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Cooperative Compliance in Poland: The Question of Equality

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Abstract: An increasing number of tax jurisdictions are implementing the concept of cooperative compliance into their tax systems. It aims to improve tax compliance by building an enhanced relationship between tax authorities and taxpayers. In principle, the programme is aimed at large taxpayers capable of engaging in aggressive tax optimization that is detrimental to state revenue. Dedicating the programme exclusively to large taxpayers may raise doubts about whether it violates the principle of equality before the law. In Poland, the legislation governing the cooperative compliance programme was introduced on July 1, 2020. As in other countries, it was targeted at large taxpayers. The article therefore discusses the question whether the Polish legal regulations on cooperative tax compliance are in line with the constitutional principle of equality.

1. Introduction

Cooperative compliance is a programme that has been implemented for more than 12 years. It began to be introduced into the tax systems in Anglo-Saxon countries' over the first decade of the 21st century. Meanwhile, in most European countries, it began to be adopted in the second decade of the 20th century.[1] The reason for this was that it was promoted by the OECD,

[1] See: Katarzyna Bronżewska and Alicja Majdańska, "Program Współdziałania z Dużymi Podatnikami – polski odpowiednik co-operative compliance. Czy warto?," *Przegląd Prawa Podatkowego*, no. 2 (2019): 45–8; Marta Kluzek, "Bariery implementacji Co-operative Tax Compliance w Polsce," *Ruch Prawniczy, Ekonomiczny i Socjologiczny*, no. 3 (2020): 220–4;

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which issued three reports in the form of recommendations to member countries of the above organization.[2] The objective of the programme is to improve tax compliance by building a stronger relationship between tax authorities and taxpayers. Hence, countries that have cooperative compliance in their systems are changing their approach to relations with taxpayers. A cooperative approach is being introduced where possible, giving taxpayers greater legal certainty in return for tax transparency. It should be noted that, in principle, the cooperative compliance programme is aimed at large taxpayers who, because of their staffing, internal structure, and financial capacity, are more likely to engage in aggressive tax optimization, which is undesirable from the point of view of the fiscal interest of states. The above fact often gives rise to accusations that this group of entities is favored. This is because it is often considered whether the preferential treatment of a certain category of taxpayers does not violate the constitutional principle of equality before the law. Admittedly, one of the OECD reports argues that the principle of cross-compliance does not violate the principle of equality,[3] however, it should be noted that this report is not legally binding. Hence it appears that the decisive factor as to whether the above institution violates the principle of equality will be how a country implements it in its legal system.

This article aims to answer the question whether the Polish legislator, by introducing cooperative compliance into the Polish legal order, violated the constitutional principle of equality. First, the article outlines the problems faced by modern states and the essence of cooperative compliance. Second, the essence of the Polish scheme, which was introduced in mid-2020, is discussed, which is followed by the examination of its compliance with the principle of equality.

Ronald Russo, J.J. Engelmoer, and Mário H. Martini, "Cooperative Compliance in the European Union: An Introduction to the European Trust and Cooperation Approach," *Bulletin for International Taxation*, no. 2 (February 2022): 90–1; Dario Marano, "Le cooperative tax compliance," in *L'evoluzione della fiscalità internazionale le venti „primavere" di Napoli. Atti del XIX Simposio di Fiscalità Internazionale e Comunitaria Springs in Naples*, eds. Clelia Buccico, Stefano Ducceschi, and Salvatore Tramontano (Padova: CEDAM, 2020), 143–8.

[2] OECD, *Study into the Role of Tax Intermediaries* (Paris: OECD Publishing, 2008); OECD, *Co-operative Compliance: A Framework: From Enhanced Relationship to Co-operative Compliance* (Paris: OECD Publishing, 2013); OECD, *Co-operative Tax Compliance: Building Better Tax Control Frameworks* (Paris: OECD Publishing, 2016).

[3] OECD, *Co-operative Compliance*, 45–8.

2. The Essence of Cooperative Compliance

Modern states are placed in an extremely difficult position. In their traditional role, they are obliged to fulfil tasks for their societies. Consequently, they are determined to obtain certain revenues, which nowadays come from taxes, because of the widespread privatization of public assets. In addition to the delivery of the so-called traditional duties, states face new challenges. These arise, on the one hand, from ever-changing social needs and internal problems such as the ever-increasing public debt, or an ageing population, which will give rise to an even greater public expenditure in the near future. On the other hand, states are subject to increasing pressures from the international environment in which they have to operate. One should, for example, mention the implementation of a common immigration policy, which is caused by illegal immigration, or the implementation of the European Union's ambitious plan to go "net zero" CO_2 emissions by 2050. The implementation of such programmes will inevitably increase public expenditure. In addition to that, it should be noted that the kinetic war in Ukraine and the related threat to European Union Member States has resulted in an increase in public expenditure on the modernization of the army. The vast majority of NATO states have begun to pay more attention to arms expenditure, mostly fulfilling the alliance's commitments that arms expenditure should be at least 2% of GDP. So, modern states feel great pressure internally as well as externally when it comes to the spending side. This would not be unusual if the public expenditure was covered by the tax revenues they generate. However, in the global world of the digitalized economy, modern states are facing great spending pressures, with concomitant problems with ensuring an adequate level of government revenue. This is exacerbated by the information asymmetry, which favors multinational corporations that often use aggressive tax optimization. On the other hand, states' policies towards taxpayers have also changed in response to that. In the so-called post-BEPS world, we are dealing with an increased number of tax controls, constantly tightening cooperation between tax authorities on information exchange, increased tax obligations, rising compliance costs, and, consequently, very high tax uncertainty, which may involve a lot of capital on the part of large companies. This situation is prompting both taxpayers and tax authorities to change their mutual relationship.

The traditional relationship between taxpayers and tax authorities is based on the authority of the latter and the subordination of the former. This is the so-called vertical model. In this model, verification of compliance with tax law takes place *ex-post*. This means that the taxpayer recognizes the tax facts and, appropriately applying the tax law, determines the tax liability by paying the tax due to the tax authority. Thus, any irregularities that may arise are usually detected after the deadline for payment of the tax has passed. It is often the case that such liabilities lapse without the tax authority being satisfied. This can occur, for example, if the taxpayer fails to demonstrate all tax facts and the tax authority fails to carry out proper control.

Meanwhile, for several years now, attempts have been made to introduce a new approach to the tax authority-taxpayer relationship, which would break the pattern of mere authority and subordination by introducing an element of cooperation based on mutual trust. This is the so-called horizontal relationship model. The main objective of such an approach is the voluntary and, at the same time, correct fulfilment of the tax liability by the taxpayer, which, in turn, will result in the reduction of costs related to tax inspections (controls) and law enforcement on the part of the tax authorities. Indeed, literature notes that taxpayers can cooperate with the tax authorities and, therefore, fulfil their tax obligations as long as the interaction between the tax authorities and the taxpayers is perceived as fair, i.e. transparent, accurate, and in line with proper procedures.[4] The purpose of this model, as opposed to the horizontal model, is to verify a taxpayer's compliance with tax laws *ex-ante*, that is, before a tax liability arises or after it has arisen but before it is due. By properly cooperating with the taxpayer, the tax authorities can diagnose emerging tax risks and eliminate them. Thus, they can ensure proper fulfilment of the tax liability and, consequently, certain revenues to the state budget. This form of cooperation is, therefore, more effective than if the verification of the correctness of the tax liability were to take place *ex-post*. The advantage for the taxpayer, in this case, will be the certainty of the correct enforcement of the tax liability, and thus the avoidance of sanctions as well as the costs associated with securing sufficiently high financial reserves created to cover possible uncertain

[4] Eduard Müller, "Steuern und Governance," *Austrian Law Journal*, no. 1 (2014): 112–9.

tax positions. The price for having the taxpayer's certainty as to the correct discharge of the tax liability is its transparency manifested by making available to the tax authorities all the information necessary to verify the correct discharge of the tax liability.

However, for this model to succeed in a given tax system, it must be based on mutual trust and characterized by enhanced cooperation between the tax authority and the taxpayer. A key issue therefore turns out to be the level of trust in public authorities, or the state more broadly. This is a significant issue, for two reasons. Firstly, from the very beginning of treasury, relations were based on the power of the tax authorities, and the authorities themselves, equipped with *imperium*, treated taxpayers according to a concept attributed to contemporary Feliks Dzierżyński. He was said to adhere to the principle that there are no innocent people, only badly interrogated ones. Applying the above to tax law, it would therefore have to be said that the tax authorities have, since their inception, acted according to the belief that there are no honest taxpayers, only poorly controlled ones. In such a situation, it is extremely difficult to require taxpayers to shed their previous prejudices by displaying complete transparency and trust towards the tax authorities. This requires sufficient time. Secondly, in addition to the above difficulties in restoring trust in tax authorities, there is also the cultural context, which is strongly rooted in the historical experience of specific societies. Indeed, it should be noted that the level of trust in public authority varies between the societies concerned. A certain relationship should be noted, according to which where the state has been oppressive towards the people, or a given society has not been able to create a state, and for several years has been dominated by a culturally alien authority, a lower level of trust in public institutions is observed. Undoubtedly, the quality of revenue administration is of great importance for the gradual restoration of trust where it is low. In particular, this refers to the substantive preparation of tax authority staff. This can either determine the success or failure of the cooperative compliance programme.

A fundamental problem facing the tax administration is changing the staff's mentality. Employees assigned to participate in the project on behalf of the tax authorities need to move on from an inquisitorial conduct of proceedings to consensual relations based on full understanding, openness, and rapid response to taxpayer problems. An important issue from

the point of view of the tax authorities is that staff should be adequately trained so that they thoroughly understand the specifics of the business, as well as the broader context of the transactions carried out by the taxpayer. An additional factor that affects the level of trust in the tax authorities is that the cooperative compliance programme should not be over-regulated in legal terms. Both the taxpayer and the tax authority must have the opportunity to base their mutual relations on cooperation aimed at discerning, together with the taxpayer, the most optimal solutions for the application of tax law. This does not mean, however, that the legislator should not give a normative shape to cooperation between tax authorities and taxpayers at all. The lack of a legal mandate for cooperative compliance may lead to a programme that ends in complete failure. This has been the case in Sweden, where cooperation between authorities and taxpayers is not regulated by common law, but by non-binding guidelines developed by the Tax Agency, which can be changed from day to day thus leading to a lack of predictability.[5] In response to less trust in the tax authorities, instruments are being created to encourage taxpayers to participate in the cooperative compliance programme.

The benefit for taxpayers cooperating with the authorities is reduced uncertainty. However, this preference is not always sufficiently encouraging. Hence, in many countries, other benefits can be observed, which are usually related to procedural issues. These include, for example, the complete abandonment of tax control or a significant reduction in both the quantity and quality of such proceedings.[6] The abandonment of controls or their significant reduction for participating taxpayers is in line with the concept of cooperative compliance, which should be based on trust. Indeed, it has been argued in the literature that, from the taxpayer's point of view, the vision of control can lead to minimized communication with the tax authorities and

5 Anna-Maria Hambre, "Cooperative Compliance in Sweden: A Question of Legality," *Journal of Tax Administration* 5, no. 1 (2019): 6–25; Lotta Björklund Larsen, "SWEDEN: Failure of a Cooperative Compliance Project?," *FairTax Working Paper Series*, no. 7 (December 2016); Lotta Björklund Larsen, "What Tax Morale? A Moral Anthropological Stance on a Failed Cooperative Compliance Initiative," *Journal of Tax Administration* 5, no. 1 (2019): 26–38.

6 However, in Belgium, participation in the programme does not exempt from the possibility of tax control, see: Francesco Cannas and Kristof Wauters, "The Rise of Cooperative Compliance Programmes and the Rule of Law: A Comparison between Belgium and Italy," *European Taxation*, no. 12 (December 2019): 567.

also negatively affect relational attitudes.[7] Another benefit of participating in the programme may be the reduction of tax sanctions. This usually refers to interest on arrears, but also penal sanctions of a criminal nature.[8] An additional benefit for taxpayers is that they can obtain an interpretation from the tax authority on the application of tax law more quickly. In Italy, for example, the period for issuing individual interpretations has been reduced from 90 to 45 days.[9]

When analyzing cooperative compliance solutions, it should be noted that while there is no single model in this respect, the literature notes that there are three common features. The first is the risk assessment, which involves a more or less thorough monitoring of the taxpayer. The second is the real-time work between the taxpayer and the tax authority aimed at preventing the incorrect enforcement of the tax liability. This is because it avoids unnecessary disputes. The third is mutual understanding. On the one hand, the authorities care about the quality of staff so that the complexity of economic relations can be better understood, while on the other hand, taxpayers declare full transparency in exchange for greater legal certainty.[10]

3. Characteristics of the Polish Cooperative Compliance Programme

Cooperative tax compliance, known as a cooperation agreement, was introduced into the Polish legal system on July 1, 2020. The Polish legislator decided to make the institution in question an elite programme available only to the largest taxpayers meeting appropriate quantitative as well as qualitative

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[7] Vincent Lacombe, Laëtitia Banos, and François Garcia, "Contrôle fiscal des grandes entreprises: les nouvelles approches des administrations anglo-saxonnes peuvent-elles inspirer une évolution en France?," *Revue de Droit Fiscal*, no. 49 (December 2012): 6–7.

[8] See more: José Andrés Rozas Valdės and Enza Sonetti, "Tax Penalties in a Cooperative Compliance Framework," *Rivista di Diritto Tributario Internazionale*, no. 2 (2014): 44–50; César García Novoa and Rosa Caballero Perdomo, "El Compliance tributario, la relación cooperativa y las nuevas relaciones fiscales. Su implantación en España y en América Latina," *Revista de Fiscalidad Internacional y Negocios Transnacionales*, no. 12 (2019): 20–2.

[9] More on the benefits of participating in the programme in Italy, see: Luigi Quaratino, "Italy's Cooperative Compliance Regime Broadened in Scope under 2023 Tax Reform Law," *European Taxation*, no. 11 (November 2023): 501–2.

[10] See: Lotta Björklund Larsen and Lynne Oats, "Taxing Large Businesses: Cooperative Compliance in Action," *Intereconomics*, no. 3 (2019): 167.

criteria. The formal framework of the programme is regulated in the Tax Ordinance Act.[11] The Polish programme is largely similar to the Austrian programme.[12] The programme is open to taxpayers whose revenue value resulting from the corporate income tax return for the previous tax year exceeded the equivalent of EUR 50,000,000. Poland has approximately 2,500 entities that meet the quantitative criterion set out above. Meanwhile, 12 taxpayers were participating in the pilot programme at the end of June 2024.[13] Unlike the Dutch solutions, where both large and medium-sized taxpayers can participate in the programme,[14] the Polish regulations only allow large taxpayers to participate in the programme. This is the case because, firstly, they have adequate internal structures to meet the criteria of the programme and, secondly, aggressive tax planning is most common among this group.[15] However, it should be noted that the Polish legislator is planning to lower the quantitative criterion so that a larger number of entities can be included in the programme. There are also plans to allow medium-sized companies to join the programme.

In contrast to the British solutions,[16] entry into the programme is voluntary and takes place at the request of the interested taxpayer. This takes place based on a tax agreement between the taxpayer and the Head of the National Revenue Administration. As provided in the Tax Ordinance Act, joining the agreement serves to ensure the taxpayer's compliance with the provisions of tax law in conditions of transparency of actions taken and mutual trust and understanding between the tax authority and the taxpayer, taking into account the nature of the taxpayer's business.[17] This is preceded by a preliminary audit in which the tax authorities assess the risks

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11 Act on the Tax Ordinance of 29 August 1997, Journal of Laws 2023, No. 2383, as amended, hereinafter referred to as Tax Ordinance Act.

12 Florian Fiala and Lisa Ramharter, "Cooperative Compliance in Austria," *European Taxation*, no. 8 (August 2019): 385–90.

13 "Program współdziałania," gov.pl, accessed July 10, 2024, https://www.gov.pl/web/kas/program-wspoldzialania.

14 José A. Rozas Valdés, *Los sistemas de relaciones cooperativas: una perspectiva de derecho comparado desde el sistema tributario español* (Madrid: Instituto de Estudios Fiscales, 2016), 69–84.

15 Explanatory memorandum to the draft law of 16 October 2019 on the settlement of double taxation disputes and the conclusion of advance pricing agreements

16 Rozas Valdés, *Los sistemas de relaciones cooperativas*, 49–67.

17 Article 20s § 2 of the Tax Ordinance Act.

and, on this basis, decide whether to include the applicant taxpayer in the programme. In this context, the issue of risk assessment should be taken into account. It is important from the point of view of the cooperative compliance programme.

In the traditional model of the taxpayer-tax authorities relationship, based on a vertical relationship, the assessment of risk, equated with the failure to properly perform a tax obligation, is, as a rule, expected to be performed by the tax authority. This is because the tax authorities, due to the asymmetry of information, make their assessment by determining the probability of non-performance of the tax liability based on the taxpayer's past behavior, analyses of unusual transactions, or industries in which tax fraud is quite common. However, in a model based on a horizontal relationship, the problem of assessing risk presents itself in a slightly different way. Firstly, since cooperative compliance is based on mutual trust, given that the taxpayer has voluntarily joined the programme, should the taxpayer be vetted at all for the risk of tax default? In most countries with a cooperative compliance programme, entry into the programme is conditional on undergoing an initial risk assessment, as it is, in principle, designed for taxpayers with reliable tax compliance. Given certain preferences provided to taxpayers participating in the programme, the tax authorities want to ensure that unreliable taxpayers do not join it. This is based on the principle: trust, but verify.

Another problem occurring at the level of risk analysis is who is to monitor the risks in the course of the programme. Whether this is to be the tax authority or the taxpayer itself under internal procedures accepted and prescreened by the tax administration and reported back to the relevant tax authority when detected. For example, in the UK, the risk assessment is carried out by a representative of the tax authority, while in the Netherlands, the taxpayer is usually responsible for the assessment.[18] In Poland, an approach similar to the Dutch one has been adopted, i.e. upon entering the programme, it is the taxpayer's responsibility to identify the risks that

[18] See more: Dennis de Widt and Lynne Oats, "Risk Assessment in a Co-operative Compliance Context: A Dutch–UK Comparison," *British Tax Review*, no. 2 (2017): 230 et seq. See also: Hans Gribnau, "Horizontal Monitoring: Some Procedural Tax Law Issues and Their Broader Meaning," in *Tax Assurance*, eds. Ronald Hein and Ronald Russo (Deventer: Wolters Kluwer, 2022), 215–52.

may lead to the tax liability not being properly performed. The practice adopted in Poland is mainly based on the creation of appropriate internal control mechanisms within the organizational structure of the taxpayer. Their development and appropriate application are intended to minimize the risk of tax liabilities not being met at all or being met only partially. During the cooperative compliance agreement, the tax authority carries out a monitoring audit, the purpose of which is essentially to verify the internal and external control mechanisms.

Participation in the cooperative compliance programme creates certain obligations for the taxpayer to demonstrate transparency to the tax authorities. Hence, taxpayers are obliged to promptly report potentially contentious issues as well as any tax benefits obtained. In addition, at a frequency agreed in the plan developed with the tax authority, taxpayers are required to report the Single Audit File, tax schedules, and internal and external audit findings. The tax authorities should also be informed of significant financial, accounting, or legal events that take place in the company and planned and implemented changes to the internal control structure. In addition, once a year, the tax authorities should be informed of the annual operational, financial, and tax plans; reports relating to the operation of the internal control framework; a report on taxes paid in the country and other tax jurisdictions; and the calculation of current and deferred tax to the company's balance sheet result.[19]

In exchange for greater transparency and openness of taxpayers towards the tax authorities, the Polish legislator has provided some preferences. These apply only to taxpayers participating in the cooperative compliance programme. The first of these appears already at the stage of the preliminary audit based on which, assessing the tax risk identified by the taxpayer, the Head of the National Revenue Administration decides to agree with the taxpayer. It should be pointed out that, in the case of a taxpayer for whom, in the course of a preliminary audit, irregularities in the performance of tax obligations have been identified, a correct submission of a tax

[19] "Wytyczne w zakresie Ram Wewnętrznego Nadzoru Podatkowego," Krajowa Administracja Skarbowa, Warsaw, 2020; "Podręcznik dla uczestnika Programu Współdziałania," Krajowa Administracja Skarbowa, Warsaw, 2020, accessed July 10, 2024, https://www.podatki.gov.pl/program-wspoldzialania/dokumenty-programu-wspoldzialania/.

return or correction of a tax return will be made, together with the payment of tax arrears, a penalty interest will be charged at a reduced rate of 50%.[20] A similar preference will apply if a taxpayer files a return or a correction to a return and pays the tax arrears for the periods in which irregularities occurred, but which were not covered by the preliminary audit.[21] It should be noted that the above preferences apply to any taxpayer that will be subject to a preliminary audit, even if such a taxpayer did not ultimately enter into the cooperative compliance programme (due to the taxpayer's final withdrawal or a negative audit result). Advantageous solutions are also provided for taxpayers who have already joined the programme and are subject to a permanent monitoring audit. Then, if it turns out during such an audit that the taxpayer has not correctly fulfilled a tax obligation despite participating in the programme, penal default interest is not charged after the taxpayer submits a return or a correction to the tax return together with the payment of the tax arrears. In addition, fiscal penalties are not enforced, as no proceedings for fiscal offences or fiscal misdemeanors are initiated against such a taxpayer.[22] The above regulations result from the adoption of the concept that, if an incorrect performance of a tax liability has occurred during the cooperative compliance programme, the blame for such a fact lies not only with the taxpayer but also with the tax authority, which was not able to diagnose the tax problem and draw attention to it within the framework of the monitoring audit.[23] In addition, the possibility of tax control by the locally competent tax authority is excluded for taxpayers who have entered into a cooperation agreement with the tax authority. The only entity that may carry out control is the Head of the National Revenue Administration.

The above-mentioned preferences protect taxpayers against self-assessment errors. However, if a taxpayer joining the programme would like to obtain greater protection, he or she may additionally conclude a tax agreement with the Head of the National Revenue Administration. Its subject

[20] Article 20zm § 1 point 1 of the Tax Ordinance Act.
[21] Article 20zm § 2 of the Tax Ordinance Act.
[22] Article 20zm § 3 of the Tax Ordinance Act.
[23] See more: Włodzimierz Gruba, "Komentarz do art. 20zm," in *Ordynacja podatkowa. Komentarz*, eds. Stefan Babiarz et al. (Warsaw: Wolters Kluwer, 2024), 235–6.

may be the interpretation of tax laws; the determination of transfer prices; the lack of legitimacy for the application of an anti-avoidance clause. In addition, a tax agreement may be concluded to determine the amount of corporate income tax liability projected for the next tax year, as well as in any other matter necessary to ensure proper implementation of the cooperation agreement. The purpose of agreeing is to provide the taxpayer with certainty in the application of tax law without the need to initiate formal proceedings on the subject covered by the agreement. An additional benefit for the taxpayer is also the halving of the rate of fees payable in previous price agreements or safeguard opinions. It should further be pointed out that the fees themselves are only charged if an agreement is concluded.[24] The conclusion of an agreement is possible once both parties agree on the legal issues covered by the agreement. Hence, the taxpayer has no legal remedy in the form of an appeal or a complaint to the administrative court ruling on tax matters.

4. Cooperative Compliance and the Constitutional Principle of Equality

The legal basis for the imposition of taxes and other public levies in Poland is Article 84 of the Constitution,[25] according to which everyone is obliged to bear public burdens, including taxes, as defined by law. It expresses the principle of universality of taxation. On the other hand, taxpayers are protected from excessive state fiscalism by Article 217 of the Constitution, in which the principle of *nullum tributum sine lege* is normalized. It stipulates that taxes and other public levies can be imposed only by law. Moreover, such structural elements of taxes as the subject, object of taxation, tax rates, as well as the principles of granting reliefs and remissions and categories of entities exempt from taxes should be standardized in the law. It should be emphasized that, in the field of taxation, it is of utmost importance that it be fair, which is often equated with the principle of equality. This principle is expressed in Article 32(1) of the Constitution, according to which everyone is equal before the law, and everyone has the right to equal treatment by

[24] Article 20zc § 4 point 1 and Article 20zc § 5 point 2 of the Tax Ordinance Act.

[25] The Constitution of the Republic of Poland, Journal of Laws 1997, No. 78, item 483, as amended, hereinafter referred to as Constitution.

public authorities. Therefore, it should be pointed out that since the Constitution indicates the principle of equality before the law, the consideration of equality in the context of cooperative compliance should focus only on the sphere of law. It should therefore be noted that the Polish Constitution does not seek to establish absolute equality, but eliminate unjustified differentiation.

The jurisprudence of the Constitutional Tribunal points to two elements of equality before the law. The first is an order for equal treatment by public authorities in the process of applying the law. The second consists of an injunction to shape the content of the law in such a way that the principle of equality is taken into account.[26] In the context of the present discourse, the issue of equality will refer to equality before lawmaking. In the literature on the subject, it is indicated that it should be understood as an obligation to create legal regulations in such a manner that they satisfy the imperative of equal treatment of entities in similar situations.[27] The jurisprudence of the Constitutional Tribunal indicates that the principle of equality before the law requires that the addressees of legal regulations, characterized equally by a given essential feature, should be treated equally. This means that they should be treated according to one measure, both without discriminatory and favorable differentiations.[28]

Thus, in the light of case law, it is permissible to differentiate between entities based on the relevant characteristic they possess, the so-called relevant characteristics. Hence, the derogation from the principle of equality must be based on relevant criteria. The jurisprudence of the Constitutional Court therefore allows for a different treatment of addressees of a legal norm who share common characteristics, provided that certain criteria are met. Firstly, the derogation from the principle of equality must be relevant. This means that it should be directly related to the aim and essential content

[26] Polish Constitutional Tribunal, Judgment of 9 March 1988, Ref. No. U 7/87; Polish Constitutional Tribunal, Judgment of 31 March 1998, Ref. No. K 24/97.

[27] Witold Borysiak and Leszek Bosek, "Komentarz do art. 32," in *Konstytucja RP*, vol. 1, eds. Marek Safian and Leszek Bosek (Warsaw: Wolters Kluwer, 2016), 833–4; Bogusław Banaszak, *Konstytucja Rzeczpospolitej Polskiej. Komentarz* (Warsaw: C.H. Beck, 2012), 225–34.

[28] Polish Constitutional Tribunal, Judgment of 9 March 1988, Ref. No. U 7/87; Polish Constitutional Tribunal, Judgment of 11 April 1994, Ref. No. K 10/93; Polish Constitutional Tribunal, Judgment of 18 October 2011, Ref. No. SK 2/10.

of the provision in which the controlled norm is contained. In addition, it must serve that purpose and content. Secondly, the importance of the interest serving to differentiate the situation of the subjects is relevant. It is emphasized that it must not be inferior to interests that will not be fully taken into account. Third, it must be in line with other constitutional values, principles, and norms that justify different treatment of similar subjects.[29]

Referring the above to the issue of Polish cooperative compliance regulations, one may wonder whether the adopted provisions violate the constitutional principle of equality. As a rule, a taxpayer participating in the programme does not obtain a direct benefit in the form of a reduction of the tax burden. This means that being in the same factual situation as entities without an agreement with the Head of the National Revenue Administration, the taxpayer is obliged to pay tax in the same amount. However, certain regulations concerning the concept of cooperation may raise concerns as to whether the principle of equality is observed.

First of all, attention should be drawn, as mentioned above, to the substance of the scheme. From the point of view of the taxpayer, participation in the programme results in greater certainty as to the application of tax law, and thus in a possible reduction of tax costs, related, for example, to the absence of disputes between the taxpayer and the tax authority, or a reduced number of tax controls that may generate higher costs for the taxpayer. In addition, it should be pointed out that further preferences have been granted to participants in the programme. In a sense, they are intended to encourage more taxpayers to participate in the programme. Because of the above, it should be considered whether a relevant feature could be attributed to the taxpayers participating in the programme. As indicated above, the main objective of the programme is to increase government revenue by improving the efficiency of tax compliance. By design, this objective should be realized by changing the model of the taxpayer-tax authority relationship from vertical to horizontal. This is manifested namely by building trust, mutual understanding, and transparency. The above-mentioned

[29] Polish Constitutional Tribunal, Judgment of 22 February 2005, Ref. No. K 10/04; Polish Constitutional Tribunal, Judgment of 15 July 2010, Ref. No. K 63/07; Polish Constitutional Tribunal, Judgment of 9 July 2012, Ref. No. P 59/11; Polish Constitutional Tribunal, Judgment of 28 September 2015, Ref. No. K 20/14; Polish Constitutional Tribunal, Judgment of 23 April 2020, Ref. No. SK 66/19.

objective would therefore have to be examined through a derogation from the principle of equality. Whether it is in direct relation to the purpose and content of the provision and whether it serves this purpose and content. As was already indicated, the scheme is designed for large taxpayers who, with the right internal structures, have the potential to carry out aggressive tax optimization that adversely affects state budget revenues.

Hence, the Polish regulations introduced a quantitative criterion whereby only entities whose revenues resulting from the corporate revenue tax return for the previous tax year exceeded the equivalent of EUR 50,000,000 could participate in the programme. Of course, an objection could arise as to how the above quantitative criterion was established. Does this way of defining taxpayers as large entrepreneurs violate the principle of equality before the law? It should be noted, however, that in the case of Polish solutions, qualitative criteria have been introduced in addition to the quantitative criterion, which in a way justifies the possibility of making the programme available to a given group of taxpayers. According to the aforementioned criteria, to become a participant in the programme, a taxpayer must manifest the will to correctly fulfil the tax obligation, i.e. in practice definitively give up an aggressive tax optimization. In addition, the taxpayer's willingness to pay its tax obligations correctly is not sufficient in itself, as it should have or be able to establish an adequate internal control framework through which it is possible to monitor whether tax laws are being complied with. It is argued in the literature that it is the creation of a proper internal control framework by the taxpayer that is central to the concept of cooperation, as it serves as an objective justification for the tax authorities' trust in the taxpayer.[30]

In addition, it should be noted that within the traditional vertical relationship between the taxpayer and the tax authority, there is, as mentioned above, an information asymmetry. This means that the tax authorities do not have full information about the taxpayer. The taxpayer himself, as far as he can, does not voluntarily share such data that could help the tax authorities to correctly assess the tax facts. This applies mainly to large taxpayers who can afford to operate across borders, often performing aggressive tax

[30] Eelco van der Enden and Katarzyna Bronzewska, "The Concept of Cooperative Compliance," *Bulletin for International Taxation*, no. 10 (October 2014): 572.

optimization. It should be pointed out that the situation of taxpayers participating in the cooperative compliance programme is therefore different from those who are not included in the programme. This is because the taxpayer when deciding to cooperate, undertakes to be transparent by providing the tax authorities with information leading to minimizing the risk of non-performance of a tax obligation.

In the jurisprudence of the Constitutional Tribunal, it is argued that the principle of equality should bind the legislator in particular about the imposition of obligations on taxpayers.[31] Since tax and other levies significantly interfere with the right to property, which is constitutionally guaranteed, the equal imposition of obligations on taxpayers is in line with Article 64(2) of the Constitution, which states that property, other property rights, and the right of inheritance are subject to equal legal protection for all. In principle, the property right may be restricted by the need to impose taxes, which follows from the principle of universality of taxation expressed in Article 84 of the Constitution. However, it is argued in the literature on the subject that interference with the right to property by tax law should take place according to the principle of equality, as otherwise, it would contravene the constitutional principle of a democratic state of law.[32]

The principle of equality should also correspond with another constitutional principle of freedom of economic activity. Because of the above, it should be noted that although a taxpayer participating in the programme obtains a kind of procedural advantage, greater obligations are imposed on him than on taxpayers not participating in the programme. As already indicated above, these consist, in particular, of making information fully available to the tax authorities by submitting, for example, to monitoring audits or providing data to the tax authorities covered by the cooperation agreement. It should be noted, however, that the taxpayer agrees to take on the above obligations. It does so in exchange for a guarantee of legal certainty, which, in the case of large taxpayers, makes it possible to release financial reserves that are created for uncertain tax positions. Undoubtedly,

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31 Polish Constitutional Tribunal, Judgment of 24 April 2001, Ref. No. U 9/00; Polish Constitutional Tribunal, Judgment of 8 May 2001, Ref. No. P 15/00.

32 See more: Adam Krzywoń, *Podatki i inne daniny publiczne w Konstytucji Rzeczpospolitej Polskiej* (Warsaw: Wydawnictwo Sejmowe, 2011), 86–8.

the weight of interest thus serves to differentiate the situation of taxpayers participating in the scheme.

Indeed, since the aim is to improve compliance with the law and thus not to deplete budget revenues, the differentiation of taxpayers within the scope of the cooperative compliance programme must be considered to comply with the principle of proportionality. Moreover, the differentiation of the entities participating in the programme in this case remains to other values, principles, and constitutional norms recognizing the different treatment of similar entities. On the other hand, the preferences granted to the taxpayers covered by the scheme themselves do not position the taxpayer in such an advantageous position. Firstly, the advantage consisting of the payment of lower interest on arrears results from the voluntary submission to a preliminary audit, thanks to which the tax authorities can verify the correctness of the fulfilment of the tax obligation without the need to carry out often costly audits preceded by analytical work of the employees of the tax authorities. As a result of catching irregularities following from voluntary submission to a preliminary audit, there is no loss of revenue to the state budget. In all probability, such a loss would have occurred if the taxpayer had not expressed a willingness to cooperate with the tax authority. On the other hand, the abandonment of the imposition of a sanction on a taxpayer covered by the programme who has not correctly performed a tax obligation is based on the idea that responsibility for the incorrect performance of such an obligation is also to be borne by the tax authority, which, while constantly cooperating with the taxpayer, failed to notice a significant problem in the correct application of the tax law by the taxpayer. Similar conclusions should also be reached in the context of the possibility of a tax agreement between the taxpayer and the Head of the National Revenue Administration. It is true that, on the one hand, the taxpayer obtains information on the application of tax law more quickly, and thus other taxpayers obtain faster certainty that the tax obligation will be executed correctly. On the other hand, however, the provision of information on the taxpayer's transactions, together with other necessary information, leads to a reduction in the costs of administrative proceedings, which is not possible for those taxpayers whose relations with the tax authority are based on the traditional vertical model.

5. Conclusions

The above considerations lead to the conclusion that Polish regulations on cooperative tax compliance do not violate the constitutional principle of equality. First of all, it should be noted that they were introduced to improve compliance with the tax law, and thus they limit the possibility of depletion of state budget revenues. Hence, the differential treatment of large taxpayers covered by the cooperation scheme from other taxpayers is in line with the principle of proportionality. It is argued in the literature that, as long as the benefits of compliance cooperation are limited to procedural proceedings, the programmes should be considered proportionate.[33] As indicated above, the Polish regulations are *de facto* limited to benefits of a procedural nature, and a taxpayer participating in the programme cannot count on a reduction of the tax liability. As already explained, the reduction of penalty interest cannot be considered as such. Undoubtedly, therefore, both the purpose of the enactment of the law relating to cooperative compliance and the position of the taxpayer participating in the programme, who makes all information about himself available in the framework of being transparent, makes his situation not the same as that of taxpayers not participating in the programme. Indeed, it should be noted that in this case, we are dealing with a different situation which, in combination with the other constitutional norms mentioned above, justifies a different treatment of similar entities. Thus, the legal provisions on cooperative compliance do not violate the constitutional principle of equality.

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[33] Alicja Majdanska and Jonathan Leigh Pemberton, "Different Treatment, Same Outcome: Reconciling C-Operative Compliance with the Principle of Legal Equality," *Journal of Tax Administration* 5, no. 1 (2019): 137; See: Fabrizio Amatucci, "Proportionality Principle and Tax Compliance: New Limits for Tax Authorities," in *New Taxation. Studies in Honor of Jacques Malherbe*, eds. Catalina Hoyos Jiménez, César García Novoa, and Julio A. Fernández Cartagena (Bogotá: Instituto Colombiano de Derecho Tributario, 2017), 187–94.

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