A review of Brazil approaches to cooperative compliance in light of International Tax Practice and the OECD concept

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Cooperative tax compliance approaches were initiated in the 2000s as an alternative to more efficiently allocate tax administrations’ limited resources to high-risk taxpayers while establishing a more collaborative, transparent, and trust-based relationship with those that are low risk. In 2008 and 2013, the Organisation for Economic Co-operation and Development (OECD) began to promote ‘enhanced relationship’ approaches for which taxpayers would offer full transparency in exchange for less tax uncertainty. Since then, cooperative tax compliance has gained importance with an increasing number of countries adopting it and, in 2018, with the inauguration of an international and multilateral program, the International Compliance Assurance Programme. Despite that, there is not yet a uniform understanding of the constituting elements of cooperative compliance as countries with completely different approaches from one another all claim to have established cooperative compliance programs. In this article, the author reviews the approaches to cooperative tax compliance existing in Brazil, testing if such approaches conform with international tax practice and the OECD Cooperative Compliance Framework.

Keywords: Cooperative tax compliance, cooperative compliance, enhanced relationship, OECD, corporate governance, internal controls, tax control framework, risk assessment, tax audit, tax assurance, tax certainty, trust-based, tax transparency, the International Compliance Assurance Programme (ICAP), Brazil, ‘projeto Confia’

1 OBJECT OF RESEARCH

In the 2019 Tax Administrations Series, a biennial OECD publication that gathers together ‘internationally comparative data on aspects of tax systems and their administration in 58 advanced and emerging economies’, Brazil is prominent as the country that, by far, has the largest number of ‘businesses that participate’ in a cooperative compliance approach. Although with an ‘implementing’ status, the Brazilian federal revenue office reported that, in 2016, 9,427 large businesses participated in the Brazilian cooperative compliance approach and, in 2017, 8,885 large businesses did so. Those numbers stand out, above all, because they are more than double of all of the participating large businesses in five pioneer countries that have implemented cooperative compliance approaches.

This article investigates which approaches in Brazil promote the relationship between large taxpayers and the Brazilian federal revenue office and compares such approaches with a paradigm concept of cooperative compliance, herein proposed based on the experiences of other countries and on the pillars established by the OECD on its 2008 and 2013 publications.

The following research question is investigated: Do the Brazilian approaches to cooperative compliance comprise the elements identified in international tax practice and the pillars laid down by the OECD? The following research sub-questions were addressed: What are the approaches to cooperative compliance that exist in Brazil?

Notes

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3 Receita Federal do Brasil – RFB.

4 OECD, supra n. 1, Annex A, Table A.151. 

5 Ibid.

6 In 2017, the ‘Actual no. of large business that participate’ was 128 in Australia, fifty-seven in Ireland, 1,915 in the Netherlands, 2,100 in the U.K. and 183 in the USA.

7 Ibid.

8 OECD, supra n. 1, Annex A, Table A.151.


Brazil? What are the main elements of cooperative compliance identified in international tax practice? What are the pillars of cooperative compliance proposed by the OECD?9

The next section will present theoretical and empirical investigations that support the development of cooperative tax compliance. Section 5 lists its elements as identified in international practice and used as benchmark to analyse the Brazilian approaches. In section 4, some empirical data regarding the Brazilian tax, economic, and political environment are presented alongside the behavioural theories discussed in section 2. Section 5 delves into a more in-depth analysis of the Brazilian approaches to cooperative tax compliance. In section 6, those Brazilian approaches are then compared with the elements of international practice that were listed in section 5. Section 7 presents some suggestions to improve the Brazilian approaches to cooperative tax compliance and is followed by a conclusion.

2 THE DEVELOPMENT OF COOPERATIVE COMPLIANCE

According to Becker’s theory of crime,8 criminals make an economic risk-reward analysis to decide whether or not to commit a crime. Regulatory frameworks for tax compliance have traditionally been based on that same rationale. Allingham and Sandmo9 as well as Srinivasan,10 for example, suggest that the weaker the deterrence mechanisms (audit probability and penalty rate), or the higher the tax rates, the lower the degree of tax compliance is expected to be.11

That regulatory framework assumes a relationship based on power and submission, often also referred to in expressions such as ‘punishment and control’, ‘carrot and stick’, ‘cops and robbers’.

Over time, it has been realized by legislators and tax administrations that taxpayers’ behaviours are, in reality, not always determined by a mere economic analysis:

a robust body of literature, produced mainly as of the late 1980s, brought up assorted theoretical arguments and empirical evidence demonstrating that there are many other factors besides a mere cost-benefit (or risk-reward) analysis which influence taxpayers’ decisions on whether or not to pay taxes.

To begin with, Smith & Kinsey noted that some non-compliance is actually unintentional, and therefore unlikely to be affected by deterrence mechanisms. Alm, McClelland & Schulze found empirical evidence demonstrating that, different from what common sense might suggest, most individuals actually pay taxes even when it is unlikely that they will be caught and penalized. Couvall & Gordon, Levi and Moore suggested that taxpayers are more willing to pay taxes when they perceive that the Government will provide benefits corresponding to the taxes paid (fiscal exchange theory). Frey proposed the existence of intrinsic motivations to pay taxes, known as tax morale. According to Snaselv, tax behavior is influenced by the social norms of the group of which the taxpayers are part, i.e. individuals adopt behaviors corresponding with how they believe others from their group will behave (social influence theory). Feld & Frey proposed a psychological contract theory, according to which individuals pay taxes in proportion to their ability to participate in the government: the more directly they participate, the more taxes they are prepared to pay. Wenzel suggested that taxpayers are also influenced by factors such as (their own) reputation, justice and fairness. McKercher & Evans identified the main motivation to pay taxes in the ideas of justice and equitable treatment (equity theory).

The slippery-slope theory, proposed by Kirchler, Hoelzl & Wahl, integrated the intrinsic and extrinsic motivators to pay taxes. The extrinsic motivator is the individuals’ perception of the authority’s power (potential to detect and punish tax evasion). The intrinsic motivator derives from the trust in authorities, belief in authorities’ benevolence, services and engagement. The main point is that taxpayer perception of the power of the tax authorities and taxpayer trust in the tax authorities can achieve the same level of tax compliance, but there is an optimal equilibrium to be achieved between power and trust.12

In the 2000s, those theoretical and empirical developments led six pioneer countries13 to implement, alongside with regulations that are more responsive14,15 alternative approaches differentiating low risk taxpayers from those that are high-risk so that tax administrations could more efficiently allocate their limited resources and, at the same

Notes

12 Ibid.
13 Australia, Ireland, the Netherlands, South Africa, the United Kingdom and the United States.
time, spare low risk taxpayers from unnecessary or excessive tax audits.

In 2008, the OECD analysed the experiences of those countries and identified some behavioural elements which, if adopted, according to the OECD, were expected to create an "enhanced relationship" between taxpayers and tax administrations. Those elements include: (1) commercial awareness, meaning that tax administrations should seek the business and commercial reasons behind the transactions that far exceed pure tax and accounting motivations; (2) impartiality when solving issues based only on the merits of the case and on reasonable legal positions regardless of the amount of taxes involved; (3) proportionality in the relationship with taxpayers so that a tax administration’s enquiries should be reasonable and balanced based on factual elements and evidences; (4) openness through disclosure and transparency which is addressed not only to taxpayers who are expected to broadly share information beyond their regulatory obligations but also from tax administrations that should share their supervisory functions and strategy; and (5) responsiveness so that taxpayers’ tax uncertainties are minimized to the greatest possible extent.

The tax control framework (TCF) is the part of the internal controls dedicated to ensure that the company is in control of all tax-related risks by taking measures aligned with its strategy in order to prevent identify and/or treat such risks. If a company can demonstrate that its TCF is effective, tax authorities have an incentive to trust that the output of tax-related information is free from material misstatements. In 2013, the OECD stressed the importance of the TCF as a necessary tool to realize the principles of transparency and cooperation which are requirements to the emergence of trust. At that occasion, the need for internal governance within tax administrations was also emphasized in order to avoid problems that a close, direct, and long term relationship between taxpayers and tax authorities could cause such as misconducts, corruption, or political influences.

The OECD was very keen in realizing that trust and collaboration cannot be enforced but should emerge from a favourable environment in which taxpayers and tax authorities interact with each other on the basis of certain behaviours (commercial awareness, impartiality, proportionality, openness, responsiveness). If that environment is created, then it is expected that trust and cooperation will emerge:

(T)he enhanced relationship is based on establishing and sustaining mutual trust between taxpayers and revenue bodies. This can be achieved through the following behaviours:

The Study Team recommends revenue bodies establish a tax environment in which trust and co-operation can develop so that enhanced relationships with large corporate taxpayers and tax advisers can exist.

It is the author’s view that a proposition of ‘mandatory trust’, or ‘mandatory cooperation’ such as that expected from taxpayers compulsorily included in cooperative compliance programs is a contradiction in itself as it is not possible to enforce nor to monitor trust. The same rationale applies to cooperation. Under that view, ‘mandatory’ cooperative compliance programs, such as in the United Kingdom, are difficult to justify. Imagine, for example, a business that opts to engage in aggressive tax planning and openly declares that to the tax inspector. Is it reasonable to state that such a business is participating in a cooperative tax compliance program? Businesses that decide not to cooperate will, in a worst case scenario, simply revert to the already existing regular regulations.

Notwithstanding the advances brought by the work of the OECD that summarized some of the elements of cooperative compliance adopted by the pioneer countries, the proposed framework is not enough to define cooperative tax compliance in a comprehensive manner. That limitation is justified based on the existing variety of legal traditions

Notes

16 OECD, supra n. 7, at 39–46.
17 Ibid., at 34–35.
18 Ibid., at 33–36.
19 Ibid., at 35–36.
20 Ibid., at 36–37.
21 Ibid., at 37.
22 Ibid., at 37.
23 OECD, supra n. 7, at 65, 66.
24 OECD, supra n. 6, at 40.
25 "Trust is essentially risky because my present action is premised upon the expectation of a future favourable response that 'I' can neither enforce nor 'buy' nor predict with any certainty and in the absence of which I suffer a loss or damage.' C. Offe, How Can We Trust Our Fellow Citizens?, in Democracy and Trust 48 (M. Warren ed., Cambridge University Press 1999).
27 Such as expressed by the OECD: ‘National revenue bodies face a varied environment within which to administer their taxation system. Jurisdictions differ in respect of their policy and legislative environment and their administrative practices and culture. As such, a standard approach to tax administration may be neither practical nor desirable in a particular instance’. OECD, supra n. 7, at 3.
and also due to the political nature of the OECD which must reconcile different interests of its members.

The lack of a commonly accepted and adopted definition of cooperative tax compliance causes some issues, such as discussed below:

There are many features and mechanisms that may differ from country to country in respect of approaches to Cooperative Tax Compliance, such as: the existence of a formal instrument between taxpayers and the tax administration; the need to liquidate past tax debts as a requirement to join a cooperative compliance programme; an obligation to implement a tax control framework (TCF); standards or requirements of the TCF; the regulatory framework for Cooperative Tax Compliance, in terms of whether it is laid down in a regulation and whether such a regulation is a hard or soft law; access to the tax authorities; whether real-time solutions are available in respect of tax disputes; the possibility to litigate tax issues while a party to Cooperative Tax Compliance, among others.

Because there are so many features to choose from, the concrete approaches to Cooperative Tax Compliance adopted by different countries may be quite different from one another. Nevertheless, the same terminology, i.e. Cooperative Compliance, is used to refer to any and all approaches that promote interaction between taxpayers and tax administration, regardless of any differences in approach. This creates significant difficulties, as “apples and oranges” are being referred to with the same terminology, potentially causing scientific debate to be flawed due to misconceptions in terminology.

In the 2019 Tax Administrations Series, twenty-five countries responded to a questionnaire indicating whether they had a cooperative compliance approach in place, implementing, or planning to do so and informed about four features adopted in their approaches. The table below illustrates how some of the fundamental elements to promote cooperative tax compliance are not always present in countries that claim to have adopted such an approach:

In approximately half of the countries, it is not required to have a TCF in place which significantly limits tax administrations’ trust in the information provided by the companies. Without a TCF, it is very difficult for tax administrations to assure that the information is accurate, complete, and reliable.

In around 30% of the countries, companies do not have to disclose information on a real-time basis. That hinders cooperation and trust as tax authorities might be aware of structures and transactions only after they were already implemented. As such, there is less flexibility and opportunity than there could be to adapt the structures or transactions to be tax compliant.

In a bit more than 30% of the countries, the possibility to solve relevant tax issues in real-time, also referred to as ‘work in the present’, is not an element of cooperative tax compliance. That is a missed opportunity to have tax authorities and taxpayers discussing relevant tax issues before they become a tax dispute and escalate to an administrative or court litigation.

In almost 60% of the countries, past tax issues must be solved prior to the participation in a cooperative tax compliance programme.

Table 1 Features of Cooperative Tax Compliance Adopted by

<table>
<thead>
<tr>
<th>Year</th>
<th>No of Countries that responded to the questionnaires</th>
<th>No of Countries Where Cooperative Tax Compliance Programmes Entail:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>with Cooperative Tax Compliance: planning, implementing or in place</td>
<td>the need to have a TCF as a requirement to join</td>
</tr>
<tr>
<td>2014</td>
<td>55</td>
<td>33</td>
</tr>
<tr>
<td>2015</td>
<td>55</td>
<td>33</td>
</tr>
<tr>
<td>2016</td>
<td>58</td>
<td>35</td>
</tr>
<tr>
<td>2017</td>
<td>58</td>
<td>37</td>
</tr>
</tbody>
</table>

Table reproduced from Martini, Russo & Pankov (2021), supra n. 29, page 30.

Notes


29 OECD, supra n. 1.
compliance approach, which seems to be positive in the creation and enhancement of trust and cooperation.

In 2017, there were at least thirty countries that had implemented or were implementing a cooperative tax compliance approach, and that number is expanding as cooperative compliance gains importance. In 2018, Belgium launched its program and, in 2019, Austria, France, and Poland did so. In 2020, the United Nations recommended cooperative compliance for developing countries to improve tax compliance and prevent disputes. In 2021, the OECD launched the permanent version of the International Compliance Assurance Programme which put cooperative tax compliance at multilateral and international levels. Additionally, for 2021, the European Union is expected to announce ‘an EU cooperative compliance framework’.

3 A PARADIGM CONCEPT OF COOPERATIVE COMPLIANCE PROPOSED IN THE INVESTIGATION

Besides the principles and elements indicated by the OECD on its 2008 and 2013 publications, the present analysis also examined the elements of cooperative tax compliance that were identified in the international practice and, more detailed, in four of the pioneer countries that have implemented it, i.e., Australia, the United Kingdom, the Netherlands, and the United States. Those elements were listed and used as a paradigm to confront with the approaches identified in Brazil.

The main elements of cooperative tax compliance programs that were used in the present analysis were extracted from the book ‘Co-operative Compliance and the OECD’s International Compliance Assurance Programme’ which makes a review of the approaches existing in twelve countries. Such elements are relevant to realize the principles of cooperative tax compliance, i.e., cooperative, trust-based, transparent relationship between taxpayers and the tax administration.

Those elements are:

- ‘work in the present’ which allows tax issues to be solved even before the taxable event is materialized or before the tax return is filed which helps to avoid conflicts from escalating;
- possibility to litigate about specific issues when the taxpayer and the tax authority could not reach an agreement and continue with the bilateral cooperative relationship in place which is also referred to as ‘agree to disagree’;
- the existence of a formal instrument to participate in cooperative tax compliance by which the taxpayer formalizes its intention to do so;
- whether the TCF is detailed in regulation or companies are free to decide how to establish it.

The main elements of cooperative tax compliance adopted in Australia, the Netherlands, the United Kingdom, and the United States are indicated below.

The Australia Taxation Office (ATO) adopted the first known cooperative tax compliance approach in 2000 resulting from the direct influence of the Ayres and

Notes
90 Ibid., at 54.
97 OECD, supra n. 6.
98 OECD, supra n. 7.
100 Australia, Austria, Canada, Germany, Italy, Japan, the Netherlands, Norway, Poland, Spain, the UK and the USA.
102 Ibid.
103 Ibid., at 272–273.
104 Ibid., at 273.
Braithwaite enforcement pyramid. Currently, large taxpayers in Australia are subject to a mandatory risk classification under the ‘justified trust’ model along with voluntary cooperative compliance programs, the ‘Annual Compliance Arrangements’ (ACAs), and the ‘pre-lodgement compliance review’ (PCRs). The ATO provides detailed guidance regarding internal controls, the set up, testing, and evaluation of a TCF that are required from large taxpayers.

The United Kingdom introduced a risk-based cooperative tax compliance approach in 2006, the ‘High Risk Corporates Programme’, covering direct and indirect taxation. Cooperative tax compliance is not one structured program but is comprised of a set of different rules. Some of its main characteristics are: the existence of a single point of contact within the tax administration, i.e., the customer compliance manager; resources are focused on the high-risk large taxpayers; since 2009, a senior accounting officer must attest that the company is in control of its tax-accounting affair; and, since 2016, companies must publish their tax strategy.

A pilot project initiated cooperative tax compliance in the Netherlands in 2005. The Dutch Horizontal Monitoring Program is voluntary; formalized with a covenant; based on trust that is justified by the existence of an adequate TCF; based on a ‘real time’ solution of tax issues; based on transparency beyond legal obligations; and available to small and medium enterprises with some modifications. Parties shall take each other’s situation into account, i.e., taxpayers shall attempt to understand tax authorities and vice-versa.

The United States launched a pilot project in 2005 introducing the Compliance Assurance Project for large businesses. It is marked by a strong reliance on the financial statements of companies subject to the Sarbanes-Oxley (SOX) legislation; voluntary application

<table>
<thead>
<tr>
<th>Features of Cooperative Tax Compliance in the International Tax Practice</th>
<th>Australia</th>
<th>United Kingdom</th>
<th>The Netherlands</th>
<th>The USA</th>
</tr>
</thead>
<tbody>
<tr>
<td>TCF formally prescribed in regulation</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>TCF mandatory to join Cooperative Compliance (CC)</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>CC provided in administrative regulation</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>formal instrument between the parties</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>real-time consultation procedures</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>possibility to agree to disagree</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>CC Restricted to Multinational Enterprise (MNEs)</td>
<td>no</td>
<td>yes</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>to clear the past before joining</td>
<td>no</td>
<td>no</td>
<td>yes</td>
<td>yes</td>
</tr>
</tbody>
</table>

Source: Table produced by the author.

Notes
46 Ayres & Braithwaite, supra n. 14.
52 Widt & Oats, supra n. 26.

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formalized in a memorandum of understandings; real-time solving of tax issues before the tax return is filed; and the necessity of having a TCF in place.

The table below indicates the elements identified in the cooperative tax compliance approaches of the four pioneer countries that were analysed:

## Tax Environment in Brazil

This section compiles empirical data that, according to the theories presented in section 2, might influence the taxpayer’s tax compliant behaviour.54

The fiscal exchange theory55,56,57 suggests that taxpayers are more willing to pay taxes when the government renders benefits proportionally to the taxes paid. Brazil ranks in the 53rd position out of 176 among the countries with the worst public services.58 Further data show that taxation in Brazil is comparable to that of developed countries,59 however, the ‘government effectiveness’60 or public services rendered by the Brazilian Government are comparable to that of least developed countries.61 A third study that examined thirty countries with high taxation confronted the tax burden against the welfare and life quality that were returned to society. Brazil ranks in the last position as the country with the worst return to society of taxes collected.62

Corruption and bureaucracy hinder the citizens’ belief in justice, equity, and fairness elements which, according to the equity63,64 and social influence,65 theories, are related with the taxpayers’ compliant behaviours. In a scale between zero being ‘Highly Corrupt’ countries and 100 being ‘Very Clean’ countries, Brazil scores 58/100, indicating a relatively high level of corruption in the country.66

The Brazilian tax system is extremely complex. Three different studies rank Brazil in the top in terms of complexity of the tax compliance environment. In the first study that investigated 100 countries, Brazil ranks in the first position as the ‘most complex tax system’.57 In a second one, Brazil ranks as the second ‘most complex country for accounting and tax compliance’ among ninety-four countries that were observed.69 In a third rank, Brazil is positioned as the country in which it is most time consuming to comply with tax obligations and the sixth worst country regarding the ‘ease of paying taxes’ among the 190 countries that were investigated.69

Punitive tax regulation plays a predominant role in the Brazilian tax system. The failure to fulfil tax obligations is subject to heavy fines64 which, together with interest, can easily triple the original debt. In addition, it is very

Notes

58 Brazil’s total tax revenue in 2014 in relation to its gross domestic product (GDP) was 33.16% while its score for ‘Government Effectiveness’ was -0.15 (in a scale ranging from -2.5 for less effective to 2.5 for the most effective). Although the total tax revenue in relation with the GDP ranks Brazil alongside countries such as Singapore (13.63% / 2.19), Switzerland (26.73% / 2.13), the United States (25.84% / 1.46), Australia (27.44% / 1.59), Japan (30.53% / 1.82), Canada (31.08% / 1.76), the United Kingdom (31.82% / 1.62), and New Zealand (31.86% / 1.93), ‘Government Effectiveness’ is much lower in Brazil than in such countries herein listed. Our World in Data, Total tax revenue (%GDP) vs Government effectiveness 2014, https://ourworldindata.org/grapher/total-tax-revenue-gdp-vs-govt-effectiveness?time=2014&country=+BRA (accessed 9 Apr. 2021), which compiled data from OECD Revenue Statistics; OECD Latin American Tax Statistics; IMF Government Finance Statistics (GFS); IMF Art. IV Staff Reports; CEPALSTAT Revenue Statistics in Latin America.
59 Ibid., in that study, ‘Government Effectiveness’ is defined as ‘perceptions of the quality of public services, the quality of the civil service and the degree of its independence from political pressures, the quality of policy formulation and implementation, and the credibility of the government’s commitment to such policies’.
60 Ibid., examples of developing countries with taxation lower than Brazil but with higher or equal government effectiveness: Kuwait (80.80% / -0.13), Indonesia (10.85% / -0.01), El Salvador (16.75% / -0.02), Tonga (17.25% / -0.08), and Kazakhstan (21.65% / -0.02).
69 Misinformation provided in the Digital Tax Accounting Registries (Escrituração Contábil Fiscal – ECF) can reach fines of 10% applied on the profits before taxes plus 5% of the omitted amount (BR: Normative Instruction 1-422/2013, Art. 6). Failure to fulfill ancillary tax obligations can be subject to fines of up to 20% of the taxes (BR:
common for taxpayers in default to face criminal representations.

At the same time, such strict punitive measures exist alongside recurrent tax amnesties\(^{75}\) which creates a paradox and strong distortions in the taxpayers’ behaviours. If, by one side, heavy fines are expected to induce tax compliant behaviours,\(^{72,73}\) by the other side, the expectation that new tax amnesties will soon follow induce a risk taking behaviour. Stated differently, fines lose their dissuasive effect.

In addition, the highly contentious and combative relationship between taxpayers and the tax administration must be mentioned. Good evidence is provided by looking at the total taxes to be recovered by the federal government as a result of tax audit and tax inspection procedures in 2019 which amounts to EUR 19.4 billion.\(^{74}\) From that amount, only 1.71% was readily paid by taxpayers while 75% was under administrative litigation, 18% was under administrative collection procedures, and more than 4% was remitted to the tax prosecution office (to initiate judicial litigation).\(^{75}\) Those figures illustrate the minimal acknowledgment and acceptance by taxpayers of the tax inspection and tax collection procedures and the mentality to litigate at any cost.\(^{76}\)

Such a litigation culture results in an impressive amount of accumulated active debt\(^{77}\) from the federal government which, in 2019, reached EUR 353 billion.\(^{78}\) To put it into perspective, that is approximately 35% of the 2019 Brazilian Gross Domestic Product. The disturbing fact is that at least 67% of the total federal government active debt\(^{79}\) was classified by the federal tax prosecution office as irrecoverable.\(^{80}\) That is strong evidence of the failure of the regulatory framework adopted in the design of the Brazilian tax system. The strong reliance on power and authority resulted in a significant stock of tax debts most of which is irrecoverable.

Professor Sergio André Rocha makes a keen summary of the Brazilian tax environment:

> Looking around, we notice an alarming fact about which we feel powerless: the National Tax System is broken. In all areas (…) we verified a dysfunctional, insecure and unfair system.

In addition to this fact, in the current Brazilian context, the taxpayer is completely distrustful of the Public Power. Although empirical tests are lacking, it is intuitive that, for a long time, it has not been noticed such low levels of confidence in the State on the part of the citizen. On the other side of the table, the situation is no different. The perception of the tax authority in relation to the taxpayer is of a police character. To a certain extent, it reflects the environment that has developed in Brazil in recent years, in which people are seeing either as virtuous or as immoral, placing taxpayers in this latter group. (author’s translation)\(^{81}\)

Brazilian taxpayers are not in an environment that motivates or promotes tax compliant behaviours.

### 5 Cooperative compliance approaches identified in Brazil

Brazil does not thus far have a structured program of cooperative compliance. The number of businesses

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**Notes**

74 Several tax amnesties have been issued since the year 2000. Although they may have quite different characteristics and conditions, in general terms, they usually grant: a discount in the tax amount due or the possibility to pay it in several installments over the years, forgiveness or significant reduction of the fines, significant reduction of interest due for late payment; and the possibility to offset tax debts with tax losses or tax credits which otherwise could not be immediately used.


81 In Portuguese, ‘Divide Avisa da União’, which comprises the total amount of debts that are due to the federal government, and can be under administrative or judicial collection procedures or not.

71 In Portuguese, ‘Divide Avisa da União’, which comprises the total amount of debts that are due to the federal government, and can be under administrative or judicial collection procedures or not.

72 Considering currency exchange of BRL/EUR 6.8 which amounts to BRF 132 billion.

80 Considering currency exchange of BRL/EUR 6.8 which amounts to BRL 2.4 trillion.

73 In Portuguese, ‘Divide Avisa da União’, which comprises the total amount of debts that are due to the federal government, and are under administrative or judicial collection procedures.

participating in a cooperative tax compliance approach in Brazil that was reported by the federal revenue office coincides with the number of large businesses subject to a differentiated or special economic tax monitoring approach adopted by the Brazilian federal revenue office.

In addition to that, there are other initiatives in Brazil with elements of cooperative tax compliance at the state and customs levels. That will be covered in this section together with the recently initiated project intended to establish a structured cooperative tax compliance program at the federal level, the so called ‘Projeto Confia’. 

5.1 Differentiated and Special Economic-Tax Monitoring (2001)

In 2016, 2017, and 2018, there were, respectively, 9,401, 8,885 and 8,969 large companies under 'Differentiated Economic-Tax Monitoring' and, in 2018, there were another 1,023 under 'Special Economic-Tax Monitoring' in Brazil. Those large taxpayers comprise less than 0.01% of the total number of Brazilian companies, but they are responsible for approximately 60% of all taxes collected by the federal government. Those figures evidence why the close tax monitoring of large taxpayers gained importance as a fundamental tool in the Brazilian federal revenue office supervisory strategy.

The internal code of procedures of the federal revenue office has provided, at least since 1998, that 'taxpayers of higher tax potential' will be controlled and followed up by a special unit, the 'Large Taxpayers Follow-up Office'. In its 2001 version, it provided that those taxpayers would be subject to differentiated monitoring to be rendered by various special units of the federal revenue office.

The general provisions contained in the internal code of procedures were first regulated by Ordinance 578/2001 which stipulated that 'differentiated tax monitoring' would be rendered to large taxpayers and would be determined based on their gross revenue of the previous year. The 'differentiated tax monitoring' comprised the follow-up by the tax collection unit (Divisão de Arrecadação – DISAR) of the monthly tax payment of selected taxpayers. Cases of inconsistency were to be reported to the tax audit unit (Coordenação-Geral do Sistema de Fiscalização – Cofis). It can be noted that, since its origin, the 'differentiated tax monitoring' was actually a tax audit strategy used to determine the sample of large taxpayers to be subject to tax inspection, i.e., those which did not carry out a consistent monthly tax collection.

Ordinance 557/2004 renamed 'differentiated tax monitoring' to 'differentiated tax-economic monitoring' and established the overall framework which, to a great extent, is the one existing until today. Some changes and enhancements were introduced by it. First, a standardized letter was created to notify the selected large taxpayers about their inclusion in the differentiated tax-economic monitoring and to request the contact information of the person, and an eventual substitute, who will be responsible to provide the information to be requested by the tax authority. Second, the tax-economic follow-up was introduced, meaning that the amount of monthly tax collected by the large taxpayers was also to be confronted against the taxpayers' tax-economic potential and the

Notes

82 OECD, supra n. 1, Annex A, Table A.151.
83 In Portuguese ‘Acompanhamento Econômico-Tributário Diferenciado’ and ‘Acompanhamento Econômico-Tributário Especial’.
87 BR, ‘Serviço de Acompanhamento dos Grandes Contribuintes – SEROG’, currently named ‘Coordenação Especial de Maiores Contribuintes – COMAC’.
90 The first criteria to determine if a large taxpayer will be subject to the differentiated tax monitoring verifies if the large taxpayer is included in the group that is responsible for 70% of taxes collected in the previous year, i.e., taxpayers are ranked in descending order based on their gross income, and a cut is made that groups those which did not carry out a consistent monthly tax collection.
91 Ibid., Art. 3.
92 Ibid., Art. 4.
93 Ibid., was replaced by Federal Revenue Office, Ordinance (Portaria SRF) nº 448/2002, however, it kept the same regime.
influencing macroeconomic variables’. Third, tax collection variation was also to be confronted against the amount of tax credits claimed by the taxpayer. Fourth, in addition to the information already held in the systems of the federal revenue office, external sources of information were also to be used in crosschecks. The cases when crosschecks of information indicated inconsistencies, or contained evidence of tax evasion, were forwarded with priority status to the tax inspection unit. The 2004 ordinance also provided that dedicated work teams would be formed to act on the differentiated tax monitoring.

Ordinance 557/2004 was replaced by Ordinance 11.211/2007 which included social security contributions within the scope of the ‘differentiated economic-tax monitoring’.

In 2008, large taxpayers were divided in two groups, the ‘special’ economic-tax monitoring that included the very large taxpayers and the ‘differentiated’ economic-tax monitoring including the large taxpayers. The identification and selection of large taxpayers for each of the two groups was based on objective criteria, i.e., the previous year’s gross income, tax debits, paid salaries, or social security contributions. The exact effectuating amounts to determine whether a company falls within the differentiated or special monitoring are updated every year.

In 2010, 2015, and 2020, changes and updates were introduced to the differentiated and special economic-tax monitoring of large taxpayers among which the following are highlighted:

- 2015, the differentiated tax monitoring was comprised of three activities. First, monitoring of tax collection (to identify variations in tax collection per taxpayer and per tax; to analyse tax collection behaviours; to compare tax collection profiles of taxpayers of the same economic sector or within the same economic group). Second, to analyse the economic sectors and the economic groups (to analyse how each economic sector operates and to identify its main representatives); and to develop indices to be used in the comparison of taxpayers and economic groups. Third, to manage the amount of taxes due by large taxpayers (tax credits potentially collectable by the tax administration) by identifying such credits and identifying the taxpayer’s requests for compensation or refund.

- 2015, the criteria do include large taxpayers within the differentiated or special economic-tax monitoring were gross income, tax debits, total paid salaries, and representativity in the overall tax collection of the federal government.

- 2020, the terminology ‘large taxpayers monitoring’ is introduced to refer to the ‘differentiated’ and ‘special’ ‘economic tax monitoring’.

- 2020, introduction of meetings to promote tax compliance, which can take place in person or online, individually or in groups of taxpayers aiming to provide relevant information to the tax administration; to provide guidance to the taxpayers; and to promote tax compliance.

Notes

96 Ibid, Art. 2.
97 Ibid, Art. 5.
105 Ordinance 641/2015, supra n. 103, Art. 2.
106 Ibid., Art. 4.
107 Ibid., Art. 5.
108 Ibid., Art. 7.
109 In Portuguese, ‘monitoramento dos maiores contribuintes’.
110 Ordinance 4.888/2020, supra n. 104, Art. 4 (paras 1, IV and par. 4).
2020, the contacts between the tax administration and taxpayers within the framework of the large taxpayers monitoring do not cause material or procedural adverse tax consequences as what happens in the case when tax inspections or tax audits are initiated.\(^{111}\)

2020, creation of one further criteria to determine when a large taxpayer will be subject to the economic tax monitoring which is operating with the international trade of goods.\(^{112}\)

The main elements identified in the economic tax monitoring of large taxpayers include:

- All large companies are subject to it (mandatory);
- Risk assessment of taxpayers (based on the records of tax payment and variations in the financial accounts);
- Tax inspections focused on higher risks;
- Focal point of contact from taxpayers and dedicated units within the tax administration;
- Opportunity of self-regularization before penalty is applied\(^{113}\);
- Possibility of meetings between taxpayers and tax inspectors.

### 5.2 Authorized Economic Operator (AEO, 2014)

By the very nature of customs control, customs authorities are pushed to carry out inspections based on samples. An inspection of all of the containers crossing the borders is very likely impossible as that would demand unsustainable amounts of resources and could jeopardize the international trade of goods. At the same time, there is an enormous volume of goods, arms, and drugs constantly being smuggled across the borders. Despite new technologies and inspection techniques, a ‘guessing’ element in customs inspections activities seems to be unavoidable.

In coordinated efforts to counteract those limitations and also to fight against terrorism, in June 2005, the World Customs Organization (WCO) introduced the SAFE Framework of Standards to Secure and Facilitate Global Trade and, in 2007, the AEO\(^{114}\) Programme. The main characteristics of the AEO are\(^{115}\):

- Partnership between businesses and customs administrations;
- Risk assessment of customs operators/businesses;
- Verification that the customs operators/businesses’ internal procedures are capable of ensuring truthness and accuracy of documentation;
- Accreditation of low risk customs operators/businesses;
- Fewer or simplified customs inspections or even a waive from inspections for accredited customs operators/businesses.

Brazil introduced its version of the WCO AEO in December 2014.\(^{116}\) It is defined as a strategic partnership between the AEO and the federal revenue office.\(^{117}\) Participation is voluntary and, until February 2021, there were 544 companies participating in the program.\(^{118}\) After the requirements to join the program are fulfilled,\(^{119}\) the AEO is accredited as a low risk and trustworthy operator, enjoying benefits related with faster and more predictable customs clearance. More specifically\(^{120}\):

<table>
<thead>
<tr>
<th>Notes</th>
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<tbody>
<tr>
<td>111 Ibid., Art. 4 (para. 5).</td>
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<td>112 Ibid., Art. 4(V).</td>
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<tr>
<td>113 Since 2012, companies that calculate their tax basis using ‘assumed profits’ are notified of inconsistencies found by the system of the federal revenue office and are afforded the opportunity to revise their tax compliance before tax inspections are initiated and before penalties are levied, the so called ‘Malha Pessoal Jurídica’. In 2014 that practice was extended to all large companies. That applies to individuals since 2002. On 20 July 2021 under the name of ‘Programa de Apoio à Conformidade Tributária – PACPJ’ (Program to Support Tax Compliance), the federal revenue office began to share with all companies, before any formal tax inspection is initiated, detailed information regarding all inconsistencies identified by its automated cross-check of information. That differentiates from previous practices for including even small companies, for being fully automated from the cross-check of information to the issuance of the notifications/warnings of inconsistencies, and for detailing the identified inconsistencies. Available at Governo do Brasil, Receita Federal lança programa para ajudar empresas a cumprir obrigações tributárias (2012), <a href="https://www.gov.br/pt-br/noticias/financas-impostos-e-gestao-publica/2021/07/receita-federal-lanca-programa-para-ajudar-empresas-a-cumprir-obrigacoes-tributarias">https://www.gov.br/pt-br/noticias/financas-impostos-e-gestao-publica/2021/07/receita-federal-lanca-programa-para-ajudar-empresas-a-cumprir-obrigacoes-tributarias</a> (accessed 22 July 2021).</td>
</tr>
<tr>
<td>117 In Brazil, federal taxes and customs controls are administered by the same office which is the federal revenue office.</td>
</tr>
<tr>
<td>119 Requirements for accreditation regarding physical security of the goods: to ensure security of the customs loads and installations, to control the physical access to the loads, preventive training and awareness against threats, and regarding conformity with tax and customs obligations: full description of the loads, customs classification of the loads, conformity when indirect operations are performed, correct tax basis for taxes and duties, conformity regarding fiscal benefits requirements, professional qualification, and foreign exchange control. Normative Instruction 1.985/2020, Arts 6 to 8.</td>
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</table>
5.3 State Tax Compliance Incentive Program (‘Nos Conformes’: 2018)

The Brazilian tax system is laid down by the federal constitution which establishes that the taxing power is divided between federal, state and municipal governments depending on the nature of the taxable event.\textsuperscript{1,2} Taxation on the circulation of goods, a valued added tax, falls within the competence of states.\textsuperscript{3,4}

The first Brazilian program to address taxes with characteristics of cooperative compliance can be attributed to a state program referred to as the Tax Compliance Incentive Program\textsuperscript{1,2,3} that was launched on 6 April 2018 by the state of São Paulo. The main characteristic of the program is the risk classification of the taxpayers into seven categories.\textsuperscript{4} That classification takes into consideration: (1) overdue and unpaid tax debits; (2) congruency between bookkeeping/tax declarations and tax documentation issued or received by the taxpayer.\textsuperscript{5,6} A third criteria, still to be implemented in the future, considers the risk profile of the suppliers of the taxpayer.

Other distinguishing characteristics of the program are:

\begin{itemize}
\item Electronic cross-checking of different sources of information; preventive tax audits intended to issue guidance and orientation before the application of penalties; to provide, free of charge and permanently, orientation and information to the taxpayers; to organize periodic educational campaigns and educational programs; and to improve tax inspectors qualifications.\textsuperscript{7,8}
\item Benefits available to the taxpayers depending on their risk profile: the opportunity to make corrections/amendments before the application of penalties; simplified procedures to have pending tax credits and tax refund requests approved; and broader possibilities to offset accumulated tax credits.\textsuperscript{9}
\end{itemize}

A second Brazilian state, Rio Grande do Sul, passed legislation in December 2020 also implementing a tax compliance incentive program\textsuperscript{10} following the São Paulo model.
The main elements identified in the state of the São Paulo Tax Compliance Incentive Program:

- Mandatory;
- Risk assessment of taxpayers;
- Possibility of self-regularization before penalty is applied;
- Specific benefits to taxpayers;
- Simplified and fast-track procedures to access services and decisions of the tax administration.

5.4 Regional Customs and Tax Compliance Program (2021)

On 18 January 2021, the seventh Fiscal Region\(^\text{131}\) of the federal revenue office issued Ordinance 5/2021 creating a Regional Program of Customs and Tax Compliance.\(^\text{132}\) Although the ordinance refers to it as a program, it lacks the elements of a structured program and, to a great extent, it does not differentiate itself from the regular functions of the tax administration.

The so called program is defined as a set of actions aimed at achieving tax compliance and, with awareness actions, promote changes in the taxpayers’ behaviours.\(^\text{133}\) It did not specify the criteria to determine which taxpayers are covered by it,\(^\text{134}\) and it will operate on a yearly basis.\(^\text{135}\) The customs and tax compliance actions will have the following targets:

- to approximate tax supervision to the taxable event, prioritizing the previous two years;
- to promote changes in taxpayers’ behaviours and to induce voluntary customs and tax compliance;
- to increase taxpayer’s perception of risk and likelihood of audits;
- to promote self-regularization by taxpayers and to provide guidance regarding customs and tax compliance;
- to decrease non-compliance and litigation and improve the quality of information provided by taxpayers.\(^\text{136}\) The customs and tax compliance actions are divided into: (1) awareness actions that will provide information and promote compliance; and (2) self-regularization actions that will point out inconsistencies and offer guidance for regularization.\(^\text{137}\)

Elements of cooperative compliance identified in the program:

- Possibility of self-regularization before penalty is applied;
- Possibility of meetings between taxpayers and tax inspectors.

5.5 Cooperative Tax Compliance Programme (‘Projeto Confia’: 2021)

In April 2021, the Brazilian federal revenue office issued Ordinance 28/2021\(^\text{138}\) which started a project for a cooperative tax compliance program in Brazil, the so called ‘Projeto Confia’. The Brazilian federal revenue office organized a webinar on 20 April 2021 that counted on the participation of tax authorities, taxpayers, and taxpayers’ associations to introduce the topic of cooperative tax compliance to the Brazilian tax community by sharing the experiences of some countries, such as the United Kingdom and Spain.

Ordinance 28/2021 has formed a steering committee comprised of eight members of the tax administration that will be in charge of establishing guidance for the creation and implementation of the cooperative tax compliance program.\(^\text{139}\) The ordinance defines cooperative compliance as:

the enhanced relationship between the tax administration and the taxpayers, characterized by cooperation, prevention of non-compliance and by transparency in exchange for legal certainty. Cooperative compliance is based on trust, justified by a structure of corporate and tax governance, tax control and risk management of taxpayers, aiming to promote benefits to the tax administration, taxpayers and the society, maintaining equal treatment of the taxpayers.\(^\text{140}\)

It is envisaged that the structure of the program will be defined with the participation of taxpayers and taxpayers’

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**Notes**

131 The federal revenue office is divided into ten fiscal regions, the 7th Fiscal Region supervises the Brazilian states of Rio de Janeiro and Espírito Santo.


133 Ibid., Art. 1.

134 Ibid., Art. 4.

135 Ibid., Art. 2.

136 Ibid., Art. 3.

137 Ibid., Art. 5.


139 Programa de Conformidade Cooperativa Fiscal – Confia.

140 Ordinance 28/2021, supra n. 138, Art. 1, pars 1 and 2 (free translation by the author).
associations. Once a framework of the program is established, it will be submitted to the approval of the federal revenue office and a pilot project will subsequently be launched with a group of selected companies.\textsuperscript{141}

The ordinance also approved the Internal Code of Procedures of the Steering Committee. It provides that a forum with the participation of taxpayers’ associations and companies will be formed to contribute to the design of the cooperative tax compliance program and to the implementation of a code of good tax practices and the guidelines for a TCF.\textsuperscript{142}

As the project is still in a very incipient phase, specific elements and characteristics are not yet known and it is still early to state if the program to be created will adhere to the approaches that already exist in Brazil, such as the differentiated monitoring of large taxpayers (section 5.1), or will introduce a true cooperative compliance program, such as that experienced in some foreign countries.\textsuperscript{143}

Considering the Brazilian tax environment discussed above in section 4, implementing a truly collaborative and trust-based cooperative tax compliance program will be challenging and will require not only a program structured with the right characteristics but also changes in the institutional framework of the tax administrations.

### 5.6 Proposed Regulations that Did Not Pass Into Legislation

#### 5.6.1 The Attempt to Introduce Mandatory Disclosure Rules in Brazil (2015)

In 2015, Brazil attempted to introduce mandatory disclosure rules such as those prescribed by the Base Erosion and Profit Shifting (BEPS) Project, Action 12, however, the disclosure obligations were ultimately excluded from Provisional Measure 685/2015 by the national congress during the legislative procedures.

The original proposal created the obligation to disclose tax planning, and it provided for heavy penalties in the event that the taxpayer failed to disclose. The information to be disclosed would require, to a great extent, a subjective self-assessment of the taxpayer to evaluate whether or not a transaction was carried out only due to tax reasons or whether it was an uncommon transaction.

That would be the very last piece of information that the Brazilian Federal Revenue Service does not yet have, i.e., a disclosure of the taxpayers’ subjective intention when performing a transaction. Other than that, there is not much more that could be asked from taxpayers in the case of a cooperative tax compliance program. That is so because of the digital and very integrated information system already in place in Brazil.\textsuperscript{144}

#### 5.6.2 Draft Ordinance Submitted to Public Consultation (2018)

Although it never entered into force, the draft ordinance is worth the analyses as an illustration of what the federal revenue office envisaged as cooperative compliance.

On 16 October 2018, it submitted a draft ordinance for public consultation that intended to introduce a federal program to promote:

- the relationship between the tax administration and taxpayers based on respect, integrity, legality, transparency, good-faith, legal certainty, collaboration, and fair competition\textsuperscript{145};
- self-regulation and voluntary tax compliance by the taxpayers; disclosure of the federal revenue offices interpretation of tax and customs regulations;
- classification of taxpayers in three groups according to their tax compliant behaviours;
- creation of tax-accounting groups within universities to provide specialized and free advice to taxpayers in need.\textsuperscript{146}

The intended programme was not restricted to large taxpayers; it would also cover small and medium enterprises.

The classification of taxpayers as compliants or non-compliants would examine taxpayers’ obligations: (1) to keep their registration data correct and update; (2) to provide truthful and complete information; (3) to provide timely declarations and book entries; and (4) to fully and timely pay the taxes that are due.\textsuperscript{147}

The benefits to be enjoyed by taxpayers classified as compliant would be: (1) early communication of inconsistencies identified by the tax authority before any action is initiated; (2) priority face-to-face service; (3) priority service regarding claims and requests submitted to the tax

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**Notes**

\textsuperscript{140} Campos, supra n. 121.

\textsuperscript{141} Ordemência 28/2021, supra n. 138, Art. 3(III).

\textsuperscript{142} Hein & Russo, supra n. 39.

\textsuperscript{143} Public system of digital bookkeeping (Sistema Público de Informação Digital – SPED) was enabled by Constitutional Amendment n. 42/2003, which determined that Federal, State and Municipal governments should integrate their activities, including the registration and sharing of fiscal information. It integrates in a digital system the accounting, tax and commercial information of all taxpayers.


\textsuperscript{145} Ibid., Art. 3.

\textsuperscript{146} Ibid., Arts 7–10.
authority, including tax refund requests; and (4) certificate attesting that the taxpayer is tax compliant. The non-compliant taxpayers would be included in tax audits that are more severe and could be subject to administrative penalties.

The ordinance intended to create some privileges for taxpayers classified as compliant, specifically, the preferential and sped-up treatment of requests formulated to the tax administration, including requests for refund of tax credits. To a certain extent, in order to be classified as tax compliant, taxpayers would not have another choice other than forfeiting their right to discuss whether taxes were due.

Although no formal communication regarding the reasons to discontinue the project have been given by the federal revenue office, there was a perception by the tax community (taxpayers, tax intermediaries, tax scholars) that the draft ordinance would violate some fundamental tax constitutional principles. First, the criteria to classify the taxpayers lacked objectivity and seemed to be abusive as it considered that taxpayers who had their claims and petitions denied by the federal revenue office would be of higher risks, what limited the taxpayers’ constitutional right to petition and to recourse to court (Federal Constitution, Articles 5, XXXIV and XXXV). Second, it provided that the risk classification would consider tax years before the ordinance was issued which was understood to violate the principle of non-retroactivity of the tax law. Third, a very controversial one was the use of the risk classification introduced by an ordinance to terminate tax law. Third, a very controversial one was the use of the risk classification introduced by an ordinance to terminate tax benefits that were granted by law. Fourth, also very controversial, was the use of the risk classification to impose penalties on the taxpayers classified as high-risk.

6 COMPARISON BETWEEN THE BRAZILIAN APPROACHES TO COOPERATIVE COMPLIANCE AND THE PARADIGM CONCEPT USED IN THE INVESTIGATION

This section compares the elements of cooperative tax compliance presented in section 3 with the four approaches currently in force in Brazil, indicating at least one provision of the regulations that conforms the Brazilian approaches to the paradigm concept of cooperative tax compliance. For some of the elements, the comparison is only formal. Table 3 in the Annex contains the complete comparison.

A positive feature of the differentiated or special monitoring of large taxpayers is the possibility created for taxpayers once an inconsistency is identified, to provide further information, or to make corrections before formal tax auditing or tax inspection procedures are initiated. That is in alignment with Ayres and Braithwaite enforcement pyramid and is expected from cooperative compliance programs identified in the international practice. There is a concern in the differentiated or special monitoring of large taxpayers that tax authorities should take into consideration the business and economic circumstances of the taxpayers when assessing eventual inconsistencies. That is aligned with the commercial awareness element of cooperative compliance. The Brazilian tax regulations grant the federal revenue office complete access to any and all types of information that may have a tax connection. As such, openness already derives from the statutory tax regulations, at least from a formal perspective. Although responsiveness is established in the regulation (Ordinance 4.888/2020, Article 3(VI)), it is not in the context of cooperative compliance for which, due to a trust-based and cooperative relationship, the taxpayer is entitled to make real-time consultations to the tax authorities and, as such, should be replied in a timely manner.

To a large extent, the differentiated or special monitoring of large taxpayers cannot be considered a cooperative compliance approach. First of all, it was designed as a tool to increase tax collection by closely investigating those taxpayers that had more tax collection potential, i.e., the large taxpayers. Periodic publications that disclose the amount of taxes collected by the federal revenue office provide evidence that the close monitoring approach was designed to increase tax collection by stimulating self-regularization of taxpayers. It did not create dialog between taxpayers and tax administration; instead, it is a unilateral channel through which the tax authority request further information, documents or clarifications from taxpayers. No relationship based on trust and cooperation is created nor stimulated. It applies to all large taxpayers without differentiation; as such, there is no risk assessment as an entry criterion. A risk assessment based on the records of tax payments and variations in the taxpayers’ financial accounts is carried out by the tax administration in order to warn the taxpayers of identified inconsistencies and, if such inconsistencies remain, to initiate tax audits and tax inspections. That is a relevant difference from the risk assessment performed in cooperative compliance programs in the international arena where the risk assessment is mainly based on the quality of information provided by the taxpayer, the tax strategy disclosed by the taxpayer and whether the taxpayer has a history of engaging in aggressive or even fraudulent tax behaviours. Although the tax administration has full

Notes

148 It is beyond the scope of this research to verify if Brazilian taxpayers and tax authorities materialize fulfill the elements of commercial awareness, impartiality, proportionality, responsiveness, trust, and cooperation. For example, regulations can provide that tax authorities should have commercial awareness but to know if they actually do would require other investigation methods.

access to taxpayers’ information, it is very difficult to assess to what extent that information is free from material misstatements as a TCF is not mandatory. In practice, the close monitoring is carried out in relation to events that occurred from the previous two to four years, and not on a real-time basis as expected from a cooperative compliance approach. Real-time discussions between taxpayers and the tax administration would have the potential to avoid the scission of minor tax issues to court litigation.

The AEO is focused on customs clearance procedures and customs duties and comprises most of the elements expected from cooperative compliance programs aimed at enabling a cooperative and trust-based relationship. The economic operator (equivalent to the taxpayer in other approaches) is accredited based on a risk assessment, and those that are low risk have access to timely approvals and fewer inspections. This allows customs authorities to be able to focus their resources on high risk operators. Although a structured TCF is not required, the operator must have some specific physical and documentary internal controls. There is a determined focal point of contact from both parties. A clearance declaration from the federal revenue office and the tax prosecution office stating that past debts are either cleared or under regular appealing procedures are needed to join the program.

In the São Paulo State Tax Compliance Incentive Program, although the legislation explicitly provides for the promotion of trust and cooperation, participation is mandatory, and it consists in the risk classification of taxpayers based on their past compliance. As such, the risk assessment is not an entry criterion but used to grade taxpayers and, later on, to focus tax inspection resources of the tax administration. Its main feature is the warning issued to low risk taxpayers if their information is found to be inconsistent by the matching of tax, accounting, and commercial information that is automatically performed by the tax administration system with the possibility of self-regularization without any penalty.

The 7th Region Customs and Tax Compliance Program applies to all companies that fall under its selection criteria, which were not yet disclosed. This approach is limited to the issuance of a warning in the event that inconsistencies are identified, stimulating the self-regularization within a determined time-frame. However, if they do not, heavy fines are applied; taxpayers will always be able to have recourse to administrative or judicial appeals while participating in the program. That is a constitutional right (Article 5, XXXV, Federal Constitution). That possibility should not preclude the existence of simplified administrative appeal proceedings within the cooperative compliance approaches and specially dedicated to solve issues without the need to recourse to revision procedures that are more complex, such as judicial or even the regular administrative courts.

The heavily bureaucratic environment creates one interesting benefit to taxpayers party to the cooperative tax compliance approaches which is the preferential analyses and rapid reply to their requests, including requests to offset accumulated tax credits. Those approaches are, in some cases, taking advantage of the deficiencies and problems of the Brazilian tax framework. They offer shortcuts to resolving problems as a way to attract taxpayers to join these approaches; there are no specific provisions aimed at preventing misconducts that could arise from a long term and close relationship between taxpayers and tax inspectors which is what is recommended by the OECD and suitable specially in a country with a relatively high index of corruption.

7 Suggestions for Improvements of the Brazilian Cooperative Tax Compliance Approaches

As presented in section 4, the Brazilian tax environment does not stimulate tax compliant behaviours; on the contrary, it has established a combative culture where court litigation is the commonly adopted answer.

While a final solution for that problem would require economic and political developments beyond the reach of tax regulations, there are still some approaches that could be explored. Assessing whether companies have effective internal controls/a TCF in place has the potential to allow tax authorities to broaden their supervisory functions as they can free resources from companies that provide tax assured information and use those resources to reach other companies that would otherwise be unsupervised. Together with other factors such as the disclosed tax strategy and the history of tax aggressions and/or fraudulent behaviours, tax authorities would be able to rank...
taxpayers from low to high risk. That system has not been adopted in Brazil where there is a strong reliance on the automated collection of tax related information from third parties that is followed by a cross-check with the information provided by the taxpayers. The focus is not on the quality of the information provided by the taxpayers but instead on the records of tax payments, variations in the financial accounts of the taxpayers and the adherence of the information provided by the taxpayer to the information collected from third parties such as financial institutions, suppliers, clients, state level tax collection, notaries etc. The tax administration could achieve more scalability of its tax monitoring functions by promoting the establishment of effective TCFs by large companies and by beginning to focus more on the quality of the internal controls and on the output of the information provided by the taxpayers.

Trust and cooperation cannot be ordered by legislation nor enforced by the state in the sense that they are always dependent on a subjective will of the parties to exist. As such, a true cooperative compliance approach should be voluntary as parties forced to participate will not necessarily trust or cooperate with each other. Especially in an already contentious tax environment, any attempt to introduce a mandatory cooperative compliance programme will be destined to fail. That does not preclude tax authorities from making a risk assessment of all taxpayers such as that started by the state level program ‘Nos Conformes’. If all tax and constitutional principles are respected, it seems that the risk assessment of taxpayers is within the discretionary administrative powers of tax authorities to more efficiently organize its internal affairs such as the allocation of resources to tax inspections in accordance with the risk profile of taxpayers. Companies rated as low risk ones, specially because of their trustworthy and effective TCF, would have the option to voluntarily join a cooperative compliance program, yet to be designed (maybe that will come from ‘projeto Confia’).

The adage of ‘agree to disagree’ is the possibility to litigate issues that could not be agreed between taxpayers and tax inspectors while still maintaining the cooperative compliance relationships in place. Especially considering the highly complex context of tax regulations, the ‘agree to disagree’ helps to preserve the cooperative compliance relationship and to avoid indignation if parties know beforehand of such possibility. In Brazil, it could be explored as a tool to circumvent the narrow margin of freedom that results from the interpretative administrative provisions issued by the federal revenue office that are binding on all tax inspectors.

It is interesting to note that the Brazilian tax administration already has a very broad reach to all sorts of information including accounting, tax, commercial, bank, and civil registries. That information is subject to an automated digital cross-check. As a result, access to information is likely not a pursued benefit of Brazilian tax administration.

The tax administration should prioritize their obligation to guide and inform in place of their obligation to pursue and charge taxes. Both obligations are legally binding, however, in the context of cooperative tax compliance, guidance and information should be prioritized and only later should the pursuit and charge of taxes occur.

The compatibility of cooperative compliance approaches with the principle of equality before the law is very often a concern and, in many cases, the lack of objective criteria to determine which taxpayers can access benefits arising from cooperative compliance programs can indeed be in breach of the principle of equality. The OECD concluded that different taxpayers may be treated differently; that cooperative compliance programs should never change the amount of taxes due; and, that there should be rational and objective entry criteria such as the existence of a TCF or the compromise to share information beyond statutory obligations. The close monitoring of large taxpayers, for example, determines which taxpayers will be subject to it based on gross income; amount of taxes due; total salaries; representativity in the overall tax collection of the federal revenue office; and, participation in international trades. Those are certainly objective criteria in the context that all large companies are admitted equally, however, it does not seem to be rational as medium or small companies will not be able to join it simply because they are not big enough. A rational criterium would be, such as explained by the OECD, if the companies were admitted based on their risk profile or on the robustness of their internal controls. ‘Projeto Confia’ should take that into consideration to avoid potential legal disputes in the future.

8 Conclusions

The elements of cooperative tax compliance identified by the OECD and further elements extracted from the

Notes


152 RR. Tax Code, Art. 142, http://www.planalto.gov.br/ccivil_03/leis/2011/05172.htm (accessed 12 May 2021). The Brazilian Tax Code provides that the tax inspector, before confronted with a taxable event, has an irrevocable and mandatory obligation to constitute the tax credit, i.e., to charge the tax due. An omission from the tax inspector can even result in administrative punishments.

153 OECD, supra n. 7, at 45–48.

experience of other countries were listed and commented on in section 3. There are four cooperative tax compliance approaches currently in force in Brazil, such as discussed in section 5. The comparison between those approaches and the elements listed in section 3 were summarized in Table 3 which is presented as an Annex to the analysis. With the exception of the AEO, the other three approaches to cooperative tax compliance that were analysed do not conform with the programs of other countries and the OECD concept.

Special attention should be paid to the differentiated or special monitoring of large taxpayers. Such as discussed in section 6, it does not conform with a cooperative compliance approach when confronted with the elements of cooperative compliance laid down by the OECD and identified in international practice. Yet, among the countries that responded to the 2019 Tax Administrations Series, Brazil is the country that announces having, by far, the largest number of companies participating in a cooperative compliance approach. That inconsistency derives from the lack of a standard concept of cooperative compliance, such as discussed in section 3, and evidences the relevance of the topic for the scientific debate.

The Brazilian approaches are characterized by the strong reliance on a strategy of stimulating self-regulation by warning taxpayers when the information provided by them was found to be inconsistent. If taxpayers do not conform to what is expected in a timely manner, they will be subject to tax inspections and, consequently, heavy fines. The automated digital cross-check of various sources of information is a fundamental tool for that strategy. Another characteristic of that strategy is to offer compliant taxpayers shortcuts and some privileges within the highly bureaucratic Brazilian tax environment, including preferential authorization to offset accumulated tax credits.

The recently initiated project intended to implement a structured cooperative tax compliance at the national level is yet to be designed. As such, it could take the direction of the already existing approaches, or it could use the opportunity to introduce a new program focused on: the quality and effectiveness of the taxpayers' tax control; the risk assessment of taxpayers based on their TCFs; the possibility to consult and reach an agreement with tax inspectors before transactions are implemented or before the tax return is filed; fair taxation as opposed to taxation at all costs; and the possibility to ‘agree to disagree’.

Although the very unfavourable Brazilian tax environment can make it difficult to implement a true cooperative tax compliance approach, at the same time, it can be the reason to justify a profound change in the current regulatory tax framework, especially the approach to low-risk taxpayers.

9 Annex

Table 3 Elements of Cooperative Tax Compliance: Comparison Between the Brazilian Approaches to Cooperative Tax Compliance and the Elements Identified in International Tax Practice

<table>
<thead>
<tr>
<th>Elements of the proposed paradigm concept of Cooperative Tax Compliance</th>
<th>Close monitoring of large taxpayers</th>
<th>Authorized Economic Operator (AEO)</th>
<th>State Tax Compliance Incentive Program</th>
<th>Regional Customs and Tax Compliance Program</th>
</tr>
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<tbody>
<tr>
<td>OECD 2008 and 2013 publications (<em>supra</em> ns. 6 and 7)</td>
<td>commercial awareness</td>
<td>yes</td>
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Notes

155 OECD, *supra* n. 1.
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<tr>
<th>Element</th>
<th>Responsiveness</th>
<th>Trust</th>
<th>Cooperation</th>
<th>Risk Assessment of Taxpayers</th>
<th>Tax Administration Internal Governance to Prevent Misconducts Deriving from CC</th>
<th>TCF/Internal Controls</th>
<th>Coop Compliance from the International Tax Practice</th>
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Source: Table produced by the author.