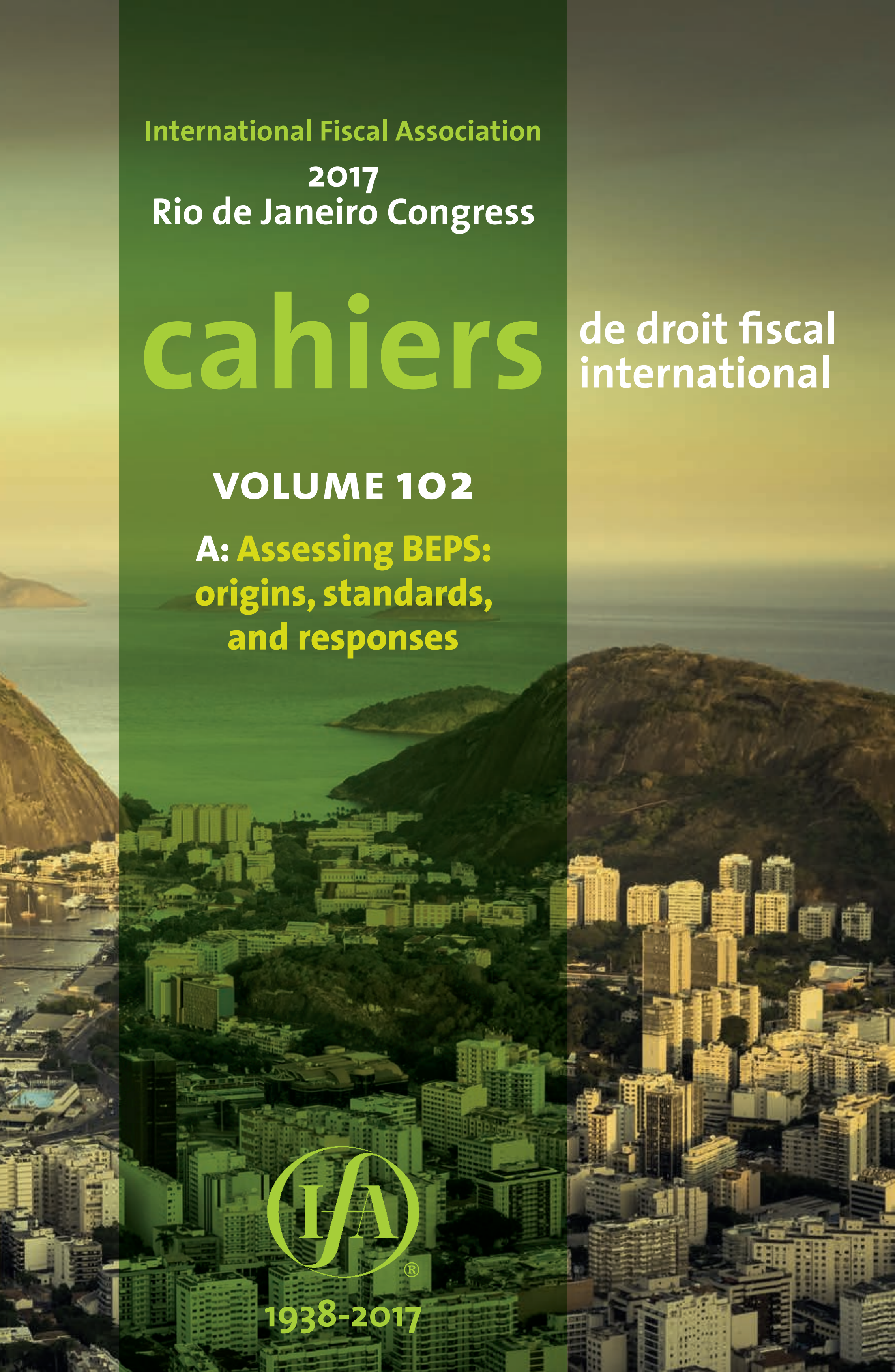

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A: Assessing BEPS: origins, standards, and responses

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Branch Reporter
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Summary

The priorities of the base erosion and profit shifting (BEPS) project in Portugal must be placed in the context of Portugal's membership of international organizations and their corresponding tax policies. Portugal is an OECD member country, and its tax policy in the 21st century has therefore complied with the OECD recommendations on tax transparency and measures aimed at countering aggressive tax planning and abuse.

Moreover, as an EU Member State, Portugal has transposed the directives on direct taxes and the recent amendments related to the EU interpretation of BEPS. On the other hand, some rules in the corporate Ant-Tax-Avoidance Directive (ATAD) will not have to be transposed, as they are already in force in Portugal and the directive has a *de minimis* character. It is expected that in most cases (e.g. controlled foreign company (CFC) rules and exit taxes), only small adjustments will be made.

In respect of domestic legislative and administrative responses, the focus is on hybrid arbitrage, exit taxes and slight amendments to the CFC regime, so that these rules comply with the ATAD.

Matters requiring treaty-based responses will be dealt with under the Multilateral Convention announced on 24–25 November 2016.[1] Although it is not yet publicly known what reservations were introduced by Portugal, it is expected that Portugal will attempt to retain its recent tax policy as regards corporate tax which is based on a participation exemption regime.

Transfer pricing rules will follow the BEPS and the EU standard on value creation. A country-by-country reporting (CbCR) regime was approved on 30 March 2016,[2] implementing BEPS Action 13.[3] This will have to be amended

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Sections 1.3, 2.1.1 and 2.1.4 of this report were written in collaboration with José Almeida Fernandes, Member of the Committee for the corporate income tax reform in 2014 and adjunct to the Secretary of State of tax affairs in 2011.

1 OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

2 PT: art. 134, Law 7-A of 30 March 2016, introducing art. 121-A to the Corporate Income Tax Code (CIRC).

3 OECD (2015), Transfer pricing documentation and country-by-country reporting, Action 13, 2015 final report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, available at: http://www.oecd-ilibrary.org/docserver/download/2315381e.pdf?expires=1481801634&id=id&accname=guest&checksum=1BADACE83BFCDABE672E541C6E51C852.

taking into account the European Union Directive on CbCR approved on 25 May 2016.

Portugal's major challenges ahead are not really related to BEPS. They are instead related to the country's public debt and to its long-standing efforts to comply with the budgetary constraints of the EU fiscal stability treaty and to improve growth rates.

Political debate in Portugal concerning fair taxation has not paid much attention to BEPS. Rather, it has mainly focused on tax transparency and the more progressive taxation of individuals.

Portugal anticipated some unilateral measures related to the BEPS project that have either already been amended or will be amended, in order to be BEPS compliant. That is the case with the patent box regime, approved in 2014.[4] In August 2016, the modified nexus approach was introduced.[5] Most of the BEPS project measures adopted in Portugal are a result of enacted EU directives and will also be adopted under the multilateral convention.

Legal uncertainty may increase as a result of the interplay between case law of the Court of Justice of the European Union (CJEU) and the EFTA Court, as regards the meaning of abuse and tax abuse, several general anti-avoidance rules (GAARs) that are being approved in EU directives, the Portuguese GAAR and specific anti-avoidance rules.

The BEPS project may reinforce the application of the Portuguese regime on the compulsory disclosure of aggressive tax planning schemes enacted in 2008.[6]

Members and officials of the Centre for Tax Studies participated in the policy discussions of the BEPS actions both at the OECD meetings and in the EU Council, code of conduct group and platforms. This type of participation in OECD and EU working groups is routine and the BEPS project did not imply a drastic shift in Portuguese general tax policy.

Business groups, private sector lawyers and accountants, individual taxpayers and NGO representatives have not participated directly in the BEPS project. It is anticipated that the lack of any participation or involvement by civil society, tax lawyers and consultants, and the business sector in the BEPS project may have a negative impact in the future. Anti-abuse measures may be perceived as unfriendly to the business sector and the context of their introduction misunderstood.

BEPS does not seem to have played a decisive role in the tackling of treaty abuse concerns in Portugal, which might be linked to a previous tax treaty policy, accepting limitation on benefits clauses and specific treaty carve-outs allowing for the application of domestic anti-abuse rules.

CFC rules will be applicable in the case of a low-tax jurisdiction that is included in the Portuguese blacklist or that will be listed, in the future, in the pan-EU blacklist (which will replace EU Member States' blacklists). Moreover, if the actual corporate tax paid on its profits by the controlled foreign entity or permanent establishment (PE) is less than 60 per cent of the Portuguese corporate income tax rate, CFC rules will be applicable.

4 PT: Law 2/2014 of 16 January.
5 PT: art. 50-A nos. 6–9, Decree-Law no. 47/2016 of 22 August.
6 See above.

The tax treatment of PEs has been significantly altered from a domestic corporate income tax perspective with the introduction in 2014 of the possibility of opting to apply an exemption to PE income. It is anticipated that Action 7 and a broader definition of a PE may still be introduced – if not via the Portuguese legislation, at least via the multilateral convention.

1. Overview

1.1. Priorities

1.1.1. Main aspects

Priorities of the BEPS project in Portugal must be placed in the context of Portugal's membership of international organizations and their corresponding tax policies. Because Portugal is an OECD member country, its tax policy in the 21st century has complied with the OECD recommendations on tax transparency and measures aimed at aggressive tax planning and abuse. Higher taxation of outbound investment in non-cooperative jurisdictions,[7] anti-abuse rules such as CFC rules,[8] limitations on interest deductibility[9] and a statutory GAAR[10] were in force before the BEPS project started.

Although the Portuguese legislation is compliant with OECD standards, the tax authorities and courts are more reluctant to apply the GAAR and the CFC rules, and to adjust transfer pricing arrangements, than, for example, to deny the deduction of a company's expenses on the grounds that they are not related to the company's activity.[11]

Moreover, as an EU Member State, Portugal has transposed the directives on direct taxes and the recent amendments related to the EU interpretation of BEPS (the anti-hybrid rule and the GAAR in the Parent–Subsidiary Directive, concerning elimination of economic double taxation of dividends). On the other hand, some rules in the corporate ATAD[12] will not have to be transposed, as they are already in force in Portugal and the directive has a *de minimis* character. It is expected that in most cases (e.g. CFC rules and exit taxes), only small adjustments will be made. But the anti-hybrid rule will have to be transposed, as it does not yet exist in domestic legislation.

7 Art. 88, para. 8, CIRC, introduced in 1995, by Decree-Law no. 37/95, 14 February, as amended by Law 32-B/2002, 30 December.

8 Also introduced in 1995, by Decree-Law no. 37/95, 14 February. See A. P. Dourado, "Legislation – Portugal", *EC Tax Rev.*, 4 (1995), pp. 273–274.

9 PT: Law 60-A/2005 of 30 December.

10 PT: art. 38(2) of the General Tax Code (LGT), introduced by Law no. 30-G/2000, of 29 December.

11 Ana Paula Dourado, *Direito Fiscal*, Lições, 2015, Coimbra, Almedina, pp. 208–214.

12 Anti Tax-Avoidance Directive: Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market, OJ L193/1 (2016).

Thus, in respect of domestic legislative and administrative responses, the focus is on hybrid arbitrage, exit taxes and slight amendments of the CFC regime, so that these rules comply with the ATAD.

Matters requiring treaty-based responses will be dealt with under the multilateral convention announced on 24–25 November 2016.[13] It is not yet publicly known what reservations were introduced by Portugal, but it is expected that Portugal will attempt to retain its recent tax policy as regards corporate tax, which is based on a participation exemption regime.

Finally, transfer pricing rules will follow the BEPS and the EU standard on value creation. A CbCR regime was approved on 30 March 2016,[14] implementing BEPS Action 13,[15] and enters into force for tax periods starting on or after 1 January 2016. This will have to be amended taking into account the European Union Directive on CbCR approved on 25 May 2016.

1.1.2. BEPS and tax competition

The BEPS project implies that tax policy priorities must take into account the fair taxation of multinationals. However, the competitiveness of the tax system cannot be forgotten in most jurisdictions, and Portugal – as a small open economy – is no different in this respect. A competitive tax system is a priority in the context of the fundamental freedoms under the Treaty on the Functioning of the European Union (TFEU), 28 scarcely harmonized corporate tax regimes and the limits arising from the state aid regime.

The state aid regime forbids tax benefits targeted at specific sectors or companies,[16] and therefore tax competition is mainly driven by the adoption of participation exemption regimes, the low taxation of royalties, such as patent box regimes, granting increased deductions for R&D related expenses and low tax rates.

In 2014, Portugal shifted from a corporate tax regime covering worldwide income to a participation exemption regime.[17] The BEPS action plan was published while this reform of the tax regime was being prepared,[18] and the reform commission made a serious effort to reconcile a competitive tax regime in the EU context with fairness as interpreted by the BEPS project and guidelines.

Whereas, initially, the participation exemption required a 5 per cent holding, in line with other competitive EU jurisdictions and other less competitive ones (such as Italy),[19] a new, left-leaning government increased the threshold for the

13 OECD, Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting.

14 PT: art. 134, Law 7-A of 30 March 2016, introducing art. 121-A to the CIRC.

15 OECD (2015), Transfer pricing documentation and country-by-country reporting, Action 13, 2015 final report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, available at: http://www.oecd-ilibrary.org/docserver/download/2315381e.pdf?expires=1481801634&id=id&accname=guest&checksum=1BADACE83BFCDABE672E541C6E51C852.

16 Commission Notice on the Notion of State Aid as referred to in art. 107(1) of the Treaty on the Functioning of the European Union, 2016/C 262/01.

17 Art. 14(3) CITC, introduced by Law 2/2014 of 16 January.

18 OECD (2013), Action Plan on Base Erosion and Profit Shifting, OECD Publishing, http://dx.doi.org/10.1787/9789264202719-en.

19 https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-italyhighlights-2016.pdf.

participation exemption regime to a holding of at least 10 per cent.[20] The rationale was related to avoiding intermediate holdings that would facilitate the establishment of companies which created no value in Portugal and which were motivated exclusively by tax reasons.

Otherwise, the participation exemption regime and other incentives such as a patent box regime were maintained. Thus, it is likely that any measures that shift the territorial regime to the universal taxation of resident corporations holding at least 10 per cent of participations abroad, such as subject-to-tax and switch-over rules, will be avoided.

Portugal's progress on the various aspects of BEPS to date has been swift, taking into account both the recommendations under the OECD BEPS actions and regional EU implementation of anti-BEPS measures.

In terms of legislation, Portugal has been at the forefront in many respects, and even anticipated some of the rules now proposed in the BEPS actions. Indeed, this is the case concerning the interest deduction limitation rules, which in 2013[21] replaced the thin capitalization rules even before the Action Plan and Action 4 were published; and also the case of domestic legislation requiring disclosure of aggressive tax planning structures by promoters and customers (taxpayers), which was approved in 2008.[22]

Probably because Portugal recently introduced the participation exemption regime (2014) and because the economy's growth rate is very weak (1.6 per cent in 2015 and probably 1.3 per cent in 2016), the major challenges ahead are not really related to BEPS. They are instead related to the country's public debt (130 per cent of GDP, which is the third highest in the EU); to the long-standing efforts to comply with the budgetary constraints of the EU fiscal stability treaty;[23] and to improving growth rates.

1.1.3. Political debate

Political debate in Portugal concerning fair taxation has not paid much attention to BEPS. Rather, it has mainly focused on tax transparency and more progressive taxation of individuals,[24] specifically promoted by the Left Bloc (*Bloco de Esquerda*), a left-wing party in favour of "non-capitalist solutions".[25] The media themselves pay more attention to transparency[26] than to the fair taxation of multinationals.

[20] PT: Law 7-A/2016 of 30 March.

[21] PT: Law 66-B/2012 of 31 December.

[22] PT: Decree-Law 29/2008 of 25 February.

[23] Treaty on Stability, Coordination and Governance in the Economic and Monetary Union.

[24] Abílio Ferreira, "Mariana Mortágua: novo imposto imobiliário 'é para apanhar quem escapa ao IRS'", *Expresso* (15 December 2016), available at: http://expresso.sapo.pt/politica/2016-09-15 Mariana-Mortagua-novo-imposto-imobiliario-e-para-apanhar-quem-escapa-ao-IRS.

[25] http://www.bloco.org/media/estatutos_IXconvencao.pdf.

[26] See e.g. https://www.youtube.com/watch?v=VSHw3gysi3k&feature=youtu.be; http://expresso.sapo.pt/palavra/editorial/panama-papers; http://www.jornaldenegocios.pt/economia/mundo/detalhe/panama_papers_shed_light_on_global_money_movement?ref=DET_relacionadas; http://www.jornaldenegocios.pt/economia/detalhe/luis_portela_manuel_vilarinho_e_elidio_pinho_estao_na_lista_dos_papeis_do_panama?ref=DET_relacionadas; http://www.jornaldenegocios.pt/economia/detalhe/panama_papers_ha_uma_estrategia_de_isolamento_dos_offshores.

It has to be added that in 2012, during the financial assistance programme led by the troika (the International Monetary Fund (IMF), the European Commission and the European Central Bank) and intense restrictive economic measures, some Portuguese companies shifted their Portuguese residence for tax reasons. Exit was politically condemned, on the grounds of lack of patriotism.[27]

1.2. Participation

As an OECD member country, Portugal participated in the discussion of all BEPS actions, through the corresponding working groups. After the approval of the actions by the Committee on Fiscal Affairs (CFA), they were presented to the Minister of Finance. Portugal is a BEPS associate.[28]

Portugal was particularly engaged in the ad hoc group developing the multilateral convention,[29] under Action 15 (multilateral instrument to modify bilateral tax treaties). Portugal has also sent observations and reservations to the multilateral convention that have not yet been made public.

In Portugal, international competences regarding taxes belong within the Ministry of Finance to the International Relations Division (*Relações Internacionais*) and to the Centre for Tax Studies (*Centro de Estudos Fiscais e Aduaneiros*). Both are divisions of the central tax administration composed of economists and lawyers working as a team. The International Relations Division administers Portuguese international tax policy by applying income tax treaties and protocols and monitoring their correct application; participates in the technical groups accompanying the implementation of tax treaties; coordinates exchanges of information; and participates in actions carried out by the European Union, the OECD and other international organizations, in the context of mutual assistance and administrative cooperation.[30]

The Centre for Tax Studies is competent to draft and negotiate treaties and agreements on taxes and duties, and to ensure coordination with other tax administration bodies, national representation and participation in the work carried out by different committees and working groups of the OECD, EU and other international organizations.[31]

The BEPS project was followed with interest and participation by tax officials, even though it was not perceived as a policy priority, or as a political priority by politicians.

27 http://www.dn.pt/economia/interior/ida-da-jeronimo-martins-para-a-holanda-abre-polemica-2219042.html; https://www.google.pt/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=jer%C3%B3nimo+martins+e+pa%C3%ADses+baixos.

28 OECD, Inclusive framework on BEPS composition (7 December 2016), available at http://www.oecd.org/tax/beps/inclusive-framework-on-beps-composition.pdf.

29 Note 13 above.

30 PT: art. 5 Regulation (Portaria) 320-A/2011 of 30 December.

31 Art. 29(e) and (f) Portaria 320-A/2011.

1.3. Domestic context

1.3.1. Tax relief for foreign investment promotion

Portugal offers a series of tax incentives that are aimed at attracting foreign investment, although not exclusively available for non-resident investors. The constraints of EU state aid rules[32] prevent Portugal from granting incentives geared solely to attracting foreign investment.

The Investment Tax Code (*Código Fiscal ao Investimento*)[33] currently establishes the existing incentives available to corporate investors. The scope of targeted activities is broad, ranging from the extractive and processing industries to R&D and high-technology intensity. The incentives include the contractual incentives regime for productive investment; the tax incentives regime on business R&D; the deduction from taxable income regime; and the regime regarding retained and reinvested profits. The first two regimes are targeted at regions with lower income, and all of them have been approved by the European Commission under the EU state aid regime.

The Investment Tax Code was approved in 2014 and aims to codify a series of incentives that had been approved during previous years, namely those that were initially approved as a temporary measure to promote investment in certain activities (usually in the Budget Bill for a particular year) but were subsequently renewed and actually became an integral part of the tax system. This is the case regarding the tax regime to support investment (*Regime Fiscal de Apoio ao Investimento* (RFAI)) and the business R&D tax incentive regime (*Sistema de Incentivos Fiscais em Investigação e Desenvolvimento Empresarial* (SIFIDE)).

Annually, the Portuguese tax authorities are legally obliged to disclose the amount of tax expenditures on tax incentives and benefits in the preceding year, as well as to list the corporations that have benefited from those incentives and the amount of the benefit.[34] Official statistics are available on the website of the Portuguese tax authorities.[35]

Notwithstanding the relevant amount of information being disclosed concerning tax incentives, there is no knowledge of a determination by the competent authorities or in academic literature as to their effectiveness.

1.3.2. Public scrutiny

From a BEPS compliance perspective, the existing tax incentives aimed at promoting investment have not been formally or expressly scrutinized in Portugal. From a recent historical perspective, one should take into account the economic recession endured by Portugal from 2009 onwards and which resulted in 2011 in Portugal having to enter into an agreement under the financial assistance programme

32 Art. 107 TFEU.
33 PT: Decree-Law no. 162/2014 of 31 October.
34 PT: art. 15-A Tax Benefits Code, as amended by Law 55-A/2010 of 31 December.
35 Statistics on tax benefits and incentives are available on the website of the tax authorities at: http://info.portaldasfinancas.gov.pt/pt/dgci/divulgacao/estatisticas/Estatisticas+-+contribuintes+com+benef%C3%ADcios+fiscais.htm.

between the Portuguese authorities, the European Union and the IMF.[36] Under that agreement, Portugal was forced to establish an ambitious programme of curtailing tax expenditure which led to a significant tax reform that resulted in an overhaul of tax incentives, benefits and allowances in 2012.

A political and economic consensus regarding the need to promote investment and growth in the subsequent years to spur an economic recovery with, for example, tax incentives to attract investment also favoured the absence of an explicit scrutiny of such incentives against the background of the BEPS project.

However, the fact that these tax benefits must be communicated to the European Commission, and comply with the state aid regime, means that they are also BEPS compliant. In fact, state aid rules and the European code of conduct are aligned with the BEPS project – or go even further. In the case of multinationals operating in Portugal, state aid rules guarantee that transfer pricing rules correspond to the value created in Portugal, and that profits are not improperly shifted in order to benefit from selective low taxation. In turn, the code of conduct criteria guarantee that Portugal does not engage in harmful tax competition by granting tax benefits specifically targeted at non-residents.

The issue of BEPS consistency was raised mainly within the context of the corporate income tax reform which was proposed by a government-appointed commission of experts in 2013 and which entered into force in 2014.[37] The draft of the corporate income tax reform was published in advance by the corporate income tax reform commission so as to be the subject of public consultation and discussion in 2013. During that time, the BEPS compliance issue was raised by several commentators.[38]

The BEPS-related questions discussed at the time dealt mainly with the proposed introduction of a broad participation exemption regime and a patent box regime for royalties income from the licensing of patents.[39]

It was not clear in the draft of the corporate income tax reform what role – if any – would be played by CFC rules, due to the participation exemption regime. It was also not clear whether the "patent box" regime was compatible with the modified nexus approach promoted by the BEPS project.

1.3.3. The dominant context of small and medium-sized enterprises

The perception of the Portuguese public regarding corporate tax avoidance and possible use of tax planning in a cross-border scenario (as emphasized by the BEPS

36 Financial Assistance Programme, Council Implementing Decision 2011/344/EU of 17 May 2011; IMF Country Report No. 11/127, June 2011.

37 PT: Law 21/2014 of 16 January.

38 See e.g. Ana Paula Dourado, "A dupla não tributação, a competitividade e o que queremos ser e parecer", *Jornal de Negócios* of 28 August 2013, available at: http://www.jornaldenegocios.pt/economia/impostos/irc/reforma-do-irc/detalhe/a-dupla-nao-tributacao-a-competitividade-e-o-que-queremos-ser-e-parecer; Henrique de Freitas Pereira, "Competitividade fiscal com efeitos no investimento e no emprego ou simples erosão das receitas fiscais", *Jornal de Negócios* of 26 August 2013, available at: http://www.jornaldenegocios.pt/economia/impostos/irc/reforma-do-irc/detalhe/aumento-da-competitividade-fiscal-com-efeitos-no-investimento-e-emprego-ou-simples-erosao-das-receitas-fiscais.

39 *Ibid.*

project) is affected by the fact that the majority of Portuguese companies are small and medium-sized enterprises.

Other factors have also served to prevent further public outcry against the perception of the lack of fair taxation of corporations in Portugal. One factor has to do with the fact that corporate income tax revenue is essentially collected from a few large Portuguese groups. Moreover, progressive taxation of corporations was introduced in 2011 and remains in force (for example, through a state surcharge applicable at progressive tax rates to taxable profits over €1.5 million, €7 million and €35 million).

Other legal measures, such as the limited carry-forward of tax losses and the aforementioned rule on limited deduction of interest, may also contribute to reduce the perception of unfair contribution to taxes by Portuguese corporations.

In general, there is not much publicity or discussion on the amount of taxes paid by multinationals or related to certain activities and sectors. Personal income tax and property taxes increased exponentially, targeting the middle class and public officials, as part of the financial assistance programme discussed above. Small and medium-sized enterprises have experienced difficulties in accessing credit, and the very efficient and coercive Portuguese tax collection system has driven many such enterprises into bankruptcy.

As a political measure to reduce the sense of tax unfairness, special contributions for certain highly profitable activities and sectors (e.g. banks, energy, retail, pharmaceuticals, etc.) were also enacted in 2013, and operate as surcharges to corporate income tax.[40]

1.4. Taxpayers' rights and risks

Like other OECD member countries,[41] Portugal anticipated some unilateral measures relating to the BEPS project, that were either already amended or will be amended, in order to be BEPS compliant. That is the case of the patent box regime, approved in 2014.[42] In August 2016, the modified nexus approach was introduced.[43] Moreover, as previously mentioned, the CbCR regime approved in March 2016[44] must be amended. Most of the BEPS project measures adopted in Portugal are a result of enacted EU directives and will also be adopted under the multilateral convention.

However, legal uncertainty may increase as a result of the interplay between case law of the CJEU and the EFTA Court, as regards the meaning of abuse and tax abuse, several GAARs that are being approved in EU directives, the Portuguese GAAR and specific anti-avoidance rules.

Moreover, the ATAD has moved away from the concept of avoidance (or abuse) relying on an "artificial scheme", as asserted in CJEU case law.[45]

40 See e.g. PT: art. 228, Law 83-C/2013 of 31 December.

41 See the references in Ana Paula Dourado, "May you Live in Interesting Times", *Intertax*, no. 1, 2016, pp. 3–4.

42 PT: Law 2/2014 of 16 January.

43 PT: art. 50-A nos. 6–9, Decree-Law no. 47/2016 of 22 August.

44 See note 14 above.

45 ECJ 12 September 2006, C-196/04, *Cadbury-Schweppes plc*, *Cadbury-Schweppes Overseas Ltd* v. *Commissioners of Inland Revenue*, 2006 I-07995.

In fact, article 6 of the ATAD makes reference to an essential purpose of tax abuse, in accordance with the CJEU case law (*Halifax*)[46] and to a "genuine activity" concept, defined as an activity pursued for "valid commercial reasons reflecting economic reality".[47] The term "valid commercial reasons" has been the adopted concept of abuse in the Mergers Directive and in European Commission Recommendation no. 8806/12, of 6 December, on aggressive tax planning.[48]

It remains to be seen whether the *Cadbury-Schweppes* doctrine, which was confirmed in subsequent CJEU case law, will evolve in response to article 6 of the ATAD and what repercussions this will have for the interpretation of the Portuguese GAAR and specific anti-abuse rules, which are more or less BEPS oriented.

The Portuguese GAAR entered into force in 2001,[49] and includes several anti-avoidance doctrines that are difficult to reconcile. It makes use of the abuse of form doctrine and the substance-over-form principle, and also contains a puzzling reference to *fraus legis* and to artificiality. The artificiality of a scheme – as interpreted objectively – should prevail in the interpretation of the Portuguese GAAR, mainly because it has been the test used under the EU concept of abuse.

Because Portugal already has a GAAR, it is not certain whether article 6 of the ATAD will have to be transposed into the Corporate Income Tax Code (CIRC), since article 6 does not make reference to artificiality, but to genuine activity and valid commercial reasons. Whatever the solution, it is expected that several GAARs will be in force in Portugal, all of which contain vague concepts that give rise to indeterminacy, and that some of those GAARs will be more general than others.

Furthermore, it is not clear whether it is still legitimate to apply a GAAR or one of the GAARs if some facts apparently fall within the scope of a specific anti-avoidance rule (interest deductibility, transfer pricing adjustments), but are ultimately not within its scope. Even though the preamble to the ATAD clarifies that the GAAR in article 6 is always applicable if specific anti-avoidance rules are not, it makes no reference to reconciliation between the specific anti-avoidance rules in the directive and a domestic GAAR, or to reconciliation between specific domestic anti-avoidance rules and a domestic GAAR.

The BEPS project may reinforce the application of the Portuguese regime on compulsory disclosure of aggressive tax planning schemes, enacted in 2008.[50] It is not publicly known how many aggressive tax planning schemes have been disclosed. The website of the tax authorities publishes those schemes that may, in the view of the tax authorities, constitute tax avoidance.[51] The online information contains a summarized description of each scheme, accompanied by a warning that the adoption of such schemes may constitute avoidance. The anti-avoidance rules that may be applicable to each scheme are also identified.

These can range from the aforementioned Portuguese GAAR, the GAARs or specific anti-avoidance rules resulting from the EU directives (the Parent–Subsidiary

46 ECJ C-255/02, *Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd* v. *Commissioners of Customs & Excise*, I-1609 paras. 73–75.

47 ECJ C-255/02, *Halifax plc*.

48 Recommendation C-(2012) 8806 of 12 December 2012 on aggressive tax planning.

49 Art. 38(2) LGT.

50 See section 1.1.1. above.

51 http://info.portaldasfinancas.gov.pt/NR/rdonlyres/BC481FC3-FD05-4960-BB58-D7D2D96790DC/0/DivulgacaoDL_2908PFA.pdf.

Directive, the Interest and Royalties Directive and the Mergers Directive);[52] rules providing for transfer pricing adjustments;[53] and rules on the deductibility of finance expenses in the case of an intermediary company.[54]

As all this information is presented online without identifying the promoter or customer (taxpayer), the taxpayer's right to confidentiality is not infringed.

However, the dividing line between (a) compulsory disclosure of aggressive tax planning schemes and corresponding penalties in the case of non-disclosure and (b) the constitutional protection against compulsory self-incrimination and the right to remain silent is not clearly addressed in the regime on the compulsory disclosure of aggressive tax planning schemes.[55]

Moreover, there is no Portuguese case law on this specific topic.

Another layer of uncertainty is added by the judicial procedure in Portugal. In 2011, just before the financial assistance programme, arbitration courts were set up with a broad scope of competence, covering any illegal taxation and rendering decisions based on the rule of law and not equity.[56]

The purpose was to alleviate the backlog of cases before the tax courts – especially the tax courts of first instance; recourse to the Supreme Administrative Court is admissible only in the case of inconsistency with a decision by the latter or the decision of the Central Administrative Court ("in case of opposition to a decision by the Central Administrative Court or the Supreme Administrative Court": article 25(2)). A decision by the arbitration court can also be referred to the Constitutional Court if the former refuses to apply a rule on the basis of its unconstitutionality or if the unconstitutionality of a rule is invoked (article 25(1)). Finally, a decision by an arbitration court can be annulled by the Central Administrative Court, if the arbitration court violates procedural law.[57]

Independently of constitutional issues regarding the competence of the arbitration courts in a rule-of-law state (which still remain unclear), the fact is that arbitration courts have received and efficiently decided many complex cases. In fact, they work as a parallel judiciary and are recognized as being part of the judicial system by the CJEU, which means that they may also refer cases on the interpretation of EU law to the CJEU.[58]

Having two different categories of courts with competence to interpret and apply tax law provisions, including BEPS-related domestic rules, the multilateral convention and the EU directives, will increase legal uncertainty.

52 See e.g. art. 14 n. 17 CIRC, as amended by Law 7-A/2016, 30 March; arts. 14 nos. 13–15 and 73 n. 10 CIRC.

53 Art. 63 CIRC.

54 Art. 23(1) CIRC.

55 Ana Paula Dourado and Augusto Silva Dias,"Information Duties, Aggressive Tax Planning and the Nemo Tenetur se Ipsum Accusare in light of Article 6 (1) of the ECHR", in G. Kofler, M. Maduro and P. Pistone, (eds.), *Taxation and Human Rights in Europe and the World*, IBFD Publications, Amsterdam, 2011, pp. 143–152.

56 PT: arts 2 and 3 Decree-Law no. 10/2011, 20 January 2011, available at https://www.caad.org.pt/files/documentos/CAAD_AT-RJAT_Consolidado-2013-01-01.pdf.

57 Arts. 27 and 28 Decree-Law no. 10/2011 of 20 January 2011.

58 Art. 267 §3 TFEU: see CJEU, C-377/13, 12 June 2014, *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta SA* v. *Autoridade Tributária e Aduaneira*; PT: Centro de Arbitragem Administrativa e Tributária (CAAD), 31 May 2013, Proc. 137/2012.

2. BEPS measures

2.1. Mainly domestic BEPS actions: Actions 2–5

2.1.1. Identification of priorities

2.1.1.1. BEPS actions

As mentioned above, all BEPS actions received attention from the Portuguese tax authorities and the Ministry of Finance, which actively participated in the working groups at both the OECD and EU level.

2.1.1.2. OECD participation: legislation and regulations

The Portuguese CIRC had already adopted a series of measures that are considered currently as BEPS minimum standards, recommendations or best practices. As mentioned, detailed transfer pricing rules, limits on interest deductibility (Action 4), CFC rules (Action 3) and even exit taxes (declared incompatible with the TFEU by the CJEU), as well as a statutory GAAR, higher tax burden on investments in low-tax jurisdictions and compulsory disclosure of aggressive tax planning structures (Action 12) were already in force.

2.1.1.3. BEPS-related rule changes

This movement was further reinforced by the 2014 corporate income tax reform that had already benefited from early stage BEPS discussions and incorporated some BEPS-inspired rule changes.

One clear example of this relates to the rules limiting the deductibility of interest. In 2013, Portugal repealed its thin capitalization rules, which were presumably incompatible with the TFEU, for being discriminatory against non-resident lenders (*Lankhorst-Hohorst*).[59] Thin capitalization rules are traditionally applicable to cross-border situations, operating as irrebuttable presumptions, and therefore constitute a restriction on the EU freedom of establishment.

Following the German example in response to the *Lankhorst-Hohorst* decision,[60] Portugal replaced its thin capitalization rules with an interest-barrier type regime in 2013. This regime established a limit on interest deduction based on a 30 per cent EBITDA (earnings before interest, taxes, debt and amortization) threshold or a monetary threshold of €3 million. Interest-barrier regimes also imply an irrebuttable presumption of abuse of the deductibility of interest beyond a certain thresh-

59 Germany: ECJ, 12 December 2002, Case C-324/00, *Lankhorst-Hohorst GmbH* v. *Finanzamt Steinfurt*, 2002 I-11779.

60 Germany introduced its interest limitation rules on 18 August 2007. On 10 February 2016, the German Federal Court of Finance (*Bundesfinanzhof*) published a decision dated 14 October 2015 (IR 20/15) in which it took the view that the German interest limitation rule (*Zinsschränke*) is in breach of the German Constitution, for violating the principle of equality. The Federal Court of Finance has accordingly stayed the proceedings and referred the matter to the German Federal Constitutional Court (*Bundesverfassungsgericht*).

old or amount, but because they also apply domestically, they do not raise discrimination issues and are therefore compatible with the EU freedom of establishment.

BEPS Action 3 recommends interest limitation rules that are inspired by the German rules, and therefore the Portuguese regime, indeed, anticipates the recommendation under BEPS Action 4[61] and article 4 of the ATAD.[62]

Subsequent to the 2014 corporate income tax reform, such interest-barrier rules were further reinforced and refined by providing that income tax benefiting from the participation exemption regime was to be carved out from tax relevant earnings before interest, tax, depreciation and amortization (EBITDA) when determining the maximum amount of interest deductions allowed and reducing the monetary threshold to €1 million.[63]

Under article 4(1) of the ATAD, "Exceeding borrowing costs shall be deductible in the tax period in which they are incurred only up to 30 percent of the taxpayer's EBITDA". The amount of interest, depreciation and amortization to be taken into account are the tax adjusted amounts for tax purposes. Also, under article 4(2), income that is exempt from tax is excluded from EBITDA.

It is likely that the Portuguese interest limitation rule will not be amended in the near future, as (a) it is compatible with article 4 of the ATAD and (b) most of the other provisions in article 4 are exceptions to the interest limitation rule. This is an open issue and it may still arise that these further exceptions are included in the Portuguese CIRC.

A different situation is anticipated in article 4(1) of the ATAD, which may be transposed into the Portuguese CIRC. This provision grants the Member States the option of setting a group ratio, as is recommended by BEPS Action 4.[64] In such a case, the amount of deductible interest is to be considered for the entire group:

> "For the purpose of this Article, Member States may also treat as a taxpayer:
> (a) an entity which is permitted or required to apply the rules on behalf of a group, as defined according to national tax law;
> (b) an entity in a group, as defined according to national tax law, which does not consolidate the results of its members for tax purposes.
> In such circumstances, exceeding borrowing costs and the EBITDA may be calculated at the level of the group and comprise the results of all its members."[65]

Other exceptional cases may be considered by the Portuguese Parliament in the near future. For example, Member States may exclude interest from the scope of article 4(1) and authorize the full deduction of excess borrowing costs, if the taxpayer is a standalone entity.

A standalone entity is defined as a taxpayer that is not part of a consolidated group for financial accounting purposes and has no associated enterprise or PE.[66] And article 4(4)(b) further authorizes Member States to exclude from the rule on

[61] OECD (2015), Limiting base erosion involving interest deductions and other financial payments, Action 4, 2015 final report, DOI:10.1787/9789264241176-en, for example, pp. 21–28.

[62] http://data.consilium.europa.eu/doc/document/ST-10426-2016-INIT/en/pdf.

[63] Cf. art. 67 of the CIRC.

[64] OECD (2015), "Limiting Base Erosion Involving Interest Deductions", *op. cit.*

[65] Art. 4(1) ATAD.

[66] Art. 4(3) ATAD.

limitation of interest deductibility excess borrowing costs incurred on loans used to fund a long-term public infrastructure project where the project operator, borrowing costs, assets and income are all in the European Union.

Under Portuguese law, the debt–equity bias will be further neutralized by the introduction of an allowance for growth and investment equity base.[67] This provision has an equivalent function to article 11 of the new proposal for a directive on a common corporate tax base,[68] "Allowance for Growth and Investment Equity Base". Both provisions aim to foster reduction of excessive corporate debt.

Also, regarding hybrids and double non-taxation, the establishment of a broad participation exemption regime by the 2014 corporate income tax reform was accompanied by a specific anti-abuse rule that denied that participation exemption if the income being distributed was deductible for tax purposes for the entity paying the distribution.[69]

After the corporate income tax reform in 2014, the subsequent BEPS-related rule changes were more indirect changes from the implementation of EU directive amendments – such as those from the amendments to the Parent–Subsidiary Directive[70] – rather than those introduced directly by the Portuguese Parliament.

It is anticipated that the anti-hybrid provision as well as exit taxes in Portugal will transpose articles from the ATAD following the same terms and language.

2.1.2. OECD participation

Members and officials of the Centre for Tax Studies participated in the policy discussions of the BEPS actions both at the OECD meetings and in the EU Council, code of conduct group and platforms. As mentioned above, this type of participation in OECD and EU working groups is routine and the BEPS project did not imply a drastic shift in Portuguese general tax policy. Aggressive tax planning has been on the OECD agenda since 1998,[71] and the BEPS project is an opportunity to resolve abuse and disparities in a faster and more efficient manner.

The BEPS project still relies on the international tax order set up after World War II and condensed in the OECD model convention of 1963, and subsequent models and updates. Thus, the work done by tax officials in the BEPS project is a follow-up of previous initiatives.

Approval of EU tax directives involves the Minister of Finance and the Secretary of State for Tax Affairs, while the technical work is carried out by the members and officials of the Centre for Tax Studies.

Business groups, private sector lawyers and accountants, individual taxpayers and NGO representatives have not participated directly in the BEPS project. However, the European Tax Confederation (*Confédération fédéral européenne* (CFE)) has been involved in it, for example, as a member of the EU platform for tax good

67 Art. 41-A CITC, approved in the Portuguese budget for 2017.

68 Proposal for a Council Directive on a Common Corporate Tax Base, 25 October 2016, COM(2016) 685 final 2016/0337 (CNS).

69 Art. 51(10)(a) CIRC.

70 Art. 51(13) and (14) CIRC.

71 1998 OECD Report, Harmful tax competition: an emerging global issue: https://www.oecd.org/tax/transparency/44430243.pdf.

governance. The CFE represents European tax practitioners, including Portuguese tax practitioners. As an academic the reporter has been a member for the EU platform on tax good governance on behalf of the European Association of Tax Law Professors (together with Bertil Wiman, the Swedish branch reporter for this topic).

After initial scepticism regarding the BEPS project, the private sector in Portugal has not reacted publicly, although people have been attending training courses, seminars and conferences on the topic promoted internally and, for example, by the University of Lisbon.[72]

The major consultancy firms have dedicated increasing attention to BEPS developments by sending their lawyers and consultants to these training courses. In these training courses and seminars, it is perceived that some multinationals are especially concerned about the CbCR obligations and the likelihood of juridical international double taxation.

It is anticipated that the lack of any participation or involvement by civil society, tax lawyers and consultants and the business sector in the BEPS project may have a negative impact in the future. Anti-abuse measures may be perceived as unfriendly to the business sector and the context of their introduction misunderstood.

2.1.3. Public consultation

So far, Portuguese tax officials have not promoted public discussions regarding BEPS. However, they have participated in public discussions or conferences about BEPS-related topics, for example, when the draft of the corporate income tax reform was publicly discussed.[73] On that occasion, specific reference was made to the compatibility of the Portuguese tax reform with the BEPS project (the video in the link identified in the previous footnote can be viewed in Portuguese).

2.2. Mainly treaty-based: Actions 6 and 7

BEPS does not seem to have played a decisive role in the tackling of treaty abuse concerns in Portugal, which may be tied to a pre-existing tax treaty policy involving a special willingness to accept limitation on benefits clauses and specific treaty carve-outs allowing for the application of domestic anti-abuse rules. Therefore, it is common for the most recently negotiated tax treaties to adopt this type of rule and thus for the Portuguese tax authorities to claim its application if treaty abuse is present.

The limitation on benefits clauses introduced in Portuguese income tax treaties broadly correspond to the US type of limitation on benefits, which in turn inspired the drafting of limitation on benefits clauses in Action 6.[74]

72 See e.g. http://www.cideeff.pt/initiatives/The-8th-edition-of-the-GREIT-Lisbon-Summer-Course-on-Tax-Competition-after-BEPS/3692/; http://www.ideff.pt/ini_detail.php?zID=26&aID=635; http://www.ideff.pt/ini_detail.php?zID=26&aID=633; http://www.ideff.pt/ini_detail.php?zID=26&aID=565; http://www.ideff.pt/ini_detail.php?zID=26&aID=466.

73 http://www.cideeff.pt/initiatives/Conferencia-sobre-A-Reforma-do-IRC/3523/.

74 OECD (2015), Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, Action 6, 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, available at: http://www.oecd-ilibrary.org/docserver/download/2315331e.pdf?expires=1481650518&id=id&accname=guest&checksum=8D56BB25A5E57AAC10D17DC9B5CDB337.

CFC rules will be applicable in the case of a low-tax jurisdiction that is included in the Portuguese blacklist or that will be listed, in the future, in the pan-EU blacklist (which will replace EU Member States' blacklists). Moreover, if the actual corporate tax paid on its profits by the controlled foreign entity or PE is less than 60 per cent of the Portuguese corporate income tax rate, CFC rules will be applicable.

The CFC rule under the ATAD foresees, on the one hand, its application not only to direct participations, but also to indirect ones. However, article 8 provides for the elimination of double taxation only arising from direct participations, which implies that the Portuguese participation exemption regime may lose its attractiveness. In fact, although articles 7 and 8 of the ATAD do not forbid participation exemption regimes, they may contribute to reducing intermediary companies in the European Union. Unlike Portugal, some Member States with participation exemption regimes apply them only to active income, submitting passive income to worldwide taxation.

The tax treatment of PEs has also been significantly altered from a domestic corporate income tax perspective with the introduction in 2014 of the possibility of opting to apply an exemption to PE income.[75] However, this option was introduced with a series of safeguards that somewhat limit possible abuse, namely by means of provisions aligning the PE definition and recognition with that of tax treaties (rather than domestic law), as well as a special rule allowing for the recapture of tax losses deducted prior to an election for exemption having been made or upon the "transformation" of a PE into a subsidiary.

In this context, it is anticipated that Action 7[76] and a broader definition of PE may still be introduced – if not via the Portuguese legislation, at least via the multilateral convention.

The 2014 tax reform mainly aimed at introducing a tax regime that would be competitive in an EU context, promoting capital import neutrality. Thus, aggressive tax planning concerning the digital economy, hybrids, intangibles and the inadequate concept of PE to the current global economy were not handled as priorities. It seems as though at present it is more important for the Portuguese economy to attract foreign business than to fight aggressive tax planning.

2.3. Mainly transfer pricing and CbCR: Actions 8–10 and 13

The 2014 corporate income tax reform has introduced some changes aimed at improving transfer pricing rules, which were mainly intended to refine the associated enterprises concept and clearly state that transfer pricing rules were applicable to dealings between a Portuguese head office and its PEs. This can be said to be in line with BEPS concerns.

Nonetheless, since 2014, there have been no evident amendments to existing law and regulations that might imply a direct approach and effect regarding BEPS

75 Art. 54-A CIRC.

76 OECD (2015), Preventing the artificial avoidance of permanent establishment status, Action 7, 2015 final report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, available at: http://www.oecd-ilibrary.org/docserver/download/2315341e.pdf?expires=1481642397&id=id&accname=guest&checksum=CA9BC3CF08EC2B922011630FC6EAB4FA.

in this area. As the Portuguese transfer pricing rules closely follow the OECD transfer pricing guidelines, amendments to the OECD guidelines will have an indirect effect in Portugal.

However, the most discernible impact of BEPS (Action 13)[77] was the introduction of CbCR,[78] which was promptly introduced as part of the 2016 Budget Bill.

According to article 121-A CIRC, the Portuguese parent company of a multinational enterprise (MNE) is bound to file CbCR, provided that the parent is not itself owned by a foreign related party that is obliged to submit the CbCR. Furthermore, this information must be filed by those entities that are tax residents in Portugal, but are not the "ultimate parent entity" of a MNE group, if any of the following situations applies: (a) the ultimate parent entity has designated the Portuguese entities to submit the CbCR; (b) the ultimate parent entity of the MNE group is not obliged to file a CbCR in its jurisdiction of tax residence; (c) the jurisdiction in which the ultimate parent entity is resident for tax purposes does not have an agreement for exchange of information with Portugal.

The rapid adoption of CbCR obligations has not been accompanied by any other initiatives from the Portuguese Parliament or tax authorities. The impact may still be considered limited as only a very few groups in Portugal will reach the minimum €750 million threshold. Furthermore, concerning Portuguese subsidiaries of foreign qualifying groups, the set of data required does not deviate from the OECD's recommendations and template.

2.4. Post-BEPS process: concluding remarks

The implementation of anti-BEPS measures has not been at the forefront of Portugal's tax policy apart from the area of early adoption of increased tax reporting obligations (such as CbCR obligations). BEPS is not necessarily seen as a pressing issue for the Portuguese Parliament, in part because corporate income tax law was recently subjected to a reform in 2014 and there is a general concern of ensuring more stability in tax laws.

The main impact of the BEPS project and the adoption of BEPS-inspired rules in Portugal will be a result of the obligation to implement the EU ATAD (which has a deadline for being transposed of 31 December 2018).

Currently, BEPS has been thoroughly discussed in Portugal only in academic fora and even then only in more general terms rather than looking at its particular impact on domestic tax law. Discussions within the Portuguese tax authorities are also perceived to still be at an early stage.

Typically, the tax legislative process in Portugal has not been characterized by an input from the different stakeholders in the tax area, with the recent corporate income tax and personal income tax reforms being an exception. In both cases, drafts of the legislative amendments were disclosed well in advance and were subject to a public discussion among the various stakeholders.

77 OECD (2015), Transfer pricing documentation and country-by-country reporting, Action 13, 2015 final report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris: http://www.oecd-ilibrary.org/docserver/download/2315381e.pdf?expires=1481642731&id=id&accname=guest&checksum=6B5A6600C192F095F4AF366454106F00.

78 Cf. art. 121-A of the CIT Code, as introduced by Law 7-A/2016, 30 March.

The fact that the implementation of anti-BEPS measures is still in an early stage and that some BEPS-inspired rules were only recently introduced explains the lack of any real disputes having arisen, especially before the tax courts and arbitration.

One clear example is the new anti-abuse rule that denies the application of the participation exemption if the income being distributed was deductible for tax purposes for the entity paying such a distribution. The introduction of this rule can be said to be inspired by the BEPS project and is a necessary tool of a modern participation exemption regime, but no disputes or litigation are known regarding its actual application, and specifically regarding pre-existing tax arrangements that aimed at benefiting precisely from a hybrid tax status. The fact that this rule is applicable only from 2014 is also explained by the fact that normal tax inspections for the 2014 fiscal year are still underway, especially for corporate taxpayers that fall under the large taxpayers unit within the tax authorities. Therefore, possible disputes arising from such tax inspections will eventually come to fruition only in the course of 2017.

Regarding another rule inspired by the OECD BEPS project, namely CbCR, the fact that Portugal already adopted such an obligation in the 2016 Budget Bill signals the objective of the Portuguese Parliament and the tax authorities to increase reporting obligations for corporate taxpayers. However, the swift adoption of CbCR in the CIRC was not accompanied by any other action or guidance regarding how to prepare the actual reporting, and it does seem that this is the BEPS measure that will carry the highest compliance burden for corporate taxpayers (although no estimates of the implied burden are available at this stage).

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