensable for this master thesis. However, the type of issues that were described were instrumental to show the difficulties that might bring tax authorities to potential conflicting views with taxpayers. In such circumstances, cooperative tax compliance should lead tax authorities to a constructive approach to business decisions, which should respect the role of the managers who are

in charge of such decisions and only interfere with them when there are well-founded doubts as to the conformity with the criteria that have been agreed in the framework of the cooperative tax compliance agreement. This is essentially the direction taken by the guide for tax administrations of compliance risk management, issued by the Fiscalis group, involving the European Commission and EU Member States.[53]

The obligation of disclosure also entails the one to motivate the position held by each party. In such context, the motivation arises as an ordinary expression of the explanation of the decisions that business is carrying out. When tax authorities raise concerns on what the taxpayer is doing, they must clearly state their views and prompt the taxpayer to provide a more in-depth explanation of the sound reasons underpinning a given choice. Such dynamics in fact realise an anticipated dialogue between the parties, which presents no different structural features from the ones that are typical of advance pricing agreements and advance rulings. In fact, the point can be made that they are also not different from the ones that operate ex post in connection with how tax audits might redress the tax return filed.

However, cooperative tax compliance agreements cannot oblige taxpayers to accept the view of tax authorities on matters concerning their business. Nevertheless, it binds them to refrain from engaging in transactions that might give rise to abusive practices. For how this may seem obvious in theory, it is in fact extremely difficult in practice, especially when one considers that the boundaries of abusive practices, i.e. of tax avoidance and evasion, are often blurred. This might be easy to understand if one considers that reporting obligations of potential schemes of aggressive tax planning have exponentially grown with the mandatory disclosure regimes, such as the so-called DAC6 in the European Union,[54] or the DoTAS in the United Kingdom.[55] The risk of an induced overcompliance is therefore more concrete than it may appear prima facie, especially when tax authorities engage in a restrictive interpretation of the risks of tax non-compliance that may arise from the transactions that taxpayers intend to enact.

The correct implementation of cooperative tax compliance agreements normally obliges both parties to promptly respond to queries and information, thus allowing the parties to execute in real time the framework for cooperative tax compliance in line with their respective interest. Moreover, it creates

[53] See Fiscalis Risk Management Platform Group Compliance Risk Management – Guide for Tax Administrations, available on www.ec.europa.eu

[54] See Council Directive (EU) 2018/2022 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements.

[55] The acronym DoTAS stands for disclosure of tax avoidance schemes. It was introduced in the United Kingdom in 2004 to establish the obligation of notifying schemes that might entail tax avoidance.

an obligation of addressing all critical issues before returns are filed, thus using an ex ante approach, unless precise reasons exist for not doing so.

From a policy perspective, the compliance agreement might be regarded as a kind of code of conduct, encompassing the standard behaviour that the parties should follow. From a legal perspective, it is doubtful that the contractual nature of this agreement in fact leaves such obligation at the sole level of soft obligations. A more precise analysis of the concrete repercussions arising from the failure to implement the content of the cooperative tax compliance agreement is only possible in the light of the rules that each tax system establishes. However, intuitively, the breach of such obligations must at least determine the effect of increasing the tax risk and thus removing the conditions for cooperative tax compliance.

The content of the cooperative tax compliance produces repercussions also at the level of voluntary enforcement. Accordingly, cooperative tax compliance also creates the obligation to carry out timely payment of tax debts, on the one hand, and of refunds, on the other hand.

The contractual cooperative tax compliance agreements has a duration defined by the parties and may be normally extended, when needed also with amendments.

All these elements show that the contractual nature of the agreement produce legal rights and obligations for both parties, which are to be executed in good faith. This raises the issue as to whether legal remedies should be available for the parties in case of breach of their contractual obligations. The affirmative answer to such question might seem obvious in line with the corollaries of the rule of law. However, the opposite view might in fact better suitable in the context of cooperative tax compliance. On the one hand, any serious incompliance by the taxpayer might increase the risk and thus allow tax authorities to consider whether to intervene with a possible tax audit. On the other hand, any serious incompliance by tax authorities should be addressed in line with the applicable administrative remedies, as it might give rise to an exercise of their powers that might be either questionable from the perspective of the good tax governance and the conformity with the requirements of the principle of legality.

The rights and obligations regulated in the contractual cooperative tax compliance agreement can nevertheless only operate within the overall framework established by tax legislation and never lead the parties to dispose of what might be incompatible with the said legislation. This is particularly true in countries, such as Italy, that frame the exercise of taxing rights in well-defined boundaries, require tax authorities to pursue the levying of taxes within tax procedure in a way that reflects the

requirements of the principles of legality and the ability to pay, and almost completely excludes any margin for discretionary exercise of their powers.

1.6 Tax Audits and Dispute Settlement in the Presence of Cooperative Tax Compliance

The 2013 OECD Report showed a – partly surprising - degree of optimism as to the occurrence of tax audits and disputes in the presence of cooperative tax compliance. On the one hand, it indicated that both are more unlikely to arise, and, on the other hand, it added that, even if they occur, the willingness to address them constructively in the spirit of mutual trust and transparency could help solving them easily. Moreover, mediation and alternative dispute resolution would be sufficient elements to address any outstanding problem.[56]

Certainly, an effectively enforced tax control framework reasonably reduces the overall tax risk, thus avoiding that tax authorities may be totally unaware of violations carried out by the taxpayers. Moreover, transparency facilitates a control of relevant facts in real time and the genuine spirit of mutual trust should prompt taxpayers to flag out situations that may present higher risk of violating the applicable law.

However, this does not exclude the potential for diverging views on legal interpretation and for disputes concerning delicate issues that very often generate critical issues in the relationships between tax authorities and taxpayers outside the framework of cooperative tax compliance.

Such issues could be prevented as far as the taxpayer accepts forms of overcompliance, or at least systematically excludes engaging in situations that might be borderline from a tax compliance perspective but still within the boundaries of what is tenable in light of the applicable tax law. Accordingly, the likelihood of audits and disputes is not always marginal and grows in direct proportion to the level of risk.

Tax authorities too could do their part in preventing audits and disputes, as far as their changed mentality allows them to refrain from engaging in an aggressive enforcement of the standards of tax compliance in line with what the OECD envisaged in its reports. However, once more this is more difficult in practice than it appears prima facie in theory, especially when it comes to issues of legal interpretation and the requirements for activating tax audits. Administrative guidance issued by central tax authorities normally binds interpretation and application of tax procedures on the side of all tax authorities in each country. Such circumstances might generate tax audits and disputes under cooperative tax compliance just as much as in its absence. However, also factual disputes could arise

[56] See OECD, Co-operative compliance, cit., 2013, p. 51.

in the presence of cooperative tax compliance when tax authorities and taxpayers have different ways of characterising them. Good examples of this kind might arise in connection of business decisions, for instance when they generate losses and a reduction in tax revenue, or when tax authorities engage in assessing the merits of the business decisions and disagree with the taxpayer on the existence of a direct link with business.[57]

This section will now elaborate on the type of issues that arise in tax audits and dispute settlement, leaving the analysis of the ones concerning specific legal systems to Chapter 2.

The starting point of this analysis should be, on the one hand, that the content of the contractual agreement should give rise to vested rights of preventing tax audits for issues that relate to the execution of cooperative tax compliance and, on the other hand, that tax authorities should keep their general power to audit taxpayers that have agreed to implement cooperative tax compliance.

The two points are closely related and may be assessed consecutively. Insofar as the object and purpose of cooperative tax compliance is to create a set of rules that prevents the exposure to tax risks, a correct enforcement of this set of rules should per se not be questioned. In this sense, the point can be made that from both a legal and policy perspective, such agreement should produce binding effects.

However, tax authorities should also be left free to question what they regard as incorrect enforcement, provided that they duly motivate their views. Therefore, as indicated earlier in this master thesis, when the conditions for starting a tax audit are met, tax authorities should engage in such activity no differently from what they would do in the absence of cooperative tax compliance. If that were not the case, a violation to the principle of equality might occur. However, this does not mean that tax audits should necessarily follow the same methodology. For instance, audit methodologies departing from analytical data and making a lump-sum assessment of relevant facts can only apply to cases of cooperative tax compliance insofar as there are clear indicators that the taxpayers have infringed the obligations connected with cooperative tax compliance. Likewise, indicators of non-compliance that normally operate under the tax procedures and either reverse the burden of proof on the taxpayer, or prompt tax authorities to start tax audits, should not immediately apply to cases of cooperative tax compliance, since the direct access of tax authorities to the accounting books of the enterprise allows them to conduct a more accurate real-time check. Similar limits should apply to the use of any type of presumptions. Their legitimacy is usually justified in

[57] Some countries use alternative expressions for the concept of "direct link". For instance, in Italy this is often referred to as "*principio di inerenza*".

procedural tax systems for the difficulties of tax authorities to get access to the relevant facts, which is obviously not the case in the context of cooperative tax compliance.

Another interesting issue arises as to the obligation to motivate the tax notice that completes the tax audit. In cases concerning taxpayers that have accepted cooperative tax compliance schemes a double motivation should be required for the tax notice, namely indicating the grounds for conducting the tax audit and for dissenting from the view put forward by the taxpayer. In such context, it might also be necessary for tax authorities to indicate the reasons for which it was not possible to reach an agreement with the taxpayer before issuing the tax notice.

This conclusion reflects the line of philosophy that characterises cooperative tax compliance and that should lead tax authorities and taxpayers to reach an agreement without the need for activating the usual dynamics of tax enforcement. An agreement might in fact be reached at all times and does not necessarily require being reflected in a formal document. However, once the tax audit has formally started, it is unlikely that tax authorities might be entitled to keep the same degree of informality that otherwise usually characterises the dialogue with the taxpayer under cooperative tax compliance.

A formal agreement may be reached along the applicable tax procedural rules of a given country, using different legal instruments, such as mediation, an agreed assessment of the facts, or of the applicable law. Giving the formality that typically characterises tax procedures, it is important to further address these three instruments separately. In the case of mediation, the act of settlement formally determines the effects within the tax procedure and the corresponding repercussions for the relations between tax authorities and taxpayers in the framework of cooperative tax compliance. In the other cases of agreed assessment, the effects may be determined either by common consent, or by the administrative act issued by tax authorities, according to the requirements of the applicable tax law in each country.

The enhanced motivation requirement illustrated earlier in this section should also apply to cases in which tax authorities deny mediation, or the agreed assessment of facts, or of the applicable law.

The line of philosophy of cooperative tax compliance really sees judicial litigation as the last resort, which should apply when all other attempts have failed. The OECD indicates some degree of preference for alternative dispute resolution mechanisms, including in particular mediation and arbitration.[58] However, there may be doubts as to whether different mechanisms should apply for settling disputes involving taxpayers that have enrolled in a cooperative tax compliance programme. The main reasons for such doubts relate to the need for preserving consistency with the principle of

[58] See OECD, Cooperative compliance, cit., 2013, p. 51.

equality and the right to fair trial, which should not give rise to forms of special or private justice. Such arguments should in fact be given more weight than the higher credibility that such taxpayers have towards tax authorities for their commitment to mutual trust and willingness to enact transparency of their facts relevant for tax purposes. However, a different choice by the legislator could also work, especially if endorsed by the judicial body in charge of securing consistency with the constitutional framework.

Another question can then be raised as to whether the presence of judicial litigation is per se incompatible with the spirit that characterises cooperative tax compliance. The answer to this question depends on the reasons that have prompted the litigation and on whether the judicial appeal has assessed the violation.

In general, there should be no automatic loss of the benefits of cooperative tax compliance when the taxpayer loses the appeal. This statement considers that the application of tax law to large enterprises often raises highly technical issues, which might present complexity from a factual and/or legal perspective.

However, in cases of litigation related to serious breaches of the requirements of cooperative tax compliance, such as for instance in cases of wilful default, concealing or tax fraud, the judicial assessment of the violation should be considered when verifying whether the conditions for cooperative tax compliance are still met.

When the applicable law bans the access to cooperative tax compliance in cases of such violation, tax authorities simply have no leeway to consider re-establishing the mutual trust relationship. When no such ban exist, tax authorities should nevertheless verify whether the taxpayer still meets -sufficient standards of credibility to re-establish the cooperative tax compliance.

CHAPTER 2 – COOPERATIVE TAX COMPLIANCE: A LEGAL AND POLICY ANALYSIS

2.1. The General Legal Framework Concerning the Involvement of Taxpayers in the Determination of the Tax Due

Most modern tax systems involve taxpayers and other private parties in tax assessment and collection, imposing on them several formal and substantive obligations that are instrumental to the correct exercise of such functions.

Formal obligations include bookkeeping (only for business taxpayers) and the filing of tax returns; substantive obligations primarily consist in paying the corresponding tax. Private parties involved in the levying of taxes are also addressees of similar formal and substantive obligations. The latter obligations are frequently limited to making advance payments of taxes.

Such obligations facilitate tax assessment and collection by tax authorities but create non-refundable costs for private parties and their liability when failing to comply with the requirements established by law.

This shows that the tax compliance framework is already mostly outsourced to private parties. For taxpayers this might find an easy justification; by contrast, for other private parties the increased burden of formal obligations and the liability for the substantive ones is becoming increasingly difficult to justify, especially when the execution of compliance creates additional cost for them.

In such context, the role of tax authorities is confined to carrying out of tax audits, requiring them to verify ex post whether taxpayers have correctly fulfilled tax obligations. In the affirmative case, taxes may be levied and collected without the issuing of a single administrative act by tax authorities.

However, even in such circumstances these dynamics raise critical issues for this model of tax compliance, being it almost impossible for tax authorities to audit all taxpayers.

Since tax authorities cannot audit all taxpayers, they intervene with a combination of measures to try and optimise their auditing function. First, tax authorities use automated control systems helps to correct material errors and detect possible abnormal situations, which require a closer consideration of tax authorities in the framework of more intensive audits. Second, tax authorities end up mostly auditing those taxpayers which, based on the available facts and checks, present more critical situations.

When taxpayers or other private parties question the findings and reassessment by tax authorities, the path to tax collection might differ considerably according to whether the private parties eventually

decide to share the view put forward by tax authorities and pay the corresponding additional tax or question it and request access to justice.

In the latter case, administrative reviews and judicial procedures might last considerable time, especially when the litigants choose to conduct them until the last judicial instance. In Italy, administrative reviews – also known as *autotutela* - may be conducted in parallel with the judicial ones. The common goal of such procedures is to secure the levying of taxes on the actual facts in conformity with the requirements established by law.

Judicial procedures involve in Italy three instances, namely before the Tax Court of First Instance (*Corte di Giustizia Tributaria di Primo Grado*), the Tax Court of Second Instance (*Corte di Giustizia Tributaria di Secondo Grado*) and the Tax Chamber of the Supreme Court (*Corte di Cassazione*). When the litigants intend to make use of all such instances, it might take considerable time to reach a final judicial decision. This might in fact postpone the final enforcement of tax collection, showing additional flaws of the current model of tax compliance.

Therefore, in Italy, just as much as in other countries, tax procedures include various mechanisms to nudge tax dispute settlement. Such mechanisms often include a reduction in the applicable penalties to encourage the private parties to give up their initial claim in exchange for an earlier collection of tax, when the settlement indeed requires an additional tax to be paid.

The rationale of reduced applicable penalties shows the overall concern for the duration of tax procedures, which, on the one hand, delay the collection of tax and, on the other hand, require a prolonged involvement of the parties in the various disputes. From the perspective of tax authorities, this situation constitutes an evident flaw of the enforcement model relying on tax audits. From that of taxpayers, the problem is that it creates legal uncertainty for a prolonged period, which for business might be particularly problematic.

The traditional enforcement model of tax compliance described so far constitutes the starting point for critically assessing its validity along the lines of cooperative tax compliance.

The traditional enforcement model reflects the vision of levying taxes as an act of imposition, which can be coercively enforced if there need be, and which only uses the proactive involvement of private parties as starting point of the process for collecting taxes. The power to levy taxes justifies the burden of formal and substantive obligations imposed on taxpayers, but can in fact not go beyond such boundaries, unless when the private parties expressly agree to do so.

The latter result is what cooperative tax compliance wants to achieve, by involving private parties not only in the assessment and payment of tax, but also in an anticipated open dialogue with tax

authorities, to be conducted based on clear rules of engagement, which the latter might check in real time when all developments happen or are about to happen.

Such two main differences can simultaneously increase efficiency in tax collection and legal certainty. In the context of cooperative compliance, tax audit becomes needed only in cases of divergences on points that have been identified ex ante by tax authorities in the framework of their dialogues with the private parties. Moreover, tax authorities no longer have to conduct intensive reviews across all taxpayers involved in cooperative tax compliance, since the risk for violation is in fact significantly lower and possible problems are easily identified. The consequence of this changed relevance of tax audit is that it will require the involvement of a more limited time of human resources within tax administration and for a more limited time, thus increasing the efficiency of management in the framework of tax collection.

This creates a win-win situation, i.e. a situation in which the existence of a desirable policy for both parties generates the conditions for enhancing their voluntary acceptance and enforcement.

This chapter will now address the various cooperative tax compliance tax regimes, conducting a comparative analysis that starts by looking at the Italian legislation introduced by Legislative Decree 128/2015[59] and confronts it with the regimes applicable in other selected countries.[60] Such comparative analysis, supplemented by the one of the international and supranational programmes,[61] will facilitate a critical assessment of the Italian regime in force[62] and set the ground for a closer approach to the issues that are being discussed in the framework of the extension of cooperative tax compliance to SMEs, which is what the Delegation Act for Tax Reform envisages. The analysis of the wording of the latter act will be a core part for addressing the research question. It will be conducted in a way that combines a policy perspective[63] with the criteria of legal interpretation,[64] putting forward possible scenarios for its implementation by the government and subsequently outlining possible avenues for cooperative tax compliance in the Italian tax system.[65]

2.2. The Italian Legislation Introduced by Legislative Decree 128/2015

2.2.1. General Features, Scope and Requirements

[59] See sec. 2.2.
[60] Such analysis will be conducted in sec. 2.3 and focus on the cooperative tax compliance regime of countries such as the Netherlands and the United Kingdom.
[61] See sec. 2.5.
[62] See sec. 2.6.
[63] See sec. 2.7.
[64] See sec. 2.8.
[65] See sec. 2.9.

Cooperative tax compliance was introduced in the Italian Tax System by Legislative Decree 5 August 2015, n. 128 (hereinafter Decree 128/2015) as an instrument to enhance legal certainty in the relationship between large taxpayers and tax authorities. It is by itself an example of how supranational and international regulation affects the choices by the national legislator.[66]

The innovative approach of cooperative compliance introduced by the Italian Government in the framework of the implementation of the empowerment contained in Law 11 March 2014, n. 23[67] marks a profound change in the dynamics of tax enforcement and collection, by shifting the emphasis from an exclusive ex post approach, based on tax audits and litigation, to an anticipated dialogue between tax authorities and taxpayers. Such dialogue allows both parties to come to an agreed assessment of facts in a way that prevent possible confrontations and reduces the structural exposure to tax risks. Moreover, it also overcomes the traditional asymmetries between taxpayers and tax authorities as to the access to facts that are relevant for the levying of taxes, which usually constitute the most critical element for tax audits.[68]

Articles 3-7 of this Legislative Decree contain all relevant elements of cooperative tax compliance,[69] which produce direct and indirect repercussions also as to the application of other tax procedures.

The analysis will start from the object and purpose of the cooperative tax compliance rules in force, namely *adempimento collaborativo* and draw a critical assessment[70] also in the light of comparative, international and supranational analysis.[71]

Art. 3 of the Decree 128/2015 includes an express reference to the existence of an effective system for monitoring, measuring and management of tax risk. Such norm defines tax risk as the potential violation of tax norms, their principles or the goals pursued by the tax system.

[66] In this sense see Bronżewska, B., Tamburro, V., Cooperative Compliance in Italy – Does it Stand a Chance?, 53 Eur. Taxn. 12 (2013), sec. 3.
[67] The Law concerning the empowerment of the Government to introduce a fairer, transparent and growth-oriented tax system has been published in the Official Gazette 12 March 2014, n. 59.
[68] In this sense, unlike taxpayers, which usually have access to all relevant facts that concern their activities, tax authorities must reconstruct or gather them from third sources to verify the veracity of tax assessment conducted by the taxpayers.
[69] Their implementation operates with secondary normative sources, such as the Ministerial Decree 15 June 2016. However, Article 7 (5) of the Legislative Decree 128/2015 also allows that the concrete modality of application of regimes of cooperative tax compliance might be regulated by means of measures issued by the Director of the Italian Tax Agency. As indicated by Article 7 (3), this also applies to the exclusion or termination of cooperative tax compliance in respect of specific taxpayers, subject to obligation of due motivation.
[70] See sec. 2.6.
[71] See sec. 2.3.

Under Article 7 (4) of Decree 128/2015, the entitlement to cooperative tax compliance is temporarily limited to large taxpayers, i.e. the ones having a total turnover or profits not inferior to Eur 10bn,[72] but might be extended to further categories of taxpayers,[73] such as it occurred in the case of the new investments.[74]

According to Article 3 (2) of Legislative Decree 128/2015, the entitlement to cooperative tax compliance presupposes an internal auditing system of tax risk that meets the requirements contained in Article 4, and subject to a legal act that the Italian law defines as "accession" (*adesione*) and to the acceptance by the taxpayer of the obligations envisaged in Article 5.

The requirements of Article 4 (1) of Legislative Decree 128/2015 concern a) a clear attribution of roles and responsibilities in respect of tax risk; b) effective procedures for monitoring, measuring, management and auditing of tax risks at all business levels; c) effective procedures to intervene and correct possible misfunctioning of such procedures. All such requirements in essence reflect the content of the tax control framework and the studies conducted under the auspices of the OECD and should not be interpreted in a way that allows tax authorities to question the business decisions by the taxpayer. However, this applies only insofar as the taxpayer has activated proper systems of monitoring, measuring, management and auditing of tax risk. The effects of such systems should become clearly visible in business management and internal audit, and be properly enforced.

The wording used by Article 3 (2) significantly weakens the nature of contractual agreement for the act through which the taxpayer may access tax regime, while preserving the creation of new obligations as compared to the ones that are normally incumbent on taxpayers in the traditional models of tax enforcement and collection. In particular, the word "accession" (*adesione*) matches the one used for the agreed assessment of facts (*accertamento con adesione*, already operating within the Italian tax procedural system.

This means that the source of rights and obligations is framed within the administrative activity through which tax authorities exercise their power of tax enforcement and collection. Consequently, the obligations contracted by the parties when submitting the request for acceding cooperative tax compliance are necessary, but not per se sufficient to establish such type of regime.

[72] Unless they have participated to the pilot project of 25 June 2013.
[73] The decision by the Director of Tax Agency of 14 April 2016, n. 54237/2016 has interpreted this requirement in an extensive way, thus admitting it not on the basis of a single year, but of monitoring across three years. Accordingly, as indicated in Circular 38/E/2016 it may operate also when the taxpayer shows that either the proceeds or the turnover meets one of the thresholds in a tax year.
[74] See Art. 2 of Legislative Decree 147/2015.

2.2.2. The Commitments of the Parties, rather than Their Rights and Obligations

The wording of Article 5 requires consideration for better understanding the precise legal dimension of such rights and obligations as they arise under the Italian cooperative tax compliance regime.[75] The title of his clause refers to duties (it: *doveri*), rather than to obligations (it: *obblighi*), but its actual content only includes commitments (it: *impegni*). This wording clearly indicates that the legislator wanted to avoid using the technical legal expressions that could open the path to a legal protection in case of failure to comply with the content of Article 5.

According to Article 5 (2), the commitments of the taxpayer include a) the introduction and running of a system of monitoring, measuring, management and control of tax risk, as well as the implementation of changes required by tax authorities; b) a cooperative and transparent behaviour towards tax authorities, especially in respect of operations that might give rise to aggressive tax planning; c) a prompt reply to requests formulated by tax authorities and d) a genuine and fair business culture, which promotes tax compliance in conformity with the requirements established by the applicable law at all business levels.

The failure to comply with such commitments generates the potential loss of the entitlement to the benefits of cooperative compliance. This is unquestionably the main undesirable consequence for the taxpayer, which should prompt him to genuinely enforce those commitments. However, in various cases (such as for instance in respect of the letters a) and b)) this should already operate due to the requirements established in Article 4.

The commitment to give a prompt reply to requests formulated by tax authorities might have some innovative contribution to the goals pursued by cooperative tax compliance. However, it must still operate within the boundaries of the requirements established by law. Accordingly, it might not deprive taxpayers of their right time to have a sufficient time to formulate their reply in a way that allows them to formulate all due considerations. Any different interpretation of this commitment might otherwise run against the fundamental values of the right to fair trial, which constitutes a human right and also has procedural implications for the Italian tax system. In principle, one might also add that this human right entails the right to remain silent. However, the context of cooperative tax compliance on the one hand does not produce immediate repercussions on the sphere of the taxpayer and, on the other hand, relies by its on nature on the willingness of the taxpayer to cooperate beyond the limits of what is required by the applicable law.

[75] The matter is also object of the regulation of the Director of the Italian Tax Agency of 26 May 2017, prot. n. 101573/2017.

The commitments on the side of tax authorities require a more granular analysis from a legal perspective, which confirms that they are mere expressions of the engagement to achieve the correct functioning of cooperative tax compliance. This goal clearly reflects the international framework for cooperative tax compliance developed under the auspices of the OECD, but its formulation in Article 5 (1) of the Legislative Decree 128/2015 is rather inconsistent with the framework within which Italian tax procedures operate.

Letter a) includes a commitment to objective assessment of the internal control that conforms with the principles of reasonableness and proportionality, and puts forward possible adjustments that are necessary for either entering or maintaining cooperative tax compliance. From a legal perspective, the mentioned principles could already derived at the level of interpretation if one looks at the obligation for Italian tax authorities to exercise their powers in conformity with the rule of law. Accordingly, even though the content of this clause might be particularly important in a context where tax authorities enjoy discretionary powers, it adds little or nothing to the Italian tax system.

Letter b) refers the commitment to periodical publication of all operations, structures and schemes that tax authorities regard as aggressive tax planning. From the perspective of legal interpretation, this raises the issue as to what repercussions this list might have for the taxpayer. First, the point can be made that when taxpayers intend to enter a similar type of operation, structure and scheme to the ones listed by tax authorities, they must (this time it is an actual legal obligation) submit it to the attention of tax authorities. Second, to the extent that the taxpayers have duly informed tax authorities about the matter, no further obligation can arise for them, nor can they be deprived of their entitlement to cooperative tax compliance. Third, they will not be obliged to agree with the view expressed by tax authorities and can therefore address any outstanding matter in the framework of a tax audit, if tax authorities so proceed. Fourth, the list held by tax authorities should present some degree of consistency with their overall position as to what may constitute aggressive tax planning. As a corollary, taxpayers might have legitimate expectations as to the fact that they should not report the operations, structures and schemes not listed as forms of aggressive tax planning. Problems may also arise as to whether this list should be drafted in a way that singles out cases of tax risk or go beyond such limits and reach some conclusive results as to the fact that the said operations, structures and schemes constitute aggressive tax planning.

Letter c) includes another commitment that might already be derived from the overall principles that regulate administrative procedures in tax matters within the Italian tax system. According to such clause, the relations with taxpayers should be governed by the principles of transparency, cooperation and fairness with a view to fostering legal certainty. Also in this case, the point can be made that this

"copy and paste" approach from the international model rules of cooperative tax compliance has been transplanted in the Italian tax system without due consideration for the context of Italian tax procedures.

Letter d) establishes a commitment to simplifications of tax compliance. From a legal perspective, the point can be made that tax procedures are established by law and tax authorities have to exercise their powers in conformity with what the law requires. Accordingly, if any simplification is required, it is for the law to determine how it should apply.[76] Moreover, the principle of good management of public administration, enshrined in Article 97 of the Italian Constitution and the Italian Taxpayer's Bill of Rights already establish clear limits to how tax authorities can conduct their activities and what can be requested to taxpayers. Moreover, seen from the perspective of the EU Charter of Fundamental Rights, this fits into the framework of Art. 41, to the extent that a given situation is relevant for EU law purposes.

Letter e) indicates the commitment to a prior examination of tax risk and to provide taxpayers with a swift reply to their queries formulated in the framework of cooperative compliance. Also in this case, there are serious doubts – from the perspective of legal interpretation - that this commitment adds much to what other clauses already establish. Such doubts are clear if one considers that the initiative in pointing out cases of significant tax risk is in the hands of taxpayers and that the Legislative Decree already establishes time-limits for replying to such requests.

Finally, letter f) establishes the commitment to take into due consideration the results of internal control and audit. Considering that the reply by tax authorities to the request for short-track rulings requested in conformity with Article 6 (2) of Legislative Decree 128/2015 constitutes an administrative act, even without the commitment enshrined in letter f), it would be at least odd that tax authorities did not give sufficient attention to the findings of internal control and audit. A stricter interpretation could even lead to conclude that the failure to do so might entail relevant flaws in the administrative act as to its factual motivation.

Based on the consideration illustrated until now, the point can be made that all these expressions of commitment are rather meaningless in practice and do not contribute to an effective enhancement of the relations between taxpayers and tax authorities in the framework of cooperative tax compliance. They have possibly just been included in the law during the process of transplantation of the corresponding international models, which were developed in countries where tax authorities enjoy

[76] The legislative act of empowerment (*legge delega*) to the Government mentioned the need for simplification, but certainly not relegating it to the powers of tax authorities.

a significant higher degree of discretionary powers and cooperative tax compliance is not necessarily developed within a framework so highly regulated by law as in the Italian tax system.[77]

What might instead matter is that tax authorities make an effective change of mentality, giving up the traditional pattern of tax audits, which primarily pursues possible violations, and concretely adopt the trust attitude, which verifies whether taxpayers have enacted the required procedures.

2.2.3. The Application

The starting point of this procedure is the online application filed by the taxpayer, which - as indicated by Article 7 of Legislative Decree 128/2015 - presupposes the prior effective functioning of the systems of monitoring, measuring and management of tax risk.

The application must be drafted in conformity with the requirements established in the regulation issued by the Director of the Italian Tax Agency 14 April 2016,[78] which should allow tax authorities to obtain all relevant information concerning the taxpayer, the subjective requirements, the existence of an internal control framework and the commitment to submit the required documentation.[79]

Tax authorities have 120 days for determining whether to admit a given taxpayer to cooperative tax compliance and can exercise their powers to interact with the taxpayer in such period, to be reported in the framework of dedicated transcripts also reporting the view held by the taxpayer.

Besides the obligation to assess the conformity of the application to the requirements established by law, the wording of Article 7 clearly excludes that tax authorities have any possible discretionary power as to the application of this regime. Consequently, since the legal source of the agreement in the Italian tax system is the administrative act that authorises it, the point can be made that taxpayers have an actual right to access cooperative tax compliance when the conditions established by law are met. This should also mean that the failure of tax authorities to adopt such act raises substantially similar issues to the ones that arise when the request to issue an advance ruling is refused. Considering the implications of cooperative tax compliance for the levying of taxes, the Italian tax system should provide an effective legal remedy, be it before tax or administrative courts, to ensure that tax authorities exercise their powers in conformity with the rule of law. However, there is no official recognition of such right at present.

[77] A very clear example of this is the Dutch system of horizontal monitoring, on which see further in sec. 2.3.
[78] Regulation of the Director of the Italian Tax Agency 14 April 2016 (prot. 54237/2016).
[79] The complete documentation may be completed within 30 days from the presentation of the application.

The link with the existing tax procedures requires some specific attention, with a view to addressing the concrete implications of the fact that cooperative tax compliance does not create any immunity effect from the ordinary tax procedure, but only makes them operate in a context with lower tax risks.

The Italian system includes an - at least annual - internal reporting obligation, which in fact secures a stronger reaction to possible misfunctioning of the internal audit system that detects the occurrence tax risks and the consequent information to tax authorities. Even if presupposed for the entitlement to cooperative tax compliance, its nature of internal reporting obligation should in principle exclude that tax authorities might impose tax sanctions in case of failure to comply with it. However, it certainly allows them to exclude the application of cooperative tax compliance, subject to evidence that the requirements are in fact not met. The enforcement of this requirement is not easy in practice, also considering the subjective assessment. However, in cases of clear tax violations that the internal auditing has either not detected or not correct, tax authorities should not have major problems in giving the evidence required by Article 4.

2.2.4. The Fast-Track Advance Ruling

The correct functioning of those reporting obligations makes it possible for taxpayers to come to an agreed assessment of concrete situations producing tax risks at an earlier moment than that in which they have the obligation to file their tax returns.[80] This interaction might also prompt forms of anticipated tax audits and the right to request an ad hoc type of advance ruling (defined by Article 6 as fast-track advance ruling, or *procedura abbreviata di interpello*), through which the taxpayer presents any possible tax risk connected with business activities.

The content of the request for the advance ruling reflects the ones applicable for the ordinary advance ruling.[81] However, the dynamics of this procedure – concretely implemented by Ministerial Decree 15 June 2016 - differ from those of all other types of advance rulings applicable under Italian tax law. Accordingly, within 15 days from the application, tax authorities verify the entitlement and determine whether the documentation is sufficient and adequate and reply within 45 days to the taxpayer. Within such period tax authorities may convene the taxpayer, conduct inspections at the premises of the taxpayer upon agreement, and request additional documentation.

The wording of the law and its implementing decree clearly indicate the existence of an obligation for tax authorities to determine whether the request for advance ruling has been accepted, but do not expressly regulate the effects that arise when tax authorities remain silent within this period. In such

[80] See Article 6 (1) of the Legislative Decree 128/2015.
[81] This is confirmed by Art. 1 (2) of the Ministerial Decree 15 June 2016.

circumstances, the circumstance that the Legislative Decree 128/2015 contains a reference to the ordinary advance ruling procedure leads to wonder whether, also in this case, silence might equal acceptance of the position held by the taxpayer.

The answer to this question is not simple and might have to be provided in the light of future judicial and scholarly interpretation. A strong argument arises as to the fact that the shorter timeline for advance ruling in the framework of cooperative tax compliance merely reflects the lower tax risk, as compared to the ordinary advance tax ruling procedure. However, the binding value of the position held by tax authorities has a stronger relevance in the framework of tax compliance, as it might in fact determine that further tax audits might not be required in respect of those facts. Moreover, the reply of tax authorities to the short-track advance ruling has strong implications that might lead to revoking the benefits of cooperative tax compliance.

2.2.5. The Other Effects on Tax Procedures

Besides the effects concerning legal certainty in the framework of tax procedures, the reduced exposure to tax risk also produces some concrete advantages for taxpayers, in the form of a waiver from the obligation to provide guarantees in connection with tax refunds and the reduction of administrative penalties. Such effects certainly contribute to enhance the appeal of cooperative tax compliance for taxpayers within the Italian tax system.

2.3. A Comparative Legal Analysis with Other Regimes of Cooperative Tax Compliance

2.3.1. Scope and Methodology

The comparative legal analysis will review the essential features of cooperative tax compliance in selected jurisdictions, including in particular the Netherlands and the United Kingdom. [82]

Since both countries have significantly influenced the work conducted under the auspices of the OECD as to the development of cooperative tax compliance throughout the world, it is important for this master thesis to address them both. This will facilitate a more comprehensive and qualitatively better understanding of the context in which the OECD has developed cooperative tax compliance.

[82] Further tax systems include cooperative tax compliance. For a comparative analysis of the Belgian system see Cannas, F., Wauters, K., The Rise of Cooperative Compliance Programmes and the Rule of Law: A Comparison between Belgium and Italy, 59 Eur. Taxn. 12 (2019), p. 561 ff. On the Austrian cooperative tax compliance system see Fiala, F., Ramharter, L., Cooperative Compliance in Austria, 59 Eur. Taxn. 8 (2019), p. 385 ff..

Such analysis will be conducted along a common pattern that reflects the one already used in respect of the Italian tax regime in force. This will make it possible for this master thesis to single out potential elements for best practices or critical issues.

2.3.2. The Dutch System of Cooperative Compliance

The Netherlands is one of the forerunners in carrying out a radical change in the approach to tax compliance. The Dutch tax system presents various structural differences as compared to the one in which cooperative tax compliance operates in Italy, which will be outlined in this section.

Dutch tax authorities enjoy discretionary powers to pursue an effective management of tax audits up to the point that such powers can balance out the obligation of Dutch tax authorities to secure the levying of taxes in conformity with the requirements established by law. In such context, the agreed assessment of facts between tax authorities and taxpayers can also lead to dispute settlement and to advance rulings, which pursue long-term legal certainty within the overall framework of a sound legal framework for conducting business.[83] This business-oriented treatment of taxpayers as clients has gradually developed towards a context where Dutch tax authorities accompany taxpayers in the process of tax compliance, almost acting as their compliance partners, rather than primarily targeting the effects of non-compliance. In fact, a survey of the Dutch order of tax advisers indicated that the perception of the roles had changed: the tax adviser had become more like a tax supervisor and the tax inspector more like a tax adviser.[84]

Pilot projects were conducted,[85] already various decades ago, through soft law,[86] prompting action on tax procedures at the level of administrative practice, even though regulated by statutory provisions. These dynamics were followed by the issuing of a code of conduct issued in 1994 on the interaction between tax inspectors and tax accountants, before the introduction of horizontal monitoring (i.e. of *horizontaal toezicht*), which marked a milestone in the approach of Dutch tax authorities to tax compliance.[87]

---

[83] See Alink, M.H.J., van Kommer, V., The Dutch Approach: Description of the Dutch Tax and Customs Administration, IBFD, 2012, p. vi,

[84] The survey conducted by the Nederlandse Orde van Belastingadviseurs (NOB), Onderzoeksrapportage horizontaal toezicht. De dagelijkse praktijk, 2014 was quoted by Hemels, S., Chapter 24: The Netherlands, in Evans, C. (ed.), Improving Tax Compliance in a Globalized World, IBFD, 2018, sec. 24.5.

[85] This is for instance the case of the code of conduct established in 1984 with the banking and insurance sectors, which prompted the participants to the scheme to surrender data of bank account and financial investment to tax authorities on a regular basis. See further on this in See van der Hel-van Dijk, E.C.J.M., Intra-Community Tax Audit: A Comparative Survey of the Legal Guidelines for Tax Auditing and Recommendations for Enhanced Cooperation in the 27 EU Member States, IBFD, 2011, p. 126.

[86] Gribnau, J.L.M., Soft Law and Taxation: The Case of the Netherlands, 1 Legisprudence 3, 2007, p. 309 ff.

[87] Van der Hel-van Dijk, E.C.J.M., Poolen, T.W.M., Horizontal Monitoring in the Netherlands: At the Crossroads, 67 Bull. Intl. Taxn. 12 (2013), p. 673.

The introduction of horizontal monitoring took place in the context of the 2003-2006 policy plan for very large business, which developed along three main lines, namely conducting real-time assessment of tax compliance, maximising tax transparency and securing such taxpayers with dedicated attention.

A very peculiar feature of horizontal monitoring in the Dutch tax system is that it developed almost entirely beyond legislative measures and operated as an expression of efficient tax administration with the express acceptance of interested taxpayers. When the Stevens Committee reviewed the functioning of horizontal monitoring in 2012, it considered this to be a structural flaw of this new philosophy of tax compliance, which prevents a transparent management of taxation.

As the expression itself indicates, horizontal monitoring reversed the top-down tax administration strategy based on intensive audits (i.e. *vertikaal toezicht*) and pursued an equal standing between tax authorities, holding the power of levying taxes, and taxpayers, obliged to comply with their obligations.[88] This equal partnership should produce its effects on tax compliance, by strengthening constructive synergies that reduce the risk of tax non-compliance.

In line with this new philosophy, the State Secretary for Finance, when inaugurating the first pilot projects of horizontal monitoring of 20 large enterprises, concluded that the change in policy could be justified by the need for a better balance of responsibility between the parties, the growing importance of internal audit and risk management in corporate governance, framed within stricter rules on financial reporting and the willingness of taxpayers to comply with their tax obligation in order to prevent unnecessary disputes with tax authorities.[89] The latter attitude is also reflecting an innovative approach to tax compliance that takes into account the relevance of tax psychology elements, implementing some seminal studies already referred earlier in this master thesis[90] and enforcing values such as mutual trust, transparency and mutual understanding.[91]

In such context, Dutch tax authorities have stressed the importance of enforcing tax compliance and the related obligations, requesting taxpayers to file correct tax reports and pay taxes on time. What truly matters is to act transparently, and in a way to prevent possible breaches to the trust relationship that characterises horizontal monitoring. Accordingly, Dutch tax authorities have not made horizontal

[88] Ibidem.
[89] Belastingdienst, Horizontal Monitoring within the medium to very large business segment p. 7 (30 Nov. 2010), available at https://download.belastingdienst.nl/belastingdienst/docs/horizontal_monitoring_very_large_businesses_dv4061z1pleng.pdf (accessed 18 June 2023).
[90] See Belastingdienst, cit., p. 7. The studies reported in Chapter 1 include in particular the ones conducted by Kirchler, E. et al., cit.
[91] In this sense see the assessment report issued by the Stevens Review Committee in 2012, Stevens L.G.M. et al. (eds.), Tax supervision – Made to measure. Committee Horizontal Monitoring Tax and Customs Administration, 2012.

monitoring subject to an obligation to refrain from entering aggressive tax planning schemes.[92] In the latter type of situations, different views on the facts between tax authorities and taxpayers might be addressed, if there need be in a contentious manner, including before courts.

Another interesting element of the Dutch way to cooperative tax compliance is that horizontal monitoring is a success story[93] that prompted, as early as in 2008, to extend this type of regime to small and medium sized enterprises. This proves concretely that cooperative tax compliance is not necessarily to be confined within the tools for promoting effective payment of taxes by large taxpayers, but it can also work with all other business taxpayers. After all, this can also be intuitive if one considers that the burden of tax compliance, including especially its numerous cumbersome formal requirements, often has a stronger impact on business with a more limited size.

However, the application of cooperative tax compliance to SMEs in the Netherlands takes place along a different pattern. This procedure heavily relies on the involvement of tax consultants as intermediaries, up to the point of turning them into parties of the contractual agreement that regulates cooperative tax compliance.[94] In the context of such tax service provider agreements, also the tax intermediary should be trustworthy for tax authorities and have a clear understanding of the compliance issues involving his clients, i.e. the taxpayers, which have to authorise the intermediary to disclose in advance their critical tax compliance to tax authorities.[95]

Nevertheless, the dichotomy between the obligations created by cooperative compliance on the intermediary and the ones of tax compliance incumbent of the taxpayers requires some adjustment to prevent liability of tax intermediaries for matters that go beyond their possible fault and exclusively relate to breaches operated by the taxpayers.

The access to horizontal monitoring is subject to the expression of the bilateral willingness to activate it,[96] which taxpayers express by signing a dedicated covenant and by meeting the requirements that characterise it.[97] In such circumstances, the compliance agreement can regulate the rights and

[92] See Belastingdienst, cit., p. 13.
[93] According to the official information from Dutch tax authorities (*Belastingdienst*) – Belastingdienst, *16e halfjaarsrapportage* (2015), at 37, https://www.rijksoverheid.nl/documenten/kamerstukken/2015/09/16/16e-halfjaarsrapportage-van-debelastingdienst, 1944 cooperative compliance agreements with large enterprises had been concluded as of 2015.
[94] See Herrijgers, B., Cooperative compliance: small and medium sized entities, in Russo, R. (ed.), Tax Assurance pp. 163-181 Wolters Kluwer, 2015.
[95] See on this Hemels, S., Chapter 24: The Netherlands, in Evans, C. (ed.), cit., sec. 24.5.
[96] In this sense also see Majdanska, A., cit., sec. 4.2.4.
[97] Especially in the initial phases of activation of horizontal monitoring there have been cases the agreement reached between tax authorities and taxpayers was not even formally reflected in a written compliance agreement, thus confirming the very high degree of flexibility that characterises it in the Dutch tax system. See Bronzewska, K., Cooperative Compliance: A New Approach to Managing Taxpayer Relations, IBFD, 2016, p. 150.

obligations arising in respect of tax procedures until collection, but under no circumstances undermining all the application of the rules established by law. The bilateral nature of those rights and obligations is expressed also by the fact that tax authorities commit in the compliance agreement to swiftly review all critical situations.

The interaction of horizontal monitoring with tax procedures can also be better perceived by looking at the so-called layer (or onionskin) model of tax administration. Such model looks at tax audits as the extreme measure, which only applies to the extent that internal control, internal audit and external audit could not apply. This model does not mean that all such activities should necessarily be performed, but rather that tax compliance problems should be solved through them. However, it also requires that all data contained in tax returns and raising critical issues of compliance must have been the object of prior consultation with tax authorities.[98]

Internal control operates as the primary instrument for securing tax compliance. It should allow taxpayers to determine the cases in which they might feel the need to establish preliminary consultations with tax authorities in conformity with the requirements contained in the administrative guidelines issued by tax authorities.

The object and purpose of preliminary consultations is to bring a critical matter to the attention of tax authorities and to prompt them to issue a binding reply, which might be in writing or with a dedicated settlement agreement when the taxpayer so requests.

The circumstance that Dutch law allows the concrete boundaries of preliminary consultations to be regulated by means of an administrative guidance reflects the more flexible boundaries of powers of tax need for a more effective management of the critical situations.[99] However, it increases their discretionary powers up to the point of giving them the power to affect the concrete entitlement to the benefits of the procedure.[100] Moreover, since horizontal monitoring also shows a learning element, which can determine the extent to which tax audits are needed and improve the functioning of the tax control framework. The constant evolution of horizontal monitoring resulting from this context has been criticised in scholarly writing as a potential source of legal uncertainty[101] and brought to a reform, enacted in 2020, that differentiated of horizontal monitoring among very large companies (for which the programme continued *à la carte* with individual monitoring plans putting more

[98] See Belastingdienst, cit., pp. 36-39.
[99] See Decree of 5 July 2011, BLKB 2011/1087, n. 12570.
[100] For a critical analysis of the issues that arise in this context see Dourado, A.P., The Delicate Balance: Revenue Authority Discretions and the Rule of Law – Some Thoughts in a Legal Theory and Comparative Perspective, in The Delicate Balance: Tax, Discretion and the Rule of Law p. 3 ff. (C. Evans, J. Freedman & R.E. Krever eds., IBFD 2011), p. 15 ff.
[101] See Majdanska, A., cit., sec. 4.2.3.

emphasis on giving real-time access to documentation), large companies (shifted to new plans of horizontal monitoring) and the remaining taxpayers (for which horizontal monitoring continued with the involvement of their qualified tax service providers).[102]

Any disagreement between tax authorities and taxpayers does not alter the horizontal monitoring, whereas the failure of reporting critical situations certainly would potentially lead to terminate cooperative tax compliance. This is because the tax control framework should be based on thorough data that, if at all needed, may allow tax authorities to verify the consistency between the tax strategy pursued by business and its implementation, also including due consideration for tax risk management and tax accounting.

Internal auditing should verify the validity of the internal control framework and include monitoring of tax accounting and the consistency of financial statements with the applicable accounting principles. However, under the Dutch horizontal monitoring system, tax authorities can also refuse to engage in preliminary consultations, which may occur only when the main reason for such consultation is to test the applicable legislation for obtaining tax saving, in the absence of a valid business ground or when there is a clear conflict with the object and purpose of the relevant legislation.[103]

2.3.3. The United Kingdom Cooperative Compliance Programme

The United Kingdom has introduced cooperative tax compliance at a rather early stage after various tax policy studies had been commissioned to review committees with a view to improving taxation of large business and making it driven more by commercial factors than by tax consideration.[104] It might not be a sheer coincidence that this process was conducted almost in parallel with the one that took place in the Netherlands.

The levying and implementation of taxes on business in the Netherlands and the United Kingdom follow similar dynamics, which put efficiency and competitiveness at equal footing with the traditional principles of taxation, such as equality and legality. Moreover, both Dutch and UK authorities enjoy a significant degree of discretionary powers, which put them to operate in a

[102] According to the information reported by Majdanska, A., cit., sec. 4.2.7, the first group includes the 100 largest companies based in the Netherlands, the second group includes taxpayers with a balance sheet of more than Eur 20 million, net turnover of at least Eur 40 million and an average number of at least 250 employees, and the rest includes all remaining taxpayers.

[103] See Belastingdienst, cit., p. 38.

[104] Such studies include, among others, the Hartnett Review (D. Hartnett, Review of Links with Business, in http://www.hmrc.gov.uk/pbr2001/businesslinks.pdf), and the Varney Review (Varney, D., 2006 Review of Links with Large Business, HMRC, 2006).

completely different context from the one which characterises the levying of taxes in other continental European countries, such as Italy.

The bulk of UK cooperative tax compliance has developed at the level of tax risk management by the UK tax authorities with a limited number of legislative interventions. In particular, such interventions were visible in connection with the introduction of statutory requirements, such as for instance the obligation for large business to publish their United Kingdom tax strategy before the end of the financial year, or the introduction of the business risk review+.

The need to provide a supportive environment for global competition and tax risk management have characterised UK cooperative tax compliance since its introduction in 2009. The classification of large business according to the level of risk requires conducting an initial due diligence review, which considers various elements that are also normally used for determining the need for more intensive audits. Such elements include the characteristics of each business, the international structures, their tax implications, the governance of tax risk, the regular payment of tax and the tax strategy pursued.

Tax risk assessment is as important in the UK cooperative tax compliance system as the trust relationship is in the Dutch tax system. However, either of the two elements is important in both systems, just as much as in all other cooperative tax compliance regimes that have meanwhile spread throughout the world.

Together with the reduction of the cost of tax compliance, the clearance for low-risk taxpayers by UK tax authorities is a key element of competitiveness for the UK cooperative tax compliance system,[105] which creates legal certainty and a shield against possible future tax audits. The fact that clearance may operate in the United Kingdom at the level of management without being backed up by any legislative measure shows the significant level of discretionary powers enjoyed by tax authorities. In principle, the point can be made that this policy of UK tax authority might in fact create an immunity from the exercise of taxing powers, which would be hard to reconcile with the fundamental values of equality among all taxpayers. Even though this point might be legitimate, the fact is that in the United Kingdom system, this type of clearance presupposes an assessment based on tax risk. Therefore, based on the rule of experience, the low risk of tax non-compliance turns this into a de minimis problem with a limited impact on what tax audits might concretely yield in terms of additional revenue. Moreover, in the UK tax system this clearance does not prevent the adoption of measures to effectively counter the most serious forms of tax violations.

[105] See Majdanska, A., cit., sec. 4.4.2.

More concerns arise instead as to the non-transparent handling of cooperative tax compliance until the 2016 reform. The combination of this lack of transparency with a risk rating limited to the payment of tax in the United Kingdom might have contributed to enhance the competitiveness of UK based business also beyond the limits of acceptable international tax planning, perhaps even leading to a tacit endorsement of business tax strategies that might have caused detriment to the sovereignty of other states, while preserving the integrity of the tax base in the United Kingdom. Any further analysis of such issues goes beyond the scope of this master thesis, but the lack of transparency, especially in the presence of discretionary powers, remains a source of concern, which no longer fits into the overall dynamics of cooperative tax compliance.

By contrast, the approach of UK tax authorities to tax compliance of large business subjects at present around half of this category of taxpayers at any time.[106] This should be praised and shows the very strong levels of efficiency that the UK cooperative tax compliance has reached.

Various elements might have contributed to these very satisfactory results.

Disclosure obligations play a particular important role in the United Kingdom for tax purposes. After introducing in 2004 an obligation for taxpayers to reveal potential tax avoidance schemes,[107] cooperative tax compliance gradually established an obligation for large business taxpayers to share with tax authorities their tax strategy and their accounting arrangements in advance, applying penalties in case of discrepancy with their practical implementation. These developments took place in the framework of a customer relationship management, which quickly became the main axe of compliance for large taxpayers. Per each large taxpayer there is a senior professional, assigned by the UK tax authorities to the function of customer compliance manager. The customer compliance manager has an in-depth knowledge of the specific field of business and might be supported by further experts. The scrutiny of the customer compliance manager might lead to assess tax under consideration. This is a potential additional tax liability and concretely measures the risk for tax non-compliance, which might request further analysis.

The role of customer compliance managers is crucial to the correct functioning of the real-time enquiry on tax risk and liabilities of UK based large business. All business activities throughout the enquiries should be sighted by the customer compliance manager, with a view to determining real-time control and intervening with early settlement of any different views that might arise between tax

[106] See https://www.gov.uk/government/publications/hmrc-annual-report-and-accounts-2020-to-2021/customer-compliance-our-approach-to-tax-compliance-and-large-businesses#hmrcs-approach-to-tax-compliance-and-large-businesses (accessed on 19 June 2023).

[107] This type of legislation is generally known as DoTAS - i.e., Disclosure of Tax Avoidance Schemes) – and has constituted the model for introducing mandatory disclosure in the European Union, under the so-called DAC6.

authorities and the taxpayer. According to the information provided by the UK tax authorities, enquiries last in average 20 months, including the period of litigation.[108]

The introduction of the business risk review project in October 2019 has further refined the process of assessment of tax risk, giving rise to a clear classification of taxpayers into four categories from low to high risk. This process helps a more standardised approach to tax risk management and enhances the management of resources by tax authorities.

2.4. The International Compliance Assurance Programme

The development of cooperative tax compliance in various countries of the world has been a game changer in the relations between large taxpayers and tax authorities, prompting a focus on the synergies that can secure the effective assessment and payment of taxes and shifting away from the traditional confrontational model based on tax audits.[109] This shows the importance and success of supranational regulation in tax matters.

Despite such constructive trust relationship, the existing disparities in tax compliance requirements exposed large taxpayers operating across the borders to significant legal complexity and uncertainty. The only way to address those issues was to establish some form of cooperation among different countries. This was the goal pursued by the pilot projects on the international compliance assurance programmes (ICAP) that took place in 2018 and 2019.

The object and purpose of the ICAP programme - launched with 19 jurisdictions by the Forum on Tax Administration in December 2020 - is to approximate tax risk assessment and streamline tax compliance requirements among the participating countries.[110] The main advantage for participating taxpayers is the reduction of the burden related to tax compliance and the possibility to achieve an agreed assessment of facts that could be shared by tax authorities of different countries. The main advantage for participating states is a joined assessment of tax risk of large business, which also facilitates the sharing of technical expertise.[111]

---

[108] Ibidem.

[109] Martini, M.H., Russo, R. (Ronald), The International Compliance Assurance Programme: Review of the Full Programme, 75 Bull. Intl. Taxn. 4 (2021), p. 183.

[110] OECD-FTA, International Compliance Assurance Programme Handbook for tax administrations and MNE groups, OECD, 2021, pp. 7-8, available at www.oecd.org/tax/forum-on-tax-administration/publications-and-products/international-compliance-assurance-programme-handbook-for-taxadministrations-and-mne-groups.htm (accessed 21 June 2023).

[111] See further on this in Calderón, J.M., The OECD International Compliance Assurance Programme: Just a New Multilateral and Cooperative Model of Tax Control for Multinational Enterprises?, in 72 Bull. Int. Taxn. 12 (2018), p. 690 ff.

ICAP provides for assurance as to a consistent tax risk assessment across various jurisdictions based on shared documentation. Therefore, it differs from cooperative tax compliance and does not give taxpayers legal certainty, which might prevent the need for tax audits, but allows taxpayers to obtain a low-risk rating, which might prevent tax authorities from finding the need for auditing them.

In this sense, ICAP provides an international umbrella for cooperative tax compliance, which is suitable to operate together with national programmes.[112] The voluntary enrolment of large taxpayers in ICAP presupposes the residence of the ultimate parent entity in a jurisdiction participating to ICAP and their willingness to engage in an open and real-time dialogue with tax authorities which allows them to assess the tax risk. Besides the usual conditions applicable to most cooperative tax compliance regimes, the formal documentation requirements include the filing of country-by-country reporting for the group activities in different countries. All participating (covered) tax administrations operate under the coordination of the lead tax administration (supported by a surrogate lead tax administration), which also functions as contact point with the taxpayers involved.[113]

The concrete functioning of ICAP follows three stages, namely the selection, the risk assessment and the issue resolution.

The selection process starts with the application by the eligible taxpayers. Such application should be supported by the overview of risks, the country-by-country report, the Masterfile, the summary of the group structure and all agreed advance pricing agreements and tax rulings. After receiving the documentation, tax authorities decide whether they are willing to act as lead tax administration, to review the submitted documentation and coordinate with all covered tax administrations. All these activities must be conducted in a way that shows proper consideration of the application and that obliges tax authorities to motivate their acts in conformity with the applicable legislation.

This shows that ICAP establishes a flexible flow of rules between national procedural rules and international criteria that should allow to build up two sets of synergies, namely between the applicant taxpayer and the lead tax administration, and among all covered tax administrations. The complexity of this interaction becomes already visible during the selection process but continues throughout all three operational phases of ICAP. Among others, serious issues of data protection may arise in the presence of different standards for protecting confidentiality, which are of particular relevance within

[112] Calderón, J.M., The OECD International Compliance Assurance Programme: Just a New Multilateral and Cooperative Model of Tax Control for Multinational Enterprises?, in 72 Bull. Int. Taxn. 12 (2018), p. 690 and 698 regards ICAP as a step in the right direction, for preventing cross-border tax disputes and establishing a cooperative approach between different tax authorities and taxpayers in the international context.
[113] This is done in line with the concept of the single point of contact.

the European Union, due to the requirements established by the General Data Protection Regulation (GDPR) and the interpretation by the Court of Justice of the European Union.

Once the selection process is complete, the lead tax administration will inform the applicant taxpayer, providing a clear overview of the covered tax administrations, periods and risks, as well as other relevant information that might be required for the taxpayer to agree and accept the start of the ICAP risk assessment.

The risk assessment phase starts with the analysis of documentation, the tax strategy, the tax control framework, and all related materials which the taxpayer is obliged to disclose. Risk assessment entails a significant degree of shared information among all covered tax administration, which is usually combined with joint activities of fact finding and assessment. Each covered tax administration will follow its own rules and practices when preparing their input for the issue resolution stage.

Once the issue resolution has been filed, it will be communicated to the taxpayer by the lead tax administration, together with the specific letters of acknowledgement by each of the covered tax administrations. Such documents will reflect the tax risk assessment, which will then produce its concrete repercussions in the relations of the taxpayer with tax authorities.

Time will tell if the structural complexity of this programme will be handled by tax authorities in a way that optimises tax risk management and legal certainty.[114] Regardless of that, it should be regarded as another important milestone for changing the structural features of the relations between taxpayers and tax authorities, which will enhance the functioning of national cooperative tax compliance mechanisms. Moreover, its practical implementation might soon nudge the interaction between tax authorities and the convergence towards homogeneous standards of tax risk assessment.

2.5. The European Union Tax Compliance Framework

The great interest raised by cooperative tax compliance across the world also prompted the European Commission to become engaged in promoting the introduction of an EU-wide trust and cooperation approach to tax compliance in the framework for a fair and simple taxation.[115]

[114] Martini, M.H., Russo, R. (Ronald), cit., p. 183 consider that the future challenges of ICAP include the coordination between tax administration on scope and risk assessment; the attractiveness to MNEs of a mechanism that provides assurance, but not certainty; and the perception by the public opinion that it might not give rise to a privileged tax treatment for large taxpayers as it had occurred for APAs and tax rulings. Calderón, J.M., cit., p. 698 expresses similar concerns.

[115] European Commission, 15 July 2020, An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy, COM(2020) 312 final.

From a regulatory perspective, this shows that also in tax matters the European Union is in fact turning into a kind of "regulatory state".[116] The use of this attitude in tax matters is particularly interesting, considering that, on the one hand, it endorses the action undertaken by other international regulators, primarily the OECD,[117] and, on the other hand, it achieves an interesting end result of nudging national regulatory innovation in an area where the EU lacks the competence to introduce supranational legislation in the absence of a unanimous agreement by its Member States.[118] In such context, it ends up shifting the power to issue regulation to the level of tax management, creating in substance equivalent effects of nudging regulatory convergence across the EU Member States. Therefore, rather than being an expression of command-based techniques of control, it could be characterised as reflecting consensus.[119]

The scope of the EU Tax Compliance Framework project is confined to transfer pricing but includes both SMEs and large business, thus making it particularly relevant for this master thesis. The goal pursued by the European Commission is to make it supplemental to the existing national and international cooperative tax compliance programmes.

The start of a pilot project in January 2022 involving 13 European countries, named European Trust and Cooperation Approach (ETACA), might raise some issues from a legal perspective. These issues relate to the absence of a European tax policy and the implications that arise in the presence of supranational measures affecting matters of taxation.

The ETACA pilot project[120] developed with the voluntary enrolment by tax authorities of those countries, which pursued an enhancement of their tax management. Accordingly, it is developing along the lines that have characterised cooperative tax compliance programmes in the Netherlands and the United Kingdom as a *sui generis* expression of soft law. The supplemental function to the national and international programmes of cooperative tax compliance can be particularly relevant in respect of cross-border situations, which require a coordinated approach also in terms of tax risk management to reflect what taxpayers already do, especially within the European Union. Moreover,

[116] The expression is by Majone, G., The Rise of the Regulatory State in Europe, in West European Politics, 1994, p. 85 ff.
[117] See further on this in Chapter 1 of this thesis.
[118] The absence of an EU tax policy falls out of the scope of this master thesis but is evident when looking at the content of the TFEU, whose Art. 115 only admits secondary legislation in tax matters to the extent that is required for removing obstacles on the functioning of the Internal Market, which cannot be addressed by means of coordination of taxing powers by the EU Member States.
[119] This terminology reflects the conceptual categorisation used by Morgan, B., Yeung, K., cit., p. 313 ff.
[120] European Commission, Guidelines European Trust and Cooperation, 2021 available at available at https://ec.europa.eu/taxation_customs/document/download/1e2d7158-f083-4e68-9ece-b96ce02668c9_e (accessed 20 June 2023).

it can help preventing disputes, or at least to address them timely and with the appropriate legal instruments.

An interesting feature of this pilot project is the direct involvement of taxpayers, allowing them to have a one-stop shop for the assessment, which in fact largely corresponds to the ones of bi- and multilateral advance pricing agreements. Accordingly, it yields a multilateral risk assessment based on a set of documents used by all involved countries, which follows the three steps already outlined in the ICAP.[121]

The scope of the ETACA pilot project is limited to large business, which roughly corresponds to the enterprises that might be eligible to other international and supranational projects.[122] The subjective scope is confined to groups of companies with a total consolidated revenue of at least Eur 750 million and with an ultimate parent entity established in the European Union. In line with the typical features of cooperative tax compliance programmes, also the participation of taxpayers to ETACA is on a voluntary basis, provided that they are established in a country that has agreed to participate to the pilot project.

The commitments of taxpayers participating to ETACA largely reflect the ones of ICAP and of most cooperative tax compliance systems, requiring trust, transparency and cooperation. The existence of such common commitments is expected to contribute to making this pilot project better interact with the corresponding national and international programmes, allowing them also to run in parallel.

Unlike the national programmes, which only involve tax authorities of one State, ETACA must establish a set of criteria to coordinate the action by tax authorities of various states, which closely reflects the ones applicable for ICAP. A cornerstone of this criteria is the difference between the coordinating member state, the surrogate coordinating member state and all other participating member state. These different roles are determined by the State of the ultimate parent entity. Tax authorities from this state bear the responsibility of the relations with the taxpayer and of the coordination with all participating national authorities.

2.6. A Critical Assessment of the Italian System of Cooperative Tax Compliance

The assessment of the Italian approach to cooperative tax compliance requires due consideration of various elements that have been analysed throughout the first part of this chapter. Such elements

[121] See sec. 2.4. For a comparative assessment of ETACA and ICAP see Russo, R. (Ronald), Engelmoer, J.J., Martini, M.H., Cooperative Compliance in the European Union: An Introduction to the European Trust and Cooperation Approach, 76 Bull. Intl. Taxn. 2 (2022), p. 89 ff.

[122] This threshold is also used for Country-by-Country Reporting and other measures targeting MNEs.

include the rules introduced by Legislative Decree 128/2015, its comparison with similar regimes applicable in other countries, and the participation of Italy in both ICAP and ETACA.

Italy was certainly not the inventor of cooperative tax compliance, but it certainly belongs to the first group of countries that became proactive in prompting its dissemination.

The comparative analysis has shown the merits of the choice made by Legislative Decree 128/2015, which implanted cooperative tax compliance in a profoundly different tax system from the ones that had first experimented it.

Such differences can be recorded at different levels, including in particular the source of the regulation of cooperative tax compliance, the procedural issues and the operational powers enjoyed by tax authorities in such context.

Cooperative tax compliance has developed in the Netherlands and in the United Kingdom entirely as a project for enhancing tax management. The almost complete absence of statutory rules in those countries is in striking contrast with the Italian legal framework, in which it is simply impossible for tax authorities to have these powers of regulation, including when there is an agreement of the interest taxpayers. The Italian *adempimento collaborativo* finds its main regulation in the law that determines the conditions in which it operates, the powers that tax authorities have and the rights of the taxpayers that decide to participate to it. In the Italian context, therefore, the values of trust and the commitments have a more marginal value than the corresponding one in the Dutch and UK systems.

From a procedural perspective, the Italian tax system presents the cooperative tax compliance contractual agreement in a way that makes it fit within the administrative schemes that regulate the exercise of action by tax authorities. In such context, the accession (*adesione*) by the taxpayers produces effects in their legal sphere that go beyond the ones that would be anyway produced – thus also without their consent - by the administrative act adopted by tax authorities. Moreover, the administrative regulation of tax procedures prevents the taxpayers from having the same degree of legal protection that they would enjoy on the base of the cooperative tax compliance contractual agreement in countries like the Netherlands and the United Kingdom. This is clearly visible when it comes to activating administrative legal protection when tax authorities either fail to take into due consideration the view of the taxpayer, or unduly activate tax audits that include positions that are not consistent with the ones agreed in the context of cooperative tax compliance. After all, one should

not forget that Italian procedural tax law in force does not yet fully recognise the value of the *audita altera parte* principle, also known as *principio del contraddittorio*.[123]

However, the main difference is that, unlike in the Netherlands and in the United Kingdom, tax authorities enjoy in Italy little or no discretionary powers. Their function and powers are determined by the law and the need to enforce taxes in conformity with the constitutional framework. For this reason, Italy might be regarded one of the first continental European countries that have promoted cooperative tax compliance. Being a pioneer might have implications in terms of uncertainty, but also of a competitive advantage towards meeting the challenges.

The leeway of Italian tax authorities within the boundaries of *adempimento collaborativo* are therefore much narrower than the ones that typically characterises the powers that usually implement cooperative tax compliance. The repercussions of this different context might be visible at different levels, starting by the need to secure legal certainty.

The full value of clearance given by United Kingdom tax authorities in respect of tax audits is just impossible to conceive within the Italian tax system. Nevertheless, *adempimento collaborativo* has managed to achieve a reasonable balance, which might further develop at the interpretative level if one considers the legitimate expectations that taxpayers might have on acts issued by Italian tax authorities in line with administrative law.

Besides the differences in the legal context, further elements might have affected the proper functioning of *adempimento collaborativo*. A good example is the traditional culture of Italian tax authorities based on tax audits. When looking at the studies conducted in the United Kingdom prior to the introduction of cooperative tax compliance, it is remarkable that the awareness of not being able to audit a vast majority of taxpayers brought tax authorities to a complete change of their tax administration strategy that prevented problems of tax non-compliance rather than addressing them ex post at the level of tax audits. In other words, the policy of UK tax authorities has been to structurally reduce the need for tax audits. By contrast, Italy has first (since the reform operated in 1982, better known as *manette agli evasori*)[124] exponentially increased its sanctions for cases of non-

[123] It should be noted that Article 4 (1) (e) of the Act of Empowerment for the Tax Reform includes an express recognition of this principle, thus bringing the Italian tax procedural systems fully in line with the basic requirements of the European Convention on Human Rights and the EU Charter of Fundamental Rights. A more detailed analysis is not necessary for the purposes of this master thesis.

[124] Law 7 August 1982, n. 516.

compliance and then developed instruments - such as *redditometro*,[125] sectoral studies[126] and other forms of statistical analysis[127] - to target potentially non-compliant taxpayers and sharpen tax audits on them.

This development was accompanied by an open-ended increase of formal requirements and legal complexity, possibly prompted by the need to reduce potential legal uncertainty and room for discretionary powers. The parallel sharpening of the intensity of tax audits, also involving the role of the tax police (*Guardia di Finanza*), have brought to increase the contentious relations between taxpayers and tax authorities, pushing up the numbers of judicial litigation with unavoidable negative repercussions for taxpayers on the time for obtaining justice and for tax authorities on the time to concretely enforce tax collection. The critical status of Italian tax procedures was then addressed with repeated tax amnesties and reduction of the applicable penalties in case of settlement. Either of the latter two measures might have contributed to obtain short-term results in terms of tax collection, but has notable negative side effects on the perception of tax justice and fairness by taxpayers, who might on the one hand be prompted to reiterate violations and have expectations in an amnesty when caught in violating tax rules, or having a chance to pay taxes later and with a reduced amount of penalties.

In such context, the choice of introducing *adempimento collaborativo* was an important and brave step in the right direction, but its effects could not help being significantly weakened. A change in the culture of tax audits is undoubtedly important but not sufficient in this context. When tax authorities propose large taxpayers to open their books and pursue a trust relationship, large taxpayers might fear that one way or the other the real-time control might lead to possible reasons to activate an audit in the presence of violations that overcome the potential effects of cooperative tax compliance.

The future of cooperative tax compliance in Italy requires legislative simplification as an indispensable condition, but a more evident shift towards tax risk-oriented management of tax procedures might also be important to steer the Italian tax system in a desirable direction. These two elements are especially important in the process that might soon lead the Italian tax system to broaden the use of cooperative tax compliance and make it accessible also to other categories of taxpayers,

[125] The introduction of the *redditometro* took place with Ministerial Decree 24 December 2012, then replaced by Ministerial Decree 16 September 2015.
[126] The *studi di settore* were introduced by art. 62-bis of the Decree 30 August 1993, n. 331, converted into Law 29 October 1993, n. 427.
[127] The main expression of those studies is the so-called *indici di affidabilità fiscale*, introduced by Ministerial Decree 24 December 2019, then amended by Ministerial Decree 28 February 2020. The core concept of this instrument is to rank the reliability of each taxpayer based on prior compliance and taking into account the available information. Various benefits are granted to taxpayers with a high index of reliability. The logics of this instrument largely reflects the spirit of nudging voluntary tax compliance rather than the coercive one.

such as the SMEs. Unlike large taxpayers, SMEs do not have large resources to enact complex technical requirements that characterise the content of cooperative tax compliance in the dialogue with tax authorities. However, SMEs also need to find a sustainable solution to comply with the requirements established by tax compliance, which are currently very burdensome and heavily absorbing financial resources that could otherwise be devoted to securing their competitiveness. Moreover, the current heavy reliance on tax auditors within tax authorities is also not sustainable, considering the more reduced levels of taxes collected per each of those taxpayers.

2.7. Extending cooperative tax compliance to SMEs from a policy perspective

The policy choice of extending cooperative compliance to SMEs might be addressed in a way that properly considers various contextual elements. Such elements will be briefly outlined hereby, others will require prior understanding of the management issues, which will be more thoroughly addressed in Chapter 3.

The analysis contained in this Chapter has depicted the switch from a tax-audit based enforcement to cooperative tax compliance as a sound and sustainable choice. Instead of chasing non-compliant taxpayers, tax authorities become their business partners and accompany them in the process of fulfilling tax obligations correctly. The circumstance that cooperative tax compliance was essentially developed for large taxpayers might depend on the complexity of the issues arising in such context but does not necessarily imply that this philosophy can work with these taxpayers only.

Tax psychology studies already quoted in this master thesis show that compliance depends on several factors, including the perception by the taxpayers that their violations can be caught and effectively sanctioned. Accordingly, repeated amnesties and an inefficient enforcement of tax procedures increase the likelihood that taxpayers might be dissuaded from complying with their tax obligations. In such scenario, they might find it unnecessary to open their tax accounting to tax authorities and rather try to conduct their activities in a way that allows them to maximise their return without paying taxes.

When comparing the attitude of large and small/medium business taxpayers in such scenario, differences might be recorded. An effective corporate governance requires large business taxpayers to rely on an established strategy, which allows the top management to achieve its goals. Therefore, the establishment of a trust relationship with tax authorities with a top-down business approach to management will imply that the overall corporate strategy includes a compliance culture and enforces it. Small and – albeit to a lesser extent – medium enterprises might share the top-down corporate governance approach to their business but might not necessarily rely on an established strategy and

might be, especially in countries like Italy, more inclined to accept engaging in the so-called informal economy. A thorough interdisciplinary analysis of all relevant elements that might influence the corporate behaviour of small and medium business falls out of the scope of this master thesis. However, it might be reasonable to assume that in a country of recurrent tax amnesties and inefficient tax enforcement, this inclination might grow. The case of Italy shows that repeated tax amnesties are combined with a significantly enhanced tax audit strategy, which create a significant tension for small and medium enterprises. This tension is exacerbated by the growing complexity of formal documentation and filing obligations, which often operate in a context of outsourcing of preliminary auditing functions.

This brief comparison indicates that, from a policy perspective, a tax enforcement strategy mostly relying on tax audits is outdated for both categories of taxpayers.

For large taxpayers it generates extremely complex procedures, which might last for long and absorb significant human and financial resources. Moreover, such procedures require a very high degree of technical capacity, create legal uncertainty and a relevant exposure to significant negative repercussions for taxpayers when held guilty of violating the law. From a tax administration management perspective, the goal is not just to secure effective compliance, but also to make it in a way that is sustainable. After all, the ultimate goal of tax procedures is not just to enforce the payment of taxes, but also to secure effective financial resources to fund the State's budget.

For small and medium enterprises, the same problems arise with slightly different nuances. Tax procedures might not be as complex, but violations usually yield less revenue and absorb more financial and human resources on both sides.

Proving that a tax-audit based enforcement is unsustainable from a policy perspective does not per se mean that cooperative tax compliance is good. The *pars construens* of this critical analysis will therefore now look at the same issues in the context of cooperative tax compliance. An *ex ante* approach prevents tax violations, secures real time monitoring of tax compliance, nudges an agreed assessment of facts and helps settling potential disputes at a much earlier stage, with notable savings on time, thus on human and financial resources for both the taxpayers and the tax authorities.

Tax risk management of large taxpayers in the United Kingdom has shown that the combination of a tax control framework with tax risk assessment monitored by a compliance officer reaches an optimal balance of all relevant goals. The experience of the Netherlands has shown that cooperative tax compliance for smaller taxpayers might not sustain this type of structures. This means that cooperative tax compliance might work with the latter category of taxpayers, but only with

adaptations. The most obvious adjustment, also used in the Netherlands, entails the involvement of tax intermediaries, such as tax consultants, in nudging tax compliance. In such context, tax consultants beget an auxiliary function to tax authorities.

Tax intermediaries are already very actively involved in the framework of tax procedures with formal and substantive obligations, such as to file tax returns, supply information concerning taxpayers and liquidating in part or full their taxes due. The involvement of tax intermediaries has significantly grown across the years. It started with the establishment of the obligation to levy withholding taxes at source of income in their function as paying agents. Similar mechanisms operate in the field of value-added taxes. More recently, their formal and reporting obligations has grown beyond the need to document their payments. Both with the obligations to report financial activities and the mandatory disclosure obligations, tax intermediaries must report potential schemes that generate tax violations. In such circumstances, the outsourcing of ancillary tax audit functions to tax intermediaries creates a significant non-remunerated burden on them with exposure to sanctions in case of violations.

Strengthening the role of tax intermediaries for small and medium enterprises also in a way that allows including cooperative tax compliance obligations might be a valid option to pursue from a policy perspective. Chapter 3 will provide further arguments, especially concerning small enterprises, that support the sustainable nature of this option.

In the Italian tax system, it should be noted that the involvement of intermediaries in tax compliance is already visible in respect of the filing and transmission of tax returns. In some circumstances, this already implies a higher reliability of the information submitted and therefore might produce some advantages for the taxpayer.

Another valid option for small and business enterprise might be to nudge standardised tax compliance, following the model that is already applicable in the Netherlands. A possible variation of this second model is an agreed assessment of facts. The latter option comes very close to the types of mechanisms that apply in the field of transfer pricing within the framework of the so-called advance pricing agreements.

Either of the options presented for extending cooperative tax compliance might have its own advantages and side repercussions. However, what matters for the purposes of this master study is that there are no valid reasons excluding the conceptual validity of extending cooperative tax compliance to small and medium enterprises. By contrast, there are good reasons to indicate that, from a policy perspective, it is desirable for those taxpayers too to abandon the exclusive reliance of tax enforcement and collection on tax audit driven models.

In such policy framework and in the light of the comparative legal analysis conducted in this chapter, this master study will now analyse the content of the Italian Act of Empowerment for the Tax Reform, putting the emphasis on how cooperative tax compliance might be extended to small and medium enterprises.

2.8. The Italian Act of Empowerment for the Tax Reform

2.8.1. General Issues

The object of the analysis in this section is limited to the clauses on cooperative tax compliance as included in Act of Empowerment for the Tax Reform (*Legge Delega per la Riforma Fiscale*).

The criteria and goals enshrined in the Act of Empowerment aim at strengthening and broadening cooperative tax compliance through two main axes that are contained in Article 17 (1) (g). Both such axes pursue a comprehensive revision of tax assessment by nudging voluntary tax compliance by taxpayers.

The first axis is enshrined in n. 1 of Art. 17 (1) (g) and is geared at expanding the current regime of *adempimento collaborativo*. For this master thesis, it is important to determine the extent to which expanding this regime might go as far as covering small and medium enterprises.

The second axis is enshrined in n. 2 of Art. 17 (1) (g) and focuses on smaller taxpayers only. The entirety of this second axe is meaningful for the research goal conducted in this master thesis. The bulk of such criteria and goals is to introduce a regime of agreed predetermined tax assessment for taxpayers that derive business income and income from independent personal services.

The analysis of the reform of cooperative tax compliance to be implemented by the Government in line with the criteria enshrined in the Act of Empowerment will be conducted from a twofold perspective. On the one hand, this master thesis will review the criteria and goals considering legal interpretation to determine the boundaries within which the Government may reform of cooperative tax compliance in a way that goes beyond the regime of *adempimento collaborativo* and involve a broader group of taxpayers. On the other hand, the master thesis will verify the consistency of the said criteria and goals with the international and comparative developments of cooperative tax compliance.

When conducting the analysis, this section will also evaluate possible repercussions on the relations of tax compliance with tax audit. This coordination is required also considering that the proposed reform aims at changing the overall standpoint of tax assessment, as indicated by the title of Article 17. As indicated in the technical report accompanying the presentation of the proposed reform to the

Italian Parliament, this change should enhance legal certainty and efficient (economic) management of administrative tax procedures.[128] Two interesting comments should be made in this respect. First, the technical report indirectly acknowledges that some type of measures, such as the extension of statute-of-limitation rules, negatively affects legal certainty and should therefore be limited within the framework of the planned tax reform. Second, the technical report regards a more efficient management of tax administration, based on a stronger reliance on cooperative tax compliance and agreed tax assessment, as a necessary condition for a more efficient use of financial resources made available for public finance within the State budget.

The regulatory goals that the Government pursues are particularly important to understand the plan of enacting a radical change in the tax administration strategy.

This means concretely a U-turn in the overall strategy, which should rely less on chasing incompliant taxpayers and more on nudging their voluntary compliance.

The technical report gives several additional specifications of how the Government might achieve it. Among others, it mentions the use of digital technologies to streamline tax audits, a stronger reliance on tax risk management (which might require an overall intervention in the applicable rules), but also voluntary compliance nudging through the two main axes of reform and cooperation with tax authorities of other countries.

Moreover, considering that the proposed changes are formulated in the framework of a broader reform of the Italian system, the analysis of the Act of Empowerment for the Reform of the Italian Tax System will occasionally shed light on other elements of such reform that might affect the topic of this master thesis, such as for the creation of a General Tax Law and the implications that it might have on the principles of tax law and all the rules that govern their application.

In such context, the broadening of cooperative tax compliance can in fact be carried out through both measures and will therefore be addressed on a separate basis within the following sections.

After analysing the content of the proposed criteria for the reform, this master study will verify their common elements with a view to outlining potential avenues for the application of cooperative tax compliance to SMEs in Italy.[129]

2.8.2. Strengthening adempimento collaborativo - Art. 17 (1) (g) (1) of the Act of Empowerment for the Tax Reform

[128] See Delega al Governo per la Riforma Fiscale. Relazione tecnica, 2023, p. 17.
[129] See sec. 2.9.

The first axis of the reform of *adempimento collaborativo* pursues broadening of its scope in line with the following nine goals and criteria, which this section will address for each of them on a separate basis. An important contribution of this section is also understanding whether and how this first axe may concretely contribute to bringing small and medium enterprises within the *adempimento collaborativo*.

This assessment should be made by looking at the first goal and set of criteria contained in Art. 17 (1) (g) (1). This clause lowers the thresholds for applying this type of regime, providing the Italian tax authorities with adequate resources for properly handling this change.

The first goal reflects the positive evaluation of cooperative tax compliance and shows the willingness of the Italian Government to strengthen the reliance on this philosophy, thus going beyond the category of large taxpayers. The question raised by this first goal is how much lower this threshold can be set. The comparative tax law experience and the policy analysis contained in earlier sections of this chapter have shown that cooperative tax compliance may also apply to categories of taxpayers other than the large ones.

Considering that the current threshold limits the application of this regime to taxpayers with a total turnover or profits not inferior to Eur 10bn, there is much room for this type of intervention. The international and supranational risk assurance programmes of tax compliance have thresholds generally limited to Eur 750 mio of profits/turnover. This threshold should be regarded as the primary reference threshold for extending the scope of *adempimento collaborativo*.

However, the intervention could well go beyond this intervention and expand *adempimento collaborativo* also to medium-large taxpayers and produce a sustainable intervention without major changes. Moreover, the first goal should be interpreted in a way that the Government might further expand *adempimento collaborativo* also to smaller taxpayers, provided that appropriate adjustments preserve the sustainability of this philosophy of tax enforcement.

The Dutch experience shows that the use of standardised cooperative tax compliance might help addressing smaller taxpayers in a way that still facilitates their voluntary compliance without giving rise to excessive human resources on the side of tax authorities. Moreover, the use of artificial intelligence and blockchain might contribute to carry out the data analysis required for real time control of all relevant documentation. E-invoicing and compliance obligations required for VAT purposes might be a good model to secure such a change and pilot projects might be a safe way to test their validity.

Should the Government wish to engage in a significant lowering of the thresholds for eligibility to opt for cooperative tax compliance, then it will also be important also to make a comprehensive review of the documentation requirements, including the various types of simplified tax obligations for smaller taxpayers. In the presence of such a revision, it might be difficult to identify an exact minimum threshold to the access of cooperative tax compliance.

However, it might be meaningful to create a two-track system of cooperative tax compliance. The core elements might be shared by its two different modes of application. Such elements should include the tax risk management internal mechanisms, the establishment of a trust and partnership relation between tax authorities and taxpayers, and the opportunity for having a dialogue prior to issuing of administrative acts by tax authorities.

The dialogue represents a valid instrument to comply with the requirements of the *audita altera parte* principle – aka as *principio del contraddittorio* – and should lead tax authorities to give green light to all matters with low-tax risk. On such matters, tax authorities should provide clearance with binding effects also in respect of tax audits *rebus sic stantibus*, i.e., insofar as all submitted documentation is thorough and correct. Considering that the clearance for tax audit purposes presupposes a thorough tax risk assessment and is conditional upon having submitted the proper documentation, the problems of creating a preferential treatment for tax audit purposes should not be as significant as they might appear *prima facie*. This conclusion might be even more evident if one considers that the object and purpose of the planned reform of the tax system is to lead tax assessment towards a more efficient and effective tax compliance than the one that mainly relies on tax audits. This might mean better compliance of tax administration with the requirements of good management established by Article 97 of the Italian Constitution and Article 41 of the EU Charter of Fundamental Rights. Moreover, the point can be made that submitting a significant percentage of large taxpayers to an effective real-time control of taxpayers is also from a qualitatively perspective a better way for tax authorities with their obligation to secure the correct enforcement of taxes. The experience of the United Kingdom shows that even one out of two of taxpayers can be subject to an effective scrutiny in the framework of cooperative tax compliance.

All other relevant elements might instead differ according to two main sets of criteria. Larger taxpayers might require a closer monitoring by dedicated tax officials with technical competence and familiarity with the business conducted by the taxpayer. In this respect, the United Kingdom customer compliance manager seems a successful practice, which should be considered by the Italian tax authorities for this category of taxpayers. Other taxpayers might have their tax compliance addressed

in the framework of standardised procedures, such as the ones that successfully operate in the Netherlands.

When addressing the second goal enshrined in Article 17 (1) (g) (1), the connection with the first one is rather evident. The planned reform might empower the Government to conduct a major shift towards cooperative compliance. This means concretely extending cooperative tax compliance also to companies whose size does not meet the requirements of *adempimento collaborativo*, provided that such companies belong to groups in which at least a company meets such requirements. The extension of the regime in this case is subject to the condition that a system of tax risk monitoring, measuring, management and control operates on a unitary basis at the level of the group. The attention for group tax risk management strategies reflects the one that operates in other countries, but also in the international and supranational assurance mechanisms. It might well open the perspective of allowing cooperative tax compliance operating at group level. This would be certainly a useful development for large taxpayers involving groups of companies, especially when such groups include smaller taxpayers. The criteria indicated in this goal do not allow to specify whether this extension will operate for taxpayers with entities that are resident in other countries. The circumstance that Italy actively participates both in ICAP and ETACA might lead to presume that this should be possible. However, in such circumstances it will be important also to secure proper coordination with these programmes, allowing the one-stop shop dynamics envisaged with the filing obligations in the country of the ultimate parent entity. The need to secure proper coordination with these initiatives – pursuing assurance on tax compliance - should nevertheless not deprive the Italian Government to enact the delegation in a way that fully allows the *adempimento collaborativo* to determine its effects in respect of taxes due in Italy going beyond mere assurance, as *adempimento collaborativo* currently does.

The third goal binds the Government to introduce an integrated system for certifying the monitoring, measuring, management and control of tax risk (*sistema integrato di rilevazione, misurazione, gestione e controllo del rischio fiscale*) without preventing the exercise of tax auditing powers by Italian tax authorities. Introducing this type of mechanism in the Italian tax system might prompt an important step forward in the direction of securing objective standards of tax reliability for taxpayers. Such standards essentially reflect the dynamics of (private) business auditing. Their implementation in the context of *ex ante* tax risk management might require coordination with tax audits and the existing tools, including – among others – the synthetic indexes of tax reliability (*indici sintetici di affidabilità fiscale*).[130] In that context, critical issues might for instance arise to the extent that the

[130] See Art. 9-bis of Decree 24 April 2017, n. 50, converted by Law 21 June 2017, n. 96.

taxpayer introduces the certification system and the reported income (or elements arising from other sources) might indicate the need for a tax audit.

The fourth goal allows the Government to evaluate the possible extension of cooperative tax compliance to periods prior to the one in which the taxpayer was admitted to it. The concrete implementation of this goal might in fact raise critical issues too. This is especially the case if one considers that the admission is requested by taxpayer but determined by means an administrative act. This act completes the procedure in which tax authorities verify that all conditions were met. In such context, any retroactive effect of the administrative act would certainly have to find limits in the possibility that tax authorities might have already started tax audits. Moreover, from a practical perspective it might be difficult to allow the real-time control presupposed by cooperative tax compliance.

The fifth goal strengthens the dialogue between tax authorities and taxpayers in the framework of *adempimento collaborativo* before the adoption of measures that might affect their legal sphere reflects the more general shift towards securing the right of being heard during tax procedures, which will be implemented in conformity with Article 4 (1) (e) of the Act of Empowerment for the Reform of the Tax System. This fifth goal will be pursued with corresponding changes also to other instruments that facilitate the dialogue between tax authorities and taxpayers, such as advance rulings or the other opinions formulated by tax authorities. In such context, the possibility of having non-final replies as a necessary condition that precede the rejection of the requests made by the taxpayer are an important step forward in the direction of the dynamics of cooperative tax compliance. The point is that, from a regulatory perspective, cooperative tax compliance seeks to establish a constructive trust relationship between tax authorities and the taxpayers, rather than a confrontational one. In such context, from a policy perspective, the fact that the taxpayers might have the opportunity to present an amended version of his original request after tax authorities have notified their preliminary intention to reject the request might already provide for a meaningful way to address potential critical issues and nudge an agreed assessment with the taxpayer. From a legal perspective, it will nevertheless be important to understand the formal value of this non-final reply issued by tax authorities. The context of this reply is no different from the one to requests for advance rulings, in respect of which there is currently no effective legal remedy against possible rejections. An alignment of such measures might be desirable, also for clarifying the implications that the rejection of a request might imply for tax audits and the boundaries within which the latter ones may apply in the case of an accepted request.

The sixth goal is to simplify the settlements by taxpayers that comply with the indications provided by tax authorities should be implemented in line with the dynamics of cooperative tax compliance. Discrepancies between taxpayers and tax authorities arising in the framework of real-time control conducted by tax authorities during cooperative tax compliance do not automatically create a dispute but might open the path to conduct a tax audit. In such circumstances, the rules applicable to cases of cooperative tax compliance should take into account whether the discrepancies that have generated the tax audit concern factual or legal issues or arise from violations conducted by the taxpayer and such that might breach the trust relationship with tax authorities. The need for simplified settlement procedures pursued by this goal should only apply to the former type of issues, whereas all others should follow the generally applicable rules.

The seventh goal empowers the Government to issue a code of conduct that regulates the rights and obligations of tax authorities and taxpayers. From a policy perspective, it might be reasonable to introduce a code of conduct. Such a development might be particularly important for tax management and in legal systems, such as the ones of the Netherlands and the United Kingdom, where tax authorities enjoy a significant degree of discretionary powers and there are hardly statutory rules that establish such rights and obligations. However, as indicated earlier in this chapter, the existing legislation already includes a series of commitments, and their value is limited when compared to the legal consequences of rights and obligations that apply in connection with the conduct of tax authorities required in connection with the issuing of administrative acts and the corresponding right of taxpayers to have an effective legal remedy that protects their sphere against possible violations.

As an eighth goal, the reform of *adempimento collaborativo* should avoid excluding cooperating taxpayers from the application of this regime in case of minor violations and, in such cases, rather shift the functioning of the regime to a transitional period in which the taxpayers will be subject to a closer scrutiny. This goal reflects the opportunity of giving taxpayers a second chance and is manifestly in line with the growing importance of the principle of proportionality, which requires limiting the reactions to what is strictly necessary to react to possible violations. Considering that the loss of cooperative compliance could be regarded as a form of indirect sanction, this eighth goal reflects the values of the EU Charter on fundamental rights and might therefore also play a role when interpreting the compatibility of the legislation with the constitutional framework.

Finally, the ninth goal prompts the Government to further strengthen the existing advantages for taxpayers that accept cooperative tax compliance. Currently, these advantages include a reduction in the applicable administrative tax penalties. The goal is to reduce them further, apply such reductions also to possible criminal tax sanctions and to introduce special measures for defining taxes in the

presence of due certificates of tax professionals that confirm the correct behaviour of taxpayers. These criteria raise different issues, which are worth being addressed more in detail hereby. A stronger reduction of administrative penalties in case of violation might be admissible in case of non-reiterated breaches but should otherwise not be regulated differently from the way in which it otherwise operates to all other taxpayers. After all, cases of reiterated violations are more likely to lead to possible exclusions of taxpayers from the benefits of cooperative tax compliance. A reduction of criminal sanctions is by its own nature questionable, considering the severe nature of this type of violation and the fact that cooperative tax compliance can only lead to the application of preferential rules insofar as it relates to a reduction of the tax risk. When that is not the case and there are serious breaches, such as the ones that are addressed with criminal sanctions, the same rules should apply as the ones that apply to all other violations by other taxpayers. Finally, the agreed definition of taxes due should be enacted in a way that respects the obligation of tax authorities to exercise their powers in conformity with the requirements established by law. Therefore, possible leeway might exists as to the procedures to reach agreements on factual matters, but likely no more than that.

Based on the analysis of all nine criteria and goals, and in preparation for the analysis of the second axe for strengthening tax compliance of smaller taxpayers, it is important to shed some light on the implications that might arise when taxpayers opt for conducting tax compliance through *adempimento collaborativo*.

This will allow to then compare the implications arising for tax compliance when the measures enshrined under Art. 17 (1) (g) (2) apply. Once more, it is important to indicate that, from a policy perspective, an overlap between the two measures should not be excluded.

For large taxpayers such overlap is hard to conceive, considering that a predetermined agreed assessment of taxes due might in fact be too difficult to achieve with a reasonable level of precision. Moreover, the Act of Empowerment for the tax reform expressly refers to small taxpayers.

However, the alternative between cooperative tax compliance and tax compliance by predetermined agreement on tax assessment might have important repercussions on the business decisions of smaller taxpayers. Cooperative tax compliance pursues a real-time control aimed at securing tax compliance in line with the analytical determination of taxable income. By contrast, a predetermined agreement on tax assessment can secure the levying of taxes also based on legal fictions, for which the analytical determination of taxable income is not strictly indispensable. Accordingly, if the tax assessment is based on sufficient reliable proxies, the latter option might be preferable for both taxpayers and tax authorities, saving precious time and reducing the complexity of tax procedures required for the analytical determination of taxable income.

The repercussions of cooperative tax compliance on tax procedures should also be addressed from the perspective of the effects of an agreed factual assessment. Such agreed assessment should produce binding effects for both parties except when significant differences are recorded ex post, based on elements that were neither known to either of the parties, or could not be known by them.

This might have at least two relevant corollaries.

First, it means that if tax authorities do not conduct an effective real-time scrutiny on facts that were made accessible to them, they should not be allowed to invoke their right to conduct tax audits to alter such factual assessment. This interpretation secures legal certainty and reflects the best practices of clearance that have contributed to the success of cooperative tax compliance in some European countries, including especially the United Kingdom. This should apply also when additional elements arise that were unknown to tax authorities. In such circumstances, the entitlement to conduct non-analytical forms of tax audits should not produce punitive effects on taxpayers that go beyond what is strictly necessary to adjust cooperative tax compliance to such additional elements. This conclusion is based on an application of the principle of proportionality. Moreover, in the context of the Act of Empowerment for the tax reform, it is also backed up by the eighth goal pursued by the reform, according to which there is non-automatic exclusion from the entitlement to cooperative tax compliance in case of non-serious violations that do not undermine the mutual trust between the parties.

The second corollary is that taxpayers relying in good faith on the scrutiny conducted by tax authorities in the framework of cooperative tax compliance should be entitled to see their legitimate expectations protected both in cases when tax authorities change their interpretation at a later moment or revoke the administrative act with which they had agreed to admit such taxpayers to cooperative tax compliance. Under Italian tax law, the protection of legitimate expectations is currently limited to the exclusion of penalties. However, in the framework of the planned reform, strengthening this protection also with effects that cover the taxes due might go in the right direction. This result should already be applicable at the level of interpretation on matters connected with value-added tax to comply with the current standards of legal protection established by the Court of Justice,[131] which apply a similar reasoning to estoppel for excluding that tax authorities can invoke their own fault to revoke some benefits to taxpayers.

[131] See CJEU, 15 April 2021, EQ, case C-846/19, para. 75; 10 September 2002, Kügler, case C-141/00, para. 60; 26 May 2005, Kingscrest Associates and Montecello, case C-498/03, para. 42.

2.8.3. The E*x-Ante Agreed Tax Assessment for Smaller Taxpayers – Art. 17 (1) (g) (2) of the Act of Empowerment for the Tax Reform*

The second axis of the reform for nudging voluntary tax compliance is not a real broadening of cooperative tax compliance in strict terms, but rather the establishment of an alternative form of tax compliance for smaller taxpayers, which is in essence an *ex ante* agreed tax assessment with validity for two years (*"concordato preventivo biennale"*).

From a legal interpretation perspective, this measure is a derogation from the otherwise applicable tax compliance. The derogation is from both the ordinary regime and the *adempimento collaborativo*. Therefore, if, on the one hand, *adempimento collaborativo* might have the potential of becoming the ordinary tax compliance regime applicable for a group of taxpayers that certainly includes large taxpayers and might stretch out to cover further categories of taxpayers, on the other hand, the *ex-ante* agreed biennial tax assessment constitutes a special regime, which should be subject to strict interpretation and application.

The agreed tax assessment does not constitute a completely innovative legal framework for the Italian tax system. It applied in Italy until the tax reform of the 1970s, was abolished and reappeared a few decades later on a provisional basis for the sole years 2003 and 2004.[132] This measure applied to taxpayers deriving business income and income from self-employment, subject to the condition that the amount of income declared by the taxpayer in 2003 was higher by 7% than the one declared in 2001 and, for 2004, that the latter amount was increased by a further 3.5%. The advantages of this regime, in fact an optional fixed-base taxation of income, mainly consisted in a preferred tax treatment, the waiver from issuing tax receipts and simplified modes of tax audits, prohibiting the use of presumptions.

A similar type of tax regime was introduced and is still operating in two further contexts, namely the agreed tax assessment for taxpayers in financial distress (*"concordato preventivo per le imprese in crisi"*)[133] and the agreed assessment by consent to a tax audit ("*accertamento con adesione*").[134]

When operating in the context of pre-bankruptcy, the agreed tax assessment is in fact an agreed determination of how taxes due might be effectively enforced.[135] This object and purpose make such

[132] The measure was introduced by Art. 33 of the Decree 30 September 2003, n. 269, converted by Law 24 November 2003, n. 326.
[133] See Art. 182-ter of the Bankruptcy Act (*Legge fallimentare*).
[134] This regime was introduced by Art. 2-bis of Law Decree 30 September 1994, n. 564 and was later amended by Legislative Decree 19 June 1997, n. 218.
[135] In such context, the likelihood that business assets are not sufficient to avoid bankruptcy may justify various types of waivers from the obligation to pay taxes.

context differ from the one that is relevant for Art. 17 (1) (g) (2) of the Act of Empowerment for the Reform of the Tax System. By contrast, despite its different wording, the context of the consent to a tax audit (*"accertamento con adesione"*) is much more like the agreed tax assessment for smaller taxpayers and might require some deeper analysis.

Both the consent to a tax audit and the *ex-ante* assessment of tax, share the common feature of having the final assessment of tax prompted by the taxpayer and produced by an administrative act, which tax authorities adopt in the framework of a tax procedure.

The latter act is in essence an act of tax assessment, which deviates from the procedure that would otherwise applies and makes any different amount of income irrelevant for the purpose of levying taxes as compared to the ones that have been agreed with the taxpayer. This situation might generate advantages for the taxpayer during the two years in which the ex-ante agreed assessment of taxes operates, but also disadvantages, when the effective income is lower than the one that had been agreed.

In the case of consent to a tax audit, tax authorities – even when prompted by a request of taxpayers - adopt such act during an audit and might thus gather additional relevant information to the one supplied by the taxpayers or at least had the opportunity to do so.

By contrast, the *ex-ante* agreement between tax authorities and the taxpayers operates at a logical prior moment, which precedes and should prevent any possible tax audit. In such context, tax authorities do not have access to relevant information concerning the taxpayers, unless the taxpayers themselves allow for that, which is what happens in line with the constructive spirit of trust that characterises cooperative tax compliance.

Consequently, the point can be made that, even though the *ex-ante* agreed tax assessment does not constitute a form of cooperative tax compliance in strict terms, it presupposes the establishment of a dialogue between tax authorities and the taxpayers based on the spirit of trust that is like the one that operates in the presence of cooperative tax compliance. Accordingly, cooperative tax compliance is not only compatible with the ex-ante assessment of taxes but enhances its functioning.

The point can even be made that, in the absence of a constructive dialogue between taxpayers and tax authorities, the lack of access to information would make it impossible for the *ex-ante* tax assessment to operate in the Italian tax system. This conclusion is also based on the circumstance that Italian tax authorities enjoy no discretionary powers and are therefore prevented from conducting any form of negotiation of the tax due. In line with this interpretation, the fourth criterion enshrined in Art. 17 (1) (g) (2) indicates forfeiture of the entitlement to the regime of ex-ante assessment of tax when the

taxpayer fails to correctly document revenue or fees for a significant amount or commits significant violations.

When compared this consequence with the one applicable in case of violation of the eighth criterion and goal for expanding *adempimento collaborativo*, there seems to be more caution for preventing that taxpayers unduly benefit of the *ex-ante* agreed assessment of tax. This might also be justified by the prospective effects of this regime.

Moreover, unlike the regime of *adempimento collaborativo*, the cooperation between taxpayers and tax authorities will be limited to allowing tax authorities to access relevant documentation that supplements the one already available to them. This will make it possible to create the factual conditions for a technically reliable determination of the applicable tax base, which will then be assessed by means of interaction between taxpayers and tax authorities.[136]

When designing how this measure might concretely operate, there should be a reasonable legal framework for establishing on what taxable base the *ex-ante* agreement might be achieved between tax authorities and the taxpayers. For income tax purposes, the right way forward is possibly to use the existing mechanisms for projecting the potential situation of the taxpayer – including the so-called *redditometro* – i.e., a tool for the synthetic reconstruction of the taxpayers' income - as a starting point for verifying the likelihood of the estimation made by the taxpayer. For how precise the approximation of the potential ability to pay of the taxpayer may be, the point remains that profits and income from independent personal services are subject to natural oscillations, which are hard to be detected in advance. This situation is rather different from the one that arises in the other areas of taxation where the legislator estimates the tax due. This might be particularly problematic to apply in the field of value-added tax, unless in *de minimis* situations. Accordingly, it is reasonable that the third criterion contained in Art. 17 (1) (g) (2) of the Act of Empowerment indicates that the ordinary VAT regime will in principle apply.

For income tax purposes the margins might be broader, especially considering the desirability of reducing the burden of compliance for smaller taxpayers and the importance of making a more efficient use of human resources in the management of tax administration. In this context, the introduction of the ex-ante tax assessment might well constitute a form of taxation of deemed income, which produces its effects on a biennial basis and is based on a fixed amount of tax.

[136] This interaction also exists when the taxpayers give their consent to tax audits.

The validity of this approach to the levying of taxation of smaller taxpayers has been the object of abundant analysis in public finance literature, which has addressed it within the boundaries of the strategy known as "fixed amount of tax or tax assessment", aka FAToTA.[137]

The findings of this literature suggest that the reasonableness of this policy choice is higher with smaller taxpayers, especially considering the combined positive effects that may be derived in terms of reducing the formal documentation burden for them and the savings of human resources required for conducting effective tax audits in respect of a higher number of taxpayers.

This master study leaves these considerations to the implementation of the reform by the Italian Government, which will also duly consider the relevance of using digital technologies, artificial intelligence and blockchain.

The *ex-ante* agreed tax assessment does not differ in fact that much from other forms in which the Italian legislator has intervened for simplifying tax enforcement, such as with the levying of final withholding taxes for resident taxpayers and the prepopulated filing of tax returns.[138]

However, the latter two measures also present significant differences from the *ex-ante* agreed tax assessment. Accordingly, final withholding taxes are exclusively enforced by intermediaries, but do not deprive tax authorities of their right to conduct tax audits that might lead to a different assessment of taxes; prepopulated tax returns come closer to the measure enshrined in Art. 17 (1) (g) (2) for sharing the dialogue between taxpayers and tax authorities, but do not go as far as producing a prospective determination of the taxable base.

Further common elements may be traced with measures that allow for an estimated determination of the taxable base, such as for instance the cadastral-based determination of income from immovable property,[139] or some VAT special regimes based on the application of margins.[140] The compatibility of these regimes with the constitutional framework, including with the ability-to-pay principle, has

[137] See on this Falkinger, J., Walther, H., Separating Small and Big Fish: The Case of Income Tax Evasion, in 54 Journal of Economics 1, 1991, Springer, pp. 55-67.

[138] This type of measure, known in Italian as *dichiarazione precompilata*, was introduced by Art. 1 of the Legislative Decree 21 November 2014, n. 175 and uses all information that can be retrieved from the list of taxpayers (*Anagrafe tributaria*) and the other documentation available to tax authorities. In such case, the taxpayer has the right, but not the obligation to accept the determination of the tax base and tax that tax authorities had established. Moreover, the taxpayer can also accept it after bringing modifications to such elements.

[139] This system was conceived with the goals of preventing possible disputes concerning the assessment of the relevant facts that are relevant for the levying of taxes and of creating a de facto incentive to intensive land cultivation and ownership. However, it also applies to income from other types of immovable property, subject to the exception of evidence of higher rentals than the one that applies on a cadastral basis.

[140] See for instance the special VAT regimes applicable to the field of agriculture and to travel agencies.

been long admitted by the Italian Constitutional Court.[141] Therefore, there is no dogmatic preclusion to achieving the result that the reform pursues with the *ex-ante* agreed assessment of taxes to smaller taxpayers, i.e. an *ex ante* non-analytical determination of taxable income.

The delegation to the Government to introduce this measure, as contained in Art. 17 (1) (g) (2) of the Act of Empowerment for the Tax Reform, limits its subjective scope to "smaller taxpayers" and envisages four criteria that should be considered when implementing the reform.

The express reference to smaller taxpayers ("*soggetti di minore dimensione*") in the wording of Art. 17 (1) (g) (2) is combined with a further specification of the eligible (smaller) taxpayers as all those who derive business profits and income from independent personal activities (*"titolari di reddito di impresa e di lavoro autonomo"*).

The expression "smaller taxpayers", as used in Art. 17 (1) (g) (2), should not be interpreted as a synonym for small taxpayers ("*contribuenti minori*"), which has a technical meaning for income tax and for value-added tax and may apply both with simplified[142] and lump-sum[143] tax regimes. From a legal interpretation perspective, the legislator may nevertheless choose either threshold to apply this regime, considering that a broader application would match the justification for the entitlement to simplified tax accounting and a narrower one would instead significantly limit the application of this regime.

However, when looking at the criteria established by Art. 17 (1) (g) (2) of the Act of Empowerment, the former option might seem more plausible, especially considering the express reference to the implications that might arise for IRAP - contained in points 1 and 2 - and the safeguard for the application of VAT under the ordinary regime, contained in point 3.

Another option for determining the boundaries of the category of smaller taxpayers might be given by the EU recommendation, which defines it by reference to employed staff and turnover/balance

[141] On the compatibility of taxation of estimated income from immovable property with the ability-to-pay principle and, specifically, with its requirement of effectiveness of taxation see Corte Cost., 31 March 1965, n. 16; Id., 3 December 1987, n. 431.

[142] For the purpose of levying Italian value-added tax, small taxpayers have an annual turnover not exceeding 400k Eur in the case of business providing services and professionals and not exceeding 700k in all other business activities.

[143] The Italian lump-sum tax regime brings together income and value-added tax for all business taxpayers and professionals who derive income from independent personal services and have a total amount of revenue not exceeding 65k Eur in a year. This regime limits the application of the levying of VAT and the right to deduction of input VAT.

sheet.[144] This EU recommendation is also relevant for determining the waiver from the obligation of notification and approval of preferential tax treatment under the EU State aid rules.

After having addressed the issues connected with the subjective scope of Art. 17 (1) (g) (2) of the Act of Empowerment for the Tax Reform, it is now appropriate to focus on the four criteria contained in such provision. After outlining them, their procedural implications will be analysed more in details from a legal and policy perspective.

The first criterion included in Art. 17 (1) (g) (2) establishes a commitment of the taxpayer to accept and comply with the proposal for an ex-ante agreed assessment of income and business[145] taxes. This commitment does not have entail any legal obligation for the taxpayer but allows to establish a dialogue in line with the right of being heard before the proposal is made. All binding effects will operate after the tax authorities have made their proposal and the taxpayer has accepted it. The right of tax authorities to use databases and new technologies will allow them to gather all relevant information also by using tax profiling, blockchain and artificial intelligence.

The second criterion concerns the prospective effects of the ex-ante assessment of taxes during its two years of validity. In essence, even though taxpayers are obliged to comply with their accounting and other formal obligations (including the ones concerning the filing of the tax returns), their tax liability will not change according to the effectively derived income but remain determined by reference to what has been agreed on an *ex ante* basis with tax authorities.

The third criterion safeguards the application of VAT formal and substantive obligations. This requirement might have been established not to interfere with the levying of this tax and the requirements established by EU law throughout the entire territory of the Union.

The fourth criterion concerns the effects of the failure to comply with the documentation of revenue and fees, giving rise to significant violations. Such circumstances may produce forfeiture of the ex-ante agreed assessment of taxes also with effects during the ongoing or prior period.

The levying of taxes on a prospective predetermined – rather than effective – basis makes it necessary to address the potential implications that arise from the perspective of tax procedures.

When addressing these situations from the perspective of the principle of equality with other taxpayers, there might be different ways to find a possible justification to these situations. For

[144] According to Art. 2 of the EU Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, in OJ L 124, pp. 36-41, a small enterprise employs fewer than 50 persons and whose annual turnover and/or annual balance sheet does not exceed EUR 10 million.

[145] The expression business tax used in the text refers to the Italian *Imposta Regionale sulle Attività Produttive* – IRAP.

instance, the goal of pursuing substantive equality, enshrined in Art. 3 (2) of the Italian Constitution might justify the room that this measure leaves for the taxpayer to benefit from an advantage in respect of incremental income compared to the one that had been used as parameter for the agreement. When comparing with the justifications of the cadastral based taxation of income from land, the goal of favouring economic development might play an important role in this context too. This might also be meaningful for finding a reasonable ground to depart from the taxation of the effective income.

Moreover, as indicated by the explanatory report to the Act of Empowerment for the Tax Reform, a fixed-base taxation might favour a reaction to non-compliance and dissuade tax evasion.[146] The latter effect might depend in practice on how the measure will be concretely implemented. However, it is plausible that the smaller taxpayer applying for this type of regime might have some inclination to report all income as a possible way to obtain legal certainty as to the applicable taxes and prevent the possible risk of being deprived *ex post* of the entitlement to it under the fourth criterion enshrined in Article 17 (1) (g) (2).[147]

The opposite scenario, i.e. the one in which the taxpayer has agreed to an *ex-ante* assessment that leads to a payment of higher taxes than the ones that correspond to the situation occurring in practice, might be slightly more difficult to justify, as it might generate some form of unintended minimum taxation. When comparing this situation with the one occurring in the cadastral system, the failure to produce income for reasons that are independent from the intention of the taxpayer prevents the levying of a tax in the absence of the corresponding income. By contrast, no such consequence arises when the lower income is due to inaction by the taxpayer. There is a fundamental difference between this measure and the one enshrined in Art. 17 (1) (g) (2), namely that the latter measure does not apply automatically, but only upon agreement with the taxpayer. This might imply that the taxpayers should accept the consequences of their own decisions, following the maxim *ubi commoda, ibi incommoda*.

After all, when comparing the effects of the agreement by the taxpayer in this context and in that of the consent to a tax audit (*accertamento con adesione*), the procedural implications might in fact be the same. The agreement by the taxpayers completes the process of levying taxes, indicating their consent to it, and thus precluding any further consideration.

Possible issues of compatibility with the prohibition of state aids might arise insofar as the threshold for determining what is a "smaller taxpayer" is set at a too high level, insofar as it might give rise to selective tax advantage that affects competition within the EU internal market. However, even going

[146] See Relazione illustrativa, cit., p. 33.
[147] See Art. 17 (1) (g) (2) (4) of the Act of Empowerment for the Tax Reform.

beyond the *de minimis* rules,[148] established for State aid purposes, the existence of the EU General Block Exemption Regulation (GBER)[149] would highly likely keep this type of measure out of the obligation of prior notification and approval by the EU Commission within the boundaries established for small and medium enterprises.[150]

2.9. Outlining Potential Avenues for the Application of Cooperative Tax Compliance to SMEs in Italy

The analysis of the criteria and goals contained in the Act of Empowerment for the Tax Reform allows this master thesis to briefly outline the potential avenues for applying cooperative compliance to small and medium enterprises (SMEs) in Italy. This short section will therefore constitute the conclusive point of the legal and policy component of this master thesis.

The shift towards a stronger cooperative tax compliance should be positively evaluated from a policy perspective and is very welcome also from the point of view of legal interpretation, provided that its implementation will take into account the critical issues that have been addressed earlier in this chapter. This development will represent the ideal completion a process initiated many years ago with the involvement of taxpayers in tax assessment,[151] which secures realistic and sustainable perspectives for an effective enforcement of taxes.

Considering the focus of this master thesis on the expansion of cooperative tax compliance to SMEs, the following elements might require special attention.

The Act of Empowerment for the Tax Reform outlines two possible approaches to shift away from the tax-audit based line of philosophy, which can have a significant positive impact on the operational tax compliance framework for SMEs in Italy. Nudging the reduction of tax risk ex ante will eventually yield an approach of better management of tax administration in conformity with the requirements of Art. 97 of the Italian Constitution and of Art. 41 of the EU Charter of Fundamental Rights, and enhance the tax climate for business conducted by SMEs

[148] Commission Regulation (EU) No. 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, p. 1-8.
[149] Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance, OJ L 187, 26.6.2014, p. 1–78.
[150] See Art. 4 of the Regulation No. 651/2014, cit.
[151] The seminal studies on the involvement of taxpayers in tax assessment were conducted in Italy by Salvini, L., La partecipazione dei privati all'accertamento nelle imposte sui redditi e nell'IVA, Cedam, 1990.

A clear definition of the boundaries of the category of SMEs constitutes a preliminary important condition for the reform to achieve the goals enshrined in the Act of Empowerment in a way that correctly implements its object and purpose and fulfils the criteria that are contained therein.

The two measures enshrined in Article 17 (1) (g) of the Act of Empowerment for the Tax Reform are not necessarily mutually exclusive as to their respective scopes, but their partial overlap might require some coordination and adjustment. A strong broadening of the scope of *adempimento collaborativo*, on the one hand, and of the ex-ante agreed tax assessment, on the other hand, might in fact open for some medium-sized enterprises the opportunity to have two options available to avoid the application of the ordinary tax regime. From a policy perspective this *à la carte* approach for those taxpayers is not undesirable, at least to the extent that the two following goals are fulfilled. First, the application of cooperative tax compliance to non-large taxpayers may be facilitated by standardised mechanisms, along the model that operates in the Netherlands. The role of tax intermediaries might be meaningful in the assessment of tax risk for this category of taxpayers. Second, the application of ex-ante agreed tax assessment to taxpayers who are still regarded as small or medium under the EU recommendation but are above the quantitative boundaries of the simplified tax obligations regime currently in force might need some adjustment with the latter type of rules.

The possible avenue to explore should also take into account that quantitative thresholds for determining the category of smaller taxpayers might not only be based on turnover and balance sheet, but also on the number of employees, as the EU recommendation does.

The expanded scope of the *adempimento collaborativo* should take place in a way that reflects the willingness of the Government to make a concrete shift from ex-post tax audit-based dynamics to ex-ante correct tax compliance determined harmoniously with the taxpayer. The use of technologies, such as blockchain, and of artificial intelligence will notably facilitate the capacity of tax authorities to conduct a real-time scrutiny of the relevant facts and their characterisation as put forward by the taxpayers. However, this change should be accompanied by a corresponding change of mentality, which facilitates the establishment of a constructive dialogue between tax authorities and the taxpayers. Only in such context, the shift to cooperative tax compliance may properly work when taxpayers open their books to tax authorities, they should not fear that formal imperfections are discovered in most of the cases. This does not mean in practice that tax authorities should ignore them, but also and especially that a degree of simplification in the compliance requirements should be enacted with far-reaching legislative interventions, such as the ones that can take place in the framework of the announced comprehensive reform of the Italian Tax System.

The streamlined compliance for smaller taxpayers through the ex-ante agreed tax assessment represents a valid opportunity for reducing the need for burdensome tax compliance requirements and for tax audits. It might also encourage smaller taxpayers that opt for this type of tax assessment to limit the risk of conducting forms of tax violation and tax evasion. However, also for this measure, the effective success will depend on how tax authorities concretely enact it. Proposing solutions that are acceptable for taxpayers might in this context be more effective than the ones that are based on a *pro fisco* interpretation. The absence of discretionary powers for tax authorities represents by its own nature an effective protection against possible arbitrariness and a potential source of a policy-based approach that enforces the values of the rule of law. The potential shortcomings related to the principles of equality and ability to pay that might be derived from the prospective effects of an *ex ante* agreement-based determination of taxes due are limited within the biennial validity of the measure and might be softened by some carve-out measures for particularly strong oscillations, especially when the latter are due to unexpected circumstances that do not depend on the taxpayers, or are caused by force majeure (such as for instance in the case of the recent COVID19 pandemics.

CHAPTER 3 - MANAGING THE RISK OF TAX NON-COMPLIANCE BY SMEs IN THE FRAMEWORK OF COOPERATIVE TAX COMPLIANCE

3.1 Does Cooperative Tax Compliance Make Sense from a Business Management Perspective?

This Chapter will address the potential implications arising, from a business management perspective, from the implementation of Article 17 (1) (g) (2) of the Act of Empowerment of the Italian Tax Reform for small and medium-sized enterprises.

The analysis will be conducted in a way to compare the different features of the two forms of cooperative tax compliance enshrined in Article 17 (1) (g) of the Act of Empowerment and putting forward arguments that verify whether the shift towards cooperative tax compliance for SMEs can produce desirable regulatory effects and whether the choice of the Italian tax reform to follow a different path for them, as compared to that which characterizes large enterprises, is meaningful and sound from a business management perspective.

SMEs are a salient feature of the Italian economy: in 2021 their number stood at 163,551[152], up from 2020. This increase was particularly visible during the period of the COVID-19 pandemic. In numerical terms, the entire SME sector in Italy is in line with the relevance of this sector in other European countries, with a percentage of total enterprises that is similar to neighbouring countries such as France and Spain. However, differences can be recorded as to the stronger presence of micro-enterprises, which in Italy account for 93% of the total SMEs (as compared to 82% in Germany), and to large enterprises, considering that in Italy only 0.09% has more than 250 employees. What is more, the small enterprises (under 10 employees) perform less well than the European average (about 30 thousand euro per employee against the European average of 35 thousand), while the larger ones have an average turnover per employee well above the European average (56.5 thousand euros per employee, against the European average of 48 thousand).

Moreover, SMEs account for a large part of the companies active mainly in south and central Italy. This is a possible outcome of different traditions and entrepreneurship of those regions, which contributes in some sectors to iconic *Made in Italy* products sold worldwide.

From a regulatory perspective it is indeed desirable to promote the economic growth of the country by using all possible strategies and policies that enhance the prosperity of SMEs. Therefore, the issue

[152] See Cerved Report on SME, 2022.

also arises as to the possible implications of Article 17 (1) (g) of the Act of Empowerment in pursuing those regulatory goals.

From a theoretical perspective, the impact of tax incentives on economic growth is often disputed in economic literature on arguments that indicate the uncertainty in the output as compared to the foregone revenue. However, the analysis of such issues falls out of the goals of this master thesis, as the approach of the Italian tax reform is to supplement the existing incentives with a more friendly tax environment, which replaces coercive with voluntary and nudged tax compliance. Accordingly, the core issue, from a business management perspective, is rather understanding whether cooperative tax compliance is suitable for SMEs too and, in the affirmative, how it should be concretely implemented.

This approach to the issues shows the importance of developing a coherent, rational and long-term economic and industrial policy design that acts first and foremost by correcting the 'criticalities' of the tax system that SMEs have to deal with, including in particular the ones related to meeting the requirements of tax compliance in the existing system.
From the perspective of regulatory innovation, the challenge is therefore designing economic policy in a way that abandons the logics of granting extraordinary measures to nudge the growth of SMEs and replaces it by structural solutions that reform the overall features of tax compliance. Accordingly, the point can be made that regulatory innovation should pursue measures that secure legal certainty in the taxation of business and reduce the exposure to recharacterization in the framework of tax audits. These priorities should be given more weight as compared to the perception of being entitled to a substantive tax reduction, which might only be obtained insofar as the SME has complied with a large number of requirements and overcome various steps of tax audits. This remark should not be interpreted as indicating that the current Italian tax system ignores the importance of simplified tax regimes for SMEs. Such regimes indeed exist at present. What matters is instead combining the existence of such regimes with a simplified tax compliance framework, which secures compliance without relying on tax audits as much as the current one does. In other words, replacing tax incentives with an increased likelihood of legal certainty in tax matters, which can nudge SMEs as taxpayers to voluntary comply with the payment of taxes due.

3.2 The Current Public Finance and Regulatory Framework for SMEs

The current Italian public finance framework creates fertile land for this type of reform, making European and national cohesion funds, including the so-called PNRR (National Plan of Resilience and Restart), available for structural measures that can enhance business competitiveness and help

building a modern, efficient, inclusive and sustainable country, following the overall objective of reducing inequalities as to gender, generations, territory and skills.

The average size of the Italian SMEs, smaller as compared to other European countries, certainly does not constitute an advantage, but their capillary spread throughout the territory is an extraordinary heritage of productive knowledge. In such context, regulation might find it meaningful to enhance the performance of SMEs, by creating a tax framework that reduces the complexity of tax compliance and the risk of legal uncertainty, using the opportunity of the ongoing tax reform to support the dimensional, qualitative and managerial growth of companies, looking inwards, and supply chain projects, considering the relationship between companies, even of different sizes.

Earlier measures have already facilitated the growth of SMEs in Italy. Two examples of successful regulatory innovation can be mentioned hereby, namely Legislative Decree 231/2001 and Legislative Decree 128/2015. Such measures make the access to 'bonus schemes' in the administrative and tax domains, respectively subject only to the adoption of a specific organisational model, and to the obligation to adopt an adequate organisational structure provided for in the second paragraph of Article 2086 of the Italian Civil Code.

However, the cogency of these standards is different. In the first two cases, the rule refers to the adoption of an organisational model, which represents a step by the management body towards the voluntary management of corporate risk. However, the rule of the second paragraph of Article 2086 of the Civil Code, introduced by the new Business Crisis Code (Legislative Decree 14/2019 in full effect as of July 2022), places on the administrator (regardless of legal form and size) the obligation to set up an organisational, administrative and accounting structure appropriate to the nature and size of the business, which allows for the timely detection of the business crisis and the possible assessment of the loss of business continuity.

It follows that all companies must have a 'set-up', i.e. a set of rules, internal procedures and actions carried out on an ongoing and not sporadic basis, to regulate corporate life and ensure the pursuit of the corporate purpose. The adoption of an organisational model for assessing and controlling the tax risk associated with business choices and the impact on the company of the consequences of a failure to fulfil tax obligations, is instead a further, voluntary and more specific step, aimed at admission to a privileged regime of preventive cooperation with the tax authorities.

The requirements of Decree 231 and its related organisational model were presupposed by Legislative Decree 128/2015 as basis to introduce cooperative tax compliance in Italy. In particular, Article 3 of Decree 128/2015 allows for access to the cooperative compliance regime only to those taxpayers who are equipped with an effective tax risk detection, measurement, management and control system' (i.e. a Tax Control Framework). These requirements indicate the need for a risk management activity

within the company, which applies the techniques and methodologies of a corporate risk management model to the specificities of tax risks.

Such requirements might be regarded as a de facto additional barrier for the access to cooperative tax compliance, on top of the one represented by the minimum revenue threshold, indicated in the Decree 128/2015.

The consequence of this regulatory framework is that corporate governance and tax governance (or tax risk management), of which it is a part because it is limited to the so-called tax risk[153] are now part of the routine of many groups of large companies. However, the same cannot be said for SMEs, which often show an overlap of functions between the management and administrative body in the person of the entrepreneur/owner, and which generally lack the risk management structure.

The unipersonal management of the company, which may seem the most efficient - especially in the case of smaller companies, due to their size - is not always the most effective. When addressing this context from a business management perspective, the point can be made that it is difficult for a single person to deal efficiently with all aspects of company life, from the commercial to the more strictly productive, to the administrative-legal: it is just unlikely that a single person is equipped with the necessary technical skills and sensitivity to pay due attention to the various aspects that characterise the business.
Micro-enterprises, i.e. those with less than 10 employees, are often managed with this logic, at least until the dimensional growth of turnover and profits also requires an organisational growth of the company, with the identification of figures, tasks and responsibilities formalised in the drawing up of the company organisation chart (and the attribution of appropriate delegations).
This is the context in which we should frame the potential impact of the 2023 Act of Empowerment for the Tax Reform on the enhancement of cooperative tax compliance for a broader number of companies, including the SMEs.

3.3 The Organisational Set-Up of SMEs

The analysis of the regulatory framework in which SMEs currently operate shows that the main obstacle to their access to cooperative compliance mechanisms might be the organisational set-up or, rather, its deficiency, which would *de facto* hinder such access even if the legislator had expressly admitted it.

[153] Valente, P., “Tax Governance" e management del "compliance risk", in Fiscalità Internazionale, Corr. Trib. 35/2011, p. 2924.

This statement should not lead to the erroneous conclusion that SMEs as such are never suitable for cooperative tax compliance.

Digging deeper into the definition of SMEs and their structural features might be a meaningful way to verify whether and to what extent there might be room to lead SMEs to an efficient and effective tax risk management along the schemes of cooperative tax compliance along the two solutions envisaged in Art. 17 (1) (g) of the Act of Empowerment.

The starting point of this insight might be the conclusion reached by the OECD in its 2013 study.[154] Manifesting its international regulatory function, the OECD urged countries to consider enterprise, taxation and risks, and therefore to a more careful assessment of the internal dynamics of companies that takes into account differences and peculiarities.

The term SME lumps together companies that are in fact very different in size and consequently also organizationally. The concept of SMEs includes three main groups of entities, which present significantly different features and raise a correspondingly different type of issues, namely micro-business, small business and middle-sized business. Their boundaries are put forward in the chart below, which sets them by reference to the number of employees and either the turnover or the assets.

Category	**Employees**		**Turnover**		**Assets**
Micro-business	< 10	And	≤ 2 mi	Or	≤ 2 mi
Small business	< 50	And	≤ 10 mi	Or	≤ 10 mi
Medium-sized business	< 250	And	≤ 50 mi	Or	≤ 50 mi

Obviously, a company that employs 250 people requires a far greater level of organisation than one that employs only 10 or 50, regardless of whether it wishes to adhere to tax compliance. And it is equally obvious that if the urge to change organisation is endogenous and comes from growth in turnover and profit, resistance to change will be much less than a need to change that comes from outside, from tax requirements for example.

As extensively discussed in this master thesis, the Act of Empowerment for the Italian Tax Reform has the potential of becoming a real game-changer in the relations between tax authorities and taxpayers. The strong inclination to push for a broader adoption of tax compliance mechanisms, even before stimulating an organisational change, intends to set the pace for a change of mentality of both the tax authorities and the taxpayer as to how they conceive tax compliance. That is, it intends to shift the axis of the relationship between the Agency and the taxpayer from the current 'vertical' one between controller and controlled to a 'horizontal' one that sees the emergence of a collaboration, a

[154] See OECD, Co-operative compliance, cit., 2013, p. 57.

'partnership' between them. Certainly, given the current standpoint of such relations in the Italian tax system, this is an ambitious regulatory goal. However, this change of approach has already shown its validity in other countries that have pioneered cooperative tax compliance, such as the Netherlands and the United Kingdom.

The experience of the Netherlands and the United Kingdom with cooperative tax compliance has already been the object of detailed analysis in Chapter 2. It is now appropriate to review it in the light of their potential repercussions from a business management perspective with a view to determining how cooperative tax compliance can apply to SMEs of different sizes.

3.4 Business Management Capacity and the Requirements Presupposed by Cooperative Tax Compliance

3.4.1 Improving Business Management in Connection with Tax Risk Management

In general terms, beyond the differences of the two approaches to cooperative tax compliance, the lesson for regulatory innovation applied to tax matters is that taxation can and should be considered as a lever to enhance the competitiveness of management both for the state (in terms of attracting invested capital, as it is the case of the UK, and in terms of tax audits, as it is the case of the Netherlands) and for taxpayers (better management of tax risk reduces uncertainties and possible negative impacts on the company itself).

Improving the tax leverage must be a goal for SMEs to pursue to ensure business growth, and innovative regulatory intervention must be aimed at them. The different types of tax incentives that have applied across time in Italy have already made entrepreneurs, small and large, familiar with the impact in terms of deductibility or tax credit that every investment decision brings. However, a proper running of tax risk management is an essential tool to avoid an unnecessary exposure of business to reputational and operational risk.[155]

In principle, it is meaningful to suggest that a further change might take place in connection with the ongoing tax reform: SMEs should be required to develop a dialogue with the tax authority based on sincerity and trust, on an ongoing basis, not only when planning new investments. To do so, SMEs need to have an organisational structure that secures tax risk control on an ongoing basis.

It is therefore meaningful to verify what differences might exist between the different sizes of SMEs, also considering whether they already have such an organizational structure.

[155] See further on this Shi, M., Introduction to Tax Risk Management, in A. Bakker, S. Kloosterhof (eds.), Tax Risk Management: From Risk to Opportunity, IBFD Publications, 2021, secs. 2 and 3, where also various methods are indicated for assessing tax risk.

3.4.2 Cooperative Tax Compliance and the Medium-sized Business

Medium-size business normally has an organizational structure.

Therefore, in practice, it is necessary to assess how much would it cost an SME to institutionalise tax risk control, or rather how much would it cost an SME to adopt the measures presupposed to secure the access to cooperative tax compliance along the pattern conceived by Legislative Decree 128/2015. It is not for this master thesis to make an empirical assessment through a potential estimation of such cost, which would in fact be almost impossible, due to the numerous variables that could arise in this context. However, the general question is whether cooperative tax compliance in the modality applied by Decree 128/2015 is customised on large or very large companies. In such context, an additional question arises as to whether it can be desirable and feasible to shift part of this cost onto the tax authorities, and, in the affirmative, how this might concretely occur.

Every decision of a company is made after a careful evaluation of the pros and cons: this applies to all types of enterprises, regardless of their size. However, the difference across the different sizes of companies makes it possible only for some of them to deploy sufficient resources to this evaluation. Introducing such a fundamental change as determining whether to embark into a programme of cooperative tax compliance is something that the company must properly evaluate in the light of all relevant elements with a view to making a sufficiently reliable cost/benefit analysis both in the short and long term, which brings together the tax and business management advantages.

The size and resources of a company are crucial in making this decision with the due degree of technical in-depth awareness. However, the notable differences between the micro-enterprises and the medium-sized enterprises suggests that there is no one size fit all solution.

A medium-sized company (with <250 employees) will already have a more or less far-reaching degree of organisation, probably articulated in functions. Accordingly, the reasonable assumption can be made that, within the administration function, or in a staff position as support to the company management, there are already sufficient tax competences capable of dealing with the task of compliance with the complex requirements of the Italian tax legislation and with those of the foreign countries in which the company may operates. In other words, there is a technical capacity to handle the management of tax obligations generated by the company's day-to-day business.

In this context, the point can be made that the need to set up a tax compliance office might go beyond what is strictly needed by reference to the size of the company and its business. This is possibly something that a tax compliance officer can do instead. Such person should perform the functions related to the implementation of procedures for assessing tax risk, its monitoring and reporting to management, thus complying with the basic requirements of the standards presupposed by Article 3 Legislative Decree 128/2015. Accordingly, for this type of companies the expansion of cooperative

tax compliance, also if enacted through the implementation of the first type of mechanism envisaged in Art. 17 (1) (g), namely the one enshrined in number (1), could require a refinement of business management, not construction from scratch.

If this is the case, the cost for the company to implement the decision of joining a cooperative tax compliance scheme could be considered as a minimal increase of the management expenses, which would be easily absorbed by the company's performance and which might be even set off by the potential reduction in the exposure to tax audits and the working hours that the company staff should be obliged to devote in average each year for processing the requests of tax authorities.

Accordingly, it would be sufficient for the management to provide the input and initiate the accession process, empowering staff through appropriate forms of delegations, identifying staff responsible for internal and external control and for the dialogue with the tax authorities.

An adjustment of the structure of management and of the working process organized in this way could be sufficient to set the ground for tax authorities to set up a sort of horizontal monitoring along the lines of the Dutch model of cooperative tax compliance, which would be suitable to establish a hypothesis of collaboration not just for large companies, but also for the medium-sized ones. As indicated in Chapter 2, horizontal monitoring is rooted in a relationship of trust and collaboration in which companies can expose their doubts and uncertainties on the application of the rules in a sort of advance ruling aimed at reducing the risks of non-compliance. The Dutch model of cooperative tax compliance, however, cannot be replicated *sic et simpliciter* because the Italian tax system operates within a legal environment that attributes more weight to the requirements established by law and limits the discretionary powers of the Italian tax authorities as compared to the Dutch ones. However, it is precisely this greater regulatory rigidity, which acts as a guarantee of legal certainty, that should make it possible to overcome the criticism raised on the Dutch model in connection with the discretion enjoyed by the tax authorities, which in fact translates into regulatory uncertainty for taxpayers.

3.4.3 The Micro-SMEs: No Organisational Structure

The situation becomes more complex when the company is smaller and probably has a non-existent or minimal organisational structure. A more granular approach to those types of situations might be an appropriate way to go.

In particular, a very small company (i.e. a micro-enterprise) is likely to have an internal administrative figure in charge of carrying out tax obligations on time and in the manner laid down by the legislation, and, on top of that, it will unavoidably need to make use of an external tax advisor, e.g. a chartered accountant. The latter person is a tax specialist and will provide the internal employee with the

necessary technical advice, support and training to adequately fulfil the tax obligations associated with the activities carried out by the company.

For this type of context, the Dutch experience of involving an intermediary in horizontal monitoring as a counterpart to the tax administration may be an interesting solution.

On the corporate side, it could be conceivable to broaden the tasks entrusted to the external advisor, investing him also with the identification and introduction of ad hoc procedures established for tax compliance, the monitoring of their execution and the dialogue with the tax authority to share the outcomes of the internal control (which could possibly also see the involvement of the single statutory auditor, if any).

This solution, in my opinion, would certainly lead to an increase in costs. However, since the relationship with the external consultant already existed, it would only be a matter of increasing the relative budget, and it would certainly be a lower expense than the cost of remunerating an additional employee to be hired *ad hoc*. Moreover, making use of a professional figure (whose skills are guaranteed by membership of a professional association and possibly also by an ad hoc register) would assure the tax authority of the quality of the technical dialogue aimed at obtaining a 'validation' of the control of the tax risk associated with the business strategy.

3.4.4 Small SMEs: a Case for a Minimum Organisational Structure

Let us now address the case of a small company (up to 50 employees). In this context, it is plausible to assume that a minimum internal structure already exists and that the role of the external consultant would be less dedicated to the day-to-day management of accounting and tax issues and more devoted to advising on major transactions, investments, etc. It follows that also in this scenario, the consultant could act as the counterpart of tax authorities.

However, it is likely that these enterprises are at a delicate stage of growth in business, i.e. they are making the leap from micro to medium-small enterprise, which in my opinion may be a deterrent in facing further changes and the associated risks. For this reason, tax authorities should put in place additional 'attractive' measures to nudge the willingness of the company to enroll in a cooperative tax compliance programme. This might help overcoming the entrepreneur's reluctance to undertake new changes, and above all such as to transform the perception of the tax authorities from being 'hostile' to turning into an 'ally', thus switching from having their 'threat' to seizing any 'opportunity' that may arise from them.

This means a change in culture of the relations between entrepreneurs and tax authorities that should take place within a framework of credibility. From a psychological perspective, such change cannot take place until tax authorities remain aggressively monitoring tax compliance and entrepreneurs

operate in a way that does not deserve the trust of tax authorities. Entrepreneurs are required to start assessing cooperative compliance as an ally to their growth: having the opportunity to confront the tax administration before taking important steps on the path to growth (e.g. the internationalisation processes of SMEs and the important tax and customs issues they entail) is tantamount to minimising the risk of adverse impacts of non-compliance that could halt the growth process itself, if not even initiate business crises.

With this in mind, in a tax authority of the future, the administration could also implement a change and could start to play an 'advisory and fiduciary' role like the senior professional made available to companies by the English tax authority, who acts as customer compliance manager.

In my opinion, this is an ambitious project, but not unfeasible or impracticable.

To the extent that the objectives of the 2023 tax delegation include the promotion of voluntary tax compliance, the adoption of measures to prevent taxpayers' errors by limiting assessments mainly to those taxpayers characterised by a high tax risk, and therefore to achieve greater cost-effectiveness in the recovery of tax revenues through ex ante rather than ex post actions, there is no doubt that this group of companies is the main target to which the tax authorities must turn.

The introduction of a 'Small Enterprises' section along the lines of the 'Large Taxpayers' section, with professionals specialising in issues typical of small and growing businesses, could be a decisive step towards an allied tax authority that makes its expertise available to taxpayers in order to build a win-win relationship. This means that, in the presence of a proper organizational structure, also medium-size enterprises should be included in the framework of those corporate entities that are eligible to cooperative tax compliance along the schemes of Art. 17 (1) (g) (1) of the ongoing Italian tax reform.

The only and main obstacle to the realisation of this vision is the need for the Administration to earn the taxpayer's trust. One might think then of establishing a code of conduct for the Administration, again following the Dutch example: a sort of 'pact' between accountants/tax advisors and professionals/employees of the tax authorities that would guarantee a fair and effective dialogue between the tax authorities and taxpayers.

For all other SMEs the most appropriate path to mark the change in tax compliance is the *ex ante* agreed tax assessment, along the lines of Art. 17 (1) (g) (2) of the Italian tax reform. This type of measures will have the advantage of reducing the tax compliance cost and the pressure of tax audits on taxpayers, while enhancing the management of tax procedures on the side of tax authorities. Accordingly, it can also represent a kind of win-win situation for both parties, which will lead in the long-term to a more efficient management of both business and tax procedures.

3.5 Can a Remodelled TCF Work for SMEs?

This Chapter has so far put the emphasis on the organisational problems of SMEs and the extent to which the lack of a well-defined structure can be an obstacle to accessing cooperative compliance.
In principle, the establishment of a suitable organisation to manage the business and tax risk may remain a free choice of the SME entrepreneur. However, in practice, the regulatory innovation embedded in the two types of measures enshrined in Art. 17 (1) (g) of the Italian Tax Reform to broaden the use of cooperative tax compliance require that an SME must demonstrate that it has an effective tax risk control system in place. This implies that the SME must be able to identify, not occasionally but on an ongoing basis, the tax implications of his company's strategic choices. And the SME must also fulfil to the best of his ability the duties of transparency and cooperation set out in Article 5(2) of the decree.
In addition, the system must guarantee the promotion of a corporate culture marked by principles of honesty, fairness and compliance with tax regulations, ensuring their completeness and reliability, as well as their knowledgeability at all corporate levels.
In its 2016 study on 'Building better tax control framework'[156] the OECD identify the following essential requirements of the tax risk control system:

a) a clear representation of the tax strategy, highlighting the objectives pursued by top management in the management of the tax variable and thus reflecting the company's tax risk appetite, i.e. identifying the level of risk that the company believes it is willing to bear;
b) a clear allocation of roles and responsibilities to persons with appropriate training and experience within the organisation, according to the criteria of segregation of duties;
c) the provision of effective methodologies and procedures for the detection, measurement, management and control of tax risk;
d) the constant monitoring of the functioning of the control system and the activation of remedies in case of deficiencies or errors;
e) the adaptability of the system to changes in the internal organisational and regulatory environment;
f) finally, the provision of a report to the management bodies (usually the board of directors) on the findings, the remedies activated and, in general, the activities planned under the tax risk management and control system, at least annually.

The listing of the requirements of a TCF as suggested by the OECD makes it immediately clear that as it is conceived, it is not an instrument that will find wide application in the day-to-day life of a small business.

[156] See OECD, Co-operative Tax Compliance: Building Better Tax Control Frameworks, 2016.

The Italian Revenue Agency[157] intervened at the interpretative level to clarify that these requirements are indeed essential, but should not be interpreted as mandatory, in the sense that each company and each business has its own peculiarities for which one cannot think of a standard model. However, it is clear from the approach that it is aimed at large companies with a budget to spend to implement the framework. Suffice it to say that in relation to the segregation of roles, the Agency specifies that 'to ensure the independence of corporate control functions, these functions must have the authority, resources and expertise to perform their duties. The personnel in charge of the various activities must be adequate in number, experience, technical and professional skills and up-to-date': a situation that is only abstractly verifiable in SMEs, at least not in micro and small ones.

This consideration prompts attention once again to the professional figures of tax intermediaries, although it is obvious that one cannot expect to place all the burdens of controlling tax risk on the professional.

It is rare to find an entrepreneur who defines in a business plan the company strategy and the relative level of sustainable risk as suggested by the OECD, even indicating the operational paths to place the company on the determined level of risk and the system of incentives to be given to managers to implement it; This is not because the small entrepreneur does not make an accurate assessment, but rather because, being the sole head of the company, or at most being assisted by family members, he does not feel the need to formalise these decisions, let alone establish an incentive mechanism for implementing what he has established. This shortcoming can be overcome with the help of the tax advisor/intermediary who I have imagined can assist the entrepreneur in the dialogue with the tax authorities within the tax compliance procedure.

Similarly, where there is not yet a formalised system of delegation in the company, i.e. where roles and responsibilities have not yet been identified, the presence of a professional figure can help the small business owner to choose staff with the appropriate skills and to train employees with a view to transparency, honesty and compliance with the rules.

Only after the key figures in the companies have been identified and entrusted with the role of tax risk assessment, will it be possible to implement the necessary procedures and monitoring to ensure that the residual risk is no higher than the one identified by the entrepreneur as the target.

It is likely that all these actions aimed at implementing a risk control system that allows access to co-operative compliance may be perceived by small companies as processes that are too tortuous and complex to be feasible, given the limited resources often available.

[157] See Circular 38/E of 16.9.2016.

This consideration should, I believe, be very much in the minds of those who want to design regulatory intervention with the aim of disseminating cooperative compliance also to companies that are far from the size limit currently in force (turnover EUR 1bn).

It is important in my view that the entrepreneur feels that the willingness to implement tax compliance to the best of his ability is recognised and rewarded rather than neglected due to a lack of organisation or segregation of duties or even procedures.

If one really wants to extend the tax compliance regime also to small enterprises, these guidelines must be 'translated' into something implementable, i.e. into something actually within the reach of even the smallest entrepreneurs.

Therefore, if as the tax authority says there is no standard to be achieved, it is in my opinion necessary that a minimum level be set for each area identified by the TCF, from which the entrepreneur is guaranteed access to cooperative compliance.

In this sense, for example, the joint drafting of a sort of 'roadmap', i.e. a document setting a minimum acceptable level for each of the key elements of the TCF, could be considered, thus enabling the small enterprise to have reference points, guidelines to follow in order to shape its control system step by step.

Obviously, as the company's experience in tax risk management matures and as the framework itself matures, the entrepreneur will himself be spurred to adapt the system to the new level of business growth.

I consider it fundamental that in this process of growth towards Cooperative Tax Compliance, the entrepreneur, especially the smallest one, perceives that he is not alone; he must know that he can count on the support and experience of both his advisors (which is quite obvious) and that of the tax authorities' professionals, who are called upon by the tax reform to play a new role, not only closer to taxpayers, but above all to play in advance, that is, to prevent the risk of tax non-compliance rather than to intervene ex post, with audits, controls and possibly repression of non-compliant behaviour.

A tax system with a truly innovative face, which almost has the imprint of a partnership, would truly constitute the desirable turning point in the taxpayer-taxpayer relationship, and could represent for the first time an asset for the growth of businesses and the entire Italian productive system.

Conclusions

The analysis of cooperative tax compliance has given a more concrete idea of the positive impact that it has on the payment of taxes, replacing coercive methodologies with voluntary ones and creating win-win effects for tax authorities and taxpayers, which improve efficient management and legal certainty. The Dutch and United Kingdom experiences have been used as benchmark to evaluate and assess the effects of the Italian *adempimento collaborativo*, which has been operating on a voluntary basis since its introduction by Decree 128/2015.

From a regulatory perspective this analysis has set the background for verifying the validity of the choice made by the Italian Parliament with Law 9 August 2023, n. 111, to empower the Government to introduce a comprehensive tax reform, which includes, among others, the extension of cooperative tax compliance to a broader number of large companies, as well as to SMEs. The Act of Empowerment for the Italian tax reform pursues the latter goal by two different sets of measures, namely an extension of the existing *adempimento collaborativo* and an *ex ante* assessment of taxes due by SMEs through the so-called *concordato preventivo*.

After thoroughly examining the technical features of both measures, this master thesis has reached the conclusion that *adempimento collaborativo* may successfully apply to a broader number of companies, provided that they have a sufficient organisational structure, which allows the benefits of cutting down costs of tax procedures to outweigh the ones related to setting up the internal methodology of tax risk management.

This general conclusion was then used as guiding light for determining the extent to which *adempimento collaborativo* might also work for non-large enterprises. The answer given by the research conducted in the framework of this master thesis has shown that there is no single answer to the question. The Dutch experience has shown that even for medium-sized business cooperative tax compliance might reach meaningful results in terms of efficient management and legal certainty with the involvement of tax intermediaries. This conclusion was reviewed by Chapter 3 from a business management perspective, confirming that it might be desirable, from a regulatory perspective, to involve tax intermediaries to a greater extent in an ex ante tax compliance strategy. The absence of specialised staff on tax compliance for most SMEs is the natural consequence of the unsustainability of a business management that allocates such function to single persons. However, right those SMEs cannot do without a partial outsourcing of those functions to tax intermediaries. Therefore, insofar as the organisational structure allows for a proper recording of tax risk, the involvement in cooperative tax compliance programmes would not give rise to excessive cost as compared to the ones that such business already incurs.

The regulatory option pursued by the ongoing Italian tax reform shows awareness of such difficulties in purporting a general extension of cooperative tax compliance to SMEs. This is shown by the idea of including the alternative path to cooperative tax compliance represented by the *ex ante* agreed assessment of taxes. This instrument will certainly contribute to shift away from the coercive models of tax compliance that are currently predominant in the Italian tax system and might be interesting especially for smaller business, which lacks sufficient organisational structure for a fine-tuned mastering tax risk.

In other words, the combination of the two measures enshrined in Art. 17 (1) (g) of Law 111/2023 creates a comprehensive package for a radical shift in the philosophy of tax compliance, which has reasonable good chances of being successful in the years to come. This will be more likely the case if tax authorities will accept changing their attitude of ex post tax auditors into that of ex ante tax advisors.

A successful change might yield several important results from a regulatory perspective, which can be summarised as follows.

First, the more efficient management of tax procedures will reduce the number of working hours of tax officials on inspections and audits through which they verify that taxpayers have complied with their tax obligations. Setting free such working hours will make it possible to achieve a more comprehensive coverage of taxpayers' compliance, which will hopefully show concrete results, such as in the case of the United Kingdom.

Second, the introduction of the agreed *ex ante* tax assessment might further contribute to strengthen this trend, thus achieving a broader spectrum of change in tax procedures. Moreover, it might indirectly contribute to enhance business performance by simplifying the tax burden and tolerating that, for SMEs enrolling in this form of cooperative tax compliance programme, possible higher income derived by such taxpayers as compared to the one originally foreseen by tax authorities will remain untaxed. Among others, this might nudge business taxpayers to be more ambitious, thus contributing more to the economic growth of the national economy.

Third, both forms of cooperative tax compliance that are being introduced by the ongoing Italian tax reform will notably relax the tensed adversarial climate between tax authorities and taxpayers, reducing the scope for confrontation in the framework of tax audits and establishing a prior constructive dialogue as to the fulfilment of tax obligations. The outcome will undoubtedly enhance legal certainty for taxpayers, which is certainly a very desirable policy goal for business.

Fourth, international and supranational regulation have now accompanied the various forms of cooperative tax compliance regimes with a system of tax risk rating, which classifies taxpayers according to their records of complying with the correct payment of taxes. The Italian tax system already includes this type of measures, known as *indici di affidabilità fiscale*. Their correct usage also in the framework of cooperative tax compliance might further improve the functioning of such procedures and operate as a guidance for a proportionate approach to the oversight of business by the tax compliance officers.

Fifth, the advantages of cooperative tax compliance can also nudge more categories of business taxpayers to consider the importance of having a sound tax risk policy as an extension of their overall business strategies and risk management.

Time will tell whether the scenarios envisaged in this master thesis will in fact contribute to a more successful handling of the relations between taxpayers and tax authorities, as well as to a more efficient pattern of tax compliance. For the time being, the sole fact that the Italian tax reform has put forward an extension of compliance measures that have been elaborated through international regulation and implemented in various countries shows the importance of regulatory innovation in the field of taxation as a complement to policy choices and legal compliance.

BIBLIOGRAPHY

M.H.J. Alink & V. van Kommer, The Dutch Approach: Description of the Dutch Tax and Customs Administration, IBFD Publications, 2012

J. Alm et al., Taxpayer information assistance services and tax compliance behavior, in 31 Journal of Economic Psychology, 2010, p. 577 ff.

R. Avi-Yonah, Taxation as Regulation: Carbon Tax, Health Care Tax, Bank Tax and Other Regulatory Taxes, in University of Michigan Law School Scholarship Repository, available at https://repository.law.umich.edu/articles/1644.

I. Ayres, J. Braithwaite, Responsive Regulation: Transcending the Deregulation Debate, Oxford University Press, Oxford, 1992

A. Bakker, S. Kloosterhof (eds.), Tax Risk Management: From Risk to Opportunity, IBFD Publications, 2021.

R. Baldwin, The Search and The Struggle', in Baldwin, R., Cave, M., Lodge M., Oxford Handbook of Regulation, 2010

C. Black, Co-operative Compliance Programmes in Australia: Working Towards Justified Trust, in Co-operative Compliance and the OECD's International Compliance Assurance Programme pp. 35-57 (R. Hein & R. Russo eds., Kluwer L. Intl. 2020)

J. Braithwaite, Meta Risk Management and Responsive Regulation for Tax System Integrity, in 25 Law and Policy, 2003, p. 1 ff.

K. Bronżewska, Cooperative Compliance: A new approach to managing taxpayer relations (IBFD 2016), IBFD (accessed 1 June 2023).

K. Bronżewska & E.M.E. van der Enden, Tax Control Framework – A Conceptual Approach: The Six Nuances of Good Tax Governance, 68 Bull. Intl. Taxn. 11 (2014), pp. 635 ff.

K. Bronżewska & V. Tamburro, Cooperative Compliance in Italy – Does it Stand a Chance?, 53 Eur. Taxn. 12 (2013), Journal Articles & Opinion Pieces IBFD (accessed 1 June 2023).

J.M. Calderón, The OECD International Compliance Assurance Programme: Just a New Multilateral and Cooperative Model of Tax Control for Multinational Enterprises?, in 72 Bull. Int. Taxn. 12 (2018), p. 690 ff.

F. Cannas & K. Wauters, The Rise of Cooperative Compliance Programmes and the Rule of Law: A Comparison between Belgium and Italy, 59 Eur. Taxn. 12 (2019), Journal Articles & Opinion Pieces IBFD (accessed 1 June 2023).

C. Coglianese, E. Mendelson, Meta-Regulation and Self-Regulation, in M. Cave, R. Baldwin, M. Lodge (eds.), The Oxford Handbook of Regulation, Oxford University Press, Oxford, 2010, p. 3 ff.

A.P. Dourado, The Delicate Balance: Revenue Authority Discretions and the Rule of Law – Some Thoughts in a Legal Theory and Comparative Perspective, in The Delicate Balance: Tax, Discretion and the Rule of Law p. 3 ff. (C. Evans, J. Freedman & R.E. Krever eds., IBFD 2011), pp. 15-37.

European Commission, 15 July 2020, An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy, COM (2020) 312 final.

European Commission, Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance, OJ L 187, 26.6.2014, p. 1–78.

European Commission, Commission Regulation (EU) No. 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid, OJ L 352, 24.12.2013, p. 1-8

European Commission, Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, in OJ L 124, pp. 36-41

C. Evans et al., Improving Tax Compliance in a Globalized World (IBFD 2018), Books IBFD (accessed 1 June 2023).

J. Falkinger, H. Walther, Separating Small and Big Fish: The Case of Income Tax Evasion, in 54 Journal of Economics 1, 1991, Springer, pp. 55-67.

A. Fantozzi, La teoria dell'indisponibilità dell'obbligazione tributaria in M. Poggioli (eds), Adesione, conciliazione ed autotutela, CEDAM, Padova, 2007, pp. 49 ff.

F. Fiala & L. Ramharter, Cooperative Compliance in Austria, 59 Eur. Taxn. 8 (2019), Journal Articles & Opinion Pieces IBFD (accessed 1 June 2023).

Fiscalis Risk Management Platform Group Compliance Risk Management – Guide for Tax Administrations, available on www.ec.europa.eu

J.L.M. Gribnau, Soft Law and Taxation: The Case of the Netherlands, 1 Legisprudence 3, 2007, p. 309 ff.

A. Guidara, Riserva di legge e indisponibilità del tributo, in I Quaderni Europei, Settembre 2012, n. 44, p. 33 ff.

R. Hein & R. Russo (eds.), Co-operative Compliance and the OECD's International Compliance Assurance Programme, Kluwer L. Intl. 2020

S. Hemels, Chapter 24: The Netherlands, in Evans, C. (ed.), Improving Tax Compliance in a Globalized World, IBFD, 2018

B. Herrijgers, Cooperative compliance: small and medium sized entities, in Russo, R. (ed.), Tax Assurance, 2015, Wolters Kluwer, 2015, pp. 163-181.

C. Hood et al., The Government of Risk, Oxford University Press, 2001

International Fiscal Association, Key Issues Report: Initiative on the Enhanced Relationship, 2012, available in http://www.ifa-jb.com/media/ER%20Key%20Issue%20Report%20final.pdf (consulted on 2 June 2023).

E. Kirchler, E. Holzl, I. Wahl, Enforced versus voluntary tax compliance: The "slippery slope" framework, in 29 Journal of Economic Psychology, 2008, p. 210 ff.

A. Majdańska, An Analysis of Cooperative Compliance Programmes: Legal and Institutional Aspects with a Focus on Application in Less Developed Countries (IBFD 2021), Books IBFD (accessed 1 June 2023).

G. Majone, The Rise of the Regulatory State in Europe, in West European Politics, 1994

E. Marello, L'accertamento con adesione, Giappichelli, Turin, 2001

M.H. Martini & R. (Ronald) Russo, The International Compliance Assurance Programme: Review of the Full Programme, 75 Bull. Intl. Taxn. 4 (2021), Journal Articles & Opinion Pieces IBFD (accessed 1 June 2023).

B. Morgan, K. Yeung, An Introduction to Law and Regulation: Text and Materials, Cambridge University Press, 2007

OECD, Study into the Role of Tax Intermediaries, Paris, 2008

OECD, Co-operative Compliance: A Framework: From Enhanced Relationship to Co-operative Compliance, Paris, 2013, available at http://dx.doi.org/10.1787/9789264200852-en

OECD, Co-operative Tax Compliance: Building Better Tax Control Frameworks, Paris, 2016, available at http://dx.doi.org/10.1787/9789264253384-en

OECD, International Compliance Assurance Programme (ICAP), Paris, 2021, available at http://www.oecd.org/tax/forum-on-tax-administration/international-compliance-assurance-programme.htm

L. Osofsky, Some Realism About Responsive Tax Administration, in 66 Tax Law Review, 2012, p. 307 (2012), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2018905 (accessed 1 June 2023)

D. Quiñones, Determinants of corporate tax behaviour and co-operative compliance: A comparative study of the UK and Colombia, PhD thesis, Oxford University (2019) in https://ora.ox.ac.uk/objects/uuid:7d6f0700-75b5-40c3-86bc-bc0594988fdc/download_file?file_format=application%2Fpdf&safe_filename=DQC%2BDphil%2BThesis%2BDissemination%2Bversion.pdf&type_of_work=Thesis (accessed 2 June 2023)

S. Ranchordás, B. van Klink(eds.), Special Issue Experimental Legislation in Times of Crisis, Law and Method, 2021, p. 3 ff.

K., Raustiala, The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law, 2002, UCLA School of Law, Research Paper No. 02-26

B. Russell, Revenue Administration: Developing a Taxpayer Compliance Program p. 8 (IMF 2010), available at https://www.imf.org/external/pubs/ft/tnm/2010/tnm1017.pdf

R. (Ronald) Russo, J.J. Engelmoer & M.H. Martini, Cooperative Compliance in the European Union: An Introduction to the European Trust and Cooperation Approach, 76 Bull. Intl. Taxn. 2 (2022), Journal Articles & Opinion Pieces IBFD (accessed 1 June 2023).

R. (Ronald) Russo & M.H. Martini, The International Compliance Assurance Programme Reviewed: The Future of Cooperative Tax Compliance?, 73 Bull. Intl. Taxn. 9 (2019), Journal Articles & Opinion Pieces IBFD (accessed 1 June 2023).

L. Salvini, La partecipazione dei privati all'accertamento nelle imposte sui redditi e nell'IVA, Cedam, 1990

M. Shi, Introduction to Tax Risk Management, in A. Bakker, S. Kloosterhof (eds.), Tax Risk Management: From Risk to Opportunity, IBFD Publications, 2021

L.G.M. Stevens et al. (eds.), Tax supervision – Made to measure. Committee Horizontal Monitoring Tax and Customs Administration, 2012.

E.C.J.M. van der Hel-van Dijk, Intra-Community Tax Audit: A Comparitive Survey of the Legal Guidelines for Tax Auditing and Recomendations for Enhanced Cooperation in the 27 EU Member States, IBFD, 2011

E.C.J.M. van der Hel-van Dijk & T.W.M. Poolen, Horizontal Monitoring in the Netherlands: At the Crossroads, 67 Bull. Intl. Taxn. 12 (2013), Journal Articles & Opinion Pieces IBFD (accessed 1 June 2023).

J. Vazquez-Caro, & R. Bird, Benchmarking Tax Administrations in Developing Countries: A Systemic Approach, International Center for Public Policy Working Paper 85, p. 14 (2011), available at http://scholarworks.gsu.edu/icepp/85 (accessed 2 June 2023).

LEGISLATION, CASE LAW AND OTHERS

- Decree 128/2015
- Circular 38/E/2016
- Legislative Decree 147/2015
- Italian Tax Agency, Circular of 26 May 2017, prot. n. 101573/2017
- Regulation of the Director of the Italian Tax Agency 14 April 2016 (prot. 54237/2016)
- Ministerial Decree 15 June 2016
- Decree of 5 July 2011, BLKB 2011/1087, n. 12570.
- Decree 24 April 2017, n. 50, converted by Law 21 June 2017, n. 96.
- CJEU, 15 April 2021, EQ, case C-846/19, EQ contro Administration de l'Enregistrement, des Domaines et de la TVA
- CJEU, 10 September 2002, case C-141/00, Ambulanter Pflegedienst Kügler GmbH v Finanzamt für Körperschaften I
- CJEU, 26 May 2005, case C-498/03, Kingscrest Associates and Montecello
- Law Decree 30 September 1994, n. 564
- Legislative Decree 19 June 1997, n. 218
- Corte Cost., 31 March 1965, n. 16;
- Corte Cost., 3 December 1987, n. 431.
- Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises
- Law 9 August 2023, n. 111
- Commission Regulation (EU) No. 1407/2013 of 18 December 2013
- Commission Regulation (EU) No 651/2014 of 17 June 2014