

# VOLUNTARY DISCLOSURE AND COMPLIANCE PROGRAMMES

## THE NEW INTERNATIONAL TAXATION CONTEXT

- 2002: Creation of the Forum on Tax Administration.
- 2008: Study into the role of tax intermediaries.
- 2011: Tackling aggressive tax planning through improved transparency and disclosure.
- 2013: BEPS Action Plan.
- 2013: Co-operative compliance: a framework.
- 2015: BEPS Final Reports.
- 2015: Building Tax Culture, Compliance and Citizenship.
- 2016: Co-operative Tax Compliance: building a better tax control frameworks.
- 2012: Commission Recommendation on aggressive tax planning (C(2012) 8806 final).
- 2015: Commission Communication: A Fair and Efficient Corporate Tax System in the European Union: 5 Key Areas for Action (COM(2015) 302 final).
- 2016: Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market (ATA Directive).
- 2016: Proposal for a Council Directive on a Common Corporate Tax Base (CCTB Proposal) and Proposal for a Council Directive on a Common Corporate Tax Base (CCCTB Proposal).

Implementation on national legislations in progress. VDCP have become more frequent in a transitional context.

## IMPROVING INFORMATION

International context	EU context
<ul style="list-style-type: none"> <li>Article 26 OECD Model Tax Convention.</li> <li>Agreement on exchange of information on tax matters (2002).</li> <li>→ By 2012, more than 500 TIEA's signed.</li> <li>→ Model Protocol to the Agreement (2015).</li> <li>Action 5 BEPS Project: Counter harmful tax practices more effectively, taking into account transparency and substance.</li> <li>Action 13 BEPS Project: Re-examine transfer pricing documentation.</li> <li>The Common Reporting Standard (CAA &amp; CRS).</li> <li>→ MCAA signed in Berlin (2014) by 40 countries. By 2016, 101 jurisdictions have committed.</li> <li>→ First exchanges by September, 2017.</li> <li>→ AEOI as a response to FATCA.</li> </ul>	<ul style="list-style-type: none"> <li>Council Directive 2011/16/EU as regards administrative cooperation in the field of taxation. The Directive was amended by:</li> <li>→ The Council Directive 2014/107/EU, of 9 December 2014.</li> <li>→ The Council Directive 2015/2376/EU, of 8 December 2015.</li> <li>→ The Council Directive 2016/881/EU, of 25 May 2016.</li> <li>→ The Council Directive 2016/2258/EU of 6 December 2016.</li> <li>COM(2016) 198 final, 2016/0107 (COD). Proposal for a Directive of the European parliament and of the council amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches.</li> </ul>
<p>Convention on Mutual Administrative Assistance in Tax Matters, developed in 1988 and amended in 2010.</p>	

Recent and relevant improvements in exchange of tax information mean more pressure on non-compliant taxpayers. In this context, VDCP become a useful tool in order to enhance tax compliance.

## SCOPE AND OVERVIEW OF THE RESEARCH

The aim of the thesis is to provide a legal and global view of voluntary disclosure and compliance programmes (VDCP). Non-compliance is a problem which affects most tax jurisdictions and VDCP should be seen as an interesting tool for improving voluntary tax compliance, providing Tax Administrations with relevant information and increasing tax revenues.

### Introduction.

#### Chapter I. General context of voluntary disclosure and compliance programmes.

- I. The forefather role of the OECD.
- II. Improvements in transparency and exchange of information.
- III. Co-operative compliance programmes.

#### Chapter II. VDCP in Spanish legislation.

- I. General voluntary disclosure and compliance provisions.
- II. Special voluntary disclosure and compliance provisions.

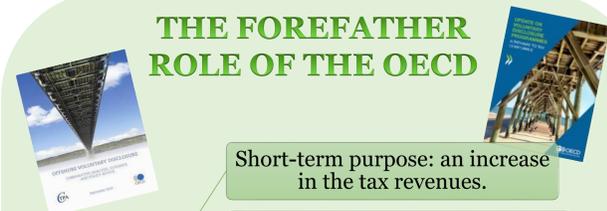
#### Chapter III. The conceptual framework of VDCP.

- I. Concept and main features.
- II. Legal effects.
- III. Principles and legal constraints (EU and domestic level).

### Conclusions.



## THE FOREFATHER ROLE OF THE OECD



Three main purposes

Short-term purpose: an increase in the tax revenues.

Medium/long-term purpose: an improvement in tax compliance.

In addition, VDCP represent an opportunity to take advantage of the progress made in transparency and exchange of information.

For the OECD perspective, a successful VDCP must...

Be clear about its aims and its terms

Explain and prove its short-term effects

Be consistent with the general compliance strategy

Seek to improve long-term compliance and to deter non-compliance

## STARTING POINT CONCEPT AND CATEGORIES

Voluntary disclosure and compliance programmes can be defined as exceptions in the general terms of a tax system. VDCP can be considered as opportunities offered by the law in order to correct a past non-compliance behaviour.

This general definition allows us to conclude that even if the name is innovative, the essence is not. In fact, VDCP could be considered as an umbrella concept which is used for referring to and matching up other old categories as tax amnesty, condonation, regularization, etc. depending the terms of the programme. These opportunities should be considered for Tax Administrations as an interesting tool in order to get an improvement in tax compliance, taking advantage of a particular context. VDCP can be classified in two categories: general and special VDCP.

### General VDCP

When a VDCP is set up by general law and is not a time-limited offer, it will be classified as general.

Some examples are the extemporaneous declaration regime in Spain (art. 27 GTA), the voluntary disclosures program in Canada, the offshore voluntary disclosure program in USA.

### Special VDCP

A VDCP will be classified as special when the offer for regularization is limited in time. Another feature of this category is that special VDCP are focused on specific taxpayers who meet certain requirements and usually they are introduced under specific circumstances.

In recent years, some countries have implemented a special VDCP such as Spain (Royal Decree-Law 12/2012), Italy (Law Decree 193/2016), Argentina (Law 27260/2016), Portugal (Decree-Law 67/2016), among others.

## CO-OPERATIVE COMPLIANCE

The main objective of a co-operative compliance programme is to modify the relationship between Tax Administrations and taxpayers into a win-win situation. A co-operative compliance programme should be built on good faith, trust, transparency and cooperation in business practice principles. Also the perspective of implementing a co-operative compliance programme could be the explanation of adopting a VDCP as a transitional opportunity for those taxpayers who want to comply but are stuck in the past. In this context a VDCP could represent a chance to restart the Tax Administration – taxpayers relationship by applying the new principles on which it will be held in the near future.

It will depend on the terms established when determining the eligible population of cooperative compliance programmes. For example, in Canada it is established that only lower-risk taxpayers can enter into the Horizontal Monitoring, whereas in the Australian Annual Compliance Arrangements higher-risk taxpayers are also suitable if the ATO considers the taxpayer took active steps to reduce his risk profile.

Action 12 BEPS Project: Mandatory disclosure rules will have a better outcome when they are established within a co-operative compliance framework.



## EU AND NATIONAL LEGAL CONSTRAINTS

The design of a VDCP needs to assure a difficult balance because they are not only focused on improving the compliance of a minority group of taxpayers who have failed to comply with their tax obligations but also, they must keep the trust of the majority who have fulfilled their tax obligations.

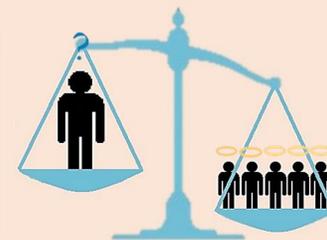
Therefore, the legislator must consider the interaction of European and domestic principles, which can influence the effectiveness of a VDCP.

### Domestic principles

- Legal certainty principle.
- Tax justice principle.
- Ability to pay.
- Equality.
- Proportionality.
- Legality principle.

### European principles

- Proportionality principle.
- Legal certainty principle.
- European Freedoms:
- Free movement of persons.
- Free movement of capital.
- Freedom of establishment.



Furthermore... Could some VDCP fit in the State Aid concept elaborated by the CJEU doctrine?

- In the current context, VDCP should be considered as an opportunity to improve the generality and fairness of our tax systems and not as a threat to compliant taxpayers. When doing so, VDCP should be designed taking into account that these measures need to be attractive in order to achieve an improvement in tax compliance by integrating non-compliance taxpayers into the system but, at the same time, VDCP must be designed considering the position of compliant taxpayers with the purpose of maintaining their compliant behaviour.
- Although the relationship between Tax Administrations and taxpayers tends to be co-operative, Tax Administrations should not refuse using some coercive measures. The reason why Tax Administrations need to keep the "stick" is found in the three categories of taxpayers indicated above. VDCP are aimed to improve the compliance of doubter taxpayers but, probably, these measures do not impact on determined non-compliant taxpayers to whom coercive and punitive measures are intended.
- Legal certainty is a most relevant issue when dealing with VDCP. In this respect, the terms and conditions of the VDCP should be clearly established in the relevant tax provisions and clearly explained to the taxpayers by the tax officials in the relevant procedure.
- In order to assure the tax justice principle, the better conditions of VDCP should not include the tax due. The different position of doubter taxpayers legitimizes the legislator to establish favourable conditions for regularizing a past non-compliant behaviour with the aim of improving voluntary tax compliance in long term.

## CONCLUSIONS TO DATE