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PhD Dissertation

Title of the academic paper(s):	Requirements for Efficient Mandatory Disclosure Rules on Potentially Risky Tax Planning
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Degree program:	Doctoral Program in International Business Taxation - DIBT
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MARCIO HENRIQUE SALES PARADA

Requirements for Efficient Mandatory Disclosure Rules on Potentially Risky Tax Planning

PhD Dissertation

Thesis defended before the Academic Committee, as part of the Doctoral Program in International Business Taxation – DIBT, at the Institute for Austrian and International Tax Law, under the Supervision of Professor Dr. Alexander Rust and Professor Dr. Pasquale Pistone.

Vienna University of Economics and Business (WU)
VIENNA
2021

ACKNOWLEDGMENT

This work is a result of three years of intense study in Vienna. However, being in Vienna was already a result of a long preparation, which culminated in my moving, accompanied by my wife and son, leaving behind a structure of life that took years to build.

But the Institute for Austrian and International Tax Law in Vienna could not be replaced by any other school of law in the world and today I am quite sure and proud of that.

So, first, I want to thank the Institute for the excellent education I received, as well as for the welcome from colleagues, professors and administrative staff.

Next, I thank my wife Odara and my son Arthur, who accompanied me on this journey. Family support was essential and made the achievement much more important.

Finally, I thank God, because we were able to go, come and win.

ABSTRACT

PARADA, Marcio Henrique Sales. **Requirements for Efficient Mandatory Disclosure Rules on Potentially Risky Tax Planning.** 420 p. Doctoral Thesis (core discipline Law) – Institute for Austrian and International Tax Law, Vienna University of Economics and Business, 2021.

This work analyzes mandatory disclosure rules (MDR) under different perspectives describing the origins, the arguments of introducing and the existing regimes, in order to find the most efficient solution when applying this kind of measure. The thesis first examines when the concept of *aggressive tax planning* emerged within the OECD and mentions some of the first steps taken to recognize the relevance and the role of the so-called *tax intermediaries* that promote, designing and offering, such planning. This work proposes a new way of applying MDR on *potentially risky tax planning*. It discusses tax arrangements, which are both *risky* for the taxpayers involved and for the tax administrations because potentially they represent undesirable tax avoidance. Undesirable schemes mean *schemes which produce tax advantages not in accordance with the spirit of the law*. This work understands that developing trust would be a step towards the introduction of MDR; that MDR is suitable for structures developed within the limits of the law and it is designed to increase the tax administration´s capacity to react, especially involving the need for changes in the legislation, identifying the existence of loopholes or mismatches, which allow undesirable tax planning to work. However, as the tax administration inspection power increases, on the other hand, the taxpayers raise issues such as privacy, confidentiality, uncertainty, freedom of enterprise and proportionality. The question that arises is whether an apparently legal or legitimate proceeding (tax planning) should be controlled or limited by any kind of legal or administrative action. Moreover, could this action work without precise legal definitions? This research also aims to discuss the right of the taxpayer to economic enterprise freedom, under the possible introduction of MDR, focusing on the action's legitimacy, analyzing equality, justice, certainty and fundamental freedoms, thus providing a legal analysis of the measure and its compatibility with constitutional principles. Finally, results are presented with suggestions and advice that aim at a practical, efficient and effective application of MDR. For instance, the suggestion to reward those who comply with the obligation and, regarding the sanctions, the *third part liability* between taxpayers and intermediaries. The point is that MDR plays a role in attributing civil liability to tax consultants for acting with a lack of care or negligence towards their clients when offering tax planning. The existence of the obligation makes the promoter's duty to inform the client that the arrangement contains characteristics that require it to be disclosed clear and robust. The general conclusion is that MDR is a system that requires adaptability by taxpayers, intermediaries and tax administration. The best results will not come right after the measure is implemented, adjusts will certainly be necessary to *balance* the system. An important characteristic, which this work suggests to all MDR: starting as small as possible and expanding gradually. This will bring certainty and trust in the application. The contribution is to show that MDR can be used as an instrument in building a trust-based relationship that is beneficial to both tax authorities and taxpayers.

REQUIREMENTS FOR EFFICIENT MANDATORY DISCLOSURE RULES ON POTENTIALLY RISKY TAX PLANNING

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I. INTRODUCTION.

This work analyzes mandatory disclosure rules (MDR) under different perspectives describing the origins, the arguments of introducing and the existing MDR, in order to find the most efficient solution when applying this kind of measure. The thesis first examines when the concept of *aggressive tax planning* emerged within the Organization for Economic Co-operation and Development (OECD) and mentions some of the first steps taken by the Organization to recognize the relevance and the role of the so-called *tax intermediaries* that promote such planning. The objective is to demonstrate how, basically, the idea of creating the obligation to disclose tax planning was born, with focus on the intermediaries, which led to BEPS[1] Action 12.

This action has become known as Mandatory Disclosure Rules on "*aggressive tax planning*" from OECD works (2002 – Forum on Tax Administrations; 2006 – Seoul Declaration; 2008 – The Role of Tax Intermediaries; 2009 – Engaging with High Net Worth Individuals and 2011 – Tackling Aggressive Tax Planning by improving Transparency and Disclosure)[2]. Despite the fact that the 2008 Study focused on big companies and the 2009 Report focused on the high net worth individuals, both describe the market for "*aggressive tax planning*" as a market governed by demand and supply laws like any other. Thus, three players are pointed out: the taxpayers, the intermediaries and the tax administration. The question is how to reduce the demand in this market, developing the relationship between the tax administration and taxpayers. Developing trust would be a step towards the introduction of MDR, which focuses on the intermediaries or the supply-driven. The solution involves the development of risk management analysis and clear, timely and specific information is required.

The thesis is based on the premise that it is not efficient to define what *aggressive* means, when applying MDR, and taking into consideration previous works by the OECD, which are based on risk analysis methodology, this work proposes a new way of applying MDR on *potentially risky tax planning*. Thus, it discusses tax arrangements, which are both *risky* for the taxpayers involved and for the tax administrations because potentially they represent undesirable[3] tax avoidance. This point is aligned with the explanation[4]: "*according to the EU Commission, an endeavour to define the concept of aggressive tax planning would risk being in vain. This is because aggressive tax planning structures have evolved over the years to become particularly complex and are always*

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[1] OECD (2013). *Action Plan on Base Erosion and Profit Shifting.* Paris: OECD Publishing, 2013. Published on 19 Jul 2013.

[2] OECD (2008). *Study into the role of Tax Intermediaries* ("*2008 Study*"), Paris: OECD Publishing, 2008. OECD (2009). *Engaging with High Net Worth Individuals on Tax Compliance,* Paris: OECD Publishing, 2009. OECD (2011). *Tackling aggressive tax planning through improved transparency and disclosure*, Paris: OECD Publishing, 2011.

[3] NOTE. "*Undesirable schemes*" means "*schemes which produce tax advantages not desired by the tax law*" or "*schemes which produce tax advantages not in accordance with the spirit of the law*". The conceptualization will be made clear in the thesis.

[4] PIANTAVIGNA, Paolo. *Reflections on the Fight against Aggressive Tax Planning (When the Law is Silent)*. World Tax Journal, v. 10, n. 4, 2018. Published online: 19 Sep 2018.

subject to constant modifications and adjustments to react to defensive counter-measures by the tax authorities."

When classifying taxpayers by risk factors it is also better to understand the facts and circumstances of their activities, which are not normally presented in the annual tax returns. This way, tax administrations may choose to conduct audits only in relation to taxpayers involved in similar events or circumstances and to avoid some gaps that normally arise when collecting information on tax returns. This also represents an increase in efficiency, speed and optimization of results. Mandatory disclosure rules can be applied as an instrument in this process.

In order to increase knowledge and to allow comparisons, previous mandatory disclosure systems of tax planning existing in the United Kingdom, Portugal and Ireland are described, besides an attempt to introduce the obligation in Brazil, during the BEPS Action 12 development[5]. Moreover, the Council Directive (EU) 2018/822 of 25 May 2018, amending Directive 2011/16/EU in regards to mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements is extensively analyzed, considering the European Union´s framework, the existence of a common market and the free movement of capital, persons, services and goods and its particularities, which imposes special challenges.

Mandatory disclosure rules in tax matter have a specific objective. They do not mean paying more tax, directly, but they mean an extra obligation with the scope to provide knowledge, control and the possibility to react when any undesirable result is detected. Consequently, as the tax administration inspection power increases, on the other hand, the taxpayers raise issues such as privacy, confidentiality, legal uncertainty and excessive burden.

The question that arises is whether an apparently legal or legitimate proceeding (tax planning) should be controlled or limited by any kind of administrative action. Moreover, could this action work without precise legal definitions, which make an eventual *checks and balances*[6] control possible, avoiding administrative excesses?

Constitutional limits, therefore, are at stake. In contemporary states, the power to tax is one of the favorite constitutional legislators' fields of work. Both because the exercise of taxation is fundamental to the interests of the state, to produce enough revenue to cover the always increasing social needs, and to use taxes as an instrument of extra-fiscal policies, a technique in which the interventionist state is lavish[7] . Therefore, being extremely robust, taxation power must be disciplined and contained for the sake of citizens' security[8].

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[5] OECD (2015). *Mandatory Disclosure Rules, Action 12 - 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project. Paris: OECD Publishing, 2015. Published on 05 Oct 2015.

[6] See the definition of the concept available at: *https://www.britannica.com/topic/checks-and-balances.*

[7] LEROY, Marc. *Taxation, the State and Society: the fiscal sociology of interventionist democracy*. Brussels: P.I.E Peter Lang SA, 2011.

[8] COELHO, Sacha Calmon Navarro. *Curso de Direito Tributário Brasileiro.* 6. ed. Rio de Janeiro: Forense, 2001, p. 37.

This research also aims to analyze two important pillars that are considered in almost all modern constitutions: the right of the State to create and demand taxes and the right of taxpayers to freely develop their economic activities. Thus, the State can tax as long as it does not create obstacles for the taxpayers to practice their activities and even organize themselves to pay the lowest possible burden, within the boundaries of the law. More specifically, the objective is to discuss the right of the taxpayer to economic enterprise freedom, under the possible introduction of mandatory disclosure rules in order to provide tax administration with early information about tax planning. The focus is on the action's legitimacy, analyzing equality, justice, certainty and fundamental freedoms within a constitutional perspective in the current economic, social and legal reality.

There is, obviously, a demand on the more precise definition of "aggressive" or "abusive" and on the effective role of the intermediaries and its legal consequences. However, providing these definitions could make the system ineffective. Exactly because the majority of the tax planning to be considered relies on the existence of weakness in tax systems which were built over hard and formalist interpretations of the Rule of Law, both by exploring the mismatches between domestic systems acting internationally and by exploring loopholes caused by their inadequacy to cover the new economic reality.

That is why it is possible to observe a fluid and malleable *tax organization*, flowing through rigid systems, as a consequence of globalization and liberalization of capital. Harmonizing all systems in order to eliminate all the disparities is not a good solution, because it is necessary to respect the sovereignty and the particularities of each country. Then, the solution would be to flexibilize concepts. This flexibilization, which could promote a smooth adjustment between two different tax systems, cannot be unlimited, but it also cannot, on the other hand, be flatly rejected by the constitutional courts and legislators.

The objective is not to criticize the existing MDR, but to propose some specific actions to improve the system. BEPS Program is an unstoppable force and there is an international pressure for transparency, which is why I believe that in the near future MDR will become a widespread system, as in the recent past the end of bank secrecy and the CRS[9]. The BEPS actions depend on one another and on other transparency initiatives for successful implementation. For example, the development of the multilateral legal instrument which is intended to deliver a simultaneous renegotiation of about 3,000 bilateral tax treaties (Action 15), as well as the progress in the Country-by-Country Reporting (CbCR), which requires multinationals to report both tax and general business information yearly and by jurisdiction where they operate. Specifically, Action 12 is connected to Action 5, which intends to counter harmful tax practices more effectively, taking transparency and substance into account, restoring the full effects and benefits of international standards.

[9] OECD (2014). The Common Reporting Standard (CRS), developed in response to the G20 request and approved by the OECD Council on 15 July 2014, calls on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis. Available at: https://www.oecd.org/tax/automatic-exchange/common-reporting-standard/. Accessed on 26 Nov 2019.

1.1 Motivation.

In 2015, shortly before the release of the BEPS Action 12 - final report, Brazil launched the Provisional Measure n. 685/2015[10], which caused great repercussion in the tax community. In short, the Provisional Measure introduced mandatory disclosure rules on aggressive tax planning to the domestic legislation, following the suggestion presented by BEPS Action 12. That year was my 17th anniversary working for the Brazilian Federal Revenue Service - RFB, 10 of which in taxpayer assessment. Until then, the Brazilian Tax Administration had a work policy aimed at auditing and the increase in number was, at the same time as the launch of the new legislation, celebrated by top officials. Brazilian Federal Revenue Service announced that the audits to tax offenses committed by taxpayers would set records compared to the previous year "*reaching R$ 75 billion in the first semester, 40% higher than for the same period the previous year (R$ 53,77 billion)*" [11]. The Tax Administration attributed the increase of this type of assessment to the improvement of its technological system, which improves oversight of taxpayers' behavior patterns and catches "*small scams*" of the taxpayers when paying their taxes. Those audits also included delay and non-compliance.

The two policies struck me as conflicting: introducing the obligation to disclose tax planning to the Tax Administration that bases its work on a growing number of audits. In other words, it doesn´t seem efficient to require those who were subject to auditing and whose primary purpose in relation to RFB was precisely to avoid those audits, at the same time to provide information so that the tax authorities could accurately improve their audit performance. That was the trigger of my curiosity about the matter.

Therefore, this Brazilian experience piqued my interest to study BEPS Action 12 and MDR in general, including the OECD proposal and the experiences of some countries that employed this kind of action.

The first idea was to work with the *psychology of taxation* to demonstrate how paradoxical the situation mentioned above can be. Erich Kirchler´s work caught my attention. In his book *The Economic Psychology of Tax Behavior*[12], he develops a model based on two dimensions: "*originating from the interaction climate between tax authorities and taxpayers, the dimensions are defined by citizens´ trust in authorities and the power of authorities to control taxpayers effectively*". He explains, moreover, that trust depends on cooperation and favors cooperation. A

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[10] BRAZIL (2015). Câmara dos Deputados. Provisional Measure n. 685, 22 Jul 2015, converted into Law n. 13.202, 2015. Provides for the Tax Litigation Reduction Program - PRORELIT, creates an obligation to inform legal transactions and acts or transactions that result in tax suppression, reduction or deferral to the federal tax administration and establishes other measures.

[11] TEIXEIRA, Maíra. *Can billionaire IRS audits revert drop in revenue?* (Autuações bilionárias da Receita Federal podem reverter queda na arrecadação?). São Paulo: Economia – iG. Available at: https://economia.ig.com.br/2015-09-01/autuacoes-bilionarias-da-receita-federal-podem-reverter-queda-na-arrecadacao.html. Published online: 01 Sep 2015. "*Simultaneously to this environment of scarce revenues with no foreseen improvement, the RFB announced that the audits to taxpayer's infringements generated record credits - Jung Martins, Subsecretário de Fiscalização, states that it is not possible to say 'scientifically' if tax evasion has decreased, but there is less and less potential for taxpayers who try to circumvent their tax obligations: We understand that tax evasion has decreased because the tools we have today inhibit or identify situations. The fight and the audits have been more efficient, no doubt.*"

[12] KIRCHLER, Erich. *The Economic Psychology of Tax Behavior*. Cambridge: Cambridge University Press, 2009. Preface, xiii.

cooperative climate is based on a motivational posture and on high tax morale in the society. Rather than guaranteeing compliance, audits and fines may have the opposite effects in a trusting environment and thus corrupt voluntary compliance. That is why one of the key points of this research is to demonstrate that being mandatory is not enough, in the case of tax planning disclosure, even if "*dissuasive*" sanctions are established.

When Kirchler presented his model[13], he said that there was a need for empirical evidence to support it and that the model could also prove to be of practical value in discussions on the power of authorities, taxpayers´ trust in authorities and strategies to shift taxpayers from enforced compliance to voluntary compliance through dialogue and support[14].

MDR may be a good field to apply those ideas based on cooperation and voluntary compliance, realizing that the OECD did not establish a "*minimum standard*"[15]; that previous experiences contained nuances not revealed in the BEPS Action 12 discussion and that the analysis of the origins of the thinking about "*aggressive tax planning*" and the systematization of OECD studies that culminated in Action 12 provide several good hints. Moreover, some failed attempts or studies for the introduction of MDR could provide the necessary answers for the development of the proposed measure, as a new tax obligation, which especially interferes in the taxpayers' rights. For instance, in France the disclosure of aggressive tax-planning implementation was considered and analyzed[16] and the French Constitutional Court rejected a proposal included in the finance bill for 2014, considering the project unclear and ambiguous, creating excessive legal uncertainty for taxpayers and the possibility of arbitrary application of the law by the Tax Administration. In Germany, considering the OECD recommendations, as of 2014 German authorities started to analyze the possibility of introducing mandatory disclosure rules to tackle tax avoidance. A study[17] conducted by researchers at Max Planck Institute for Tax Law and Public Finance presented a document examining whether a disclosure requirement for tax structuring could be implemented in an admissible and expedient manner in German tax law.

Nevertheless, taking into consideration my academic background in law and my practical experience in the public administration, the idea for contributing turned to more legal and administrative analysis. In this sense, no surveys or series of interviews were conducted to determine individual behavior patterns. What this study provides is an analysis of the issues and difficulties raised by taxpayers and intermediaries, for example in public discussions and various comments that have been common in the doctrine and opinions of professional entities, such as

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[13] Ibid. Slippery-slope model of voluntary compliance versus enforced compliance, p. 205.

[14] Ibid, p. 206.

[15] OECD (2015). Op. Cit., p. 9. "*The recommendations in this Report do not represent a minimum standard and countries are free to choose whether or not to introduce mandatory disclosure regimes.*"

[16] MAJED, Leila. *Implementation in France of the disclosure of aggressive tax planning arrangements under action 12 of BEPS*. ABDF – Brazilian Association of Finance Law. Available at: http://www.abdf.com.br/index.php?option=com_content&view=article&id=2175. Accessed on: 9/5/2018.

[17] OSTERLOH-KONRAD, Christine, HEBER, Caroline and BEUCHERT, Tobias. *Notification obligations for tax planning in Germany*. Max Planck Institute for Tax Law and Public Finance. Munich, Germany. Published online: 26 Jan 2017. Available at: https://link.springer.com/chapter/10.1007/978-3-662-53761-9_5. Accessed on 26 Jul 2018.

the prohibition for self-incrimination, the limits of the intermediaries liability on the planning[18], the right to confidentiality in the professional relationship and privacy.

Commonly, it is possible to observe legal measures, which cause major practical difficulties for enforcement for both Tax Administrations and taxpayers. Lawmakers pose political and social intentions that transcend the practicality of the measures and the principle of administrative efficiency. By its turn, to observe the binding commands of the law, the public administration enacts a series of acts, regulations and norms, creating a large net of rules, which leads to an increase in complexity of the tax law. If the law is integrated with the administrative practice, this process could be simplified. On the other hand, administrative practice often doesn´t focus on the legal problems and the position of the Courts of Justice. Acts are enforced based on the circumstantial evaluation by the public administration, focusing on practical solutions but not envisaging future judicial disputes. Here, analyzing a specific measure in tax field, this work puts both views together searching for efficiency, simplicity and objectiveness.

1.2 Scope and Contribution.

This work intends to present mandatory disclosure rules as seen from a technical and practical point of view. It is not, however, a *guidance manual* or a *checklist* to be observed for the introduction of MDR. For example, when the OECD drafted BEPS Action 12 and submitted it for public commentary, many of them were arguing that the Organization was neither providing specific definitions for this or that concept, nor providing specific instructions on how to apply certain proposals. Similarly, there is no intention to do this here, *i.e.*, provide closed definitions for concepts that should be used when applying MDR or describing the systematic action for implementation. This work´s idea is to explain the origins, the fundaments, the challenges and the particularities surrounding MDR, in general. The goal will be achieved if the reader, at the end, understands the BEPS Action 12 proposal, can think for himself within the reality and legislation of his country, and if asked to do so, could provide good answers on how to introduce MDR efficiently and effectively in a given scenario.

This thesis is interdisciplinary[19] and it has, basically, two objectives: *first,* demonstrating that MDR can be used efficiently if the tax administration follows certain advice and meets certain

[18] NOTE: I mean the extent to which an intermediary or adviser can be held liable for the tax consequences of a scheme or arrangement they have designed, offered or implemented to their client(s).

[19] TAEKEMA, Sanne and VAN KLINK, Bart. *Law and Method. Interdisciplinary Research into Law.* Tübingen: Gulde-Druck, 2011, p. 8-9. *"This means that we first need to identify the elements that determine the perspective of a particular discipline in order to assess how far the interdisciplinary work moves beyond the single discipline. (...) The fifth element is the research goal or goals pursued by a discipline. A common distinction is that between descriptive and evaluative research: aiming at a correct description or explanation of a phenomenon or aiming at a normative evaluation."*

standards. This objective focuses on public administration, the development of public policies, especially tax policy. It focuses on seeking a solution to an apparent conflict having as actors the tax authorities (state) and taxpayers (society), their relationship and MDR as the object. *Second,* demonstrating that MDR does not contravene constitutional principles and fundamental rights, in this case, constitutional tax principles and fundamental taxpayer rights. In this objective, the compatibility of the measure with the principles and norms is demonstrated based on a sociological and practical view, focused on the contemporary social purposes of taxation. The interdisciplinarity is, therefore, between the disciplines of public administration and law, having as its object an eminently administrative action, which must contain legal provision and submit to constitutional principles.

Focusing on Action 12, specifically, and on the BEPS proposal, in general, Chapter II aims to analyze its need and usefulness within the current context, explaining all the "history" of MDR and its elements. The issues related to the process of economic development that explain and justify the actions that led to MDR proposal also integrate the research content. Chapter III seeks to analyze the proposal comparing it to existing or developing systems, to demonstrate that there are points that can be better developed and undergo improvements, seeking for efficiency and effectiveness when applying the measure, while trying to avoid future problems leading to litigation and resistance from taxpayers and tax intermediaries. Chapter IV provides a legal analysis of the measure and its compatibility with constitutional principles. It is not feasible to analyze each constitution, from every country, but the commented principles are clearly and widely used in terms of taxation, worldwide. A modern conception of constitutionalism is used in the sense of pragmatism. Finally, Chapter V presents the result of the work, with suggestions and advice that aim at a practical, efficient and effective application of MDR on tax planning that potentially poses a risk to both the tax administration and to the taxpayer who deals with it.

The contribution of this work can be summarized in four main topics: first, the historical part of MDR, which seeks to explain why it is necessary, why the focus on intermediaries and why the use of hallmarks, intending to demonstrate the relevance of the topic for applying fairer taxation. Second, in the MDR description, the contribution is to show that it can be used as an instrument in building a trust-based relationship that is beneficial to both tax authorities and taxpayers, and not only as an instrument of repression or increasing compliance burden. Third, in the eminently legal analysis, the contribution is to show that MDR conforms to constitutional principles of taxation. Finally, it is discussed the application of joint and several liability; which, although existing in terms of taxation, has not yet been employed as a result of MDR.

1.3 Originality and Impact.

In general, this work supports the OECD idea and the BEPS Action 12 proposals, understanding that this is a beneficial measure for both tax administration and taxpayers, and the interdisciplinarity

abovementioned is a special contribution to the OECD/BEPS Action 12 - final report. In that final report, there is no such approach or legal justification, which seeks to circumvent potential problems with constitutional courts when evaluating the application of the MDR, in practice.

Moreover, the OECD work carries a dose of politics, pressure for results and broadness for reaching the maximum possible number of its members and non-members. The concern with the "*inclusive framework*" is evident and each report joyously announces the participation or adhesion of another country. For the Organization, the data on the number of participants seems extremely important to legitimize the action. However, as will be pointed out, MDR was used in only a few countries when proposed in the BEPS, in some without significant result and in others marked by particularities that are not directly connected with BEPS scope. Thus, part of the originality of this work lies precisely in technical and scientific analysis, without any political interest or seeking legitimacy beyond science itself.

Another original point is the strong suggestion to reward those who comply with the obligation. More than a reduction of fees or monetary compensation, benefits arising from the strengthening and widening of relations between tax authorities and taxpayers. Although suggested by the OECD, it is not mentioned in the European Directive, which introduces the obligation of EU-members implementing domestically mandatory disclosure rules, for example. In this work, this possibility is strongly defended, understanding it to be more effective than sanctions. Penalties shall be provided, but rewards are an important factor in the proper functioning of the system. Furthermore, regarding the sanctions, the "*joint and several liability*" or "*third part liability*" between taxpayers and intermediaries was not analyzed in the Action 12 Final Report. It exists in other circumstances but not within the scope of MDR. The possibility, the definition of "common interest" in tax planning, whether factual, economic, legal or a combination of all of them, and its consequences are presented at the end.

The impact would be too much pressure on the tax planning market. Tax planning firms, promoters and intermediaries have the option to inform their clients that they are required to disclose the planning being offered / implemented, in which case the client decides whether to actually use a planning that will be revealed to the tax authorities or not; or these promoters and intermediaries can "risk" the planning being discovered, in which case they might be responsible for losses and damages suffered by that client. This discredits or circumvents various arguments connected to self-incrimination, or a limitation of the free professional exercise, for instance.

On the other hand, the effect intended is not to end the discipline of tax planning as the taxpayer right to organize his business in such a way as to pay the lowest possible tax burden, within the limits of the law. This work understands it to be a support pillar in the tax relationship and in the power to tax as well as in the economic freedom. What this research aims to demonstrate is that the obligation to disclose such planning can greatly contribute to the simplification and improvement of the tax system. Thus, a more transparent and simpler tax system would naturally lead to fewer options for tax planning. As a result, fewer planning options would lead to a more stable system (permanence of laws and codes over time), which causes the level of certainty to increase; hence, more certainty leads to greater trust between taxpayers and

tax authorities; finally, more trust increases voluntary compliance and reduces the need for tax planning intermediaries. However, the right to organize oneself economically and the discipline of tax planning remain.

This work has two important characteristics. *First,* it can be classified as what Boyer[20] called the "*scholarship of application*" which presents a different kind of intellectual understanding, as a result of "*acts of application*", distinctly from what he called "*scholarship of discovery*". Therefore, it is important to emphasize about the scientific contribution of this work that Boyer[21] argued that what we typically call *research* is only a small part of the scholarly work of academics, and we should also give equal status to other kinds of rigorous investigation and their outputs. According to him, scholarship of discovery presents new knowledge as a result of conceptual or empirical discoveries. As well as scholarship of discovery, there are scholarship of integration, scholarship of application and scholarship of teaching.

Concentrating on the first three above, Golding[22] summarizes: scholarship of discovery produces new knowledge that advances or contributes to a field or discipline; scholarship of integration produces syntheses, connections, "*larger intellectual patterns*", "*more comprehensive understandings*"[23], and scholarship of application focus on how can we apply our knowledge to solve problems in practice, offering applications, guidelines, policy, advice, "*outreach*" or "*engagement*".

It is possible to say that among the possibilities afore-named, this work establishes connections, seeks for patterns and "*more comprehensive understandings*" and focuses on the application, to confirm and to expand the proposal of introducing rules of disclosing certain tax planning structures, an idea which has already been launched.

Second, because its practical focus, the intended readers are tax authorities and tax policy makers interested in applying MDR. The purpose will be completely achieved if it enables the reader to see the structural features of a given MDR more clearly and to evaluate the system by himself.

Paraphrasing Golding[24], the intellectual objective of this work is advising the intended readers with suggestions which were developed as a result of applying previous research about the OECD proposals and existent MDR. At the end, the advice is the contribution of this thesis, and this advice was developed by analyzing what we already know from previous research, experiences and proposals. The work does not claim that every piece of advice is a new discovery in the sense of *never thought of before*, because this would only be appropriate for the scholarship of discovery, not application. However, the thesis makes a valuable research contribution by offering a practical

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[20] BOYER, Ernest. L. *Scholarship Reconsidered: Priorities of the Professoriate*. San Francisco, CA: Jossey-Bass, 1990, p. 23.
[21] Ibid.
[22] GOLDING, Clinton. *Advice for writing a thesis (based on what examiners do)*. Open Review of Educational Research, v. 4, n. 1, 2017, p. 46-60. Published online: 19 Mar 2017.
[23] BOYER (1990). Op. Cit., p. 19-22.
[24] GOLDING (2017). Op. Cit., p. 47.

and objective way to formulate and to use MDR based on what some countries are doing and on the behavior expected from intermediaries and taxpayers.

1.4 Limitations.

As mentioned, an excellent and productive field of study to confirm or deny the assertions that this work poses would be the European Union. It turns out that after the release of BEPS Action 12 - final report, in 2015, the European Union launched proposals for the amendment of Council Directive 2011/16/EU on administrative cooperation in the field of taxation resulting in the Council Directive (EU) 2018/822[25], of 25 May 2018 (commonly referred to as DAC 6). Thus, the EU-Member States shall adopt and publish, by 31 December 2019 at the latest, the laws, regulations and administrative provisions necessary to comply with that Directive.

Therefore, considering that this research started in 2017/2018, if on one hand the subject reveals itself as so present and interesting, on the other hand 2019 was extremely rich in "drafts", public consultations, proposals, criticism and new legislations, representing an increasing challenge for the conclusion of this work.

Moreover, the limitation is that at the end of this research, not even the first mandatory disclosure will have been delivered, considering that according to the EU-Directive, intermediaries and relevant taxpayers, as appropriate, shall file information on those reportable cross-border arrangements by 31 August 2020, consequently, fundamental analysis and results of the automatic exchange of information will not yet have been shown. The automatic exchange of information shall take place within one month of the end of the quarter in which the information was filed and the first information shall be communicated by 31 October 2020.

Furthermore, there are no higher court rulings on the MDR. It may be based on previous positions regarding similar situations, such as the automatic exchange of bank information, but not specifically in relation to tax planning considered in MDR scope. The MDR in force, which are broadly mentioned as examples and support in the OECD final report besides not having been introduced with focus on international schemes, they were not developed targeting international exchange of information, especially the UK-DOTAS.

Finally, a crucial point discussed in this work is the proportionality of MDR, analyzing whether the benefits it produces outweigh the constraints it causes for taxpayers and tax intermediaries/advisors. This is a practical measure, which can only be effectively analyzed by verifying the actual treatment, use and application by the tax administration of the information

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[25] EUROPEAN UNION (2018). Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. OJ L 139, 5.6.2018, p. 1–13.

obtained. It is also possible to make predictions based on similar measures, but not exactly in relation to MDR that focuses on international planning.

Accordingly, more work can be done to empirically study what happens when tax administrations follow or not my advice. For instance, what the intermediaries ask before the courts and what they answer about professional privileges, different treatment for different professional categories and predictable ethical conflicts that this work anticipates will occur. This is a fruitful field for future works, when there will be available data and reports about the effective use of MDR focusing on international schemes and on international cooperation.

1.5 The efficient, the effective, the proportional and the reasonable.

It would be important to clarify these concepts early, in the introduction of this work, from a comment made by a colleague, in one of my presentations during the development of this research. She said I was being inaccurate in using the terms efficient and effective throughout the text. Considering that the title of this work contains "efficient", it seemed to me that it really was necessary to explain, not only for linguistic or grammatical reasons, but mainly for teleological ones, in order to make what I am referring to and what I want to achieve perfectly clear.

Teleology, from the Greek word *telos,* meaning “purpose” or “end,” is the study of goals, ends and purposes. Macdonald and Beck-Dudley[26] explain that “*teleological approaches morally evaluate actions by looking to their consequences - right actions being right because they tend to have good consequences, wrong actions being wrong because they tend to have bad consequences. Thus, evaluations of consequences as good or bad provide the premises for inferring the norms of right acting*”.

Good administration is often defined in terms of improved efficiency and this principle has been expressly mentioned in laws and constitutions as one of the pillars of public administration[27]. Goodin and Wilenski[28] define it as a “surface-principle”, in which, according to them, exist implicit meta-principles, which underlie and give meaning to it. They explain that “*in the case of efficiency, those other principles seem to be ones of satisfying people's wants and, deeper still, of respecting persons”.* According to those authors, what stands most immediately behind the goal of efficiency is the more fundamental goal of want-satisfaction and the only reason it is good to use resources efficiently is that the same stock of resources, efficiently used, will satisfy more wants rather than

[26] MACDONALD, James E. and BECK-DUDLEY. *Are deontology and teleology mutually exclusive?* Journal of Business Ethics, v. 13, n. 8, 1994, p. 615–623.
[27]BRAZIL (1988). Constituição da República Federativa do Brasil, 05 Oct 1988. Cap. VII, Sec. I, Art. 37. *The direct and indirect public administration of any of the powers of the Union, the States, the Federal District and the Municipalities shall obey the principles of legality, impersonality, morality, publicity and* ***efficiency,*** *and the following: ...* (Constitutional Amendment n. 19, 1998). (Emphasis added).
[28] GOODIN, Robert E. and WILENSKI, Peter. *Beyond Efficiency: The Logical Underpinnings of Administrative Principles.* Public Administration Review, v. 44, n. 6, 1984, p. 512-517.

less. Thus, from society's point of view, it is better to conduct our collective affairs efficiently, applying the available resources in order to get more of what we, as a society, want.

In this work, *efficiency* is used in the sense of achieving the better or optimal (a sum of efficiency, fairness and simplicity) objectives when applying MDR, while using the least energy possible or, in other words, representing the lowest cost to both, the tax administration and the taxpayers. Thus, on efficiency as an input-output measure where results need to be weighed against costs[29]. For instance, the definition of "aggressive" is not efficient because it produces uncertainties and loopholes, which, over time, could be used to circumvent MDR, i.e., tax planning developed to avoid the disclosure obligation. Thus, the definition consumes energy unnecessarily and threatens the achievement of optimal results.

When mentioning *effectiveness*, this work means the norms capability of producing a desired result or the ability to produce desired output. Kelsen[30] says that sanctions are decreed by a normative order for guaranteeing its *effectiveness*. The usual view is that the effectiveness of a normative order consists in the fact that its norms, which command a certain behavior, are actually observed and, if not observed, then sanctions are applied. The OECD and the European Commission suggest the use of penalties for non-compliance with MDR. The Directive´s wording is: "*Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and concerning Articles 8aa and 8ab, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive*".

Sanctions are part of any tax obligation and being coercive is a basic feature of a tax, but one of the points this work highlights is precisely to show that being mandatory is not enough in this regime. Information will not be obtained efficiently, only based on the threat of sanctions in the event of non-compliance.

Following up, Kelsen[31] still distinguishes effectiveness from validity by placing the former as a condition for the latter: "*since on the one hand the effectiveness of a norm consists in the fact that it is actually observed by and large, and since on the other hand the validity of a norm consists in the fact that it ought to be observed and if not observed, then applied, therefore the validity of a norm must be distinguished from its effectiveness as an Ought from an Is*".

In fact, effectiveness is a problem regarding the acceptance in practice of the norm by the people who must comply with it and in case of non-compliance the sanction is applied. It represents a measure of whether or not the norm produces effect, if it becomes real, its concrete performance. The problem of effectiveness is a matter of human reaction to what is imposed on it, human interests and the effect of the coerciveness of the legal norm, and its measurement is a

[29] Ibid, p. 512.
[30] KELSEN, Hans. *General Theory of Norms*. Oxford University Press, 1991. Published to Oxford Scholarship Online: March 2012, p. 138. Available at: https://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780198252177.001.0001/acprof-9780198252177-chapter-34. Accessed on: 16 Sep 2019.
[31] Ibid, p. 139.

phenomenological problem of law. There are valid however ineffective norms, such as norms that fall into disuse over time, or those which are legally in force but have no desired social effect. An example that will be discussed in this work is the mandatory disclosure regime introduced in Portugal, in 2008.

Concepts of what is reasonable and proportional have also been included because reasonableness and proportionality are principles that have gained great value in the analysis of courts of law, in recent decades, when assessing the constitutionality of administrative laws[32]. They are generally regarded as standards of judicial review or principles for the interpretation and application of other legal principles and rules.

The reasonableness test may just require a rational – as a general logical relationship between ends and means – interpretation of any law, to avoid absurd results. In general, the reasonableness standard of review may either narrow or broaden the scope of normative acts according to their purpose and within their specific or general context. This work applies *reasonableness* as a principle of legitimation of the norm. Humberto Ávila[33] points out that reasonableness constitutes a "*guideline that requires a linkage of legal norms with the world to which they refer, either it is demanding the existence of an empirical and adequate support to any legal act, or to demand a congruent relation between the measure adopted and the purpose it intends to achieve*."

Proportionality may have the same objective, to avoid unreasonableness or absurdity in law in search of more fairness and consistency, by adding the ingredients of balance, conciliation, optimization or effectiveness and efficiency. As a result, it may require a higher degree of scrutiny through which principles must be balanced against each other and any measure must be reasonable, proportionate or necessary to its legitimate ends. For example, proportionality is an important principle for gauging the legitimacy of a European Directive. The principle of proportionality is laid down in Article 5 (4) of the TFEU. Under this rule, the action of the EU must be limited to what is necessary to achieve the objectives of the Treaties.

As Humberto Ávila[34] explains, a suitable means is that which is capable of promoting its end, and the necessary means is the least restrictive, among all those equally adequate, with respect to fundamental rights. In other words, a legal or administrative measure is *proportional* if the advantages it promotes outweigh the disadvantages it causes. This work discusses whether the limitations and costs MDR imposes on taxpayers and promoters are effectively compensated for the social benefit that results from use of the data they make available to tax administrations.

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[32] REGIMBALD, Guy. *Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review*. Manitoba Law Journal, v. 31, n. 2, 2005, p. 239. Available at: http://themanitobalawjournal.com/volumes/. Accessed on: 21 Sep 2019.

[33] ÁVILA, Humberto. *Teoria dos Princípios: da definição à aplicação dos princípios jurídicos.* 18 ed., São Paulo: Malheiros, 2018, p. 195. NOTE: this book also has English (*Theory of Legal Principles*), German (*Theorie der Rechtsprinzipien*) and Italian (*Teoria dei Principi*) versions; however, the edition in Portuguese is the latest.

[34] Ibid, p. 203.

Summarizing, as this work sees it, the efficient MDR is that which is effective, proportional, reasonable and able to achieve its goals, while demanding the minimum cost from both, the tax administration and the taxpayers.

1.6 Research questions.

This work starts each Chapter with a brief summary and the text includes specific questions to be answered at the end of it. The intention is to provide guidance for the reader so that he/she can extract the maximum understanding of the reasoning. Sometimes, even each topic starts with a summary and some questions. Nevertheless, based on the discussions made during the development of this work, I believe that the key questions to be answered are:

1 - Why is there a need in the first place for mandatory disclosure rules?

2 – How can MDR be seen as a part and as an instrument in the international process towards coordination and transparency in tax matters?

3 - How can MDR be seen as a part and as an instrument in the construction of a new relationship between tax authorities and taxpayers?

4 - Why is it not enough to be mandatory?

5 - What are the justifications and limits in order to make MDR consistent with fundamental rights? And,

6 - What is required for the system to function efficiently?

1.7 Methodology.

Research refers to a search for knowledge[35]. The scientific method begins with a basic observation and description of a phenomenon. In this case, the *observed phenomenon* is the proposal for the introduction of mandatory disclosure rules on potentially risky tax planning. Broadly, observations lead researchers to have questions about why certain phenomena occur. This research, in specific, offers some predictions of what will happen or what the expected outcome can be when applying MDR, in a given scenario.

[35] KOTHARI, C.R. and GARG, Gaurav. *Research Methodology. Methods and Techniques*. New Age International Ltd., 2019, p. 3-4.

Deductive research[36] is theory-testing research. The goal, however, is not just to test a theory, but possibly to refine, improve, and extend it. Interpretative research[37] is a research paradigm that is based on the assumption that social reality is not singular or objective, but is rather shaped by human experiences and social contexts and is therefore best studied within its socio-historic context. Therefore, this work can be classified as a *deductive research*, taking into consideration that the goal is to test concepts and patterns already presented using previous experiences and as an *interpretative research*, because it analyses MDR implementation as a phenomenon impossible to abstract from the social settings. Thus, my advice and observations must be interpreted through the eyes of the reader embedded in his/her particular context, therefore, interpretation must occur at two levels.

The analysis is not quantitative, which means that the numerical data eventually presented or the amount of information collected is not decisive for the conclusions or advice at the end. They are exemplificative, much more so as to draw the reader's attention to the facts being described than as the basis for demonstrating how specific variables relate in order to prove a particular hypothesis. Unlike quantitative methods, qualitative methods are not based on a prediction between two variables. Rather, qualitative methods are used to openly explore a specific topic and these methods are particularly useful for looking at topics about which not much is known and for understanding given information.

Therefore, this academic research is based on the *qualitative analysis* of mandatory disclosure rules in use and studies already carried out in several countries, and on the final BEPS Action 12 proposals. That is, it is an analysis in which the real values are in the quality of the provisions and in the actions analyzed and not in the quantity of results. Besides that, as it was explained, the effective quantitative result of the application of BEPS Action 12 will not come until a few years after the completion of this thesis. It is not possible at this time to verify the efficiency of promoting legislative changes and improvements closing gaps for the tax planning working, as a result of MDR, because in the European case, for example, the first information will only be provided in August 2020. Even when the UK´s case is mentioned, based on tables and quantities, the purpose is not to judge quantities but merely to suggest that reducing the number of reported plans does not mean reducing the number of used plans. Firstly, it may be that tax planning schemes are simply not being informed because of deficiencies in law enforcement, and secondly because the intermediaries might be migrating to another jurisdiction.

Besides being qualitative, the research is analytical and applied. *Analytical* because it does not create or constitute information. Thus, unlike descriptive research, which employs surveys and inquiries, basically, the conclusions the work comes to are the result of previous experiences in MDR application and my own professional experience and legal analysis within existing concepts and theories. *Applied* because, differently from fundamental research, it aims to find a solution for

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[36] BHATTACHERJEE, Anol. *Social Science Research: Principles, Methods, and Practices.* Textbooks Collection, n. 3. University of South Florida: USF Tampa Library Open Access Collections, 2012, p. 3. Available at: http://scholarcommons.usf.edu/oa_textbooks/3.

[37] Ibid, p. 103.

an immediate problem, and is, therefore, concerned neither with generalizations nor with the formulation of a theory.

This work can be, furthermore, classified as *traditional legal scholarship*, which according to Langbroek *et al*.[38], is seen to be about commenting on (draft) rules, on case law, and on developments in the national jurisdictions as well as in international legal domains. Legal debates concern the best ways to draft legislation, and how legal rules should be applied in concrete cases. As far as a legal analysis of the proposal is made, it takes place in constitutional field. In that part, the objective is to draw the minimum lines necessary for the system to overcome any clashes with constitutional principles.

Structurally, the work follows the Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures[39], taking into consideration that BEPS Action 12 framework for mandatory disclosure rules is based on "*international best practices*" and it presents five key elements in the design of a regime:

a) A description of arrangements that are required to be disclosed;
b) A description of the persons required to disclose such arrangements;
c) A trigger for the imposition of a disclosure obligation;
d) Appropriate penalties or other mechanisms to address non-compliance; and
e) A description of what information is required to be reported.

[38] LANGBROEK, Philip *et al*. *Methodology of Legal Research: Challenges and Opportunities*. Utrecht Law Review, v.13, n. 3, 2017, p. 1-8.

[39] OECD (2018). *Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures*, Paris: OECD Publishing, 2018. Available at: www.oecd.org/tax/exchange-of-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.pdf.

II. DESCRIBING THE PROBLEMS AND THE SEARCH FOR SOLUTIONS.

Introduction to Chapter 2.

In 2014, shortly after the launch of BEPS, Yariv Brauner published an article[40] acknowledging that the project was not just a "*populist sensation*", underscoring its importance and the need for attention to tax technics and policies. He stated that one of the article´s objectives was "*to expose, through the analysis of the BEPS project, the failings of the current competition-based paradigm of the international tax regime and to demonstrate the desirability of a shift of paradigm towards a more collaborative regime based on cooperation and coordination of tax policies".* This is, basically, the first objective of this Chapter, however focusing exclusively on BEPS Action 12 and mandatory disclosure rules (MDR). Therefore, this present analysis is limited to a specific topic, which Brauner´s article included as *Administrative and Compliance,* within the OECD Action Plan.

It seems clear when analyzing the BEPS project that Brauner[41] is right when he talks about a nation-state power loss "*simultaneously to the rise of their own MNEs, some of which have gained power and riches beyond those of many Countries*" as a result of the globalization process. Furthermore, it is unquestionable that "*the international tax regime has proven incapable of stopping them, as asserted by the BEPS project*". These two statements will be discussed here.

Focusing on MDR, this Chapter evidences that the actions taken in order to recover the portion of power lost since the last decades of the 20th century started a long time before BEPS and it demonstrates why the response based on traditional tax treaty measures was not enough. The work analyzes the evolution of the proposed solutions, from harmonization of tax legislations to coordination based on broad exchange of information and mutual assistance. Finally, transparency has emerged as a key to tackling undesirable tax avoidance. However, it is important to bear the implications between the intention of recovering some power and control that the sovereign States have been losing and the proposed measure in mind, especially considering developments in economic and political aspects.

Notwithstanding, this Chapter proposes a reflection on how globalization influenced that process, thinking along the links between competition, coordination and avoidance in international taxation. For instance, whether "*aggressive or abusive tax planning*" are in use, exploring deficiencies, weaknesses, loopholes and favorable tax treatments, countries and their tax policies, which emerged mainly to follow the new economic globalized reality, are as much to blame for it as large multinationals or high net worth individuals.

As will be shown, dealing with a single action (MDR) can deepen its causes and consequences. Brauner, for example, begins his analysis of BEPS by pointing to the multinational

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[40] BRAUNER, Yariv. *What the BEPS?* Florida Tax Review, v. 16, n. 2, 2014, p. 59-60. Available at http://scholarship.law.ufl.edu/facultypub/642.
[41] Ibid, p. 64.

enterprises (MNE)[42]. This Chapter also has the intention of demonstrating that MNE, High Net Worth Individuals, tax planning intermediaries and promoters, tax administrations and tax policymakers are affected by MDR and must rethink their behavior if the system is to be applied efficiently.

Therefore, the analysis intends to make the reader see that the application of MDR will not only put pressure on intermediaries and on the market for tax planning, which one might call "*administrative-legal pressure*", but also put "*political pressure*" on countries that allow international tax planning to be successful, by offering favorable or special treatment to particular taxpayers. This second type of pressure is not evident in Action 12 - final report[43], but it will be clear, for example, in the analysis of the European Directive, in Chapter III (topic 3.6).

Moreover, this Chapter examines when the concept of "*aggressive tax planning*" emerged within the OECD (Organization for Economic Co-operation and Development) and mentions some of the first steps taken by the Organization to recognize the relevance and the role of the so-called "intermediaries" that promote such planning. The objective is to demonstrate how, basically, the idea of creating the obligation to disclose aggressive tax planning was born, with a focus on the intermediaries, which led to BEPS Action 12.

Two OECD works are presented[44]. Despite the fact that the 2008 Study focused on big companies and the 2009 Report focused on the high net worth individuals, both describe the market for "*aggressive*" tax planning as a market governed by demand and supply laws like any other. Thus, three players are distinguished: taxpayers, intermediaries and tax administration. The question is how to reduce the demand in this market, developing the relationship between the tax administration and taxpayers. Developing trust would be a step towards the introduction of MDR, which focuses on the intermediaries or the supply-driven. The solution involves the development of risk management analysis and clear, timely and specific information is required.

Then, a third OECD report (2011) is presented[45], reporting the progress of the measures to tackle aggressive tax planning, by increasing the transparency and disclosure of those practices, which suggested the introduction of MDR, among other disclosure initiatives, moreover explaining why the traditional process of assessment (audits) was not able to control them. Furthermore, that report mentions previous experiences in other countries.

Specifically, about the BEPS Action 12, this Chapter analyzes the discussion Draft, the public comments and the Final Report. The ideas are: *first*, to put in evidence the points in common and the differences between Action 12 and the previous studies/reports; *second,* to analyze how the action was received by the tax community and to which extent its comments affected the final

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[42] Ibid, p. 57.

[43] OECD (2015). *Mandatory Disclosure Rules, Action 12 - 2015 Final Report.* Cit.

[44] OECD (2008*). Study into the role of Tax Intermediaries* ("*2008 Study*"), Paris: OECD Publishing, 2008 and OECD (2009). *Engaging with High Net Worth Individuals on Tax Compliance,* Paris: OECD Publishing, 2009.

[45] OECD (2011). *Tackling aggressive tax planning through improved transparency and disclosure*, Paris: OECD Publishing, 2011.

report. *Finally*, to analyze the final design of BEPS Action 12. At the end of this analysis, the objective is that the reader must be fully aware of the elements and characteristics of an MDR.

A specific question is brought from the Comments on the Draft OECD Action 12. The merits and legitimacy of tax planning, whether domestic or international, has been widely recognized by case law: "*Every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow tax-payers may be of his ingenuity, he cannot be compelled to pay an increased tax.*"[46] From that perspective, any type of mandatory disclosure rules improperly infringes this enduring tax principle as it forces taxpayers to open their strategies to the tax administrations. One of the questions that therefore arises is why is there a need, in the first place, for mandatory disclosure rules?[47]

2.1 Competition in a Global Economy.

2.1.1 Influences of globalization and the new economic and business reality.

The financial function of taxation has been combined with a social control function. Realizing this, Fritz Karl Mann, a German economist interested in the sociology of taxation, identifies three forms of social control through tax: the correction of undesired kinds of behavior; the readjustment of economic power between social groups; the fight against the social abuses of capitalism and the transition towards another economic order[48]. As described in the introduction to this Chapter, referring to power and sovereignty and especially considering developments in economic and political aspects, it is the time to readjust taxation in order to move towards a different world order, realizing some abuses in consequence of capitalism.

It is difficult to establish when the process of globalization began and there are divergences especially marked by the definition or application given to the term. It is possible to return to the great Iberian navigations or just post-World War II. However, considering that the intended scope here is the loss of state control over the movement of international capital, especially driven by large transnational corporations, the analysis begins mid-1980s, when tax competition was triggered by the 1986 US tax act and tax systems are as varied as countries and political systems

[46] THE UNITED KINGDOM (1933). High Court of Justice (King's Bench Division). *Duke of Westminster v Commissioners of Inland Revenue*, 1 (1933-1935) 19 TC 490. See also CANADA (1999). *Shell Canada Ltd v. Canada*, 1999 3 SCR 622, paragraph 45.

[47] OECD (2015a). *Comments received on Public Discussion draft. BEPS Action 12: Mandatory Disclosure Rules*. Paris: OECD Publishing, 2015, p. 124-125. Published on 4 May 2015. Available at: http://www.oecd.org/tax/aggressive/public-comments-beps-action-12-mandatory-disclosure-rules.pdf. Accessed on: 09 May 2019.

[48] LEROY, Marc. Taxation, the State and Society: the fiscal sociology of interventionist democracy. Brussels: P.I.E Peter Lang SA, 2011, p. 61.

themselves[49]. Moreover, as Avi-Yonah punctuates the "*old international tax regime*", based on principles developed in the 1920´s-1930´s, worked reasonably well until the 1980´s, when globalization led to tax competition that undermined those principles[50].

Since that phase of globalization became a reality, we have seen an increasing movement of people and capital promoting multinational companies and global business which, allied to new technologies and possibilities of communication that challenge the limits of space and time, allowed companies and individuals to choose where to concentrate their investments and to earn[51] their profits and gains. Translating this into numbers, in the period between 1983 and 1998, the annual flow of outbound foreign direct investment (FDI) nominally increased by more than 1200 per cent worldwide, rising from less than US$ 50 billion to more than US$ 600 billion[52].

In this new economic order, tax planning represents an instrument for sustainability for companies and businesses. In fact, tax planning became fundamental for the business activity in order to support the harder competition and demands of a globalized world and the fiscal choices - the search for less onerous taxation - become a crucial point for surviving in the market.

Recently, aspects of corporate international taxation were the subject of public debate, driven by an increasing concern with the relatively small amount of tax paid by well-known worldwide companies[53], because of complex tax planning which explores the loopholes of several different countries' legislations, at the same time. Moreover, a study[54] published by the International Monetary Fund (IMF) demonstrates that, notwithstanding the fact that this apprehension with the existent international tax planning initially arose in developed economies, clearly their effects also affect developing countries.

This finding, however, is not only due to the behavior of those companies. It is important to remember that following the example of the United States and the United Kingdom, most

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[49] TROEGER, Vera. *Tax Competition and the Myth of the 'Race to the Bottom. Why Governments Still Tax Capital.* London: The CAGE-Chatham House Series, n. 4, Feb. 2013, p. 1-12. Available at: https://www.chathamhouse.org/publications/papers/view/188967.

[50] AVI-YONAH, Reuven S. *The international tax regime: a centennial reconsideration.* Michigan University: Public law and legal theory research paper series, paper n. 462, Jun. 2015, p. 1-7. Available at: http://ssrn.com/abstract=2622883. "*The international tax regime is almost a hundred years old. The two principles it is based on (the benefits principle and the single tax principle) were developed in the 1920s and 1930s. The regime functioned reasonable well until the 1980s, where globalization led to tax competition that undermined its principles (...) But these constraints started to erode in the 1980s. Multinationals became much more mobile as the focus shifted from heavy manufacturing to services and intangibles. The result was tax competition as multinationals became able to pit one country against another*".

[51] NOTE. The central divergence to BEPS is in the distinction between where profits are genuinely earned, which countries generally accept should be the result of commercial judgements that will be influenced, if only in part, by tax, and where profits are recognized, which may be wholly tax driven.

[52] HAUFLER, Andreas. *Taxation in a global economy*. Cambridge: the United Kingdom University Press, 2001, p. 1.

[53] FINANCIAL TIMES. *Multinationals pay lower taxes than a decade ago*. Brussels, 11 Mar. 2018. Available at: https://www.ft.com/content/2b356956-17fc-11e8-9376-4a6390addb44. Accessed on: 17 Oct. 2019.

[54] CRIVELLI, Ernesto; De MOOIJ, Ruud e KEEN, Michael. *Base Erosion, Profit Shifting and Developing Countries.* IMF Working Paper. Published online: 29 May 2015. Available at: https://www.imf.org/en/Publications/WP/Issues/2016/12/31/Base-Erosion-Profit-Shifting-and-Developing-Countries-42973. Accessed on: 20 Oct. 2019.

European Union (EU) member-states have introduced significant changes to both their personal and corporate income taxation and it is clear that the increasing international mobility of capital has fundamental importance in this process[55]. For instance, the marginal tax rate on corporate profits decreased in 23 OECD countries and tax rates on labor income on average went up, suggesting a possible burden shift from capital to labor[56].

As historical examples, during the 1989-1998 period, only three EU countries were not levying withholding taxes on the interest income of domestic residents. However, this enforcement was not extended to foreign investors in most of them. The 1989 introduction of a 10 per cent withholding tax both on domestic and foreign residents, in Germany, caused long-term capital exports to reach a record level, leading the government to abolish the tax. The Constitutional Court forced the reintroduction of a 30 per cent withholding tax on interest income for domestic equity reasons, but foreigners were excluded from that obligation[57]. Yet, many OECD countries push further in the direction of reducing withholding taxes to zero, even on dividends[58].

In the United States, reform promoted by Ronald Reagan's government in 1986 significantly reduced statutory tax rates on personal and corporate income while at the same time increasing the tax base[59]. This "*tax-rate-cut-cum-base-broadening*" reform was praised worldwide and served as the model for similar tax reforms in many EU countries. Its effects, however, caused a large federal deficit and the continuous growing complexity of the income tax code[60].

These reforms and favored treatment for increasingly volatile foreign capital are largely responsible for the international profit shifting[61], which would be ineffective without countries offering preferential tax rules or low tax regimes for specific taxpayers and income categories[62], and as demonstrated above, we are not talking about small islands in the Pacific Ocean or the so-called tax havens.

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[55] HAUFLER (2001). Op. Cit., p. 13.
[56] TROEGER (2013). Op. Cit., p. 3.
[57] HAUFLER (2001). Op. Cit., p. 15.
[58] BRAUNER (2014). Op. Cit., p. 67.
[59] UTZ, Stephen. *Tax Harmonization and Coordination in Europe and America*. University of Connecticut School of Law, Faculty Articles and Papers, v. 9, 1994, p. 770/771. Available at: *http://digitalcommons.uconn.edu/law_papers/360.*
[60] HAUFLER (2001). Op. Cit., p. 21.
[61] NOTE. For US MNEs, the check-the-box regime, which came in the 90`s, was key to being able to shelter foreign profits from US taxation. Next, that gave US MNEs an edge when it came to M&A activity – Kraft`s takeover of Cadbury being a case in point. Kraft could deliver higher after tax returns because it could shelter foreign profits that were subject to taxation in the UK, under its CFC rules (until these were relaxed in 2010-11, in order to make the UK more competitive). See more in MOELLER, Scott. *Case study: Kraft's takeover of Cadbury.* Financial Times, published on 9 January 2012. Available at: https://www.ft.com/content/1cb06d30-332f-11e1-a51e-00144feabdc0. Accessed on: 13 May 2020.
[62] ROCHA, Sergio Andre. *The Other Side of BEPS: "Imperial Taxation" and "International Tax Imperialism". Tax Sovereignty in BEPS Era.* Series on International Taxation, v. 60, the Netherlands: Walters Kluwer, 2017, p. 179-200.

2.1.1.1 Competition.

Internationalization of economic activity may not change the objectives that governments try to achieve through their tax systems, said Vito Tanzi[63], in 1994. Moreover, predicting about the future, he stated the tax systems of different countries would put pressure on one another caused by different tax rates, different tax bases and different possibilities of avoidance and evasion, which would be exploited by private economic operators to improve their economic welfare, thus affecting tax revenue, economic efficiency, and the equity of the tax system. In some cases, some governments, to gain tax revenue advantages at the expense of other governments, may also exploit these pressures.

The effects, furthermore, starting in economics, extend themselves to the political and social areas. Dreher[64] precisely described the influence of globalization on tax and social policy. In his approach, the author states that higher economic integration induces mobile factors of production to migrate to countries with the lowest taxation. In order to maintain their tax bases, governments engage in competition. However, this competition led, sequentially, to losses in revenue, losses in the capacity for social actions and political losses. In synthesis, the resulting economic integration potentially increases political competition among governments. Paradoxically, the more political competition increases, the more governments are interested in political integration. Mentioning a series of previous studies[65], Dreher explains that a possible influence of political integration has been neglected when analyzing the effects of globalization. He notes that while national restrictions of international transactions have been reduced since the eighties, agreements among governments became more frequent and if rising economic integration goes along with a more political integration, these effects could cancel each other out.

In other words, countries tried to attract foreign capital for their economic development, each by itself, without achieving political integration. Nevertheless, this attraction causes them to lose political power because they stop investing in the social area. This "gap" of political power is occupied by the economic power that then directs or chooses the foundations of the legislation, which is obviously favorable to it, in detriment of legislation favorable to the social interests. The more dependent on the social engagement government is, the weaker it becomes. The less dependent on the social policies and the more based on economic success, the less it weakens. This phenomenon occurs regardless of whether the country is classified as a developed or developing country. It is a power game.

[63] TANZI, Vito. *Taxation in an Integrating World*. Washington, D.C: The Brookings Institution, 1995, p. 6.
[64] DREHER, Axel. *The influence of globalization on taxes and social policy: An empirical analysis for OECD countries.* European Journal of Political Economy, Elsevier, v. 22, n.1, 2006, p. 179-201.
[65] DREHER (2006). Op. cit. Devereux, Lockwood and Redoano (2002); European Commission (1998) and OECD (1998), and Van der Hock (2003).

According to Utz[66], "*tax competition as such is neither good nor bad. It can conceivably eliminate economic distortions due to national tax laws but it can also undermine legitimate goals of supporting government and stabilizing or stimulating domestic economic activity*".

Thus, the solution envisaged reacting to the increasing stress of competition without reducing tax rates on capital, and in consequence the state's revenue, was to adopt increasing political integration, that international organizations define as harmonization in legislation and coordination in administrative measures[67].

2.1.1.2 Harmonization in legislation.

Tax competition is not under government control. Indeed, the fundamental point is that globalization transformed the domestic options in taxation matters into a global problem and the States' traditional capabilities were being undermined by it. As Caroline Thomas points out: "*globalization is privileging the private over the public sphere and over the commons. It is eroding the authority of states differentially to set the social, economic and political agenda within their respective political space. It erodes the capacity of states in different degrees to secure the livelihoods of their respective citizens by narrowing the parameters of legitimate state activity*"[68].

Globalization, in fact, promoted an internationalization of several fields of law but, quoting Rosenbloom, "*no area of the law is closer to the subject of sovereignty than taxation*"[69]. In the meantime, it is clear that as long as diversity of cultural, economic, political, and fiscal factors leads countries to adopt a wide range of income tax systems, countries will try their best to preserve their tax sovereignty. In the absence of "true" international tax law in the sense of a multilateral tax convention or legislation by an international tax organization, national tax sovereignty will result in divergent policies and principles governing the taxation of international income. It is necessary to direct attention to a question: the trade-off between diversity and convergence based on the spectrum of international management possibilities running between explicit harmonization to coordination through mutual recognition of national autonomy.

Whether, in theory, harmonizing the tax laws of all countries, in a way that produces a similar effect on commercial and investment decisions, tax competition could be avoided; in practice, the harmonization in the domestic legislations is not viable because, first, it undermines countries sovereignty and second, it is not possible to make different realities adopt the same

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[66] UTZ, Stephen. *Tax Harmonization and Coordination in Europe and America*. University of Connecticut School of Law, Faculty Articles and Papers, v. 9, n. 360, 1994, p. 771. Available at: *http://digitalcommons.uconn.edu/law_papers/360.*

[67] Ibid, p. 767.

[68] CLAPHAM, Andrew. *Human Rights Obligations of Non-State Actors*. Oxford: Oxford University Press, v. XV, n.1, 2006, p. 4.

[69] ROSENBLOOM, David H. *Sovereignty and the Regulation of International Business in the Tax Area.* Canada-United States Law Journal, v. 20, 1994, p. 267. For further discussion of the implications of globalization for tax policy, see John P. STEINES JR., *Income Tax Implications of Free Trade,* Tax Law Review, v. 49, n. 4, 1994, p. 675-689.

taxation standards. The point then is not to "harmonize" to overcome the competition. Only those in a similar situation and / or having the same interests could be harmonized. If the socio-political-economic situation is different and the solutions sought to the problems related to these fields are equally different, how could one think of harmonizing tax laws whose primary reason to exist is to provide the state with resources for facing their particular needs?

Therefore, from the point of view both of efficiency and of fairness, the solution follows the path of redistribution or sharing of taxation power. Consequently, one of the first attempts to deal with the problem focused on encouraging an extensive network of bilateral tax treaties, and both the OECD and the United Nations (UN) sought to create models to standardize the rules of those treaties, consequently, "*influencing the domestic tax laws of every country*"[70].

2.1.1.3 Tax Treaty Model Conventions and Sovereignty.

The OECD seeks convergence, adherence and standardization, which would lead to its increasing influence and an example is the global tax treaty network, mostly based on its Model Convention[71]. Globalization, however, has caused divergences in the application of the residence-source-state paradigm. In some situations, countries have started to claim the right to tax at least a portion of profits obtained by MNE from the exploitation of their consumer market, even without the characterization of a permanent establishment (PE) in their territory. In other situations, countries argue that the remuneration derived from technical services should be taxed by the source state to prevent the erosion of domestic tax bases through payments made to non-resident companies[72]. Then the convergence is over. The fact is that the ease of capital movement and the concentration of value on services and intangibles made the international tax system that was built on a residence-source paradigm at a different time and reality, inadequate.

In fact, the profit shifting that is being discussed and which inspire the BEPS does not intend to shift tax obligations from the residence country to the source country or vice-versa, it aims to avoid tax altogether and this has become clear in the international scene with MNE recent cases[73]. What exists is a displacement of money that would be "socially" used in some state to be

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[70] AVI-YONAH (2015). Op. Cit., p. 1.

[71] OECD (2017). *Tax treaties: update to OECD Model Tax Convention released*. 18 Dec. 2017. Available at: https://www.oecd.org/tax/treaties/tax-treaties-2017-update-to-oecd-model-tax-convention-released.htm. Accessed on: 14 Oct. 2019. "*When the OECD published its first Draft Model Tax Convention in 1963, only a few dozen tax agreements were in force. Since that time, the* OECD Model Tax Convention *has facilitated bilateral negotiations between countries and made possible a desirable harmonization between bilateral conventions for the benefit of both taxpayers and national administrations. More than 3000 tax treaties in force around the world are based on the OECD Model, which is regularly updated*".

[72] BIANCO, João Francisco and SANTOS, Ramon Tomazela. *International/OECD - A Change of Paradigm in International Tax Law: Article 7 of Tax Treaties and the Need to Resolve the Source versus Residence Dichotomy*. IBFD, Bulletin for International Taxation, v. 70, n. 3, 2016. Published online: 24 February 2016.

[73] FINANCIAL TIMES (2018). Cit. See footnote n. 53.

"economically" applied for the shareholders of a particular company or for the accumulation of private wealth.

With the countries' inability to raise revenue from an income that is increasingly being disconnected from tangible goods[74], they have also attempted to attract and maintain capital by cutting rates and offering favored treatment, as in the cases of the US and Germany, which were cited here.

Bearing this panorama in mind, a step back is necessary. The Peace of Westphalia[75] established a new system of political order in central Europe, later called Westphalian sovereignty, based upon the concept of co-existing sovereign states. Inter-state aggression was to be held in check by a balance of power. A norm was established against interference in another state's domestic affairs. As European influence spread across the globe, these Westphalian principles, especially the concept of sovereign states, became central to international law and to the prevailing world order.

The state's sovereignty has its foundations in the power to demand taxes. Remembering Jean Bodin´s ideas, who first articulated the modern concept of sovereignty and who was also the first to make sense of modern sovereignty in the relations between nations[76], Yariv Brauner stresses that the idea behind sovereignty is not to maximize the welfare of a society, but to maintain order in society, which is a precondition to any set of policies taken for the maximization of welfare or any other social goal.[77]

However, those old principles of international jurisdiction and sovereignty became unable to provide adequate sustainability for the national tax systems and vice-versa. The crucial issue is while the law, as a social expression, should be able to provide the regulatory marks for the market´s development and interests; the market, after shaping the economy and provided the elements for its consolidation and development, influenced the laws, which have been made to meet its demands.

The loss of part of the sovereign power of the state over taxation is, therefore, a consequence of the loss of political power over the economy, which "freed" itself from the territorial ties, becoming less controllable. It happens that the political-institutional framework ended up not keeping pace with the globalized economy. As a solution, it was possible to verify an international movement desiring the construction of a global taxation system in order to capture,

[74] NOTE. Actually, I am referring metaphorically to "tangibles" but the problem is that income has been disconnected from the underlying value creating activities that give rise to profits involving not only the physical assets but the people function too.
[75] NOTE. The Peace of Westphalia, concluded in 1648 in Münster (Germany), ended the Thirty Years War, which started with an anti-Habsburg revolt in Bohemia in 1618 but became an entanglement of different conflicts concerning the constitution of the Holy Roman Empire, religion, and the state system of Europe. Available at: *http://www.oxfordbibliographies.com/view/document/obo-9780199743292/obo-9780199743292-0073.xml*
[76] BRAUNER, Yariv. *An Essay on BEPS, Sovereignty and Taxation* – Tax Sovereignty in BEPS Era, Series on International Taxation, Walters Kluwer, 2017, p. 73-93.
[77] Ibid, p.77.

or at least to limit, the economic agents working on cross-border transactions and relying on the competition between countries and on the weakness of domestic taxation systems.

2.1.1.4 MDR application and International Relations.

Traditionally, it is the competence of the governments to define the countries´ tax policies, taking into account the domestic economic and social contexts. The process of globalization and greater ease of capital movement have altered the fiscal policy adopted by the countries and the relationship between the different domestic tax systems. After an undesirable face of globalization was revealed, countries and their policy makers are led to uncountable attempts in harmonizing and coordinating tax systems, which can be demonstrated by the increasing number of tax treaties and a broad exchange of information, more recently using multilateral measures[78].[79]

Obviously, after expanding multilateral measures for broadening the exchange of information, it is necessary to focus on producing good and useful information in order to achieve the intended scope. The BEPS Action 12[80] proposal that focuses on international tax schemes and which should be accompanied by a broad exchange of international information has been following this reasoning.

As demonstrated here, taxpayer behavior in the profit shifting is only one side of the coin and undesirable international tax planning would not work without certain favorable tax policies in some states. Based on this idea, it is possible to imply that the information provided by MDR creates political pressure in those states, which will face criticism and international pressure to make changes in their legislation. Non-compliance, on the other hand, puts pressure on the taxpayer in the residence-state, where the taxpayer is at the risk of sanctions and administrative-legal pressure.

Thus, in order for the system proposed by the OECD to function internationally, firstly, a large number of countries, both residence and source countries, must introduce the measure and be willing to exchange information. The OECD apparently knows this and the same convergence and standardization that was sought in the tax treaty network is now sought with the BEPS inclusive framework. Secondly, countries need to be willing to make changes in their legislation, to close the gaps, or to end favored treatments that allow undesirable planning to work. The point is whether this is interesting to them and the answer is a political issue[81].

There also is another side, regarding administrative efficiency that touches countries with a very small compliance gap. An example is Sweden, which is "*one of the strongest, most stable*

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[78] AVI-YONAH (2015). Op. Cit., p. 4.
[79] NOTE. Perhaps the sequence of events could be explained in other words: the tax treaty network grew steadily over time and the BEPS project was a new departure, driven by the observed levels of tax avoidance and characterized by new "minimum standards" and multilateral measures, especially the MLI.
[80] See Chapter II, topic 2.5 – The BEPS project.
[81] NOTE. It is noteworthy, for instance, that the anti-hybrid rules (BEPS Action 2) are not a minimum standard but one may now observe proposals (Pilar 2) that would impose minimum levels of tax.

and high compliance tax states in the world" [82]. Swedish tax revenue as a percentage of GDP was at least 25 percent above the OECD average from 1965 to 2013, putting Sweden in the top five tax-yield countries for nearly the entire period. Since the 1980s, collection losses (taxes levied but not paid, the measure known as the tax gap) have been less than 1 percent of total tax receipts. By comparison, in the UK, the tax gap was between 6 and 8 percent of total tax receipts in the period 2005–13[83]. After introducing MDR[84] and consequently generating another obligation for its taxpayers, what will the result be?

This example induces a thought reflection: if a domestic system of law is good in terms of enforcement and if the degree of trust between tax administration and taxpayers is high, why should a given country introduce MDR, creating a further compliance obligation for its taxpayers and, in case of non-compliance, imposing heavy penalties? The only reason is to take part in a larger project involving many countries, which allows that country to receive information about tax schemes working abroad. Thus, putting it in a political position to pressure other countries to change their legislation and to close "gaps" abroad, once there are no gaps or deficiencies in the national law to justify the introduction of MDR.

In conclusion, thinking in terms of MDR, there will be political pressure to prevent countries from offering beneficial tax treatments without drawing the attention of the international community. For example, in the case of the Panama Papers and Paradise Papers[85], companies were exploiting benefits without anyone realizing. With MDR, it gets harder or at least riskier. Especially, let us look at intricate schemes involving various intermediaries in different countries. If one of them complies with the obligation and reports on the scheme, this could be a trigger in starting an investigation. The MDR system at the international level can become nothing more than the institutionalization of "leaks and scandals", which will occur in a legal and systematic manner.

If the system works effectively, taxpayers will stop paying nowhere and pay more taxes. The question that remains is where they will pay these taxes and if the rules developed in the international tax system are appropriate to provide the correct allocation of taxing rights in the

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[82] NISTOTSKAYA, Marina and D'ARCY, Michelle. *The Origins of High Compliance in the Swedish Tax State*. Oxford Scholarship Online: Oxford University Press, 2018, p 1-33. Published online: 21 September 2018.

[83] See more recent and detailed data in Chapter III, topic 3.2.6 – The impact of the DOTAS regime on compliance.

[84] EY. Tax News Update: Global Edition. *Swedish Tax Committee proposes Mandatory Disclosure Regime.* 21 January 2019. "*On 15 January 2019, a commission of inquiry set up by the Swedish Government handed over its proposal to implement European Union (EU) rules regarding a Mandatory Disclosure Regime (MDR) to the Swedish Government. The proposal expands the scope of the EU rules to also include domestic arrangements*". Available at: https://www.ey.com/Publication/vwLUAssets/Swedish_Tax_Committee_proposes_Mandatory_Disclosure_Regime/$FILE/2019G_012873-18Gbl_Sweden%20-%20Mandatory%20Disclosure%20Regime%20proposed.pdf. Accessed on: 14 Oct. 2019.

[85] The *Panama Papers* refer to the 11.5 million leaked encrypted confidential documents that were the property of Panama-based law firm Mossack Fonseca. The documents were released on April 3, 2016 by the German newspaper Süddeutsche Zeitung (SZ), dubbing them the "Panama Papers." The *Paradise Papers* are 13.4 million leaked files from offshore service providers and company registries also obtained by Süddeutsche Zeitung. They reveal the offshore interests and activities of politicians, world leaders and celebrities and the tax engineering of more than 100 multinational corporations. The International Consortium of Investigative Journalists (ICIJ) along with 95 media partners in six continents explored the files before publishing stories on them on November 5, 2017. Available at: https://www.investopedia.com/terms/p/paradise-papers.asp. Accessed on: 11 Nov. 2019.

current digital economy scenario, for example. These two responses are beyond the scope of this work and many studies can be developed from there. What this work points out is that the application of MDR will generate great “unrest” in a scenario that has been settling over the years. A further point is whether BEPS offers a change from the *status quo*. That is, with the application of BEPS and its actions, is there a shift from competition to coordination?

That is why this work supports MDR must take place in such a way as to result in a behavioral change for both, the State (tax policymakers and tax administration) and society (taxpayers and tax intermediaries). Therefore, before the successful implementation of the measure, a change is necessary in the State´s tax policy and in the tax administration practice. What is specifically advised in terms of those changes will be discussed throughout this work. At this moment, however, it is important to stress that if the problem has two sides; the solution needs to deal with both.

2.1.2 Influences of globalization in complexity and instability of tax system.

A significant number of experts named the process described in the previous topic as a “*race to the bottom*”[86], referring to competition between countries in the attempt to attract free and volatile capital, once tax rates were reduced and tax benefits offered. The economic, social and political effects were equally described, in order to demonstrate the influences of globalization. Broadening the discussion to the legal field, this topic demonstrates the effects of competition on the complexity of tax systems and the influence of this factor on the base erosion and profit shifting.

It is important to stress that, besides the effects in social and political fields, resulting in a reduction of the State’s power over the economy; the damage in the field of the law was disastrous, because during the race to the bottom particular laws were enacted, focusing on special economic groups or sectors. In tax law, this phenomenon is verified due to the increasing number of fiscal benefits and exemptions granted, in order to adjust supposed regional differences or economic distortions or, essentially, to attract capital and investments.

The US 1986 act's rules on interest deductions identified at least 17 different categories of interest, says Graetz[87]. He states *“the complexity of the 1986 act, coupled with its failure to adopt*

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[86] KEEN, Michael. *Competition, Coordination and Avoidance in International Taxation*, International/OECD, Bulletin for International Taxation, v. 72, n. 4/5, 2018. Published online: 21 March 2018. “*By "tax coordination" (or "cooperation" – the terms are used synonymously) is meant the collective agreement on some rules in relation to national tax policies. "Tax competition" is harder to define. One approach, and perhaps the most natural, centres on the idea that countries design (and implement) their national tax systems so as to make them more attractive than those of others, with the widespread connotation that this implies a* ***"race to the bottom"****. Conceptually, a more satisfactory definition – because it encompasses cases in which self-interest points to setting taxes higher than the collective good would require – simply highlights the idea that countries are engaged in some form of game with one another in their tax setting.*” (emphasis added)

[87] GRAETZ, Michael J. *Tax Reform 1986: A Silver Anniversary, Not a Jubilee*. Tax Analysts, published online: 21 Oct. 2011. Available at:

and maintain a coherent vision of equity, made it unstable", mentioning that since 1986, the US Congress has amended the tax code annually, adding many thousands of pages of new legislation, and regarding this as the inherent weaknesses of 1986 act. Identifying a series of causes, he concludes that long after that reform, "*the income tax continues to be what it has long been, a source for contests among different groups with different interests for the privilege of paying less taxes*".

Analyzing the complexity of tax structure in competitive political systems, Warskett, Winer, and Hettich[88] state that the complexity of a tax system is usually associated with the numbers of tax rates, tax bases and special provisions it includes. Disregarding other factors, they analyze tax complexity measured by the number of distinctions made among taxpayers and the number of tax rates in a simple system. Thus, they suggest that simple tax systems such as a flat tax or a broadly based tax without special provisions are not compatible with vigorous political competition. Moreover, they said that an investigation of taxation in democratic states must deal at the outset with the potential for instability.

Therefore, two points, which contribute to base erosion and profit shifting, can be identified: (i) a large amount of tax rates and differentiated treatments, which ultimately generate the loopholes and mismatches that allow the development of undesirable tax planning. (ii) a large system instability, because as it is possible to observe, the mobility of capital, in a "*liquid society*"[89] and in a high speed era, driven by the technology and communication improvements and connected to distinct interests, especially with economic goals dissociated of the States' social objectives, produced occasional, circumstantial and imperfect laws. Then, the more these laws are influenced by these factors, the more they need to be constantly updated. Consequently, this instability reduces the compliance and generates the weakness of these laws and the mismatches between different legislations, which are a productive field for tax avoidance and abuses of the economic power, leading to undesirable and disproportional results when applying tax law.

According to Jose Juan Ferrero Lapatza:

> *on the one hand, it is clear that a system such as taxation, which is excessively meticulous and long-winded, casuistic and obscure, plagued by special regimes or rules, forces the taxpayer and his advisers to seek the application of the most favorable law and promotes the appearance of loopholes, contradictions and divergent interpretations that can also be used by taxpayers to achieve a fiscal advantage or a "legitimate tax saving"*[90].

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http://www.taxhistory.org/www/features.nsf/Articles/066C3B71D4C8F8CA85257930006459EE?OpenDocument. Accessed on: 21 Oct. 2019.

[88] WARSKETT, George; WINER, Stanley L. and HETTICH, Walter. *The Complexity of Tax Structure in Competitive Political Systems.* International Tax and Public Finance, n. 5. Boston: Kluwer Academic Publishers, 1998, p. 123–151.

[89] AVILA, Humberto. *Teoria da Seguranca Juridica*. 4 ed., São Paulo: Malheiros Editores, 2016. pp. 65 e 66. Avila, quoting different authors, uses the expressions "high-speed society" e "liquid society" in order to explain the great values of change, flexibility and mobility.

[90] FERRERO LAPATZA, Jose Juan. *Solucion Convencional de Conflictos em el Ambito Tributario: uma Propuesta Concreta*, in Direito Tributario Internacional Aplicado, v. II, Coord. Heleno Taveira Torres. São Paulo: Quartier Latin, 2004, p. 294/5.

Besides the competition about what we are talking, tax system has other intrinsic characteristics, which can increase the problematic. As pointed out by Humberto Avila[91], the theory of equality demonstrates that the essentially different shall be treated in a distinct way by the norm. In addition, the theory of Social State defends that the State is the main guarantor of the social order. These theories provoke two consequences: an increase in the number of provisions of law and the increased complexity of these provisions. That is why the more detailed the rules of law are and the more particular rules exist, the less understandable they will be.

Therefore, the tax systems that have emerged from a globalized and competitive world are complex and unstable. The question is whether tax laws, which were constantly changed to meet the needs of the globalized economy and specific economic sectors, can be considered "certainty" and whether a system intending to promote stability of these laws over time, by making them broadly applicable, limiting or reducing the possibilities of different rates and treatments, can be considered "uncertainty", considering the legislative changes it promotes.

2.1.2.1 MDR Application and Legal Certainty.

It is acceptable that, in principle, "aggressive" tax planning is within the limits of the law, in its literalness. However, while exploiting weaknesses and mismatches, it forces those limits, preventing the objectives of the law from being met. In addition, these weaknesses and mismatches are significantly a result of a process of political competition and prevalence of the economy over the social field, which generates a complex system and a series of differentiated treatments that need to be addressed in a myriad of details, as described in the previous topic.

One of the problems always raised in the application of MDR is that the system could increase the level of uncertainty for taxpayers, when closing gaps and adjusting mismatches to prevent certain planning that are exploiting these deficiencies from continuing to work. This means that, when analyzing MDR, it is controversial if the effects it would produce by predicting as one of its outcomes changes in tax laws creates "uncertainty" in the tax system, because such adjustments would affect (legitimate) expectations of the taxpayers and their business.

However, the counterpoint that must be posed is whether the existing system can be considered "secure" and whether any uncertainties that MDR might bring would not be justified in order to counteract the instability that currently exists and has been growing since the process of globalization and competition, as it turned out.

The problem here is the risk of creating a vicious cycle of self-fulfilling expectations: administrations see taxpayers as aggressively avoiding tax, and increase their efforts to counter this; taxpayers see themselves as pressured by an ineffective and unreasonable administration.

[91] AVILA, Humberto. *Teoria da Seguranca Juridica*. 4. ed. Sao Paulo: Malheiros, 2016, p. 76.

The increased focus on maximizing tax advantages may have amplified this cycle. While it reflects legitimate public and political pressure on the side of the authorities for responses and results to tackling avoidance and evasion, at the same time many businesses have expressed concerns over what they perceive as an increasing "aggressiveness" of the tax administration in some jurisdictions, especially those less equipped. The point is that most of the problems are caused by a lack of understanding of the increasingly complex business models. In this context, a more cooperative approach to tax compliance could reduce uncertainty for low risk companies, assist tax administrations to better focus their resources and promote a culture of greater trust[92].

Zangari, Caiumi and Hemmelgarn[93] state that part of the literature investigates the relation between tax uncertainty and corporate tax avoidance. It was verified how tax uncertainty arising from intentional tax avoidance may affect a firm's investment decisions and Blouin and Shackelford[94] argue that companies may try to use complicated structures in order to mask profit shifting activities and that ultimately this may result in an increased tax uncertainty. Taylor and Richardson[95] also analyze the association between the reporting of uncertain tax positions and tax avoidance for Australian firms over 2006-2010. They also find that the disclosure of uncertainty regarding the tax positions is positively correlated with tax avoidance. Thus, Zangari, Caiumi and Hemmelgarn conclude that policy responses could improve tax certainty. At the domestic level, the key aspects to consider are the simplification of tax rules and tax compliance and of the tax law making process. At the international level, the key strategy to deal with tax uncertainty is better cooperation and more coordination between countries. MDR can be a helpful instrument to achieve these objectives in both levels.

Therefore, a careful analysis of certainty in tax law is necessary and this work relies on Humberto Ávila´s[96] theory. Dealing with the meaning of legal certainty, he expresses different points of view, as fact, value, principle of norm and finalistic aspects. However, instrumental aspects, in the sense of "*means to an end*", are especially important in this work, within the scope and structure presented in the introduction; therefore, analyzing the material and personal aspects. Moreover, taking the proposal to apply MDR as an instrument to build trust between tax administration and taxpayers into consideration, material and personal aspects will focus on the construction of trust. That is why the legal certainty shall be, in general, guided first by trust in who

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[92] IMF/OECD (2017). *Tax Certainty*. Report for the G20 Finance Ministers, March 2017, p.21. Available at: https://www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf. Accessed on: 31 Mar 2020.

[93] ZANGARI, Ernesto; CAIUMI, Antonella and HEMMELGARN, Thomas. *Tax Uncertainty: Economic Evidence and Policy Responses. European Commission*. Taxation and Customs Union. Taxation Papers, Working paper n. 67, 2017, p. 23.

[94] BLOUIN, Jennifer L. and SHACKELFORD, D. A. *Investment, Tax Uncertainty and Aggressive Tax Avoidance.* Research Gate, January 2017. Available at: https://www.researchgate.net/publication/267960298_Investment_Tax_Uncertainty_and_Aggressive_Tax_Avoidance. Accessed on 15 May 2020.

[95] TAYLOR, Grantley and RICHARDSON, Grant. *Incentives for corporate tax planning and reporting: Empirical evidence from Australia*. Journal of Contemporary Accounting and Economics, v. 10, issue 1, 2014, p. 1-15.

[96] ÁVILA, Humberto. *Certainty in Law*. Switzerland: Springer International Publishing, 2016. *Passim.*

is entitled with the power to change the system and second in the predictability of whether, when, why and how the changes will occur[97].

In terms of material aspect[98], legal certainty requires the realization of a state of affairs whose gradual promotion depends on certain types of behavior, such as publishing an act or setting for transitional rules, which creates the necessary means to realize a state of legal certainty. These behaviors or conditions form the structure of the legal certainty principle. Legal certainty is, under this perspective, a norm that determines the realization of a state of affairs characterized by the individual´s capacity to plan action strategically in a juridically informed and respected manner. In case of legal certainty principle, the question is what types of behavior contribute to the promotion of the factual conditions that constitute the ideal states of knowability, reliability and calculability of the law.

In terms of personal aspect[99], a law may be obvious to an expert but not to an ordinary citizen. This seems especially true in the field of taxation where experts on both sides, tax administration and tax law professionals, debate the state's right to demand taxes and the duty of the citizen to pay them, at a level apparently above the ordinary understanding of that taxpayer. After demonstrating why tax law becomes so complex, not just because of technicality, but because it involves large doses of political and economic interest, could it also include professional interest?

In other words, should tax legislation, which is "naturally imperfect" since it is extensive and complex, guarantee the right of certainty for exploring these imperfections? However, the point is that not only the "ordinary" taxpayer is doing so, but essentially experts, whose expertise is exactly to find and explore imperfections in the law.

Ávila[100] analyses who will benefit from legal certainty, presenting a citizen (legal certainty can take on a strictly individual dimension when its use aims to protect an individual´s private interest), the entire collectivity and the State. Moreover, he points out the perspective of who serves as a criterion for measuring legal certainty.

Tax uncertainty can, moreover, derive from several sources. Weaknesses of the institutional framework of tax policy, at domestic and international level, are the main drivers. At the international level, the existence of different tax systems unavoidably generates uncertainty for cross-border investments.

The subject is expanded in Chapter IV[101], additionally explaining other views about the existence of static certainty and dynamic certainty. A static dimension, which consists of examining the content of law; and a dynamic dimension, focusing on the investigation of the force of law.

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[97] Ibid, p. 199, quoting Mohl and Calamandrei.
[98] Ibid, p. 112.
[99] Ibid, p. 90, quoting Frederico Arcos Ramirez, *L'aseguridad jurídica: una teoria formal*, Madrid: Dykinson, 2000, p. 260.
[100] Ibid, p 91.
[101] See Chapter IV, topic 4.4 – The answer to Legal Certainty.

Finally, regarding to governments, tax competition between countries can increase tax uncertainty along an active and a passive channel. The active channel is that countries may try to attract capital, profits and corporations by introducing specific regimes mainly targeted to cross-border investments. These regimes create discontinuities in the tax treatment of investment and they may ultimately generate tax uncertainty. The passive channel describes countries trying to protect their domestic tax revenues in the process of tax competition, complicating the international tax environment further [102].

Notwithstanding, at this point, this work hopes to arouse the reader's curiosity and demonstrate how the tax system has become increasingly complex and why it would need to be reversed, to the extent that MDR highlights where weaknesses, differentiated treatments and the loopholes that could (and should, which will always be a decision of the legislator) be closed.

Interim conclusion.

In fact, the loss of revenue, coupled with a reduction in global economic growth after the financial crisis[103] in 2008, led countries to seek broad coordination and standardization in tax rules and agreements. The great evolution of this international coordination occurred around the G-20, developing both the international fiscal transparency and the attempt to combat what is considered aggressive tax planning in its intention to achieve tax advantages. In this scenario, tax issues have gained so much importance that in all the G-20 statements over the last years, both are present[104].

Searching for this political integration, tax administrations communicate constantly and seek the exchange of experiences, in permanent debates. The discussions take place within the scope of the UN, the OECD, G-20, Inter-American Center of Tax Administrations (CIAT), among others international forums. This is the true *fiscal globalization* and solutions based on transparency and exchange of information in tax matters, as MDR, started to emerge.

Nevertheless, a possible new international tax regime should not neglect the existence of differences between sovereign states in economic, social and political terms, and that is the main cause of the competition among them. If it is true that on one hand the end of tax competition could increase domestic social welfare, on the other hand the inequality between states will most likely increase. That is why without the possibility of offering fiscal benefits, States could migrate to other forms of attracting capital, modifying labor and environmental legislation[105].

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[102] ZANGARI, Ernesto; CAIUMI, Antonella and HEMMELGARN, Thomas. *Tax Uncertainty: Economic Evidence and Policy Responses.* European Commission. Taxation and Customs Union. Taxation Papers, Working paper n. 67, 2017, p. 2-3.

[103] GDP Growth Annual (%). World Bank national accounts data, and OECD National Accounts data files. Available at: *https://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG.* Accessed on: 16 Sep. 2018.

[104] IMF AND THE GROUP OF TWENTY. Available at: https://www.imf.org/external/np/g20/. Accessed on 30 Jan 2018.

[105] OLIVEIRA, Ludmila Monteiro de. *Direito tributário, globalização e competição: por que só harmonizar não basta*. Belo Horizonte: Arraes Editores, 2016, p. 128.

Moreover, globalization has collaborated in the creation of an unstable and complex tax system, which emerged from the intention of creating beneficial treatments and attractive conditions for volatile capital. From this point of view, the introduction of MDR could be justified as a means "to correct uncertainties", although some frequent changes in the tax law must be made. However, its number must be reduced over time as the system functions efficiently, in a way MDR will put in evidence weaknesses or gaps that need to be closed.

Private individuals do not have the right to postulate the maintenance of the legal order as it is at present. Thus, it is important to make a distinction between certainty and legitimate expectations. Moreover, there is a need for distinguishing who exactly is exploring the complexity in tax law and for who the legal certainty is addressed.

From the viewpoint of ordinary citizens, in the case of tax law, there will be knowability when taxpayers themselves, not their accountants or lawyers, are able to access the norm they must obey and to understand its content. The perspective of who will assess normative quality is therefore essential, because it is impossible to know whether an act is evidently or manifestly illegal without knowing from whose point of view illegality is to be established.

From the viewpoint of operators of the law, the understanding arises from the content of norms, which cannot be suitably regulated without the use of precise technical terms. In the sphere of tax law, this understanding also affects the concepts used by lawmakers. For instance, there will be knowability if technicians can decode tax concepts, regardless of whether taxpayers can do so without help.

Everything depends, nevertheless, on trust[106] and it is basic for the protection of legitimate expectations. The trust protection principle requires the trust of a private citizen in the manifestation of a public authority. By definition, its application involves tension with other principles that are also part of the legal certainty principle: the democratic principle - which means that the *legislative* has the ability to institute new rules or to change prior rules to adapt them to reality, potentially leading to discontinuation of the application of prior rules - and the principle of the separation of powers.

In conclusion, for these reasons explained here, it is possible to see how MDR might be related to some of the undesirable effects of globalization in the tax field, such as harmful tax competition and instability in the tax law systems. Some considerations were also presented to answer questions about international effects and legal certainty.

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[106] ÁVILA (2016). Op. Cit., p. 258.

2.2 From Competition towards Coordination and Transparency.

This topic specifically describes the measures that have been taken since the competition mentioned in the previous topic, as a relevant cause, and the simple standardization of international treaty rules, as insufficient solution, have shown a lack of control over the international tax base erosion and profit shifting. Michael Keen provides an interesting reflection on this theme, suggesting that "n*avigating these complexes and in some respects divergent developments requires stepping back from the fascinating but also sometimes mind-numbing complexities to think through the links between competition, coordination and avoidance in international taxation*" [107].

Harmonization *(lato sensu)* can be broken down into four different levels, according to Jose Casalta Nabais[108]:

(i) uniformity that would completely eliminate differences, based on single regulations, which means the loss of significant portions of the sovereignty represented by the power to tax;

(ii) the elimination of disparities between national laws in order to achieve the same results, without limiting the exercise of the domestic legislator, which presupposes the use of a wider range of measures, including, albeit exceptionally, the directives and community laws;

(iii) legal coordination of legislation at the level of international cooperation, which seeks to achieve a common basis of principles and rules in order to apply identical solutions to transnational problems, which ultimately leads to the standardization of rights at national level; and

(iv) simple policy coordination that leads to coordination that is not about laws or normative acts but touches the exercise of political or governmental power, despite the fact that it is possible to include legislative coordination, which is represented by international legal cooperation and is materialized through international conventions based on directives or models.

At the first level is the harmonization '*stricto sensu'*. At the following levels, there is a softening, which tries to approximate a theoretical situation of complete "equality" in legislation with a practical and factual reality, that is, coordination or "joint action" but which respects inequalities.

In other words, the great problem with harmonization '*stricto sensu'*, described at the first level above, which in theory would eliminate competition for the impossibility of disparities, is that it would not bring equal benefit to all countries. This is because this alleged harmonization stops at the tax issue, without going further in search of economic and social harmonization, which would

[107] KEEN, Michael. *Competition, Coordination and Avoidance in International Taxation.* International/OECD - Bulletin for International Taxation, v. 72, n. 4/5, 2018. Published online: 21 Mar. 2018.

[108] NABAIS, José Casalta. *A soberania fiscal no actual quadro de internacionalização, integração e globalização econômicas.* Direito Público, n. 6, out./nov./dez 2004, p. 76-77.

enable the reduction of regional inequalities and the distribution of world wealth. The solution then turns to *coordination* among countries, which could be applied in different levels, as described in the previous paragraph. The point is that by respecting these inequalities, mismatches and loopholes will still exist.

2.2.1 Coordination based on Tax Treaties.

Coordination requires a lighter interference because it allows the States to maintain their domestic policies, coordinating their respective tax systems with those of common markets or of common interests. The increasing number of tax treaties represents coordination at the international level, particularly in relation to cross-border investments and the taxation of related flows of capital and income. Tax treaties have an essential function in solving tax jurisdiction conflicts, allocating taxation rights between sovereign States. However, in combination with the free movement of capital, the existence of the treaty may open up the possibility for the company or businessperson to choose in which jurisdiction to recognize profits (by means of profit shifting), primarily to reduce the tax burden and not for business purpose.

The issue essentially relies on the nondiscrimination clause. Concepts of equal treatment and nondiscrimination were made operative through positive law. Tax Treaty nondiscrimination clauses always list the circumstances in which companies and persons should be treated neutrally, meaning a mutual promise by the Contracting States to treat each other's citizens and corporations no differently than their own, for tax purposes[109]. However, as Utz explains, if in the past, nondiscrimination clauses typically left it to the law of each Contracting State to decide which non-natural persons and associations should be accorded the treaty privilege of nondiscrimination, times have changed and *"the manipulation of corporate nationality or its counterpart (...) has become a regular feature of international business tax planning. The point of choosing carefully where to incorporate is often, if not invariably, to take advantage of the disparate benefits of tax treaties"* [110].

As a result, *"as international tax advisors are too well aware, picking the most advantageous place in which to form a corporation or other entity is sometimes precisely a question of ascertaining how treaties will permit the entities of that jurisdiction to pay lower taxes in a treaty partner's jurisdiction. The phrase 'treaty shopping' was coined to describe this phenomenon"*[111]. In the US the awareness of treaty shopping and its effects in the growing evasive business planning dates from 1980's[112].

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[109] VAN RAAD, Kees. *Nondiscrimination in International Tax Law*. Deventer, The Netherlands: Kluwer Law and Taxation Publishers, 1986, p. 13-15.
[110] UTZ (1994). Op. Cit., p. 779.
[111] Ibid, p. 777.
[112] ROSENBLOOM, H. David. *Tax Treaty Abuse: Policies and Issues.* Law and Policy in International Business, v. 15, n. 3, 1983, p. 763-832. See also SHOUERI, Luís Eduardo. *Planejamento Fiscal através de acordo de bitributação. Treaty Shopping*. São Paulo: Revista dos Tribunais, 1995.

For instance, the unilateral responses available for treaty abuse through case studies involving the United States include overrides, renegotiations, turnoff provisions, and terminations. A survey[113] indicates that these policy instruments were not part of a hierarchical set of responses and that the United States has been quite active in legislating treaty overrides, a practice that has drawn some criticism and the insertion of its Branch Profits Tax (BPT) can help to illustrate the country´s use of overrides. Subsequently, the United States renegotiated all of its tax treaties to insert a BPT provision. Therefore, it takes a lot of influence and effort to solve the problematic in a unilateral way, this normally is not in the reach of all countries, and multilateral measures have been taken.

In 2016, the OECD announced that over 100 jurisdictions concluded negotiations on the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting *("Multilateral Instrument" or "MLI").* MLI entered into force on 1st July 2018 and, according to the Organization, will implement a series of tax treaty measures to update international tax rules and lessen the opportunity for tax avoidance by closing the gaps in the existing international tax system. The OECD expects that when the instrument modifies the application of thousands of concluded bilateral tax treaties, it can eliminate double taxation and also implement agreed minimum standards to counter treaty abuse and to improve dispute resolution mechanisms while providing flexibility to accommodate specific tax treaty policies[114].

For these reasons, the conclusion is that in order to promote international tax coordination, tax treaties network demonstrated not to be a complete and definitive solution and something more is necessary.

2.2.2. A broad exchange of information.

A broad exchange of information represents another element of the increasing coordination. Notwithstanding the main objective of tax treaties models is to avoid double taxation and double non-taxation, within the reality of globalization, there is increased emphasis in the exchange of information between tax administrations.

In the more recent commentaries on Article 26 of its Model Convention, the OECD states that: "*moreover, in view of the increasing internationalization of economic relations, the Contracting States have a growing interest in the reciprocal supply of information on the basis of*

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[113] MARIAN, Omri. *Unilateral Responses to Tax Treaty Abuse: A Functional Approach.* University of Florida Law Faculty Publications, v. 41, n. 3, 2016, p. 1161-1164. Available at: http://scholarship.law.ufl.edu/facultypub/765.
[114] OECD. *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS*. Available at: https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm. Accessed on: 22 Oct. 2019.

which domestic taxation laws have to be administered, even if there is no question of the application of any particular article of the Convention" [115]. However, it was not always like this.

In 1963, the exchange of information on tax matters was already provided for. The OECD Model Convention 1963[116], Article 26 (Exchange of information), stated that competent authorities of the Contracting States should exchange such information as is necessary for the carrying out of the Convention and of the domestic laws of the Contracting States concerning taxes covered. Any information so exchanged should be treated as secret and should not be disclosed to any persons or authorities other than those concerned with the assessment or collection of the taxes which are the subject of the Convention.

Since the 1970´s and 1980´s, the international community has developed proposals for breaking down barriers in the exchange of information on tax matters. However, already in the 1990´s, Tanzi[117] registered that an *"increasing emphasis has been placed on taxpayers´ rights, which may impose legal limitations to the kind of information that the tax authorities of one country can provide or are willing to provide to those of other countries"*. Moreover, according to him, this aspect becomes particularly important when the information potentially includes trade secrets that might benefit the competitors from the requesting country. It is possible that, besides this possible problem threatening the fair competition between taxpayers, there were also political constraints due to an increasing competition between countries.

That author highlights some problematic aspects, which from his viewpoint existed at the time, for example: the obligation to provide information should be limited to the taxes covered by the tax treaty; being restricted to persons who reside in the countries covered by the treaty and, in this case, if tax evaders can claim a residence in third countries, especially in tax havens, then the requesting tax authority might not be able to get the information. Furthermore, in several cases tax authorities in the country that has been requested should not have that information themselves and might not be able, for legal or administrative reasons, to obtain it. In these circumstances, the country had no obligation to supply the information and no possibility of doing it even if it were willing to do it.

As a result, if two countries had widely different practices, for instance, one has banking secrecy and one does not, the net result was that the information exchanged would be minimal.

It is possible, therefore, to imply that for achieving coordination, a broad exchange of information is a fundamental enabler. However, a high level of coordination, in the sense of similar policies and regulations for dealing with specific situations, in other words, the elimination of disparities between national laws in order to achieve the same results, without limiting the exercise of the domestic legislator, would be necessary for providing a reasonable and proportional level of

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[115] OECD (2017). *Model Tax Convention on Income and on Capital: Condensed Version 2017.* Paris: OECD Publishing, 21 Nov 2017, p. 487.

[116] OECD (1963). *Income and Capital Draft Model Convention and Commentary*. Paris: OECD Publications, 30 Jul 1963.

[117] TANZI (1995). Op. Cit., p. 86.

information. It is a circular reasoning. Therefore, some measures to standardize the information to be exchanged and its flow were necessary.

It was from the 1990´s that the OECD began to develop a detailed report identifying so-called harmful tax practices for fiscal competition[118]. The first 1998 Report was later analyzed and revised, but at that time the focus was on identifying '*tax havens*'. It was also at that time they began to think about the creation of a Global Forum[119], with the implementation of an effective exchange of information.

At this point, it is interesting slightly digress to recall the debate on *'tax havens'*, which, within the topic of globalization, re-emerged, assuming tax havens[120] as those countries or territories that adopt a flexible policy in regard to the collection of taxes - low or nonexistent rates - for the capital deposited in their financial institutions. In addition to the tax exemption, they usually guarantee anonymity to the owners of the money and, in the case of legal entities, the confidentiality of the stock ownership of the companies.

Discussing tax havens, tax treaties and exchange of information, Tanzi states: *"to qualify as a tax haven, a country must have low or no taxes on foreign source capital income, have political stability, be easily accessible, have a free exchange market, have banking secrecy, and have developed a good treaty network with important countries, so that the incomes channeled to the tax haven country are not excessively taxed at the source".*[121]

The OECD, thus, incentivizes the fight against tax havens[122] and several countries started to adopt laws with discrimination clauses against companies using those jurisdictions. As a result, avoiding a collapse in the international tax treaties network, countries try to control the abusive use of tax havens incentivizing a mutual exchange of taxpayers' information, and it is necessary to stress, sometimes in exchange for financial aid, sometimes using their economic powers.

The fact is that although the exchange of information has long been foreseen in the OECD Model Convention to avoid double taxation, what has been observed over time is the significant use of another modality of convention, aiming exclusively at the exchange of information on tax matters: The Agreement on Exchange of Information in Tax Matters (Model TIEA)[123]. This is an

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[118] OECD (1998). *Harmful Tax Competition - An Emerging Global Issue*. (1998 Report). Paris: OECD Publishing, 1998, p. 8. "*The Report describes progress made over the last year in identifying and addressing harmful tax practices within and outside the OECD. The Report is intended to develop a better understanding of how tax havens and harmful preferential tax regimes, collectively referred to as harmful tax practices, affect the location of financial and other service activities, erode the tax bases of other countries, distort trade and investment patterns and undermine the fairness, neutrality and broad social acceptance of tax systems generally. Such harmful tax competition diminishes global welfare and undermines taxpayer confidence in the integrity of tax systems"*.

[119] Ibid, p. 53.

[120] ZUCMAN, Gabriel. *The Hidden Wealth of Nations: The Scourge of Tax Havens*. University of Chicago Press, 2015.

[121] TANZI (1995). Op. Cit., p. 78-79.

[122] GRAVELLE, Jane G. *Tax Havens: International Tax Avoidance and Evasion*. Senior Specialist in Economic Policy. Jan. 2015. Available at: *https://fas.org/sgp/crs/misc/R40623.pdf.*

[123] OECD. Model Agreement on Exchange of Information on Tax Matters (Model TIEA). "*The purpose of this Agreement is to promote international co-operation in tax matters through exchange of information. The OECD Global Forum Working Group on Effective Exchange of Information developed it. The Agreement grew out of the work*

alternative to Article 26 of the OECD Model Convention, since many countries would not be willing to enter into Double Taxation Agreements with ´tax havens´, although they would like to obtain tax information on taxpayers established in them or who had business there.

Within the rules established by the OECD at the Global Forum on Transparency and Exchange of Information for Tax Purposes[124], in order to be considered as a jurisdiction that has substantially implemented the international standards, it is necessary to have signed at least 12 Conventions foreseeing the effective exchange of information. This establishment of a minimum of agreements ended up creating an incentive for several jurisdictions formerly considered as ´tax havens´ to enter into agreements of the kind to avoid severe tax consequences imposed on "*non-cooperative jurisdictions*". Consequently, this model of information exchange, in a short time, became a success celebrated by the OECD.

It is true that the adoption of this criterion, according to which a country is considered to be "*non-cooperative*" depending on the implementation or commitment to enter into a minimum number of agreements foreseeing the effective exchange of information, has also led to the reform of the domestic legislation of several countries. In some cases, as in Brazil, even influenced the jurisprudential position of the Supreme Court[125], especially concerning access to bank account data directly obtained by Tax Authorities and sent to other parties under agreements.

Concerning what Yariv Brauner refers to as "*the Global Financial Crisis resulted in the starvation of revenue and lack of power to independently regenerate countries' tax collection*", he states that "*the first response to this crisis focused on collection and the most traditional, conservative tax treaty law measure of information exchange. The theory was that an enhanced*

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undertaken by the OECD to address harmful tax practices. The lack of effective exchange of information is one of the key criteria in determining harmful tax practices. The Agreement represents the standard of effective exchange of information for the purposes of the OECD's initiative on harmful tax practices. This Agreement, which was released in April 2002, is not a binding instrument but contains two models for bilateral agreements. A large number of bilateral agreements have been based on this Agreement". Available at: https://www.oecd.org/ctp/exchange-of-tax-information/taxinformationexchangeagreementstieas.htm. Accessed on: 23 Oct. 2019.

[124] OECD. THE GLOBAL FORUM *is the continuation of a forum, which was created in the early 2000s in the context of the OECD's work to address the risks to tax compliance posed by non-cooperative jurisdictions. The Global Forum was restructured in September 2009 in response to the G20 call to strengthen implementation of these standards. The Global Forum now has 147 members on equal footing and is the premier international body for ensuring the implementation of the internationally agreed standards of transparency and exchange of information in the tax area. Through an in-depth peer review process, the restructured Global Forum monitors that its members fully implement the standard of transparency and exchange of information they have committed to implement. It also works to establish a level playing field, even among countries that have not joined the Global Forum.* Available at: http://www.oecd.org/tax/transparency/. Accessed on: 02 Jan. 2018.

[125] BRAZIL (2016). Federal Supreme Court. Action of Inconstitutionality (Ação Direta de Inconstitucionalidade). ADI n. 2859/DF. Rel. Min. Dias Toffoli. Judgement on 24 Feb. 2016. – The questions just refer generally to Constitutional law. *"...Brazil undertook, in the face of the G20 and the Global Forum on Transparency and Exchange of Information for Tax Purposes, to comply with the international standards of transparency and exchange of banking information established with the aim of avoiding non-compliance with tax rules, as well as combating criminal practices. Should not the Brazilian State dispense with automatic access to the taxpayers' banking data by its tax administration, under penalty of non-compliance with its international commitments***".** Available at: http://portal.stf.jus.br/processos/downloadPeca.asp?id=310576360&ext=.pdf.

and cheap exchange of information, coupled with the destruction of bank secrecy would eliminate most abusive tax planning regimes and restore the power of the old international tax regime." [126]

As of 2005, paragraphs 4 and 5 were included in Article 26 of the Model Convention. Paragraph 5, in turn, ensures that the restrictions contained in paragraph 3 do not curb the exchange of information held by financial institutions, as well as the exchange of certain corporate information. Paragraph 4 was intended to emphasize that the obligation to exchange information is applicable even if the requested State does not need the mentioned data for the purposes of its own taxation. Thus, according to paragraph 4, States may use their internal data collection mechanisms only to obtain and provide information to other States[127]. So, significant changes can be observed, in comparison to what was existent in the 1963 Model Convention.

Moreover, *The Convention on Mutual Administrative Assistance in Tax Matters* (The Convention)[128] represents another multilateral instrument developed by OECD in 1988 and amended in 2010. According to the OECD, the Convention "*is the most comprehensive multilateral instrument available for all forms of tax co-operation to tackle evasion and avoidance*". The Convention was amended to respond to the call of the G-20 to align it to the international standard on exchange of information on request and to open it to all countries, for signature, on June 2011. Since 2009, the G-20 has consistently encouraged countries to sign the Convention.

Therefore, broadening the exchange of information network presented some problems, because the coordination was not in the desired level (for instance, some countries used bank secrecy or other secrecies to protect the taxpayers' identity and others not). Furthermore, only obtaining information was not a sufficient reason to engage in a "modeled" Tax Treaty that involved a series of mutual obligations.

Transparency, then, became a global flag. Besides the arguments involving the need to reinforce tax systems around the Globe, there arouse the fight against terrorism and international traffic, aiming at a control over the movement of money that funds those activities.

2.2.3 Transparency.

The term transparency is used to describe certain feature of a tax system, in particular with regard to its administrative practices[129]. For instance, a lack of transparency may manifest itself by a

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[126] BRAUNER, Yariv. *An Essay on BEPS, Sovereignty and Taxation.* Tax Sovereignty in BEPS Era, Series on International Taxation, v. 60. The Netherlands: Walters Kluwer, 2017, p. 81.

[127] OECD (2014). *Model Tax Convention on Income and on Capital: Condensed version 2014*. Paris: OECD Publishing, p. 431. Prior to the addition of paragraph 4 this obligation was not expressly stated in the Article, but was clearly evidenced by the practices followed by member countries which showed that, when collecting information requested by a treaty partner, Contracting States often use the special examining or investigative powers provided by their laws for purposes of levying their domestic taxes even though they do not themselves need the information for these purposes. This principle is also stated in the report Improving Access to Bank Information for Tax Purposes.

[128] OECD and COUNCIL OF EUROPE (2011). *The Multilateral Convention on Mutual Administrative Assistance in Tax Matters: amended by the 2010 protocol*. Paris: OECD Publishing, 2011.

[129] IBFD. *Transparency.* International Tax Glossary, 7 ed., Amsterdam: Julie Rogers-Glabush editor, 2015, p. 500.

general domestic fiscal environment such that the laws are not enforced in line with the domestic law. On tax transparency matter, one of the most significant steps was taken in 2009, when, at the request of the G-20, the OECD agreed to expand the Global Forum on Transparency and Exchange of Information for Tax Purposes to non-member countries of the entity. Most of these countries have, over the years, participated in a *peer review* process, in which they underwent review of their legislation by other countries, receiving suggestions for improvement of their laws in search of greater transparency of information.

For example, despite that fact it is not an OECD Member, Brazil has been actively participating in this process towards transparency. In the Global Forum's report on the Brazilian exchange of information practice, it was evident that Brazil had sent information 89 times between 2009 and 2011, which is not a significant number. However, since 2012 and strongly from 2014, the Forum focuses on what is called *automatic information exchange*. If before it was necessary for one country to request the other for the information, this system foresees the exchange, independently of any request, for so-called passive incomes, which are dividends, royalties, interest, rents, etc.[130]

Therefore, in addition to the *peer review*, the Global Forum created the automatic exchange of international information, which became a reality since 2017 and is based on the *Convention on Mutual Administrative Assistance in Tax Matters*. In 2017, 54 countries (called *early adopters*) started to automatically exchange information on financial assets (even if they were under trusts, foundations or offshore companies) and, starting in 2018, another 47 countries, entered in the automatic exchange. The standard for the exchange of these information was approved in 2014 by the G-20, which is called Common Reporting Standards (CRS)[131].

The list of the first countries included almost all the Member States of the European Union (Austria entered one year latter), dependent territories of the United Kingdom and Denmark, as well as some prominent members of the G-20, such as South Africa, Argentina, South Korea, India and Mexico. Thus, since September 2017, the British territories of Anguilla, Bermuda and Caiman Islands, among others, ceased to be tax havens and became the first countries to automatically share the bank details of their citizens.

The United States (US), one of the great absentees of this global system, already has dozens of bilateral agreements on the exchange of banking data, especially with Luxembourg, Monaco and Switzerland. Notwithstanding, the US has enacted its own plan called FATCA, with which this work

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[130] BRAZIL (2015). *Brasil exagera ao usar regra internacional contra planejamento fiscal abusivo*. Revista Consultor Jurídico. 11 Jan. 2015. Available at: https://www.conjur.com.br/2015-jan-11/entrevista-sergio-andre-rocha-advogado-tributarista. Accessed on: 02 Jan. 2018.

[131] OECD (2014). *Standard for Automatic Exchange of Financial Account Information in Tax Matters*. Paris: OECD Publishing, 2014. In 2014, the Global Forum adopted the Standard for Automatic Exchange of Financial Account Information in Tax Matters (the AEOI Standard) developed by the OECD working with G20 countries. To deliver a level playing field, the Global Forum launched a commitment process under which 102 jurisdictions have committed to its implementation in time to commence exchanges in 2017 or 2018. With exchanges under the AEOI Standard, having now commenced amongst almost 50 jurisdictions there has been a major shift in international tax transparency and the ability of jurisdictions to tackle offshore tax evasion. Available at: http://www.oecd.org/tax/transparency/reporting-on-the-implementation-of-the-AEOI-standard.pdf . Accessed on: 02 Jan 2018.

deals in a specific topic below, in 2010 by the Congress, to target non-compliance by US taxpayers using foreign accounts[132].

On June, 2019, the OECD[133] made a note available, which "*presents a summary of ongoing work to assess the impact of increasing tax transparency and exchange of information (EOI) on cross -border financial activity using international investment data*". The Organization registers a "dramatic" growth in tax transparency worldwide and that more than 100 jurisdictions thus participate in the Multilateral Convention on Mutual Administrative Assistance on Tax Matters. As a result, a "significant" decline in activity in international financial centers (IFC) is specified.

The concept of IFC is controversial and it comes from a set of jurisdictions, for instance Andorra, Bahamas, Cyprus, Gibraltar, Malta, Singapore, Switzerland and Vanuatu, that have historically been associated with offshore activity. In its study, however, the OECD used a list of 46 jurisdictions based on IMF report[134], which defines offshore financial centre (OFC) as "*a centre where the bulk of financial sector activity is offshore on both sides of the balance sheet, where the transactions are initiated elsewhere, and where non-residents control the majority of the institutions involved".*

According to the OECD, scientific works have examined the impact of the expanded exchange of information network and its association with reductions in the bank activity in IFCs. The Organization´s data confirm those findings.

However, in its point 25, the note[135] registers that:

> *(...), shifts in deposits are not the only potential response to EOI. Bank deposits may remain offshore and become tax compliant. Reductions in IFC bank deposits may also respond to other contemporaneous tax factors including changes in the tax environment of the IFC and the home jurisdiction of the capital owner. These could include changes in statutory rates or changes in tax rules, such as those that might result from the implementation of the OECD/G20 BEPS package. Disentangling these various effects remains a significant challenge.*

That note has two important links to MDR analysis. First, it demonstrates how growth in tax transparency plays an important role in the OECD acts for tax compliance promotion and that it is not necessary to specify if the taxpayer conduct was defined as "avoidance" or "evasion", but only the result in terms of compliance. Irrespective of the money in offshore deposits having its origins in money-laundering, bribery or being legal and only avoiding the regular taxes, the effects appear.

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[132] THE UNITED STATES. Department of the Treasury. *Foreign Account Tax Compliance Act* (FATCA). Available at: *https://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx.* Accessed on: 29 Oct. 2019.
[133] OECD (2019). *Using bank deposit data to assess the impact of exchange of information*. Paris: OECD Publishing, 2019, p. 1-12. Available at: http://www.oecd.org/tax/exchange-of-tax-information/using-bank-deposit-data-to-assess-the-impact-of-exchange-of-information.pdf. Accessed on: 07 Jun. 2019.
[134] IMF (2000). *Offshore Financial Centers*. IMF Background Paper. Prepared by the Monetary and Exchange Affairs Department, on 23 Jun. 2000. Available at: https://www.imf.org/external/np/mae/oshore/2000/eng/back.htm. Accessed on: 07 Jun 2019.
[135] OECD (2019). *Using bank deposit data to assess the impact of exchange of information*. Cit., p. 9.

Second, the reduction in offshore bank deposits does not directly mean that the entire amount has been repatriated and reported to the tax authorities. It is possible that money has migrated to other jurisdictions; it can now be represented not in the form of deposits but capital or other investments. It may have returned to resident jurisdiction because it has temporarily offered tax favors, as happened in Mexico[136] and the effect is temporary.

As the OECD recognizes with regard to measures that increase transparency and reduce the amount of deposits in observed international financial centers, the same phenomena can be observed regarding to the amount of tax planning revealed after the introduction of MDR, which does not mean that the system is operating successfully or failing. Similarly, the deterrence effect, which the OECD proposes as one of MDR results is much more challenging to measure, as the Organization concludes here, when analyzing the effects of the measures addressed in this topic ("*Disentangling these various effects remains a significant challenge*").

2.2.3.1 The FATCA.

The United States (US) is not part of the amended Convention[137], so they created their own information exchange system, the well-known *Foreign Account Tax Compliance Act* (FATCA). The discipline provides for a unilateral requirement for any *Foreign Financial Institution* (FFI) holding US citizen bank accounts. The obligation consists of a United States tax-compliance law for application by financial institutions on a worldwide scale, which shall control and report to the US Tax Authorities information concerning the US legal person or company, or concerning him/her who has evidence of being so. Non-compliance implies the possibility that the United States will tax 30% the amounts remitted from their territory to these foreign financial institutions. Given that holding US securities is an essential part of the business of FFIs of any size, a 30% withholding would be commercially crippling.

FATCA is seen by many people as a new form of imperialism[138], where the US uses its economic power to compel jurisdictions to meet their fiscal and economic interests, in addition, the automatic exchange of financial information between governments because of the FATCA promulgation are made without taking domestic laws into consideration.

One might even question whether domestic legislative provisions could link taxpayers from other jurisdictions, especially where the obligations imposed on foreign banks in the exchange of information violated the law of the country of residence in terms of privacy and banking secrecy.

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[136] MEXICO (2017). *Mexico attracts 3 billion pesos through tax repatriation plan.* Reuters, Business News, 19 Apr. 2017. Available at: https://www.reuters.com/article/us-mexico-tax/mexico-attracts-3-billion-pesos-through-tax-repatriation-plan-idUSKBN17L067. Accessed on: 29 Oct 2019.

[137] OECD. *Jurisdictions Participating in The Convention on Mutual Administrative Assistance in Tax Matters* - status on 3 October 2019. Available at: https://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf. Accessed on: 23 Oct. 2019.

[138] LOADER, David. *Fund Custody and Administration.* London: Elsevier, 2016, p. 7.

Not only that, the application of the withholding tax was in contrast with possible double taxation treaties in force with the FFI's States of residence, not to mention the obligation to apply the withholding tax to the same FFIs with respect to which the FATCA legislation could not constitute a binding legal basis[139].

As of 2012, the US has concluded a series of bilateral agreements (*Intergovernmental Agreement*, IGA). The existence of an IGA implies to elide the claim of punishment for breach in FATCA. For the exchange of information, initially, the domestic legal structure is used to capture the data in each tax administration and, for the effective exchange, the IGA, which has legal support in the norms that allow its establishment. In Brazil[140], for example, it is incumbent on the Federal Revenue Service (RFB) to collect the data and send it to the US, receiving in return data about Brazilians´ holdings in the US. However, this reciprocity does not occur in general.

In this way, a legal basis has been given to the obligations imposed by the FATCA regulations on subjects unrelated to the US legal system. In fact, these obligations no longer derive from US domestic legislation, but from a source of international law (the IGA are, in fact, international treaties pursuant to the 1969 Vienna Convention), by the domestic legislation transposing it.

The US created two basic models of IGA. The first (IGA1) provides for an obligation on the FFI of the Contracting States to communicate the information to their respective tax authorities, which will automatically exchange it with the IRS. It is the model with which most of the completed IGAs follow, which inspired the OECD's Common Reporting Standard[141] (CRS) and was adopted in the European Union by Directive n. 2014/107 /EU[142].

The second model (IGA2) does not provide for the intermediation of the tax authorities of the countries of residence of the FFI (except for the information exchanged on request, therefore not automatic), but the exchange directly between the IRS and the financial institution (FFI). In this case, the IGA serves as a legal basis to exempt foreign financial institutions from any restrictions on the exchange of information that may be established by domestic regulations. That is, the international agreement is used to direct changes in domestic law or sometimes circumvent domestic law.

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[139] NOTE. This is treaty override and therefore legal from a US point of view. See Chapter II, topic 2.2.1 - Coordination based on Tax Treaties.

[140] COELHO, Carolina Reis Jatobá. *Bank secrecy and global governance: the incorporation of FATCA (Foreign Account Tax Compliance Act) into Brazilian legal framework and its international regulatory impact*. Revista da Receita Federal: estudos tributários e aduaneiros, Brasília-DF, v.1, n.2, jan./jul. 2015, p. 83-122.

[141] OECD (2014). *Standard for Automatic Exchange of Financial Account Information in Tax Matters*. Paris: OECD Publishing, 2014.

[142]EUROPEAN UNION (2014). Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation. OJ L 359, 16.12.2014, p. 1–29. Following a previous political endorsement at the G20 level (June 2013), as well as the technical work undertaken by the OECD level and by Germany, Italy, Spain and the UK for the implementation of their FATCA agreements, in October of 2014 EU Member States reached a political agreement to amend the Directive 2011/16/EU, implementing the automatic exchange of information on tax matters. The agreement was formalized in December, with the adoption of the amended Directive by the ECOFIN Council (Council Directive 2014/107/EU).

Principally, while the IGA1 model is based on the automatic exchange of reciprocal information, the IGA2 model provides a one-direction to the US. A limited number of countries, including Switzerland, Bermuda, Hong Kong, San Marino, Taiwan, Austria and Japan, has adopted this IGA2 model.

The main difference between the automatic exchange of information planned under the OECD-EU framework and the exchange of information under the FACTA agreements lies in the issue of reciprocity of reporting obligations. For example, the agreement between the US and Italy in 2014, which was ratified by law in June 2015, followed by a Decree of the Ministry of Economy and a procedure of the Italian Tax Administration in August of the same year[143].

The IGA1 model in this case is reciprocal only in its intentions. Article 6 (1) of the Agreement (reciprocity) states that the US Government recognizes the need to achieve an equivalent level of reciprocity in the exchange of automatic information with Italy. The US government is committed to further improving transparency and intensifying the reporting of information exchanges with Italy, pursuing the adoption of regulations and legislation to achieve these levels[144].

Besides the agreement recognizing the absence of reciprocity in the flow of information, it establishes on the part of the US only intentions, not obligations. It is possible to verify that the balance of the agreement is decisively in favor of the US.

Thus, it is possible to conclude the existence of an instrument, which is different from the OECD Model Convention, Article 26 and from Multilateral Instruments, forcing the information flow between countries, not necessarily based on coordination, neither legislative, nor political, nor administrative.

Something that should be avoided, in the eventual introduction of MDR due to external pressures, is that the system should not be implemented without advantages for the Tax Administration and national taxpayers. This is one of the objectives of this work, discuss how in the application of MDR, even if only to follow global trends, it should be possible to extract advantages in the domestic relationship.

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[143]ITALY (2015). MEF, Dipartimento delle Finaze. Decreto di attuazione della legge 18 giugno 2015, n. 95, di ratifica dell'Accordo tra il Governo della Repubblica italiana e il Governo degli Stati Uniti d'America finalizzato a migliorare la compliance fiscale internazionale e ad applicare la normativa FATCA, con Allegati, fatto a Roma il 10 gennaio 2014. Available at: http://www.finanze.it/opencms/it/archivio-evidenza/evidenza/FATCA-decreto-di-attuazione-della-legge-18-giugno-2015-n.-95/. Accessed on: 30 Oct. 2019.

[144] THE UNITED STATES/ITALY. Agreement between the Government of the United States of America and the Government of the Republic of Italy to Improve International Tax Compliance and to Implement FATCA. *Article 6 - Mutual Commitment to Continue to Enhance the Effectiveness of Information Exchange and Transparency. 1. Reciprocity. The Government of the United States acknowledges the need to achieve equivalent levels of reciprocal automatic information exchange with Italy. The Government of the United States is committed to further improve transparency and enhance the exchange relationship with Italy by pursuing the adoption of regulations; advocating, and supporting relevant legislation to achieve such equivalent levels of reciprocal automatic exchange.* Available at: https://www.treasury.gov/resource-center/tax-policy/treaties/Documents/FATCA-Agreement-Italy-1-10-2014.pdf. Accessed on: 30 Oct. 2019.

2.2.3.2 The Common Report Standards (CRS).

After the US FATCA, the G20 and the OECD started developing their own tax information sharing standards regarding to calls on jurisdictions to obtain information from their financial institutions and automatically exchange that information with other jurisdictions on an annual basis.

The Common Reporting Standard (CRS) was developed in response to the G20 request and approved by the OECD Council on 15 July 2014[145]. It is a regime providing for the automatic exchange of tax information, with the aim of combating tax evasion and fraud worldwide, levying on assets and income or other investment gains earned in countries other than the taxpayer's tax residence. In summary, all financial institutions resident in CRS member countries will be required to identify and report to the national tax authorities tax-related information on their clients classified as resident for tax purposes in any of the other CRS subscribing countries.

CRS determines the financial account information to be exchanged, the financial institutions required to report, the different types of accounts and taxpayers covered, as well as common due diligence procedures to be followed by financial institutions. For instance, it is specified that the jurisdiction of residence to be reported with respect to an account is the jurisdiction of residence identified by the Reporting Financial Institution for the Reportable Person with respect to the relevant calendar year or other appropriate reporting period, pursuant to the due diligence procedures[146].

Compared to FATCA, where tax information is collected only on the US-citizens´ bank accounts, CRS should identify the tax residence of all bank account holders and collect tax information for reporting to the competent authorities, which will then exchange information, resulting in a significant volume of reports and data. In addition to the information required by FATCA, CRS also requires, for instance, in the case of any individual that is an account holder and a reportable person: the name, address, jurisdiction(s) of residence, TIN(s) and date and place of birth[147].

According to the OECD[148] information, of August 2019, there were close to 4000 bilateral exchange relationships activated with respect to more than 100 jurisdictions committed to the CRS. The relationships include those under the framework of the Multilateral Convention as well as exchange relationships based on bilateral agreements and the EU framework.

The OECD states that:

> *for a model of automatic exchange of financial account information to be effective (...) it needs to be standardized so as to benefit the maximum number of residence jurisdictions and*

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[145] OECD (2017). *Standard for Automatic Exchange of Financial Account Information in Tax Matters.* 2 ed., Paris: OECD Publishing, p. 3.
[146] Ibid, p. 96.
[147] Ibid, p. 94.
[148] OECD. *Automatic Exchange Portal*. Available at: https://www.oecd.org/tax/automatic-exchange/international-framework-for-the-crs/. Accessed on: 28 Oct. 2019.

> *financial institutions while recognizing that certain issues remain to be decided by local implementation. The advantage of standardization is process simplification, higher effectiveness and lower costs for all stakeholders concerned*[149].

Therefore, it is possible to register one more example of standardization, in the process of fighting against international base erosion and profit shifting, among others already described in this work[150]. Moreover, it is important to note that, despite this recognition of decision by local implementation, the OECD issued a handbook "*to assist government officials in the implementation (…) and to provide a practical overview of the Standard to both the financial sector and the public at-large*"[151]. Thus, in conclusion, the intention is a full standardization.

After the development and implementation of the CRS, furthermore, the OECD deemed it necessary to develop some rules concerning schemes or arrangements designed to avoid the information sought after by the regime. The OECD provides the following definition: "A *CRS Avoidance Arrangement is any Arrangement for which it is reasonable to conclude that it is designed to circumvent or is marketed as, or has the effect of, circumventing CRS Legislation or exploiting an absence thereof"*[152].

The point is very important to MDR and it is possible to infer that after the implementation of certain MDR, schemes or arrangements could be designed to avoid the disclosure of other schemes or planning. Let us imagine some "instrumental arrangements" in the scope to keep undiscovered the "substantial arrangements". That is why when defining what kind of arrangements must be included as a reportable arrangement in a given MDR, it is necessary to take into consideration arrangements developed to avoid the disclosure.

Interim conclusion.

International economic and political competition has had undesirable effects on the tax field, prompting countries and international organizations to look for ways to regain control of the situation so that taxation can reach its intended ends again, whether in its ability to produce necessary resources for public spending, either in the form of inducing or discouraging behavior.

Due to competition between countries, national tax systems created divergences and several special treatments and some important steps have been taken towards international coordination to avoid tax base erosion and profit shifting, especially those based on practices that

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[149] OECD (2014a). *Standard for Automatic Exchange of Financial Account Information in Tax Matters.* Paris: OECD Publishing, p. 11. Published on 21 July 2014.

[150] NOTE. Despite the fact I recognize that CRS is more about tax evasion by individuals than it is about BEPS, some hallmarks, which have been included in MDR, are directly linked to CRS.

[151] OECD (2018). *Standard for Automatic Exchange of Financial Information in Tax Matters*. Implementation Handbook, 2 ed., Paris: OECD Publishing, p. 6.

[152] OECD (2018). *Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures*. Paris: OECD Publishing, p. 14. Published on 9 March 2018.

exploit loopholes in domestic legislation, which has become more extensive and complex, and mismatches in different tax systems.

The solution based on standardizing and extending the international tax treaties network encountered some obstacles, such as the great mobility offered by globalization, which resulted in problems for applying traditional residence-source jurisdictions paradigms. Moreover, the existence of so-called tax havens, where investors could keep applications protected by secrecy, since many countries would not be willing to enter into double tax treaty with tax havens, although they would like to get tax information on taxpayers established in them or who had business there.

The concept of *transparency*, then, emerged as a global flag and some unilateral solutions were sought, especially by the US, or multilateral examples by the OECD / G-20. These solutions essentially sought to expand the exchange of tax information between countries to reduce the possibilities of tax avoidance or evasion, money laundering and fraud. These exchanges of information initially focused on tracking the money, seeking information and sharing on bank account deposits. This would reduce the role of tax havens and, in addition to the tax issue, it targets crimes ranging from terrorism to international trafficking.

However, there is controversy regarding some solutions, such as the US / FATCA, which is widely criticized for being too imposing and poorly coordinated. Another problem is it was not focusing on an important figure in this international scenario, the tax intermediaries, or those people who professionally design, offer, sell and implement the most sophisticated tax planning.

The OECD / CRS is another example of this expansion of information exchange, which if in the past time was only specific and on request of a State, became automatically carried out and, therefore, in large amounts of data that were not previously processed, in order to verify its real validity. Moreover, it carries an excessive dose of standardization, although the OECD tries to soften it. The existence of the handbook for CRS implementation, however, says otherwise.

In the CRS regime, tax planning for circumventing the obligation was developed, in a way one could call planning of the planning, or a *material planning* to avoid tax and an *instrumental planning* to avoid disclosing the material one. This reasoning must be taken into consideration when designing MDR.

Finally, it is possible to imply that for achieving coordination, a broad exchange of information was presented as a fundamental tool. However, a high level of coordination, in the meaning of similar policies and regulations for dealing with specific situations, in other words, the elimination of disparities between national laws in order to achieve the same results, without limiting the exercise of the domestic legislator, is necessary for providing a reasonable and proportional level of information. It is a circular reasoning. Either way, an era of automatic exchange of information based on standardized procedures has begun.

MDR is part of this process of increasing transparency. The crucial point, however, is whether MDR can work in a way as standardized as CRS, bearing in mind, for example, who suffers the actual compliance burden in each regime and how each regime affects the relationship

between tax authorities and taxpayers. These two points must be addressed when implementing MDR and this work will deal with both.

2.2.4 Why disclosure rules?

The OECD studies[153] and initiatives[154] searching for increasing transparency measures recognize that is necessary to obtain information to achieve this goal "*particularly for large corporate taxpayers*"[155]. The fact is that considering the *Panama Papers*[156] scandal, the debate was opened on the need, at least in Europe, to create a joint action plan without ruling out a real EU tax policy. After that, in the case of the *Paradise Papers*, the necessity of greater international legislative intervention coordinated by all member states surfaces, intensively. For instance, the Council recognized "*although Directive 2011/16/EU has been amended several times in order to enhance the means tax authorities can use to react to aggressive tax planning, there is still a need to reinforce certain specific transparency aspects of the existing taxation framework*"[157].

After discussing some measures of international coordination, for increasing transparency, in the previous topics, it is important to mention some other possibilities that were raised, in OECD works, as tax returns both from taxpayers and from third parties, ruling mechanisms, cooperative compliance programs and statutory advance disclosure. This topic is dedicated to presenting some aspects I see for differentiating MDR from each one of these other measures and why although they are applied, the MDR application should not be disregarded. Considering this last part, this topic also explains a view relating MDR and GAAR.

About disclosure, the 2008 Study states:

> *Disclosure goes beyond information taxpayers are statutorily obliged to provide. It should include any information necessary for the revenue body to undertake a fully informed risk assessment. This includes any transaction or position where there is a material degree of tax uncertainty or unpredictability, or where the revenue body has indicated publicly that the matter is of particular concern from a policy standpoint and will, therefore, be scrutinized*[158].

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[153] OECD (2008). *Study into the role of Tax Intermediaries* ("*2008 Study*"), Paris: OECD Publishing, 2008 and OECD (2013). *Co-operative Compliance: A Framework. From Enhanced Relationship to Co-Operative Compliance.* ("2013 Report"). Paris: OECD Publishing. Published on 29 July 2013.

[154] OECD (2013). *Action Plan on Base Erosion and Profit Shifting.* Paris: OECD Publishing, 2013. Published on 19 Jul 2013. NOTE. In this reference, I am specially thinking about BEPS Actions 5 and 13.

[155] OECD (2008). *Study into the role of Tax Intermediaries* ("*2008 Study*"). *Cit*. p. 27.

156 The Panama Papers and Paradise Papers. *Cit.* Available at: https://www.investopedia.com/terms/p/panama-papers.asp.

[157]EUROPEAN UNION (2018). Council Directive 2018/822/EU of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. OJ L 139, 5.6.2018, p. 1–13.

[158] OECD (2008). *Study into the role of Tax Intermediaries* ("*2008 Study*"). *Cit*., p. 41. NOTE. It is worth clarifying that this definition is given in the specific context "*of an enhanced relationship*", which was to evolve into cooperative compliance, which I reference next. It is, therefore, a voluntary disclosure made in return for earlier/greater tax

At that point, therefore, the understanding was the information the tax administration needed was to know taxpayers better and improve its relationship with them. Thus, it was believed that the role of intermediaries, i.e., the demand for "aggressive" tax planning[159], would naturally be reduced. This kind of information goes beyond what is provided in the common tax returns, because it is not only used in order to verify the due taxes to be paid, but to be used as a risk analysis tool. In addition, the tax returns provided annually do not meet the '*time*' requirements and earlier information is needed.

Tax returns are filed annually, at the end of a cycle. The objective is to make an annual adjustment of taxes already paid and those that for some reason need to be supplemented or refunded, considering deductions or exemptions that were not considered, for example, when withholding taxes. Tax returns also contain economic-tax information on the taxpayer's equity evolution, for monitoring purposes. But they do not normally reveal the taxes that were reduced by tax planning, that is, those that within the taxpayer 's accounting scheme or structure, were not and should not be paid. For this reason, tax returns are not sufficient to obtain information on the use of tax planning, much less on the performance of tax intermediaries, the persons responsible for these planning, which are, in short, the material and personal scope of the MDR[160].

From information on tax planning obtained by virtue of the disclosure rules, it is possible for the Tax Administration to check the taxpayer's statements on its tax returns, to cross-check the application of the scheme or structure with the result that it finally produced in the taxes payable, in a quantitative verification of the outcome, analyzing the risk or quantitative interest that a given tax planning offers. Thus, the information can be supplementary.

Concerning the time factor, as the tax returns are annual, and in many cases they are only reviewed by the Tax Authorities a year or two later, at the conclusion of the processing the result of the undesirable or risky tax planning has been verified for a long time. Thus, the disclosure objective of enabling a "quick" reaction on the part of tax administration, suggesting changes in the legislation or changing administrative procedures, would be frustrated[161].

In summary, since the taxpayer provides so much information every year in Tax Returns, why are disclosure rules necessary? *First* because the focus is different; *second* because that annual tax returns does not fulfill time requirement, I mean, every time a new scheme is implemented, introduced or offered; *third* because every taxpayer must present tax returns and only a specific "risky group" must be required to disclose tax planning (risky tax planning, not all).

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certainty. The development of the concept, the need to include disclosure on a mandatory basis and the balance between being mandatory but also advantageous are presented throughout this thesis.

[159] See Chapter II, topic 2.3.2.1 – Supply and Demand.

[160] See Chapter 2, topics 2.4.1 – Material scope and 2.4.2 – Personal scope.

[161] See Chapter 2, topic 2.4.3 – Timing of disclosure.

In 2013, the OECD issued a report on co-operative compliance programs[162]. The 2013 Report was a follow-up to a 2008 Study on the role of tax intermediaries, which encouraged tax authorities to establish enhanced relationships with their large business taxpayers.

Programs of this nature should highlight the benefits of positive behavior on the part of taxpayers, giving taxpayers who are open to greater transparency a greater level of certainty regarding their tax position[163].

Analyzing the issue on the relationship between tax authorities and taxpayers, Owens[164] says that the adherence to co-operative compliance regimes by taxpayers is similar to voluntary disclosure programs, in terms of the assumption of mutual commitments, whereby taxpayers undertake to maintain constant communication with the tax authority informing possibilities of tax risks; and the tax authorities, on the other hand, are committed to responding in an agile and efficient manner, considering the reality and speed of the economic world.

The question that arises is if a taxpayer participates in a co-operative compliance program, is he not disclosing all planning anyway? Does this mean that MDR are only necessary if the taxpayer does not participate in a co-operative compliance program?

Not necessarily. In my view, because a taxpayer entering in a co-operative compliance program is not obliged to disclosure "all" tax planning he applies, unless there are hallmarks[165] defining which planning must be disclosed, based on risk analysis. Concerning the second part of the question, some experiences in introducing cooperative compliance programs are failing because dealing with a big number of taxpayers in this kind of program is very difficult. Considering Tax Administration needs to offer advantages, rewards or administrative benefits in return, the more taxpayers are involved, the more work it has to do. So, it is necessary having focus, establishing ratings (differentiating taxpayers in the program).

Therefore, participating in a co-operative compliance program does not mean "disclosing all planning". Co-operative compliance and MDR must cover different universes of taxpayers. Moreover, it is important to note that taxpayers involved in co-operative programs offer less risk than those who are not included. As I see it, MDR and co-operative compliance program are two sides of the same coin. Or two directions in the same road. Hallmarks for disclosure must be set for both, but they must be different.

The point is that in a co-operative compliance program the taxpayer who fulfils the conditions to be accepted in the program discloses that planning he wants to certify with the tax administration and others which are included in the program protocol. Otherwise, if he is demanded to disclose "all" schemes or structures, this brings an excessive dose of uncertainty for

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[162] OECD (2013). *Co-operative Compliance: A Framework. From Enhanced Relationship to Co-Operative Compliance.* ("2013 Report"). Paris: OECD Publishing. Published on 29 July 2013.
[163] ENDEN, Eelco van der and BRONZEWSKA, Katarzyna. *The concept of Cooperative Compliance*. Bulletin for International Taxation, n. 10, v. 68, 2014.
[164] OWENS, Jeffrey. *Tax administrators, taxpayers and their advisors: can the dynamics of the relationship be changed?* Bulletin for International Taxation, n. 9, v. 66, 2012, p. 516.
[165] See Chapter II, topic 2.4.1.2 – Hallmarks. Key characteristics.

him, and the guarantees for entering are bigger, for instance that he will not be submitted to any kind of assessment. In co-operative compliance programs there is a trade-off between transparency and certainty.

What is needed, therefore, are some objective parameters for disclosing tax planning. This is existent in MDR and it is recommendable in co-operative compliance programs. In MDR, not "all" planning is in the scope, but only some of them, which offer risk. Furthermore, as this work explains in Chapter IV[166], this definition concerning which tax planning must be disclosed or not can be assessed in a control of reasonableness and proportionality, as a function of the risks involved and the outcomes MDR is able to produce.

There are issues involving fundamental rights to equality and to certainty that deserves comments, when setting differences between co-operative compliance program and MDR.

According to Szudoczky and Majdanska[167], co-operative compliance programs usually allow only certain types of taxpayers to enter into a relationship with the tax administration (normally the biggest or more economically relevant ones). This fact raises the question whether these programs lead to unequal treatment of taxpayers. Such unequal treatment may have legal relevance and the limited scope of co-operative compliance program may conflict with constitutional principles, in particular, with the principle of equality. Furthermore, the authors say that "t*he essence of a co-operative compliance model is an exchange of transparency for certainty*" and it is exactly in this requirement for "certainty" that I believe the main difference between co-operative compliance and MDR relies on[168].

Later, developing the study and focusing on the design features of cooperative compliance programs that should be informed by the formal principle of equality, Majdanska and Pemberton[169] concluded that countries should pay particular attention to the criteria determining access to that kind of program, designing them in a way that permits objective and reasonable justification of any eventual difference in treatment of taxpayers within and outside. For instance, "*countries should consider how to define large business taxpayers. Choosing criteria related to their legal obligations might make it easier to explain the rationale for special treatment (...) Where is the boundary between large taxpayers and other taxpayers to be drawn? The answer to this question may be crucial to the assessment of whether a program is compatible with the principle of legal equality or not".*

Concluding, in MDR and in co-operative compliance programs, the universe of taxpayers is different and the criteria to disclose tax planning too. In MDR, the objective criteria for disclosing are the hallmarks established in the norm, independently of the subject. In the co-operative compliance program, certain tax planning, schemes or structures must be disclosed, by some tax

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[166] See Chapter IV, topic 4.2 - Reasonableness, proportionality and MDR.

[167] MAJDANSKA, Alicja and SZUDOCZKY, Rita. *Designing Co-operative Compliance Programmes: Lessons from the EU State Aid Rules for Tax Administrations*. British Tax Review., n. 2, 2017, p. 205.

[168] See Chapter IV, topic 4.4 - The answer to Legal Certainty.

[169] MAJDANSKA, Alicja and PEMBERTON, Jonathan Leigh. *Different Treatment, Same Outcome: Reconciling Cooperative Compliance with The Principle of Legal Equality*. Journal of Tax Administration, v. 5, n. 1, 2019.

payers who are participating in the program, selected by subjective or objective criteria. Despite the fact that I defend the use of positive rewards for taxpayers disclosing planning under MDR, as it will be discussed throughout this work, I believe that in a co-operative compliance program, because of the difference above, these rewards need to be higher, for assuring the certainty, a crucial motivation for the taxpayer. The kind of certainty involved in a co-operative compliance is not the same as that involved in MDR.

Finally, as it was stressed about the use of tax returns information, the *person* in MDR focus is not the taxpayer, but the tax intermediary, who designs, offers, commercializes or implements tax planning, in a *market*. Additionally, the MDR proposed in BEPS Action 12 focuses on international tax planning and even though the taxpayer involved is not one under the country's jurisdiction, the disclosure must be made, because the intermediary is under jurisdiction or the tax advantage produced concerns to the country's tax system. Co-operative compliance program only involves taxpayers in a given jurisdiction.

Regarding tax rulings, the taxpayer gets a binding opinion of the tax administration that a certain tax planning is in line with the law. For instance, both Australia (so called *product rulings*) and the US (*private letter ruling)* combine disclosure rules and the effect of rulings. If the taxpayer discloses a certain tax planning, he will get a quick answer whether the tax planning holds and is in line with the law.

A *product ruling*[170] is a type of public ruling under the Taxation Administration Act 1953. It offers certainty to participants (or potential participants) on the tax consequences of an arrangement, provided it is carried out as described in the ruling. If the taxpayer would like to discuss his issue with the tax authorities prior to applying, he can submit an early engagement (for advice) request. A *product* is an arrangement where a number of participants individually enter into substantially the same contractual arrangements and transactions (the scheme) with a common entity or group of entities. A product ruling will only be given in relation to a similar group of participants, so that the same tax result will occur for each.

A *private letter ruling*[171], or PLR, is a written statement issued to a taxpayer that interprets and applies tax laws to the taxpayer's specific set of facts. A PLR is issued to establish with certainty the federal tax consequences of a particular transaction before the transaction is consummated or before the taxpayer's return is filed. A PLR is issued in response to a written request submitted by a taxpayer and is binding on the IRS if the taxpayer fully and accurately described the proposed transaction in the request and carries out the transaction as described. A PLR may not be relied on as precedent by other taxpayers or IRS personnel. PLRs are generally made public after all information has been removed that could identify the taxpayer to whom it was issued.

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[170]AUSTRALIA. Australian Taxation Office. ATO advice and guidance. *Product rulings*. Available at: https://www.ato.gov.au/General/ATO-advice-and-guidance/ATO-advice-products-(rulings)/Product-rulings. Accessed on: 26 Mar. 2021.

[171]THE UNITED STATES. Internal Revenue Service. IRS Guidance. *Private Letter Ruling*. Available at: https://www.irs.gov/newsroom/understanding-irs-guidance-a-brief-primer. Accessed on: 26 Mar 2021.

The Portuguese MDR, introduced in 2008[172] had as one of its results that Tax Administration made public its interpretation about disclosed tax planning, in general terms and without identifying the taxpayers involved, especially concerning those tax planning more relevant or those involving a big number of taxpayers. Therefore, this result, in a mandatory disclosure regime, is close to the tax rulings above described. However, what are the main differences?

The point is that in tax rulings the taxpayer demands a response from the administration, preventively. This means that the schemes that will be submitted for consultation are determined by the taxpayers. Sometimes, the consultation can refer to only part of a bigger scheme. Moreover, if several taxpayers are using the same scheme, but only one of them submits the question, it is not possible to assess the potential risk the scheme represents within the universe of taxpayers or to the general compliance. In tax rulings, the taxpayer chooses (voluntarily) the answers he needs or the questions he wants to submit to the tax administration. Therefore, I think tax rulings are more on the side of cooperative compliance than on the MDR side.

In MDR, being mandatory means that the taxpayer must disclose that planning which the tax administration and the legislator regard as "risky" for the general compliance. Once more, in tax rulings the role of tax intermediaries is disregarded. Finally, the collateral effects of deterrence[173] in using certain tax planning which are listed for disclosing in MDR are not verified, in my view, in ruling proceedings.

Trying to expand the ruling, thus making the answers as broad as possible, when responding a tax ruling, in order to achieve the taxpayer who is demanding, specifically, and as many others as possible could be an idea for general instruction or advice. But the Tax Administration opinion can only be binding for the taxpayer making the consultancy. For instance, in the US, repeating "*PLR is issued in response to a written request submitted by a taxpayer and is binding on the IRS if the taxpayer fully and accurately described the proposed transaction in the request and carries out the transaction as described*". In MDR, after knowing an undesirable tax planning, the counteraction, changing the legislation or administrative proceeding will achieve the tax community as a whole.

Last but not least, it is important to make the differences between MDR and GAAR clear and why I defend in this work that they are complementary but independent measures. I mean, a tax system of laws can have a GAAR without a MDR in force, what is obvious to the reader who briefly knows the existent tax systems, and the tax system can introduce a MDR although it does not apply a GAAR, what is more relevant to stress.

In other words, a legitimate tax planning is a structure allowing the taxpayer to exploit loopholes and gaps in the law. Some of the tax schemes are completely valid and cannot be attacked by a GAAR. In these cases, the legislator has to change the law to prevent the application of the tax planning schemes in the future. Other tax schemes can be attacked by a GAAR, for

[172] See Chapter III, topic 3.3 – The Portuguese experience.
[173] See Chapter II, topic 2.5.3.4.1 – Deterrence.

instance if the taxpayers act in line with the letter of the law but not in line with its purpose / objective (spirit of the law).

It is important to bear in mind that mandatory disclosure does not mean that a GAAR will be applied against the listed planning. It is possible to disclose and nothing happens, or disclose and only if or when the legislator changes the law, the planning is prevented from working. This is one point that I am stressing in the topic discussing legal certainty[174] and explaining about "legitimate expectative".

Recognizing the close relationship between MDR and GAAR, Phellipe de Oliveira[175] points out some features, distinguishing that: MDR is primarily informative, allowing tax administration to have knowledge about the arrangement; while GAAR, on the other hand, establishes borders to enable an eventual non-consideration about a specific transaction. Therefore, in his opinion, both rules have a complementary character: after knowing about an arrangement, through MDR enforcement, the tax administration can react, based on GAAR, to disregard its effects for tax purposes. Concluding, Phellipe de Oliveira says MDR is independent from GAAR, because: I – the possible tax administration reaction is not limited to disregarding the transaction, including, additionally, legislative countermeasures and II – it is possible to find other elements in the tax legislation to disregard a given transaction.

Concluding and adding my opinions, *first,* the limits to considering a tax planning legitimate or not and applying a GAAR are found in the facts, not in the hypothetical description included in MDR. S*econd,* MDR does not need to be limited, or defined, by the same theoretical efforts that are made to classify and define "abusive" or "aggressive" or "lawful" tax planning, etc., because MDR are means of knowing a planning that contains characteristics that potentially indicate abuses, and not an end to classify a taxable transaction as illegitimate and demand taxes, which is the role of a GARR. *Third,* the discussion, then, about the future disqualification or requalification of a planning and the balance between legality, business purpose or ability to pay, does not need to be resolved in order to apply MDR and can wait for the eventual application of a GAAR.

2.3 The origins of Mandatory Disclosure Rules – The OECD proposals.

So far, the process for countering undesirable tax practices that erode the tax base has been described, especially those that promote profit shifting to jurisdictions offering favorable treatments. The purpose of this topic is to analyze the whole process in the fight against what the OECD used to call "aggressive tax planning", from the concept's inception to the BEPS Action 12 Final Report, which became known as Mandatory Disclosure Rules on Aggressive Tax Planning.

[174] See Chapter IV, topic 4.4 – The answer to Legal Certainty.
[175] OLIVEIRA, Phellipe Toledo Pires de. *A Obrigação de Divulgação de Planejamentos Tributários Agressivos no Ordenamento Brasileiro. Uma análise à Luz do Projeto BEPS da OECD/G20*. São Paulo: Quartier Latin, 2018, p. 262-265.

First, despite the political impact it can have, the definition of "aggressive" is not important for establishing MDR and still has a negative effect on compliance[176]. Second, another important point in the process that had not been analyzed so far on this path towards coordination and transparency is the involvement of so-called tax intermediaries or promoters of the schemes in the MDR focus. While reading, it is important to relate MDR specific information to the process of transparency and exchange of information to verify similarities and divergences. The key questions to bear in mind are how can MDR be seen as a part and as an instrument in the international process towards coordination and transparency in tax matters and why is it not enough to be mandatory?

2.3.1 The Seoul Declaration.

The concept of "*aggressive tax planning*", according to Philip Baker[177], seems to have its origins within the OECD in the Forum on Tax Administrations, which was established in July 2002, including the Organization´s members and some non-members[178]. The first meeting happened in Seville, Spain, in January 2004, and focused on how tax administration bodies get their message to governments and to the taxpaying community. The meeting also provided an opportunity for three countries (i.e. Spain, Singapore and Russia) to showcase aspects of their tax administration reform programs[179].

The Seoul Declaration[180], on September 2006, resulting from the third Forum, made express reference to the rapid growth of tax planning schemes, mentioning "*structures which challenge tax rules, and schemes and arrangements by both domestic and foreign taxpayers to facilitate non-compliance with our national tax laws".* Philip Baker registers, however, that further studies promoted an insufficient definition for the concept, which, in the end, became related both with schemes or structures that arrive at a result not envisioned by the law and with those schemes

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[176] See Chapter V, topic 5.1.1 - The Slippery-Slope theorem and MDR. Depending on trust and the minimum use of power.

[177]BAKER, Philip. *The BEPS Project: Disclosure of Aggressive Tax Planning Schemes*. Intertax, v. 43, issue I, The Netherlands: Kluwer Law International BV, 2015, p.85.

[178] NOTE. There was parallel work on the policy side through the OECD Working Party (WP) n. 10, which was dissolved and replaced, after a gap, by the WP n. 11. There are a number of publications and there is a mechanism for Exchange of Information about aggressive tax planning. The ATP Expert Group is a sub-group of WP n. 11 that has responsibility for maintaining a secure directory of over 400 aggressive tax planning schemes submitted by member countries. Available at: https://www.oecd.org/ctp/aggressive/. Accessed on: 15 May 2020.

[179]OECD (2004). *OECD Launches New Forum on Tax Administration*. Available at: http://www.oecd.org/ctp/administration/oecdlaunchesnewforumontaxadministration.htm. Accessed on: 23 May 2019.

[180]OECD (2006). Third meeting of the OECD Forum on Tax Administration, 14-15 Sep. 2006, Final Seoul Declaration: *"Enforcement of our respective tax laws has become more difficult as trade and capital liberalization and advances in communications technologies have opened the global marketplace to a wider spectrum of taxpayers. While this more open economic environment is good for business and global growth, it can lead to structures which challenge tax rules, and schemes and arrangements by both domestic and foreign taxpayers to facilitate non-compliance with our national tax laws".* Available at: http://www.oecd.org/ctp/administration/37463807.pdf . Accessed on: 17 Set 2018.

relying on uncertain positions of the legislation. Therefore, he sustains that the definition is vague and difficult to apply, in practice.

Trying to be pragmatic, one can verify that the OECD states that since its creation in 2002, the Forum on Tax Administration (FTA) has become a unique Forum for co-operation between revenue bodies at Commissioner-level. It now counts 53 tax administrations as members and "*the FTA's vision is to create a forum through which tax administrators can identify, discuss and influence relevant global trends and develop new ideas to enhance tax administration around the world*". [181] Taking into consideration the Forum´s objectives, the ideas, concepts, needs, tools and measures developed by it are of an eminently administrative character. Accordingly, the worries focus on practices that limit law enforcement ("*national tax laws*") by the Tax Administration.

The previous topic ended by examining the development of measures taken in the intention of increasing transparency, both by the European Union and by the OECD, based on the concept of "foreseeably relevant" information, which could, in principle, be taken as "necessary" information. The tax administration can define what would be relevant (or necessary) information, so that, it can, within what was initially envisaged in the FTA, ensure the enforcement of tax law, when dealing with both national and international taxpayers. This definition of "relevant" schemes can be derived from risk analysis methodologies, as suggested in the comments to OECD-MC, Article 26.

This work supports these ideas rather than the application of the concept of "aggressive tax planning" when introducing MDR. As mentioned in the introduction[182], tax planning structures have evolved to become particularly complex and are always subject to constant modifications and adjustments to react to defensive counter-measures by the tax authorities, so a definition should vary constantly in time and place. Moreover, it has a negative effect on compliance, because aggressive might mean strong or emphatic in effect or intent but also marked by combative readiness[183], so that incompatible with the MDR application as part of a co-operative compliance program.

Thus, this work has as one of its objectives deal with the notion of efficiency, as referring to the allocation of resources to derive maximum returns in terms of the capability of the tax system to provide for solutions to prevent certain unintended tax results. In other words, solutions to prevent certain results that are not consistent with the policy intent of the relevant tax provisions. More than administrative measures, this involves concerns both about how taxpayers take advantage of the different tax systems and about how States compete among themselves. For instance, international tax arbitrage takes advantage of mismatches between tax systems that are the inevitable result of the fact that those systems were designed to be coherent at the national level. That is a policy challenge, not one of administration. Moreover, the solution (anti abuse

[181] OECD (2002). Forum on Tax Administration. Available at: http://www.oecd.org/tax/forum-on-tax-administration/about/. Accessed on: 16 Apr 2019.

[182] PIANTAVIGNA (2018). *Reflections on the Fight against Aggressive Tax Planning (When the Law is Silent)*. Op. Cit.

[183] MERRIAM-WEBSTER Dictionary. *Definition of Aggressive*. Available at: https://www.merriam-webster.com/dictionary/aggressive. Accessed on: 5 Dec 2019.

measures – domestically – and in the MLI) requires policy responses. How that is balanced with the aim to be competitive and attractive to investors is also a policy issue.

The Seoul Declaration, furthermore, put in evidence the connection between the unacceptable practices of tax minimization and the role of tax 'intermediaries', the term used to refer to tax consultants and financial entities, which will be better defined below. Phelippe de Oliveira[184] states that the need to conduct a study on tax intermediaries' activity was possibly based on an earlier 2004 study by the US Senate, which produced a detailed analysis of the US tax shelters industry, with emphasis on the role of accountants, lawyers and professionals in the financial sector. However, even earlier, in 2000, the Canadian parliament introduced penalty provisions to the Income Tax Act (section 163.2) and Excise Tax Act (section 285.1) relating to third party tax advisors such as tax accountants, tax preparers or tax lawyers. There are two penalties: a tax planner's penalty and a tax preparer's penalty and the initial aim of these tax advisor penalties was to deter and punish those who commercially promoted "*tax shelters with inflated asset values and faulty assumptions*"[185].

Thus, we have two conclusions: first, the pragmatic idea about tax planning involves administrative and policy concerns in order to provide for solutions to prevent certain unintended or distortionary tax results, guaranteeing the achievement of the objectives of the law; second, the solutions must take into consideration the role of tax intermediaries.

2.3.2 The 2008 Study.

The OECD, in 2008, explained its conclusions on the *Study into the role of Tax Intermediaries* ("2008 Study")[186], which was initiated in September 2006, after the Forum on Tax Administration (FTA)[187], in Seoul. Recognizing aggressive tax planning as one of the risks Tax Administrations have to manage in order to collect the tax due under their tax systems, the "*Study team*" states that aggressive tax planning typically requires the involvement of tax professionals – in accounting firms, law firms or other tax advisory firms, in financial institutions or in large corporate taxpayers' tax departments.

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[184] OLIVEIRA, Phellipe Toledo Pires de. *A Obrigação de Divulgação de Planejamentos Tributários Agressivos no Ordenamento Brasileiro. Uma análise à Luz do Projeto BEPS da OECD/G20*. São Paulo: Quartier Latin, 2018, p. 100.

[185] CANADA. *Tax Lawyer Commentary on CRA Penalty Assessments*. Available at: http://www.mondaq.com/canada/x/772292/tax+authorities/Canadian+Tax+Lawyer+Commentary+On+CRA+Penalty+Assessments+Tax+Planner+And+Tax+Preparer+Penalties+Under+The+Income+Tax+Act+And+Excise+Tax+Act. Accessed on: 22 Abr. 2019.

[186] OECD (2008). *Study into the role of Tax Intermediaries* ("*2008 Study*"). This report sets out the conclusions of the OECD Tax Intermediaries Study that commenced in September 2006, shortly after the third meeting of the Forum on Tax Administration (FTA) in Seoul, Korea. This study is one of the outputs of the 'Seoul Declaration'. FTA countries developed the Seoul Declaration to address the Forum's concerns about non-compliance with tax laws in an international context. Available at: http://www.oecd.org/tax/administration/39882938.pdf. Accessed on: 23 May 2019.

[187] Third Meeting of the OECD Forum on Tax Administration, 14-15 September 2006, Seoul, Korea.

2.3.2.1 Supply and Demand.

The 2008 Study is quite interesting because it analyses aggressive tax planning from the stand point of three key actors: taxpayers, tax administrations and tax intermediaries, and it does so on the basis that there is a "*supply and demand relation*". The supply side (intermediaries acting) only exists because the demand side (taxpayers) ask for its help, in a competitive and complex *tax world*.

Recognizing that the Seoul Declaration concentrated on the supply side, focusing on strategies to increase the risk for those tax intermediaries who develop or promote aggressive tax planning, by providing appropriate deterrence, the "*Study team*" concluded that FTA countries should also consider strategies directed towards the demand side. As Jeffrey Owens suggests: "*Tax administrations have accepted that getting high levels of tax compliance requires not only robust enforcement but also improved taxpayer service. They have developed more sophisticated risk management tools, a greater willingness to group tax-payers into high and low risk groups, and a "lightertouch" audit approach to those classified as low risk*" [188].

This work agrees that both sides should be addressed. i) The supply side, by increasing the knowledge about the tax intermediaries' behavior and how they act in the market, proposing penalties as was done in Australia, Canada and New Zealand. ii) The demand side, by offering services and help to taxpayers, in order for them to be more trusting and transparent in relation to the tax administration, when complying with their tax obligations and, as a consequence, reducing the demand for the services provided by the tax intermediaries.

2.3.2.2 Risk Management.

Relatively to the goals listed above, first it is important to take into consideration that besides objective knowledge about the intermediaries' practices and the imposition of penalties, tax risks are, moreover, a function of personality, cultural and legal framework in a particular country. According to J.G. Cullis and Alan Lewis: "*evasion is not just a function of opportunity, tax rates, probability of detection and so forth, but of an individual's willingness to evade (or comply). Put at its starkest, it means that when tax attitudes are favorable, tax compliance will be relatively high".*[189] Despite that fact this work does not focus on evasion, which involves an inaccurate or fraudulent statement, the reasoning can also be applied to MDR.

That is why this work supports[190] that rather than this risk analysis and imposition of penalties, it is necessary to apply Erich Kirchler´s tools and the so-called slippery slope framework[191]. In this framework, *trust* in the authorities and the *power* of said authorities as well

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[188] OWENS, Jeffrey. *Tax Administrations, Taxpayers and Their Advisors: Can the Dynamics of the Relationship be changed?* Bulletin for International Taxation. Amsterdam: IBFD, Sep. 2012, p. 516.
[189] CULLIS, J.G. and LEWIS, Alan. *Why people pay taxes: From a conventional economic model to a model of social convention.* Journal of Economic Psychology, v. 18, issue 2-3, 1997, p. 305.
[190] See Chapter V, topic 5.1.1- The Slippery-Slope theorem and MDR. Depending on trust and the minimum use of power.
[191] KIRCHLER, Erich; HOELZL, Erik and WAHL, Ingrid. *Enforced versus voluntary tax compliance: The "slippery slope" framework.* Journal of Economic Psychology, v. 19, issue 2, 2008, p. 210-225.

as *interaction* with them are decisive for tax compliance. In contrast to former approaches to tax compliance, it is taken into account that not all taxpayers share the same mentality towards taxpaying and that not all of them react in the same way to measures of tax enforcement[192].

Second, the system proposed begins with a risk management tool. In the 2008 Study's words: "*based on the identification and treatment of risks, which allows revenue bodies to allocate resources to respond to those risks. Risk management relies on information, which makes it important to encourage disclosure from taxpayers"*. Nevertheless, it is important to take into consideration the following five attributes, which are required of the tax administration when dealing with all taxpayers: "*understanding based on commercial awareness; impartiality; proportionality; openness (disclosure and transparency); and responsiveness*"[193].

This risk analysis methodology allows tax administrations to implement taxpayers' ratings, sometimes offering administrative advantages in their relationship with low-risk taxpayers. Normally, a concern with the creation of a rating, which uses objective criteria, is raised based on a possible confrontation between it and the principle of equality[194]. However, there are special taxpayers, who require different treatment by the tax administration. The UK Tax Administration[195], for example, has developed an efficient approach based on risk analysis to deal with its larger and more complex taxpayers, seeking to understand their particularities and how they respond to management. The management relationship model seeks to deal with tax issues based on clarity, security, proportionality and timeliness in the solution.

Recently, the Brazilian Federal Revenue Service (RFB) launched a public consultation at the end of 2018[196] for the introduction of a *Tax Compliance Stimulus* program. Aligning with the methodology suggested by the OECD, the program intends to establish a taxpayers´ rating, taking into account their recent records of relationship with the administration. Taxpayers will be classified based on the following assumptions: register situation compatible with the company's activities; adherence to the information provided to RFB through returns and bookkeeping; timeliness in the information; and payment of the taxes due. Once rated, this classification will serve as a reference for measures appropriate to the profile of each group, so that the taxpayers who offer the lower a risk will benefit from the actions of cooperative compliance, supervision,

[192] PRINZ, Aloys; MUEHLBACHER, Stephan and KIRCHLER, Erich. *The slippery slope framework on tax compliance: An attempt to formalization.* Journal of Economic Psychology, v. 40, Feb. 2014, p. 20-34.

[193] OECD (2008). *Study into the role of Tax Intermediaries* ("*2008 Study*"). Cit., p. 5.

[194] OECD (2013). *Co-operative Compliance: A Framework: From Enhanced Relationship to Co-operative Compliance.* Paris: OECD Publishing, p. 45-46. "*Since the publication of the 2008 Study some commentators have raised concerns about the compatibility of the "Enhanced Relationship" concept with the constitutional principle of equality before the law…. In answering this question, it is important to state at the outset what co-operative compliance is not intended to achieve: it should not result in a different or more favorable tax outcome for the taxpayer. On the contrary, co-operative compliance has been developed by revenue bodies as a more effective means of achieving tax compliance. The objective of securing the timely payment of the correct tax is the common goal of all the compliance strategies employed by revenue bodies. This has been made clear by revenue bodies that have explicitly adopted the co-operative compliance concept in the public guidance they have produced".*

[195] THE UNITED KINGDOM (2014). HM Revenue and Customs. *Large Business Strategy*. Published on: 10 Sep. 2014. Available at: https://www.gov.uk/guidance/large-business-strategy. Accessed on: 23 May 2019.

[196] BRAZIL (2018). Receita Federal do Brasil (RFB). *Public Consultancy RFB n. 04/2018*. Portaria que Institui Programa de Estímulo à Conformidade Tributária (Pró-Conformidade) no âmbito da Secretaria da Receita Federal do Brasil. Brasília, 15 Oct. 2018. Available at: http://receita.economia.gov.br/sobre/consultas-publicas-e-editoriais/consulta-publica/arquivos-e-imagens/consulta-publica-rfb-no-04-2018.pdf. Accessed on: 23 May 2019.

attendance, analysis of requirements (including reimbursement), judgment of appeals, among others.

2.3.2.3 Costs.

The 2008 *Study* stresses risk management is not only about what tax administrations must do but also about what they do not need to do, meaning, which tax returns not to audit, enquiries not to pursue and this is a matter of priority and efficiency. Therefore, both tax administrations and taxpayers should consider the matter of the costs, when deciding what choices to make and what tools to use to improve the tax relationship.

In terms of costs, on the tax administration´s side, Keen and Slemrod[197] point out that the costs for the administration to implement coercive measures or to strengthen the tax law are socially greater than measures to encourage compliance. Economically thinking, however, those authors recognize that tax authorities should still improve mechanisms to compare such administrative costs of audits or enforcement actions and those involved in providing this new type of help-service to the taxpayer. They conclude that although administrations recognize the importance of measuring these costs of drawing up their budgets, they hardly receive any attention from the academic literature and the information that can be obtained indirectly is very limited.

About compliance costs, Sandford, Godwin and Hardwick[198] first define them as those costs incurred by taxpayers in meeting the requirements laid upon them in complying with a given tax structure. Thus, they state that the existence of uncertainty about the meaning of some aspect of the tax legislation will generate additional compliance costs. Finally, they make a distinction between unavoidable – those necessarily incurred if the taxpayer is to meet the legal requirements laid upon him - and avoidable costs – which are tax planning costs undertaken in order to minimize its tax bill.

Advancing in the issue, on the taxpayer side, Keen and Slemrod[199] conclude that compliance costs would be lower than concealment costs. That is, the classification of risk management influences the taxpayer to reflect how much it costs for him/her to pay the tax and how much it costs, on the other hand, not to be collaborative. This goes through the measurement of these costs, very well treated in the article in reference. Because the issue does not only involve monetary expressions, but social, market, customer and even psychological costs (which find many scientific works dealing with them)[200]. It should be noted that large corporations, especially in

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[197] KEEN, Michael and SLEMROD, Joel B. *Optimal Tax Administration*. IMF Working Paper n. 17, Issue 8, 2017. Available at: https://ssrn.com/abstract=2924371. Accessed on: 30 Nov 2017.

[198] SANDFORD, Cedric; GODWIN, Michael and HARDWICK, Peter. *Administrative and Compliance Costs of Taxation*. Great Britain: Fiscal Publications, 1989, p. 10-13.

[199] KEEN and SLEMROD (2017). Op. Cit.

[200] LOPES. Anabela *Ferreira. Attitudes and Behaviors of Individual Taxpayers in relation to the Portuguese Tax System - The case of psychological taxation costs*. Masters dissertation. Coimbra. 2011. *"In Germany, STRUMPEL, B. (1963). In the UK, SANDFORD, Cedric (1973), Hidden Costs of Taxation, London, Institute for Fiscal Studies and SANDFORD, Cedric; Godwin, Michael; Hardwick, Peter (1989), Administrative and Compliance Costs of Taxation, Bath, Fiscal Publications). In Australia, COLEMAN et al. In Switzerland, TORGLER, Benno (2003).*

complex tax systems and with the need to move through various international legislations, maintain high-cost fiscal sectors only to comply with the standards and they are not yet sufficiently prepared and receive assessments. Besides that, avoiding unnecessary audits, taxpayers, hence, can reduce compliance costs and achieve a higher level of certainty in their tax matters.

2.3.2.4 Efficiency.

When classifying taxpayers by risk factors it is also better to understand the facts and circumstances of their activities, which are not normally presented in the annual tax returns. In this way, tax administrations may choose to conduct audits only in relation to taxpayers involved in similar events or circumstances and also to avoid some gaps that normally arise when collecting information on tax returns. This also represents an increase in efficiency, speed and optimization of results.

Moreover, a prominent problem for the tax administrations that rely on annual tax returns and audits based on its reviews is basically connected to the variable feedback time. The OECD states, that:

> *Once the revenue body identified a scheme and an operational or legislative response was framed, the scheme evolved into a further iteration, starting the cycle again. Sometimes, the next iteration of the scheme was being sold even before the response to the previous iteration had been framed. This evolution of aggressive tax planning meant that revenue bodies were constantly at least one step behind the tax planners*[201].

In conclusion, the 2008 Study, which doesn't elaborate much on the risk represented by tax intermediaries, addressing the issue to be taken into consideration individually by FTA countries, stresses the need of introducing risk management policies towards the taxpayers, presenting advantages in terms of costs, time and efficiency, and considers aggressive tax planning as one of the many compliance risks. Therefore, it supports the OECD's recommendation that tax administrations use risk management in allocating resources to address prioritized compliance risks.

2.3.3 Engaging with High Net Worth Individuals on Tax Compliance, 2009.

Following the 2008 Study, the OECD published the report "*Engaging with High Net Worth Individuals on Tax Compliance*"[202] *("the Report")* in 2009. Despite focusing on a different group of subjects than the prior study, the Report describes a similar relationship between high net worth

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[201] OECD (2008). Study into the role of Tax Intermediaries ("2008 Study"). *Cit.,* p. 10.
[202] OECD (2009). *Engaging with High Net Worth Individuals on Tax Compliance.* Paris: OECD Publishing. Published on Sep 2009.

individuals (HNWI - the term "high net worth individuals" is used broadly and thus includes both high wealth individuals and high-income individuals), tax advisers and tax authorities.

The Report concludes that those individuals are the second principal market for aggressive tax planning, after large corporate taxpayers. They pose significant challenges to tax administrations because of the complexity of their affairs, their revenue contribution, the opportunity for aggressive tax planning and the impact of their compliance behavior on the integrity of the tax system, as a whole. Therefore, tax administration should be prepared to deal with them based on the same principles suggested in the 2008 Study for large corporations, which means: understanding based on commercial awareness, impartiality and proportionality. Moreover, openness through disclosure and transparency, and responsiveness.

The Report was carried out by a focus group consisting of 14 countries[203], which examined the HNWI segment including the tax risks such taxpayers pose and the different approaches, both legislative and administrative. More specifically, the Report states that it does not focus on tax evasion, but discusses aspects of voluntary disclosure initiatives and its base is not on tax policy, despite the fact that certain tax policy choices produces impact on voluntary disclosure, but on improving compliance within the existing legal framework. Therefore, it is possible to apply various conclusions and data of the Report to MDR, as it is explained in the next paragraphs.

There was a great consultation process developed by the focus group, including broad support for hiring staff from the private sector. They concluded that bringing people who understand the complexities of the HNWIs affairs could be very helpful for the tax administration to improve the relationship with taxpayers and advisers/intermediaries. This kind of consultancy is highly recommended when introducing MDR, as it was conducted, for instance, when developing the process in Portugal[204].

According to the Report, eight of the fourteen-member focus group established formal programs through strategic risk analysis concentrating in HNWIs and made a decision to focus especial resources on those taxpayers. The Report registers the existence of HNWIs units in tax administration "*with France having commenced operation in 1983, followed by Australia in 1996 and most of the other countries between 2002 and 2008*"[205]. Furthermore, it registers that Australia reported, in March 2008, significant improvement in its revenue, as a result of active compliance activities (such as audits) on HNWIs and their associate entities. The conclusion was that regular and continued interaction with HNWI´s segment could encourage a flow of information and mutual awareness[206].

An important point is that time "*no country in the focus group used a comprehensive co-operative program for HNWI, and Australia piloted a new program*"[207]. This is remarkable because

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[203] Ibid, p.7. The focus group: Australia, Canada, Ireland, Italy, France, Germany, Japan, Mexico, the Netherlands, New Zealand, Norway, South Africa, the United Kingdom and the United States.
[204] See Chapter III, topic 3.2 - The Portuguese experience.
[205] OECD (2009). *Engaging with High Net Worth individuals on Tax Compliance. Op. Cit.,* p.55.
[206] Ibid, p. 62-63.
[207] Ibid, p.7.

one of the most relevant points this work supports is the need for this kind of co-operative compliance program, especially for specific taxpayers´ groups, before the introduction of efficient MDR program.

Some fundamental prerequisites for co-operative approach, according to Chapter 4 of the Report, are: a well-developed legal system, with an independent judiciary and a fully functioning tax administration; respecting confidentiality; impartiality; responsiveness; proportionality and competence. The benefit for the tax administrations is early, reliable, comprehensive and relevant information for risk assessment and allocation of resources. On the other hand, tax administrations need to communicate the potential benefits clearly to the taxpayers engaging in the program. Therefore, it is necessary to take positive actions and make sure that the taxpayer´s community is aware of it.

2.3.3.1 Marketable and bespoke arrangements.

The Report mentions the existence of two kinds of challenging arrangements with respect to "*aggressive tax planning*": marketable and bespoke. *Marketable arrangement*, which means an arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customized. *Bespoke arrangement*, which means an arrangement that is not a marketable arrangement because they need to be designed taking into account user-specific features that are not easily adaptable to anyone.

This is important because the OECD identifies two possible *threatening* types of arrangements: first, those easily commercialized and transferred because they do not require big adaptations and, consequently, they can be used in a wide range of cases or circumstances. The problem, therefore, is in the *quantity* of possible users. Second, those tailor-made arrangements, because they are normally more complicated and involve particular or specific characteristics not easily identified in audits proceedings. In this case, the problem is the *quality* of the arrangement.

Marketable schemes tend to be used more by the lower end of the HNWI spectrum and bespoke schemes by those at the upper end. The conclusion is the risk to a country's tax base posed by the use of marketable schemes can be reduced significantly by using strategies and combinations of strategies already applied successfully by some countries in the focus group. These same tools may be somewhat less effective in connection with bespoke arrangements. The challenges posed by bespoke schemes can be met by a combination of improved compliance activity and service strategies on the part of the tax administration. Meeting such challenges may require legislative action, as well as changes in the way that tax administrations structure and staff their operations.

The Report presents a discussion in a United States Senate Report (2005) on tax shelters, which found that by 2003 the tax shelter industry had moved from individualized tax advice to developing generic tax products that could be aggressively marketed to multiple clients, classifying that market as supply-driven. On the other hand, where tax planning market is demand-driven, mass marketed schemes are infrequent.

A movement in the opposite direction, considering schemes offered by intermediaries (supply-driven), was realized after the introduction of MDR in the UK (DOTAS) and experts believe that the system made the market migrate from mass-marketed to be-spoke arrangements[208].

The point is that MDR can be more self-sufficient in countries where mass-marketed schemes are common place (supply-driven) and more dependent on other kinds of measures (cooperative compliance and services) in countries where bespoke arrangements are frequent (demand-driven). Therefore, the analysis of which kind of tax planning market exists in each country is quite relevant. This is another important factor when evaluating the most efficient system to use, because the OECD proposal and other existent systems are focusing on the "intermediaries" or supply-side.

2.3.3.2 HNWI particularities.

As likewise proposed to deal with large corporations, the Report suggests that HNWI need to be studied, known and treated according to their particularities. For example, it is necessary to know their commercial activities and the source of their wealth, to act more efficiently. The report mentions that wealth is inherited in around 30% of the HNWI population, on a global basis. Nevertheless, there are likely to be substantial differences between developing and developed economies, and between economies with high growth rates and those with lower growth rates. In Ireland for instance, most of the wealth held by HNWIs is self-created and has accumulated over the last 20 years. In contrast, the engine of wealth creation in Germany is often in businesses that have been in family ownership for generations. This kind of data is a very important factor determining the tax planning strategies.

Moreover, commercial awareness and what the Report calls "wealth cycle"[209], HNWIs have more concerns about privacy than other people do. Considering this, it is possible to infer that when introducing MDR, privacy and data protection are very sensitive points to be dealt with. That is why especial guarantees, tools and security systems should be very clear to the taxpayers and intermediaries, who are demanded to disclose tax planning.

Typically, HNWIs show higher international mobility than other taxpayer segments, therefore, features like the use of differential rates on different types of income or capital gains represents influences on their strategies[210]. However, the Report states that due to a range of factors including the increasing sophistication of local service offerings and local investment opportunities along with tax and other regulatory pressures and increased international cooperation, a growing repatriation of offshore funds, particularly in Europe, is registered[211].

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[208] See Chapter II, topic 2.5.2 – Comments received on Public Discussion Draft.
[209] Ibid, p. 18. *"Tax strategies may have different focus, whether sheltering income (recent sources) versus preserving wealth (old sources, with low income but substantial capital)".*
[210] See Chapter II, topic 2.1.2 - Influences of globalization in complexity and instability of tax system.
[211] OECD (2009). *Engaging with High Net Worth individuals on Tax Compliance.* Op. Cit., p. 21.

The Report also mentions the improvements noted in transparency and exchange of information for tax purposes and deals with measures designed to improve voluntary compliance. It should be noted, therefore, that the initial idea in the OECD works for the creation of an obligation to disclose tax planning by intermediaries was connected to a "voluntary" compliance by taxpayers, which involves, by its turn, the existence of a favorable environment.

It is possible to see an example of this interaction in the UK/DOTAS legislation[212], in which the intermediary (subject to mandatory disclosure) is protected by professional privilege/secrecy that prevents him from providing any information. In the case, he/she is exempt from the legal obligation; however, the client has the option (voluntary disclosure) to waive the privilege of confidentiality, and the intermediary must disclose the planning.

Thus, it is possible to freely use tax planning when organizing the business, using professional assistance, yet protecting confidentiality between advisor-client, and disclosing the planning for security and certainty reasons.

Finally, the Report recognizes, stressing its concerns with tax administration rather than tax policy, that advisers have indicated that individuals may be deterred from seeking professional advice where they consider that the adviser will be obliged to notify government bodies of the compliance failure under anti-money laundering rules.

2.3.4 Tackling aggressive tax planning through improved Transparency and Disclosure, 2011.

Two years later, the OECD issued a report *Tackling aggressive tax planning through improved Transparency and disclosure*[213] *("2011 Report")* about the measures and progresses to tackle "aggressive tax planning", by increasing transparency and disclosure of those practices. That time, the focus was on the fact that tax administrations should search for early and relevant information about tax structures and on explaining why the traditional process of assessment (audits) was not able to control such tax planning. The strategies involved mandatory disclosure rules, co-operative compliance programs, rulings regimes and penalties linked to disclosure rules.

The OECD demonstrated its consciousness in differentiating *offshore* tax evasion and "aggressive tax planning" and that different actions were necessary for each of those undesirable tax practices. Distinguishing "*unprecedented progress in countering offshore tax evasion*", by improvements in bank information and in an effective exchange of that information, and strategies to deal with aggressive tax planning ensuring "*the availability of timely, targeted and*

[212] See Chapter III, topic 3.2 – The system in the UK.
[213] OECD (2011). *Tackling aggressive tax planning through improved Transparency and disclosure.* Paris: OECD Publishing. Published on February 2011. This report approved by all OECD members, covers a range of approaches from mandatory disclosure rules to forms of co-operative compliance. The report provides a toolkit for those concerned with aggressive tax planning and recommends a careful review of the different approaches to inform both tax policy and compliance.

comprehensive information" to enable governments to identify risk areas and whether and how to respond[214].

This is an important point that this work stresses many times. The early, specific and relevant information, which should be focused on MDR, is suitable to tackle tax planning forcing the limits of the law, but still limited by them. However, to practices clearly illicit, or in which the intention to break the boundaries of the law is evident, MDR is not the adequate instrument.

Despite the blurred line between evasion, avoidance and aggressive tax planning, it is possible to define which kind of measure is more efficient and which kind of counteractions are necessary. MDR was conceptually developed for identifying tax planning cases and it can result in State actions (administrative or legislative) or not, differently, therefore, from tax evasion and other actions defined as crimes, in criminal codes.

Mentioning the complexity of the arrangements, often international, the 2011 Report states that audits may not necessarily reveal their use, the traditional process takes significant time, sometimes several years, and it may be difficult to identify if a scheme is an isolated case or widespread phenomenon, in an audit context. Moreover, as was already explained[215], audits are more costly than other compliance programs, for both tax authorities and taxpayers.

Therefore, a solution proposed is the introduction of mandatory disclosure rules on aggressive tax planning, which is defined by the OECD as structures or schemes designed to produce *tax advantages*. However, the definition of "*tax advantage*" is as complicated as the definition of "aggressive tax panning". Initially it is possible to link this idea with the *main benefit test* and *the spirit of the law*.

However, the tax administration can only determine these concepts, which will be addressed specifically below, after an analysis of the planning and its results. They are, therefore, more conducive to applying a GAAR than to defining MDR. Thus, if the intermediary / taxpayer is obliged to make use of the concept of tax advantage for MDR application, this generates uncertainty for them, understandably.

The OECD´s strongest conclusion, suggesting the use of MDR, in the 2011 Report, is connected to the variable feedback time. The Organization states that these measures "*can help to fill the gap between the creation/promotion of aggressive tax planning schemes and their identification by the tax authorities*" and they have proven "*to be very effective in providing governments with timely, targeted and comprehensive information on aggressive tax planning schemes, thus allowing timely policy and compliance responses*"[216].

However, the 2011 Report makes it clear that MDR is only one of the "disclosure initiatives", which means it does not produce the desirable and efficient results when used alone.

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[214] Ibid, p. 6 and 11. "*The report does not deal with tax evasion and the disclosure initiatives discussed will generally have little or no impact in tax evasion cases*".
[215] KEEN, Michael and SLEMROD, Joel B. *Optimal Tax Administration.* Op. Cit.
[216] OECD (2011). *Tackling aggressive tax planning through improved Transparency and disclosure.* Op. Cit., p. 19.

MDR, additional reporting of specific relevance to aggressive tax planning, use of questionnaires, co-operative compliance programs and ruling regimes are among the listed disclosure initiatives.

Penalties are, in case, exclusively connected to the idea of "mandatory" and the others, according to the OECD, "*have in common they require create incentives for taxpayers (and in certain case advisors*)" to provide the relevant and necessary information, in a timely manner. Thus, it is important first to create an environment based on trust and transparency, second to present MDR as a benefit for both the taxpayer and the tax administration, comparing to the system based on audits and tax disputes.

This is a crucial issue leading to one basic question of this work: why is it not enough to be mandatory? As examples, the frustrated experiences in Portugal and Brazil will be analyzed in Chapter III.

Finally, it is important to stress that when the 2011 Report was issued, despite the many times repeated statement that "*several countries have recently enacted rules which require disclosure*"[217], mandatory disclosure regimes were in place only in Canada, Portugal, the United Kingdom and the United States. As the 2011 Report informs, Ireland had recently also adopted legislation requiring mandatory disclosure of certain transactions.

As this work will describe, in Portugal the rules were introduced in 2008 and despite the existence of a mandatory regime, they did not produce significant results. In the United Kingdom, the regime, introduced in 2004, did not focus on international tax planning, being much more projected to domestic planning. In Canada, the regime, which focused only on tax shelters and penalties, was under substantial revision. The conclusion is that the idea was already existent, but not based on widespread previous experiences.

Interim conclusion.

Within the process of increasing transparency in tax matters, as a way of curbing unwanted practices and focusing on tax planning, which reduce and sometimes even nullify the tax collection for certain taxpayers, the OECD has begun to develop programs based on demands arising from the Forum on Tax Administrations, in 2002. Tax administrations were willing to share information and adopt administrative measures to contain abusive tax planning.

In the material scope, the criticized concept of aggressive tax planning has been arrived at. The problem is that the practical application of the term "aggressive" is inefficient because it does not correctly address the information that is ultimately relevant for Tax Administration to take the counteraction it needs.

[217] Ibid, p. 13.

In the personal scope, the relevance of the role of tax intermediaries was pointed out, including the professionals, tax consultants, firms and institutions that develop, offer, commercialize and assist in the implementation of the planning (supply-driven) and the particularities to be considered when dealing with large multinationals and high-net-worth-individuals (demand-driven focus).

The question is how to approach the personal scope and two sides must be tackled: offering services and increasing trust between tax authorities and taxpayers, which would make the demand for intermediary services diminish; and at the same time introducing measures that would force the intermediaries to disclose the planning.

The disclosure would have two effects: first by deterrence, knowing that planning should be revealed, supply and demand would decrease; second because, early knowing the schemes, the tax administration could take countermeasures to close gaps and loopholes in the legislation, that allow these schemes to work.

Solutions go through the development of risk analysis methodology, for which the information gathered is very important and leads to savings for both tax administration and taxpayers. For the first, because it increases the efficiency of their work and for the second because compliance costs are lower than the costs of concealment and the costs of facing an eventual and avoidable auditing.

2.4 Describing the System – Mandatory Disclosure Rules.

In this Chapter, this work first aimed to demonstrate how the old international tax regime lost control over volatile capital and the influence of globalization in the process. The steps that have been taken since then to regain control over this were then analyzed, starting with the harmonization or standardization of treaties, going through procedures for coordinating and exchanging tax information and reaching tax transparency. Transparency based on a widespread exchange of information and the end of bank secrecy and represented by unilateral, mainly by the US, and multilateral measures, eminently developed by the OECD-G-20. Finally, mandatory disclosure rules focusing on tax planning strategies coupled with other administrative actions were presented as a good source of information to tax administration, enabling an effective reaction to tackle undesirable tax practices, which produce results that deviate from the objectives of taxation.

In describing this process, several references were made to the mandatory disclosure rules (MDR), “aggressive tax planning” and the so-called tax intermediaries. In this topic, the intention is to expand these and other concepts, as this work sees them. This will be done using the following structure:

i) Material scope;
ii) Personal scope;
iii) Timing of disclosure;
iv) Penalties and liability. MDR enforcement; and
v) What information is required to be reported.

Initial remarks.

This topic has no conclusions. The intention is to present the structure of a possible MDR and rather to raise questions than to present solutions. The proposals will come in Chapter V. However, at the end of this topic, it is hoped that the reader has already understood the whole structure, the focus of MDR on material and personal terms, the great differences and challenges of setting purely domestic or international systems and how it influences the definition of the hallmarks. Moreover, it was stressed the relevance of the information time and the reaction time of the tax administration. Effective responsiveness is also challenged by international schemes because of the volume of information, the complexity, the work capacity of the tax administration and the dependence of other countries´ capacity and the effectiveness of their enforcement.

2.4.1 Material scope.

2.4.1.1 Aggressive or Abusive Tax Planning.

This work does not intend to define the difference between tax avoidance and tax evasion. There are numerous others dedicated to this focusing on different fields, such as legal[218], economic[219], public finances[220] and even psychological[221]. For example, the economic effects would be the same and there is no reason to differentiate from this perspective. In the discipline of public finance, *"the term `tax avoidance' may be used interchangeably with `tax evasion' on the basis that a dollar or euro of lost revenue through tax evasion is the same as a dollar or euro of lost revenue through tax avoidance"*[222]. On the other hand, focusing on the psychological effects and how the taxpayer sees the reduction of the tax burden and how he/she believes it is more acceptable socially

[218] DEÁK, Dániel. *Legal considerations of tax evasion and tax avoidance*. Society and Economy, v. 26, n. 1, 2004, p. 41–85.
[219] CABALLE, Jordi and PANADÉS, Judith. *Tax Evasion and Economic Growth*. Journal of Public Finance, v. 52, Issue 3-4, 1997, p. 318-340.
[220] SLEMROD, Joel and YITZHAKI, Shlomo. *Tax Avoidance, Evasion, and Administration*. Handbook of Public Economics, v. 3, 2002, p. 1425-1465.
[221] KIRCHLER, Erich; MACIEJOVSKY, Boris and SCHNEIDER, Friedrich. *Everyday representations of tax avoidance, tax evasion, and tax flight: Do legal differences matter?* Journal of Economic Psychology, v. 24, Issue 4, August 2003, p. 535-553.
[222] MERKS, Paulus; ERNST & YOUNG and VRIJE Universiteit, Amsterdam. *Tax Evasion, Tax Avoidance and Tax Planning*. Intertax, v. 34, Issue 5, 2006, p. 272.

thinking, the basic legal definition that evasion is illicit and avoidance is lawful produces a significant difference[223] in the compliance results.

MDR is designed to increase the tax administration´s capacity to react, especially involving the need for changes in the legislation, identifying the existence of loopholes or mismatches. Investigation, prosecution and sanction for financial crimes, corruption, money laundering and similar are not among the tax administration primary objectives[224], although during ordinary audits evidence of this type of crime can be found.

Therefore, MDR is not primarily intended to identify persons who are committing crimes and to serve as a basis for criminal prosecution, therefore, determining whether the planning to be disclosed is considered avoidance or evasion is useless. MDR is suitable for structures developed within the limits of the law. The rules, as pointed out, have two main objectives: to increase transparency and to reduce uncertainty. The focus should never be identifying criminal or unlawful activities, which can occur eventually, during the development of the analysis by the tax administration, but not primarily, when designing the rules.

Furthermore, if when determining which planning must be disclosed, the law uses definitions of "illicit" and criminal clauses and the respective consequences, the disclosure obligation can be objected, considering the principle of non-self-incrimination[225]. Legally speaking, requiring someone to reveal an illegal arrangement comes up against the limitation for non-self-incrimination. No one can be required to self-incriminate under threat of penalties, and strong arguments can be presented, within the obligation to disclose tax schemes[226]. Indeed, it seems illogical to ask someone who is consciously committing a crime or applying an illegal arrangement, which is characterized by fraud and the express intention to breach the law, to reveal to the tax administration his or her unlawful scheme. This way, the argument based on prohibition of "self-incrimination" becomes a possible exception and not the rule.

The majority of the States have the competent authorities and the due process of law to deal with economic and financial crimes. In France, for instance, there are public prosecutors and a Special Prosecutor for Financial Crimes (*procureur de la République financier)*[227]. If the tax

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[223] KIRCHLER, MACIEJOVSKY and SCHNEIDER (2003). Op. Cit., p. 535. "*From a macro-economic perspective – legal considerations apart – tax avoidance, tax evasion, and tax flight have similar negative effects on the national budget. Hence, some economists suggest analyzing their effects jointly, and no longer discriminate between them (e.g., Cross & Shaw, 1982). However, from a psychological perspective, due to legal differences and moral considerations (Etzioni, 1988), it is assumed that taxpayers perceive tax avoidance, tax evasion, and tax flight differently, despite their identical economic consequences.*

[224] NOTE. Although there is now the need for governments to coordinate the work of law enforcement, including tax administration, to tackle tax crime and related illicit financial flows, MDR is not really relevant to this aspect of tax administration.

[225] See Chapter V, topic – 5.1.2 The issue to non-self-incrimination, the adviser's liability and MDR.

[226] ČIČIN-ŠAIN, Nevia. *New Mandatory Disclosure Rules for Tax Intermediaries and Taxpayers in the European Union – Another "Bite" into the Rights of the Taxpayer?* IBFD, World Tax Journal, v. 11, n. 1, 2019. Published online: 18 January 2019.

[227] WRAZEN, Céline**.** *Le Procureur de la République financier, un an après*. Portail universitaire du droit, 2014. *"Le Procureur de la République financier, qui dirige le Parquet financier à compétence nationale, doit son existence à la loi du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière*

administration is primarily introducing MDR and taking into consideration the existence of illicit behavior, beyond subverting its constitutional role, in many cases, it is creating an additional barrier against receiving the information. One of the main issues in this work is to demonstrate the need for a cooperative compliance program in parallel with MDR. Proposing or arguing the necessity of combating crimes as an argument to require the information using MDR goes in the opposite direction.

For example, in February 2019, Brazil witnessed a public discussion involving a Judge of the Supreme Court and the Special Secretary of the Federal Revenue Service, because a group of tax auditors was auditing public authorities to identify money laundering, corruption and white collar crimes[228]. The discussion is not about the possibility of identifying this kind of behavior and the connection between tax evasion and those crimes, but the use of tax administration´s tools, efforts and budget to criminal prosecute rather than to inspect and collect the statutory tax.

It is important to keep in mind that the planning MDR focuses on and intentional evasion are not the same, do not involve the same practices nor should have, in principle, the same consequences. In other words, MDR is a tool for attracting those who are willing to pay the tax, by giving them some advantage by doing so correctly, such as a service, a simplification, a discount. If the taxpayer´s intention is not to pay tax and he/she deliberately engages a scheme for this purpose, MDR will not change his/her behavior.

The European Parliament, for instance, has called for tougher measures against intermediaries who assist in arrangements that may lead to tax avoidance and evasion[229], as expressed in the Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU. However, it is important to highlight my position in which MDR is not the appropriate instrument to tackle fraud and evasion. MDR is an eminently administrative measure, which can, eventually, result or lead to criminal prosecution, after a future audit. What is not recommendable is establishing the identification of crimes, frauds and tax evasion as the initial objective, because if someone is breaking the law, it is not the case of changing or adjusting the law. Furthermore, the risk analysis issue is very different if a taxpayer is applying an "aggressive", however licit, tax planning or if he/she is trying, consciously, to commit crimes or evasion.

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et à la loi organique du même jour. Entrés en vigueur le 1er février 2014 (codifiés aux articles 704 et suivants du Code de procédure pénale), ces textes ont été complétés par une circulaire du 31 janvier 2014. Le Parquet financier est compétent en matière de lutte contre la corruption et la fraude fiscale de grande complexité, aux niveaux national, européen et international, sachant que ce type d'affaires nécessite une grande spécialisation des magistrats et une centralisation des moyens et des compétences". Available at: *https://univ-droit.fr/la-gazette-juridique/18290-le-procureur-de-la-republique-financier-un-an-apres*. Accessed on: 18 Mar 2019.

[228] BRAZIL (2019). Jornal Folha de São Paulo on-line. "*Não compete à Receita fazer investigação criminal, diz Cintra sobre caso Gilmar. Secretário afirma que auditor no caso do ministro do STF apresentou juízos que não cabem ao órgão*". 14 Feb 2019. Available at: *https://www1.folha.uol.com.br/poder/2019/02/nao-compete-a-receita-fazer-investigacao-criminal-diz-cintra.shtml*. Accessed on: 15 Mar 2019.

[229] EUROPEAN UNION. Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. OJ L 139, 5.6.2018, p.2.

Furthermore, as pointed out by Juárez e Hamzaoui[230], the distinction between tax avoidance and tax planning seems even harder to make than the distinction between avoidance and evasion. Thus, there is no reason to place the "aggressive" between avoidance and evasion, if the boundary between each other is not being defined for MDR application.

Tax planning is connected to the idea of tax mitigation[231] and can be defined as an arrangement in order to minimize tax liability. The Canada Revenue Agency[232], for example, warns that extending the boundaries of the law creates a risk of crossing the barrier between "acceptable" planning and one that is considered aggressive or abusive. They say that both tax avoidance and tax planning involve tax reduction but clarify that "*effective tax planning*" happens when the result achieved is consistent with the intent of the law. However, when planning reduces tax inconsistently "*with the overall spirit of the law*", it is reputed to be tax avoidance. Thus, their interpretation of the term *tax avoidance* includes all forms of "*unacceptable and abusive*" tax planning. Aggressive tax planning refers to schemes that "push the limits" of acceptable tax planning.

MDR should not be related to aggressive or abusive because, first, there would be a need for a "judgment" to assess whether the disclosure arrangements list actually contains arrangements that may be considered abusive or not. In many instances, the distinction between tax avoidance and tax planning is determined by the judicial system[233] and in several jurisdictions, the courts have considered the use of a loophole or unintentional imperfections in the law as permissible. In other words, if it is established that abusive schemes should be disclosed, litigations will arise, even prior to disclosure, to determine whether a particular planning could be considered abusive, and therefore subject to disclosure, or whether it could not be considered abusive, and therefore not amenable to disclosure.

Some attempts to define the scope of MDR are connecting aggressive tax planning arrangements to schemes designed to achieve tax advantage and the OECD and the EU have adopted, as will be explained in the specific topics[234]. This solution of linking aggressive tax planning to obtaining a tax advantage seems to come from the system applied in the UK. The definition of *tax advantage*, however, is very broad. For instance, the DOTAS guidance[235] says it includes the avoidance or reduction of a charge to tax, a relief from tax, repayment of tax and the deferral of tax or the avoidance of an obligation to deduct tax.

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[230] OGAZON JUÁREZ, Lydia G. and HAMZAOUI, Ridha. *Common Strategies against Tax Avoidance: A Global Overview*. International Tax Structures in the BEPS Era: An analysis of Anti-Abuse Measures, v. 2, Amsterdam: IBFD, 2015, p. 6.

[231] IBFD. *Tax Planning.* International Tax Glossary, 7 ed, Amsterdam: Julie Rogers-Glabush editor, 2015, p. 477.

[232] CANADA. Canada Revenue Agency. *Tax Avoidance*. Available at: https://www.canada.ca/en/revenue-agency/corporate/about-canada-revenue-agency-cra/tax-alert/tax-avoidance.html. Accessed on: 11 Nov 2019.

[233] MERKS, ERNST & YOUNG and VRIJE (2006). Op. Cit., p. 281.

[234] Chapter II, topic 2.5 – The BEPS project and Chapter III, topic 3.5 – The European Directive.

[235] THE UNITED KINGDOM. HM Revenue and Customs. *Guidance Disclosure of Tax Avoidance Schemes - DOTAS*, p. 31. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/701190/DOTAS-March.pdf. Accessed on: 11 Nov 2019.

In the context of the legislation for transactions in securities, they explain, the Courts considered the meaning of '*tax advantage*' on a number of occasions. For instance: (i) where the scheme is expected to result in tax being avoided or reduced applies, the existence of a *tax advantage* is tested on a comparative basis (the long-standing judgment of Lord Wilberforce in CIR v Parker (1966 AC 141)). (ii) what the draftsman was manifestly trying to do when defining *tax advantage* was to cover every situation in which the position of the taxpayer vis-à-vis the Revenue is improved in consequence of the particular transaction or transactions (Lord Justice Parker said in Sema Group Pension Fund (2003 STC 95)). Thus, they expect the existing body of case law to apply equally for disclosure purposes.

However, the point is that if the system is being enforced in a country that adopts civil law, it is not so easy to expect that the court, in assessing the application of MDR, will itself "create" a definition or concept, not present in the law. Most likely, the Court will reject the application of the system, precisely because of the lack of such a definition, as occurred in France in 2014.

The disclosure of aggressive tax planning implementation under BEPS Action 12 was considered and analyzed, in France[236]. That work mentions that the French Constitutional Court rejected a proposal of disclosure of tax schemes included in the finance bill for 2014, considering the project unclear and ambiguous, creating excessive legal uncertainty for taxpayers and that there was a risk of arbitrary application of the law by Tax Administration. In the same decision, that Court also discussed the legality and necessity of a precise description of crimes and penalties, when analyzing the possible imposition of penalties on tax intermediaries, how it could harm ample defense and introduce an extensive definition of abuse [237].

After trying to delineate some characteristics, the guidance - DOTAS[238] concludes "*in our experience those who plan tax arrangements fully understand the tax advantage such schemes are intended to achieve. Therefore we expect it will be obvious (with or without detailed explanation) to any potential client what the relationship is between the tax advantage and any other financial benefits of the product they are buying*", in summary, transferring the decision about whether an arrangement represents a "tax advantage" or not to the intermediaries/users of the arrangements.

In Portugal, Saldanha Sanches[239] defended the legitimacy of tax planning, which he calls "*the taxpayer's subjective right and a necessary condition for legal certainty in tax relations*". He supports that "*we are beyond the time when it was enough for the taxpayer to just sit back and wait for a paternal and authoritarian State, to tell him how much to pay in taxes*".

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[236] MAJED, Leila. *Implementation in France of the disclosure of aggressive tax planning arrangements under action 12 of BEPS*. ABDF – Brazilian association of finance law. Available at: http://www.abdf.com.br/index.php?option=com_content&view=article&id=2175. Accessed on: 9 May 2018.
[237] FRANCE. Conseil Constitutionnel. *Decision 2014-707 DC* du 29 Decembre 2014. Available at: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2014707dc/2014707dc_ccc.pdf. Accessed on: 5 Nov 2019.
[238] THE UNITED KINGDOM. HM Revenue and Customs. *Guidance Disclosure of Tax Avoidance Schemes – DOTAS. Cit., p*. 32.
[239] SALDANHA SANCHES, José Luís. *Os limites do planeamento fiscal*. Substância e Forma no direito fiscal português, comunitário e internacional. Coimbra: Coimbra Editora, 2006.

In this sense, all tax planning should be legitimate in "*every situation in which the position of the taxpayer vis-à-vis the Revenue is improved*"[240], as quoted above, and it is hard to relate them with unacceptable or abusive practices.

2.4.1.2 Hallmarks. Key-characteristics.

Tax planning strategy includes techniques, ideas and tactics in order to reduce the effective tax rate. Russo *et all*[241] basically distinguish it in profit migration strategies and jurisdictional strategies. The first category they define as "critical" that must be evaluated in the planning of any MNE, "*it is at the core of global tax planning and addresses the most significant tax rate drivers*". The concept refers to that portion of a corporation´s profit "*that legally and within risk tolerances can be migrated to lower-tax jurisdictions and permanently deferred through acceptable tax planning actions*". Jurisdictional strategies, by its turn, focus on the use, according to those authors, of domestic or in-country tax laws and may also include legislative initiatives, which are generally domestic actions to reduce tax burdens.

Considering all which has been discussed above about *legally* and *acceptable* tax planning actions, this work defends that MDR should focus on "risk tolerances", in order to narrow the limits to "tolerable", making certain kinds of planning disclosable.

The fact is that tax planning usually involves the same elements. Conduit companies, the exploitation of patent box schemes, the use of offshores in tax havens, under or overvaluation of equity or the creation of companies solely to generate deductible payment expenses are practices well known[242]. Russo *et al*[243] conclude that "*an integrated global structure*" should ensure it has addressed three areas of impact: first, where the business profit initially arises and so falls to be taxed; second, how to take advantage of particular characteristics of a given taxpayer and a given tax system in which it operates; third, all the issues arising from cash being located in a different jurisdiction from where it is needed for re-investment or return.

Therefore, what makes a tax planning innovative is the way these elements are organized and arranged. Thus, they can be framed by the presence of certain general characteristics. These characteristics are named "*hallmarks*" and the legislation must promote descriptions of which arrangements it focuses on. As explained in the guidance - DOTAS[244], some of these hallmarks are

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[240] *Lord Justice Parker said in Sema Group Pension Fund (2003 STC 95). Cit.*
[241] RUSSO, Raffaele *et al*. *Fundamentals of International Tax Planning*. Amsterdam: IBFD Publications BV, 2007, p. 76-78.
[242] NOTE. These features are quoted because of the BEPS focus on international tax schemes. However, domestic tax planning arrangements can have other features, such as translating income profit into capital gains, delaying recognition of income, accelerating the recognition of allowable expenditure, to name just a few. Notwithstanding, the same reasoning in the paragraph is applicable to both.
[243] Ibid, p. 83.
[244] THE UNITED KINGDOM. HM Revenue and Customs. *Guidance Disclosure of Tax Avoidance Schemes – DOTAS.* Cit., p. 35.

designed to capture new and innovative arrangements. Others are designed to capture areas of specific concern and they may include schemes that are well known or commonly used.

It is expected that the range of hallmarks will change over time, in function of perceived changes in the tax planning market or in the effectiveness of any counteraction. For instance, every time the tax planning market adapts its practices according to the new rules, provisions or opinions emitted by the tax administration or every time the potential risk of such planning changes and it is no longer considered to be relevant in MDR application. Moreover, although a possible dissuasive effect is expected, reducing the number of arrangements in the market, one cannot expect tax planning will suddenly disappear, but the disappearance of some planning is possible.

Therefore, considering the possible MDR effects on the intermediaries/taxpayers´ behavior, one advantage of using hallmarks is that it is easier and more efficient to adapt the hallmarks´ table than to try to redefine the concept of "aggressive". Additionally, after promoting the competent changes in the law, in case of loopholes or weaknesses closed or corrected, the related hallmark could be removed, avoiding unnecessary information and observing the proportionality of the measure.

The absence of a hallmark should not be regarded as an indicator that arrangements not caught constitute practices that are acceptable. Similarly, not all arrangements that include or meet a hallmark description should be regarded as unacceptable practice. Therefore, taxpayers may have to tell tax administration about schemes that may not be considered to be avoidance, but which are important to gather information in order to develop risk analysis.

2.4.1.2.1 The Main benefit test.

As described above, an attempt to define "abusive" schemes (Canada Revenue Agency)[245] is based on the distinction between the letter of the law and the spirit of the law. This way, schemes consistent with the intent of the law could be acceptable. However, when planning reduces tax inconsistently "*with the overall spirit of the law*", it is reputed to be tax avoidance, which would include all forms of "*unacceptable and abusive*" tax planning.

According to Merriam-Webster dictionary[246], the expression spirit of the law means "*the aim or purpose of a law when it was written*". The question is who is able to define the spirit of the law, when applying MDR?

This work will deal with the question analyzing the UK DOTAS[247], for instance; however, it is important to keep in mind that when applying MDR one State power cannot concentrate all the functions, especially if, when defining the characteristics of the planning to be disclosed, this

[245] See Chapter II, topic 2.4.1.1 - Aggressive or Abusive Tax Planning.
[246] MERRIAM-WEBSTER Dictionary. *The spirit of the law*. Available at: https://www.merriam-webster.com/dictionary/the%20spirit%20of%20the%20law. Accessed on: 5 Nov 2019.
[247] See Chapter III, topic 3.2.6 - The impact of the DOTAS regime on compliance.

conceptual idea of "*purpose of law*" is used. Because is not the executive, but the legislature, when writing, and the judiciary, when interpreting the application, who should define it.

When establishing the list of hallmarks they were divided into general and specific[248]. The first category relates to the *main benefit test.* The main benefit test is about the 'tax advantage' that a taxpayer may reasonably expect to derive when applying such planning. Therefore, it is necessary to compare between the business and other benefits and the tax benefit, to reach a conclusion about whether the "main benefit" is related to tax or to other benefits.

The EU-Directive[249] says that the test will be satisfied if what a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage. However, it does not define what a *tax advantage* is. Analyzing that provision, Korving and Verbaarschot[250] state that the main benefit test is met if the main benefit or "*one of the main benefits that can be reasonably be expected of an arrangement – considering all the relevant facts and circumstances – is obtaining a tax benefit".* Additionally, they raise an interesting question: "*realizing a tax benefit also comprises avoiding a tax disadvantage"*? Based on the Netherlands State Secretary for Finance´s consultation document[251], they indicate that the main benefit test is not met when a tax disadvantage is avoided.

There is no indication in the EU-Directive, for instance, that there is room to conclude that the main benefit test is not met where a gross amount of a tax benefit is exceeded by the amount of some other negative financial effect of the arrangement, says the Dutch Association of Tax Advisers[252].

This is only for exemplification of how many questions can emerge using unprecise concepts such as tax advantage, tax benefit or spirit of the law. First, tax administration is not the competent body to define the spirit of the law; second, tax advantage or benefit is a variable measure, depending on the existence of other benefits or even on the existence of disadvantages, when evaluating the transactions and the planning.

The main benefit test must be used as a first step, when verifying the necessity of disclosure or not. If the planning has as main benefit a tax advantage, shall one move to a second step, based on the specific hallmarks, which must be defined based on risk analysis and as relevant information to tax administration. Thus, disclosing such a plan exclusively based on the main benefit test is

[248] EUROPEAN UNION (2018). Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. OJ L 139, 5.6.2018, Annex IV.
[249] Ibid.
[250] KORVING, Jasper and VERBAARSCHOT, Joep. *Mandatory Disclosure in the Netherlands – To Disclose or Not to Disclose? That Is the Question*. IBFD – European Taxation, October 2019, p. 463.
[251] Ibid. State Secretary. *Draft explanation on the consultation implementing the Mandatory Disclosure Directive*, p. 14. Available at: https://www.internetconsultatie.nl/dac6.
[252] NOB, Dutch Association of Tax Advisers. Mandatory Disclosure. *Questions and Interpretation of the EU Directive, Discussion Paper.*
Available at: https://www.nob.net/sites/default/files/content/article/uploads/mandatory_disclosure_-_nob_questions_and_interpretation_of_the_eu_directive_-_discussion_paper_september_2018_0.pdf. Accessed on: 6 Nov 2019.

broadly controversial because first, the quantification of the "tax benefit" in comparison to the "business benefit" is in charge of the person who must comply with the disclosure; second, because all tax planning has as one of its objectives to obtain tax advantages.

2.4.1.2.2 Specific Hallmarks.

Specific hallmarks must be defined based on risk and relevance to the tax administration. When doing this, it is important to bear in mind the proportionality and the reasonableness of the measure. The first on the basis of the administrative capacity to extract information which would really produce advantages, in comparison with the limitations or costs it brings; the second may require a rational test – as a general logical relationship between ends and means – to avoid absurd results, for example including all tax planning or none.

Another point is related to the objective, if it includes domestic and/or cross-border arrangements. Domestic arrangements tend to be simpler and encompass structures designed for repeated use. Moreover, after identifying domestic arrangements, a MDR system can counteract quickly and more easily than when the solution involves several jurisdictions. This is important because if the results of the disclosure are presented clearly to the taxpayer´s community, the system can work more efficiently. On the other hand, if they cannot observe the results of the disclosure and the effectiveness of the countermeasures, the compliance tends to decrease.

Cross-border arrangements are complex and difficult to identify, because they exploit different systems of law and require bigger coordination and exchange of information between the involved jurisdictions[253]. Russo *et al*[254] divided international tax planning into temporary and permanent; substantive, which alters the pattern of the economics activity and formal, which retains the substance of the thought activity, and if the planning involves the use of double tax treaty or not.

Based on these differences, it is impossible to use the same specific hallmarks when focusing on domestic and/or cross-border arrangements. As pointed out by Brauner, for instance, MDR was working in the US and in the UK, however this does not mean it will work equally everywhere: "*One should however note that the United States' experiences with the reporting of tax shelter activities may not be as positive as believed. Furthermore, the context is different because it is naturally simpler to identify reportable transactions pursuant to a specific and single legal regime than pursuant to general principles"* [255].

Furthermore, when designing hallmarks, besides verifying if the focus is international and/or domestic, it is necessary to establish which kind of result (outcome) is targeted. It is possible to identify tax arrangements producing undesirable results in different fields, thus measures and counteractions are different.

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[253] See further analysis in Chapter II, topic 2.5.1.1 – International tax schemes.
[254] RUSSO *et al* (2007). Op. Cit., p. 65-70.
[255] BRAUNER (2014). Op. Cit., p. 109.

In the field of general principles, for instance, a tax planning outcome could breach the ability to pay principle. Thus, big multinationals by developing and applying tax planning do not pay any tax anywhere, although they demonstrate ability to pay[256]. In this case, it is important to verify if the scheme exploits domestic law rules that contributes to base erosion and profit shifting, as an effect of the countries competition to attract international capital. If so, it is necessary to define hallmarks able to capture regimes allowing for exemption of foreign-source income, such as patent box regimes or territorial tax systems[257]. However, in these cases, neither is the solution in the Tax Administration hands nor is necessary to close gaps in the legislation, because this is a political option. This way, the disclosure of the scheme leads to an international political pressure on the country offering the favorable tax regime, which can change its policy, occasionally. The hallmarks are not so difficult to set as the solutions to avoid the planning from working.

In the international tax field, it is possible for a tax planning to explore mismatches between tax rules in different countries. There is no favorable treatment in none of them, but the issue relies on the lack of coordination. As was discussed in a previous topic[258], this coordination is sought through tax treaties. However, it is possible to use hybrid financial instruments and entities in international transactions to take advantage in different jurisdictions, in circumstances that give rise to international tax avoidance[259]. Moreover, it is possible to explore classifications and definitions contained in domestic law and in the tax treaties to obtain undesirable (from the taxation´s perspective) tax advantages. Therefore, it is necessary for tax administration to verify if it really has problems involving hybrid mismatches and treaty shopping arrangements, in order to avoid hallmarks focusing on those issues to be unnecessarily set, only causing extra burden, doubts and confusion to the taxpayers.

Undesirable arrangements can come up from a tax policy point of view. The question regards exploiting loopholes in the tax law and despite the fact that the arrangement is legal, it challenges moral and fairness. This is one more reason why hallmarks must focus on the outcomes and not on the techniques. Because, first the users of this kind of planning argue that they are acting in accordance with the law and from a technical perspective, they are right. Again, the solution is not changing a law, but modifying the tax policy. It is not so difficult for the legislators to technically modify the law, but the issue is balancing limitations or cuts in benefits and attractiveness and economic development[260].

Finally, yet importantly and without exhausting the issue, it is possible to face undesirable schemes from the administrative point of view. In this case, the scheme avoids the enforcement of the law and the undesirable outcome hinders the practicality to inspect and collect the due

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[256] THE NETHERLANDS (2012). International Tax Review. *UK politicians attack Starbucks' tax planning*. Published on 03 December 2012. *The UK Parliament's Public Accounts Committee (PAC) has called for government action to clamp down on seemingly successful multinational companies that pay little tax in the country, as well as criticizing HM Revenue & Customs (HMRC).* Available at: https://www.internationaltaxreview.com/article/b1fbsmhh6zh8h5/uk-politicians-attack-starbucks-tax-planning. Accessed on 03 Dec 2019.

[257] OGAZON JUÁREZ, Lydia G. and HAMZAOUI, Ridha (2015). Op. Cit., p. 10-12.

[258] See Chapter II, topic 2.2.1 - Coordination based on Tax Treaties.

[259] HOLMES, Kevin. *International Tax Policy and Double Tax Treaties*, Amsterdam: IBFD Publications BV, 2014, p. 374.

[260] OGAZON JUÁREZ, Lydia G. and HAMZAOUI, Ridha (2015). Op. Cit., p. 8.

taxes. Tax laws must be enforceable, enabling them to achieve their public interest purposes - namely, the proper compliance of their commands by the taxpayers, in a simple and efficient manner, and the proper collection of taxes. As a result, state acts of enforcement of such laws - administrative and jurisdictional - are built with the dictates of practicality, so as not to frustrate the public purpose stipulated in the law[261]. For instance, tax schemes including the creation of fake economic groups or economic chains require hallmarks that focus on a non-transparent legal or beneficial ownership chain, in the intention of identifying schemes using the interposition of third persons, which increases the distance between the economic fact and its real actor. Normally, administrative acts are enough to counteract.

As a conclusion, the establishment of the hallmarks depends on the risk posed and on the capacity to react. Above, this work mentions some examples and if a given tax administration does not face the specific problem or does not have ability to react in that field, MDR including these transactions can cause disproportionality and inefficiency.

2.4.2 Personal scope.

2.4.2.1 Intermediaries and advisors.

International tax planning services include a broad offer, from simple projections and calculations to acquisition´s structuring and restructurings, cash repatriation, use of foreign tax credits, tax treaty planning and interpretation, limitation on benefits, cross-border corporate groups, advice on transfer pricing, permanent establishment abroad, new business models after BEPS and supply chains, among others. This work introduced the role of the persons required to disclose tax planning in topic 2.3.2, starting from the OECD conclusions on the *Study into the role of Tax Intermediaries* (“2008 Study”)[262]. In the concept of “*intermediaries*”, any person that designs, markets, organizes or makes available for implementation or manages the implementation of a reportable arrangement is included. This does not differ from the UK or Portuguese definitions[263], for instance.

Tax arrangements without the interference of intermediaries are in secondary importance, in the context of MDR. First, these schemes, when existing, are not so *risky*, because they are particularly developed by a specific taxpayer, therefore not included as a marketable arrangement[264]. Second, without the specialized professional assistance, arrangements would not normally be as innovative and challenging for the tax administration.

The role of the so-called intermediaries, in general, increases due to two main factors: a conflicting relationship between tax authorities and taxpayers and the increasing complexity of tax

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[261] COSTA, Regina Helena. *Princípio da Capacidade Contributiva.* 4. ed. São Paulo: Malheiros, 2012, p. 82.
[262] OECD (2008). *Study into the role of Tax Intermediaries* (“*2008 Study*”). Cit.
[263] See Chapter III, topic 3.2 - The system in the UK and topic 3.3 - The Portuguese experience.
[264] See Chapter II, topic 2.3.3.1 – Marketable and bespoke arrangements.

law systems, which furthermore do not keep up with social and technological[265] developments. The 2008 Study is correct in its conclusion that by strengthening the relationship between tax authorities and taxpayers, the participation of third parties, i.e., intermediaries, would gradually weaken. On the other hand, the introduction of MDR puts pressure on the relationship between taxpayers and intermediaries, and it is also necessary that the tax administration be prepared to fill the gap left for them so that the system can function at length.

Agreeing that tax professionals, including large multinational professional firms, have specific and significant duties in connection with abusive tax avoidance, Russel and Brock[266] published a study, in 2016, stating that the tax avoidance market is governed by the laws of supply and demand as any other, as it had already been mentioned in 2008 Study. They identify on the demand side a "*population of well-financed and well-connected corporations and high net worth individuals*".

However, in their approach, they additionally discuss who should be responsible for addressing and remedying the deprivation caused by abusive tax avoidance. Thus, some issues related to the supply side are specifically pointed out: i) how tax professionals facilitate abusive tax planning, differentiating accountants (and the dominant multinational accountancy firms), lawyers, and financial advisors; ii) what tax professionals gain from abusive tax avoidance and iii) what tax professionals could do about abusive tax avoidance. In summary, their study "*is tempting to treat causal contribution, benefit and capacity*".

As an example, their article mentions the "*four dominant accountancy firms*"[267] presenting data to support that those firms heavily engaged in the development and marketing of generic tax avoidance strategies during the late 1990´s and early 2000´s. Even though the firms claimed to have changed their behavior, introducing new policies and internal controls, those authors cast doubts stating that firms do not seem to provide their tax professionals with strong incentives to adhere to those new practices. In the same period, besides those firms, lawyers and financial institutions earned millions of dollars for their assistance and opinion letters promoting and facilitating abusive tax avoidance[268].

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[265] NOTE. Referring to technological developments, one can imagine the possibilities of tax planning and the difficulties for taxation in the digital era and all the efforts scholars, governments and institutions have made to tax adequately the digital economy.

[266] RUSSELL, Hamish and BROCK, Gillian. *Abusive Tax Avoidance and Responsibilities of Tax Professionals*. Journal of Human Development and Capabilities, v. 17, issue 2, 2016, p. 278.

[267] Ibid. p. 286. "*There are currently four dominant multinational accountancy firms: Deloitte, PricewaterhouseCoopers (PwC), Ernst & Young (E & Y) and KPMG. Collectively, these firms are known as the "Big Four." Tax services are a significant component of the Big Four's operations; in 2012, the Big Four's combined annual revenues from tax services was approximately US$ 25 billion, or roughly one-fifth of their total global revenues (Public Accounts Committee 2013, 7–8). Of this $25 billion, the majority comes from tax advice, and much of that advice is aimed at helping wealthy individuals and corporations minimize the tax they pay*".

[268] Ibid. p. 287. *"There are three main ways in which lawyers facilitate abusive tax avoidance: (1) assisting in the design and implementation of abusive shelters; (2) providing legal opinions in support of abusive transactions and (3) representing tax shelter clients. In many cases, a single law firm—and even the same individual—assists a particular tax avoider in two or three of these capacities….*

In 2008, six Wall Street banks—Citigroup, Lehman Brothers, Morgan Stanley, Merrill Lynch, UBS and Deutsche Bank—became the subject of a US Senate Subcommittee investigation for allegedly helping non-US persons avoid US dividend tax (US Senate Permanent Subcommittee on Investigations - PSI 2008). In 2014, similar charges have been

In its conclusion, that article states that tax professionals have special responsibilities in helping to combat abusive tax avoidance, because of their duty to serve the public interest, which they defined as "*the collective well-being of the community of people and institutions that the profession serves*". Therefore, such professional duties ought to be taken more seriously than they typically are, in case of abusive tax avoidance practices.

2.4.2.2 Trade Secrets and Confidentiality.

Systems that determine the disclosure of tax planning have recognized the existence of professional prerogatives regarding professional secrecy and confidentiality. This is important and involves a great deal of discussion about professional ethics, trade secrets and economic interests that has existed in the US, for instance, for a long time. In 2002, Andrew Franklin Peterson[269] discussed the issues involved when accounting and financial planning firms claim either the protection of trade secrets for, or a proprietary interest in, tax planning strategies, and the potential ethical problems involved when attorneys bind themselves to confidence regarding such strategies.

One point to be considered is that many advisors working in the tax planning market are tax lawyers and, generally, the relationship between lawyers and their clients is protected by professional secrecy. Many states have laws that grant lawyers professional prerogatives, as a corollary to the right to ample defense, free professional exercise and client privacy.

However, the more multidisciplinary practice becomes acceptable in the tax advisory services, the more a range of ethical and legal problems becomes common. The question arising is whether in developing tax planning, the lawyer is acting to ensure the right to ample defense, that is, defending his client from any charge, or acting like any other professional, such as an accountant, an economist or a tax advice firm could also act.

For instance, as the Peterson´s abovementioned study marks, to protect their interests, "*accounting firms, insurance companies, investment banks and some law firms have asked clients and other advisers to sign confidentiality agreements*"[270]. Thus, the question is about the formal status of the tax-planning strategies: whether tax planning represents a taxpayer's right to defense against the State's tax requirement or whether it is a trade secret, which guarantees market competitiveness? In other words, which law should/will protect them, if tax planning could be seen as something that amounts to a trade secret: confidential information that could give taxpayers a competitive tax advantage and whether they rise to the level of trade secrets?

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made against Barclays and Deutsche Bank; one hedge fund, Renaissance Technology Corp., allegedly dodged $6.8 billion in US taxes using schemes devised by Barclays and Deutsche Bank (McKinnon and Tracy 2014)".

[269] PETERSON, Andrew Franklin. *Trade Secrets and Confidentiality: Attorney Ethics in the Silent World of Tax Planning*, Brigham Young University Journal of Public Law, v. 17, issue 1, 2002, p. 163-190. Available at: https://digitalcommons.law.byu.edu/jpl/vol17/iss1/8. Accessed on: 31 May 2018.

[270] Ibid., p. 165.

If so, tax planning is protected by intellectual property and trade secrets laws, but it is not the intermediary, whether lawyer or any other professional or firm, that is protected by professional privilege. In this case, the relationship is between the intermediary with his/her clients and with the market, that is, other competitors in the market. However, this could not include or be opposed to the tax authorities, for whom tax planning can be disclosed and kept confidential by tax law secrecy, like any other taxpayer´s business or financial information that is normally provided.

The question is very broad and this work does not involve exhausting it, which would require a specific study. Therefore, it is acknowledged that future studies will be needed and substantial material will exist as soon as the EU-Directive providing for the introduction of MDR comes into force from 2020 onwards, given the specificities of the freedom to provide services and the free movement of persons within the European Union framework. Thus, there may be competition for the tax planning market, with the demand for tax planning migrating from States that do not apply for legal professional privilege or establish higher penalties for non-disclosure, and those where the legal professional privilege receives broad protection and penalties may be lower. Therefore, this work identifies one more reason to classify tax planning as a trade secret and therefore to protect it with the referring laws[271].

It is important to highlight that the EU-Directive[272], for instance, provides two *generic* hallmarks, which include conditions linked to the relationship between the intermediary and the user(s) of tax planning and depend on the terms of the contract. Thus, whether there is a condition of confidentiality between the user and the arrangement provider, which is intended to ensure that the arrangement is not brought to the other intermediaries or even the tax authorities' attention; or if the fees, remuneration and other charges are fixed in proportion to the tax advantage that the scheme produces, it must be disclosed.

In these cases, this work understands that there is joint economic interest and the liability for any tax exigence needs to be discussed, which will be dealt with in Chapter V[273]. Because besides the issues already discussed here, about the role of the tax intermediaries, it is possible to advance to the liability of these intermediaries and how this will be done is of fundamental importance for the efficient functioning of MDR.

Concluding, it is important to note whether the professional is acting with a lawyer´s prerogative, which binds him to the client's ample defense and confidentiality clauses relating to the sole profession of lawyer, or whether he is acting as a tax planner/intermediary. In such a case, the exercise is not exclusive but could be exercised in the same way by an accountant, an economist, or a tax advisory institution.

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[271] See Chapter IV, topic 4.5.1 – Confidentiality, privacy and MDR.

[272] EUROPEAN UNION (2018). *Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU.* Cit., Annex IV, Part II, A. Generic hallmarks linked to the main benefit test, 1 and 2.

[273] See Chapter V, topic 5.1.2 - The issue to non-self-incrimination, the adviser's liability and MDR.

Thus, the material scope and the role of the intermediaries can now be connected with two other pillars in the structure used in this topic: timing of disclosure and penalties for non-disclosing.

2.4.3 Timing of disclosure.

Referring to the trigger for the obligation to disclose a tax planning, under MDR scope, there are two issues to be taken into consideration: one practical and objective and another one legal and subjective. The first is that the information must be early in order to make possible an effective response by the tax administration. The second is related to the liability for non-disclosing and further effects, as it was mentioned in the previous topic.

The obligation to disclose, in essence, should be early and at the time of availability or implementation of the planning. There is no reasonableness in a once-a-year MDR, together with the annual tax return, as explained[274], because the objectives of the information provided in the MDR differ from the objectives of the information provided in the annual tax return. In addition, in the case of marketable schemes, early information can prevent them from being spread to many taxpayers, keeping eventual damage to tax revenue under control.

Thus, by knowing the arrangements, the tax authorities may act to prevent one (or more) intermediary from organizing the same scheme for multiple actual or potential users. For this reason, the time of information and reaction is essential. The focus is on knowing a planning in the same fiscal year/taxable period it is being implemented and already preventing it from being repeated in the following fiscal year(s)/taxable period(s). It is not an efficient application to use the information in the following year/period of the planning implementation, when a large universe of taxpayers has already used it. Moreover, by principle of application, MDR is not introduced only to know a tax planning, start a tax assessment, disregarding its tax effects and, eventually, imposing penalties and fines.

In other words, essentially, the direct objective of MDR is not exactly to punish the intermediary or even the taxpayer, but to adapt the legislation/administrative practice/tax policy to prevent loopholes or mismatches from being used to reduce the tax burden, promoting the effective achievement of tax law purposes. In this sense, the variable time for both information and the possibility of reaction by the tax administration, promoting the due adjustments, proves to be crucial.

Therefore, requiring early information is not only challenging for the intermediary / taxpayer but also for the tax administration, because it requires quick reaction. If the information is required in advance but the tax administration is not prepared to use it to achieve the abovementioned objectives, the proportionality and reasonableness of MDR may be argued.

[274] See Chapter II, topics 2.2.4 - Why disclosure rules and 2.3.2.4 – Efficiency.

2.4.4 Penalties and liability. MDR enforcement.

In 2000, the Canadian Parliament introduced a new penalty to the Income Tax Act - section 163.2 and the Excise Tax Act - section 285.1 concerning third parties such as tax advisors, accountants and tax lawyers. There are two types of fines: the *tax planner's penalty* and the *tax preparer's penalty*, whose initial purpose was to punish and discourage those who commercially promote tax shelters. When proposing the legislation, the Finance Department said the penalties would apply only in "*notorious*" cases. However, given the broad field of activities that fall within the scope of the law, anyone making tax planning would potentially be subject to sanctions[275].

For tax planning non-disclosure, it is possible to set specific or "*ad valorem*" fines, as a percentage of the "saved" tax from the use of the scheme. Supposing MDR is in force in a given tax system, in Phelippe de Oliveira's[276] view, the argument for these fines is that anyone who submits a statement to the tax authorities, but does not report that they are using tax planning that brings them some kind of tax advantage, would be committing fraud. One discussion that follows is exactly the nature of the infringement, whether administrative or criminal.

In Germany, for example, a public consultation has been launched on a draft law providing for a fine of up to € 25,000 for violation, regarding non-compliance with the obligation to disclose aggressive tax planning[277]. Non-compliance or untimely information would constitute an administrative infringement (*Ordnungswidrigkeit*). In Poland, however, which was the first country to step forward and introduce the obligation to disclose tax planning after the publication of the EU-Directive, non-compliance is a criminal offense based on the Polish Fiscal Penal Code, subject to a fine[278].

In the point of view of this work, only in very special cases could the tax-planning intermediary be jointly and severally liable for the tax exigence. Criminal liability is even more difficult to configure when he was not the person required to pay the tax. However, there needs

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[275] CANADA. *Tax Lawyer Commentary on CRA Penalty Assessments*. Available at: http://www.mondaq.com/canada/x/772292/tax+authorities/Canadian+Tax+Lawyer+Commentary+On+CRA+Penalty+Assessments+Tax+Planner+And+Tax+Preparer+Penalties+Under+The+Income+Tax+Act+And+Excise+Tax+Act. Accessed on: 22 Abr 2019.

[276] OLIVEIRA, Phellipe Toledo Pires de. *A Obrigação de Divulgação de Planejamentos Tributários Agressivos no Ordenamento Brasileiro. Uma análise à Luz do Projeto BEPS da OECD/G20*. São Paulo: Quartier Latin, 2018, p. 343 – 348.

[277] EY. *Germany publishes draft Mandatory Disclosure Rules*. Tax News Update: Global Edition. Global Tax Alert. 20 March 2019. "*On 30 January 2019, the German Federal Ministry of Finance (BMF) sent a draft bill to all other federal ministries to introduce a "law on the introduction of a mandatory disclosure regime for tax arrangements" (the bill). The bill is intended to transpose the European Union (EU) Directive 2018/822/EU of 25 May 2018 into German national law and to create a reporting obligation for certain cross-border tax arrangements*". Available at: https://www.ey.com/gl/en/services/tax/international-tax/tax-alert-library. Accessed on: 10 Apr 2019.

[278] KPMG. *Poland: Mandatory disclosure rules, cross-border tax planning arrangements*. International Cooperative. Available at: https://home.kpmg/xx/en/home/insights/2018/11/tnf-poland-mandatory-disclosure-rules-cross-border-tax-planning.html. Accessed on: 17 Jan 2019

to be some kind of liability, no doubt. The proposal here is the application of MDR as an instrument in the configuration of this liability[279].

As has been said, hallmarks have been introduced that require disclosure of any plan where the intermediary receives payment depending on the success of the plan or the amount of tax to be saved. Then, we get back to the point of “when” the information should be provided.

The reason in this work´s viewpoint is that professional secrecy and ample defense come in after an audit proceeding is underway. Until then, in the "planning" phase, there is no professional secrecy but commercial interest and trade secrets. The circumstance is different when the taxpayer receives an assessment/notification from the tax administration and hires a lawyer. In this case, the lawyer defends him and there must be confidentiality and professional privilege, because the lawyer had no participation in the causes that led to the assessment.

Confidentiality and professional secrecy would then depend on which circumstances we are dealing with. If at a time and causes prior to the assessment and for which the lawyer participated, it would not be cause for legal professional privilege, which is not even extended to other professional categories that also promote tax planning. If at a time and consequence after the assessment, the professional would be covered by the duty of secrecy and confidentiality and further professional duties and protections.

2.4.5 What information is required to be reported.

Systems introducing MDR should clearly specify what information must be disclosed and the information provided within the scope of MDR shall be that which is strictly connected to the intended purpose of the system. It cannot be taken for granted that an MDR is in place to gather other financial information, which was eventually left out of an annual tax return or to prevent financial crimes. This element in the system is strictly connected with the concepts of proportionality and reasonableness, which are understood here in the terms explained in the introduction of this work.

If the purpose of the system is to close gaps and loopholes that undesirably allow certain plans to work and causes distortions in relation to both the taxpayer from the tax objectives and purposes, and to other taxpayers in the competitive market, the information gathered must be justified in order to achieve those ends. If the objective is to establish risk analysis of economic sectors or specific activities and the relevant taxpayers in order to improve tax administration services and efficiency, the required information must be justified within that purpose.

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[279] See Chapter V, topic 5.1.2 – The issue to non-self-incrimination, tax adviser´s liability and MDR.

In addition, the information gathered should cause minimal cost to intermediaries / taxpayers, on one hand, not requiring too much time to produce or inform it, and also minimal cost to tax administration, which must be able to process and apply them in the social benefit.

Examples of the type of information that has been requested are provided in Chapter III, analyzing experiences in the UK, Portugal and the European Directive. Following trends in Anglo-Saxon systems[280], what has been seen is that in terms of taxation, more and more obligations are transferred to taxpayers, with the tax authorities retaining the duty to review and approve/homologate later. In MDR systematic, following this reasoning, the EU-Directive[281], for example, requires taxpayer self-assessment when reporting the planning. First, the information required must describe the planning and relate it to the hallmark. Second, it is necessary to say which national provision the planning is using to achieve the tax advantage. In addition, what is the amount in taxes that is being saved, or the quantification of the advantage.

It is a true "self-assessment" that works in countries where the Anglo-Saxon system has developed but needs to be culturally introduced in countries that still adopt the European continental system. In summary, the intermediaries / users not only provide information, but also evaluate their planning in qualitative and quantitative perspectives.

2.5 The BEPS project.

According to the OECD, international tax law is the pillar that supports the growth of the global economy. Globalization has made each country's operating models give way to global models based on organizations with a matrix structure and integrated supply chains that centralize multiple functions in regional and global levels[282].

While affirming the sovereign rights of each country in establishing its own tax legislation, but focusing on the question of eliminating double taxation and minimizing trade distortions and impediments in order to maintain sustainable economic growth, the OECD concluded that it is necessary to fight the cases in which the current rules give rise to undesirable results. Moreover, the OECD understands that the issue raises concerns at the political level, since over time these standards revealed weaknesses, which create opportunities for the tax base erosion and profit shifting.

The Organization stated that the G-20 finance ministers called for the development of an action plan to address the tax base erosion and the transfer of profits to countries with favored taxation in a coordinated and comprehensive manner. Specifically, the aim of this action plan called

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[280] See Chapter III – Existing MDR Systems.

[281] EUROPEAN UNION. Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU. Cit. Article AB (14), c), e) and f).

[282] OECD (2013). *Action Plan on Base Erosion and Profit Shifting*, Paris: OECD Publishing.

BEPS (Base Erosion and Profit Shifting) would be to provide the countries with domestic and international instruments for a better harmonization of tax enforcement powers with economic activities. The project began in 2013, then the BEPS report was delivered in 2015, and it is now in its implementation phase.

In Pasquale Pistone's description, BEPS *"is the driving force of the most ambitious reform plan ever undertaken in the field of international taxation"*[283]. He predicts that the initiative can lead to a great coordination of taxation powers at the international level and can be extremely positive in economic and legal terms. Moreover, Pistone explains that once business has become global, to combat the resulting economic distortions and injustices of the fragmentation of legislative positivism, the Plan seeks to promote global solutions to problems of international taxation and may be the long-awaited response to align the exercise of national sovereignties with the globalized economy.

However, some concerns about tax sovereignty were raised. Accordingly, Sergio Andre Rocha[284] alerts that the global economic crisis has forced countries to review their positions on the taxation of cross-border transactions and it has fostered the largest global reaction against so-called aggressive tax planning in history. At the core of this global reaction is the OECD/G-20 BEPS Project, to which development he refers as "Imperial Taxation". Moreover, stating that "*even though reference is made to the OECD/G-20 BEPS Project, perhaps it would be more accurate to refer to it as the OECD BEPS Project*", he supports that despite the fact the G-20 economies have politically backed the Project, indeed it was developed inside the OECD.

In fact, although the OECD states, in the BEPS report, that the Organization was requested by members of the G-20 to seek solutions for the tax base erosion and profits shifting, it is difficult to ascertain who has the actual leadership of the Project. It is controversial whether it was the OECD that instilled the need to address BEPS in the G-20's leaders or the G-20 that instructed the OECD to address BEPS[285]. In this sense, adds Yariv Brauner: *"[The] OECD was not only charged by the G-20 to lead the BEPS project with no supervision beyond the highest political levels but also succeeded in positioning itself as an independent partner to the G-20, taking ownership of the project rather than acting in a subordinate role*"[286].

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[283] PISTONE, Pasquale. *Coordinating the Action of Regional and Global Players during the Shift from Bilateralism to Multilateralism in International Tax Law*. World Tax Journal, v. 6, n. 1, 2014, p. 5. Published on 4 February 2014.

[284] ROCHA, Sergio André. *The Other Side of BEPS: "Imperial Taxation" and "International Tax Imperialism". Tax Sovereignty in the BEPS Era*. Sergio André Rocha and Allison Christians (eds.), the Netherlands: Kluwer Law International B.V., 2017. p. 182.

[285] NOTE. Jonathan Leigh PEMBERTON, in informal discussion in Vienna, in March, 2020, says that "*perhaps the situation is a bit more nuanced. There is a distinction to be made between the Secretariat and the OECD members (which include most of the G20). While the Secretariat was active in the conception of BEPS, it was responding to real political/policy concerns of members and it is member countries representatives that endorsed the program through the Committee on Fiscal Affairs – CFA (and non-OECD/G20 members were given a role, including in the Bureau). Later, involvement of non-members was widened, in formal terms at least, by the creation of the Inclusive Framework*."

[286] BRAUNER, Yariv. *Transfer Pricing Aspects of Intangibles: The Cost Contribution Arrangement Model. Transfer Pricing in a Post-BEPS World*. Michael Lang, Alfred Storck and Raffaele Petruzzi (eds.), the Netherlands: Kluwer Law International B.V., 2016, p. 100.

The G-20 needs the OECD's pool of expertise and operational implementation and monitoring capabilities to ensure the global effectiveness of the BEPS Project, while securing its own position as the leader in the global economy and financial system, as Sissie Fung[287] explains. On the other hand, the G-20's high-level political attention and commitment provides the OECD greater certainty regarding budgetary contributions, reinforces the OECD's relevance in the global tax policymaking and helps disseminate the OECD's BEPS policies across the world.

The discussion produced great and divergent international interest. For instance, the Technical Conference of Inter-American Center of Tax Administrations (CIAT), held in Rome in September / October 2015, brought together representatives from more than 50 countries, for a broad debate on the role of tax administration, trends and the use of inspection techniques, in this new international scenario. At the time, one thing in common were almost unanimous demonstrations in favor of the OECD initiatives on its Action Plan on BEPS, unlike what happened in the 69th Seminar of the International Fiscal Association (IFA) in Basel, Switzerland, when the interventions mostly criticized OECD's plan[288].

Evaluating the work done by the OECD on BEPS, Yariv Brauner[289] says that the action plan is a "*potpourri of issues and reflect the opportunistic and unprincipled upbringing of the BEPS project".* Nonetheless, he identifies *"five topical groups of Action items*":

i) actions in "*ongoing challenges to the international tax regime*" (actions 1 and 5);
ii) "*true action items*", addressing challenges in substantive norms, which vulnerability require technical revision (actions 2, 3, 4, 6 and 7);
iii) transfer pricing actions (actions 8, 9, 10 and 13);
iv) a set of action items dealing with administrative and compliance issues (actions 11, 12 - "*Require Taxpayers to Disclose their Aggressive Tax Planning Arrangements*" and 14) and,
v) action 15, which "*explores the possibility of developing a multilateral instrument, because it is the direct manifestation of the key insight of the BEPS project: promoting the necessity of a universal, collaborative international tax regime*".

Therefore, in one of the strongest actions, it was understood that the tax administration should require taxpayers to disclose their "aggressive tax planning arrangements". Thus, Action 12, developing "*recommendations regarding the design of mandatory disclosure rules* (MDR) *for aggressive or abusive transactions, arrangements, or structures, taking into consideration the*

[287] FUNG, Sissie. *The Questionable Legitimacy of the OECD/G20 BEPS Project*. Erasmus Law Review, n. 2, 2017, p. 76. Available at: http://www.erasmuslawreview.nl/tijdschrift/ELR/2017/2/ELR_2017_010_002. Accessed on: 27 Mar 2019.
[288] TORRES, Heleno Taveira. *A fiscalização tributária ganha força no Fisco global*. Revista Consultor Jurídico, published on 14 October 2015. Available at: https://www.conjur.com.br/2015-out-14/consultor-tributario-fiscalizacao-tributaria-ganha-forca-fisco-global. Accessed on: 16 May 2019.
[289] BRAUNER (2016). Op. Cit., p. 97.

administrative costs for tax administrations and businesses and drawing on experiences of the increasing number of countries that have such rules"[290] was included in BEPS[291].

The OECD proposed, in short, that while audits continue to be an important source of information, they are conditioned by various limitations and lack of relevant tools for early detection of aggressive tax planning activities. As a result, tax administrations would not have relevant information at their disposal on tax planning in a timely, comprehensive manner and new instruments for this information should be developed. Accordingly, recommendations were developed for the production of notifiable standards for all aggressive or abusive transactions, schemes or structures, taking into account administrative costs for both the tax administrations and the private sector and "*based on the experience of a growing number of countries with those standards*".

The work utilizes a modular design and focuses on international tax schemes, seeking to comprehensively define the concept of "tax benefit" which can capture these transactions, and it should be conducted in coordination with the work relative to cooperation, discipline and conformity. Moreover, it also has the objective of designing and implementing improved models of exchange of information between tax administrations, on international tax schemes.

BEPS is an unstoppable force. The plan is very strong in terms of persuasion and publicity. The association between the OECD and the G-20, even frequently criticized because it is not clear who called on who, coupled with strong pressure from the US in terms of transparency and exchange of information and the UK that sought, in Action 12, to clearly internationalize its DOTAS plan, makes BEPS a reality that must be enhanced, not contested. Political issues, in this work´s technical viewpoint, lead to the "inclusive framework" and even to concepts like "aggressive tax planning", based on the definition of "tax benefit", which have already been criticized in the previous topic (2.4 – Describing the System). However, other elements in the OECD awareness are in consonance with this work´s observation, like the importance of administrative costs involved and the joint action with cooperative compliance programs.

2.5.1 Discussion Draft. BEPS ACTION 12: Mandatory Disclosure Rules.

After the launch of the BEPS, the OECD presented a design of what would be Action 12 (discussion draft - hereinafter "*the Draft*")[292] in 2015, providing an overview of the key features of a mandatory disclosure regime. According to the Draft, an MDR should: (i) be clear and easy to understand, (ii)

[290] OECD (2013). *Action Plan on Base Erosion and Profit Shifting.* Paris: OECD Publishing, p 22.

[291] OECD (2014). BEPS Action 12 provides recommendations for the design of rules to require taxpayers and advisors to disclose aggressive tax planning arrangements. These recommendations seek a balance between the need for early information on aggressive tax planning schemes with a requirement that disclosure is appropriately targeted, enforceable and avoids placing undue compliance burden on taxpayers. Paris: OECD Publishing. Available at: https://www.oecd.org/tax/beps/beps-actions/action12/. Accessed on: 12 Nov 2019.

[292] OECD (2015). *Public Discussion Draft. BEPS ACTION 12: Mandatory Disclosure Rules*. OECD Publishing. Published on 11 May 2015. Available at: https://www.oecd.org/ctp/aggressive/discussion-draft-action-12-mandatory-disclosure-rules.pdf. Accessed on 12 Nov. 2019.

balance additional compliance costs to taxpayers with the benefits obtained by the tax authority, (iii) be effective in achieving the intended policy objectives and accurately identify relevant schemes, and (iv) result in effective use of the information collected.

At that time, the Organization pointed out that MDR has three main objectives: obtaining early information about tax avoidance schemes; identifying those schemes and their users and promoters, and acting as a deterrent to reduce the promotion and use of avoidance schemes. Specifically, the Draft mentions the proposal of providing tax administrations with information about the users and those responsible for promoting and implementing a scheme, with the justification of allowing the tax administration to obtain an accurate picture of the extent of the tax risk posed by a scheme and to easily identify when a taxpayer has used a scheme[293].

This work recognizes the advantages of MDR, but it takes a great deal of adaptation and knowledge to achieve the goals correctly and efficiently. Since those objectives were outlined in the Draft, advances have already been made, as the following analysis will aim to demonstrate. For example, obtaining prior information is excellent for the tax administration, but it will only work if there is a trust-based relationship between the tax authorities and the taxpayers and if the latter can benefit from the disclosure, in some way. Moreover, in the scope of MDR, identifying the schemes is more important than identifying the promoters and users and the deterrent effect must be seen as a natural consequence or side effect and must not be considered when designing the rules, avoiding conflict with fundamental freedoms. Additionally, MDR should have clarity, objectivity, flexibility, proportionality and effectiveness as its principles.

2.5.1.1 A description of arrangements that are required to be disclosed.

In the Draft, the OECD works with the concept of *hallmarks* and considers the use or not of thresholds or filters, which could be monetary filters, like in the US, or a main benefit test. The system can cover only direct taxes (income tax is present in all of those systems compared in the end of the Draft) or indirect taxes (VAT and others).

As it was explained in this work, the idea is that a reportable arrangement is one that meets some characteristics in the interest of tax administration and not one that is defined as “avoidance” or “aggressive”. The use of thresholds or filters is good because it can be adjusted as a function of the tax administration´s capacity and the quantity of information it is able to deal with.

The Draft deals with *generic* and *specific* hallmarks, recommending the use of a mixture of both. The *generic hallmarks* focus on the promoters and intermediaries and on schemes in which there are confidential clauses or the amount to be paid is proportional to the tax benefit obtained. In this work´s viewpoint, as explained, these clauses can also be used as a means to put in evidence the joint liability or “*economic and juridical common interest*” in the scheme between promoter and client, which is why its existence will be explored in Chapter V. The *specific hallmarks* describe

[293] Ibid, p. 17.

certain potentially abusive practices, which tax administration is particularly interested in and the Draft suggests they should be designed broadly and avoid technical details. This way, they depend on previous studies and risk analysis and this type of hallmark can largely vary from country to country.

Moreover, as the OECD emphasizes, unnecessary demands will increase compliance costs and may also undermine the tax administration's ability to effectively use the data obtained. MDR, then, should be strictly connected with the working capacity of each tax administration, not giving room to primary foreign interests, otherwise it would create unnecessary and disproportional burden for taxpayers. In this regard, it is important to highlight, when adopting coordinated measures, coordination may then be to the collective benefit of all countries, not in the individual interest of some. It is possible to accommodate diverse national interests if introducing MDR, however, definitions such as "relevant transactions", "relevant taxpayers", key characteristics of the transactions being disclosed, among others, should take into consideration the "*countries´ size*"[294].

A *de-minimis* filter is suggested in the Draft as an alternative to, or in addition to, a broader threshold test and could operate to remove smaller transactions. However, the Draft warns if not carefully drafted, the filter could be used to circumvent the disclosure obligation and may create additional complexity in the application of the rules. Additionally, including a *de-minimis* filter could suggest that tax avoidance, in small amounts, is acceptable[295].

The use of this kind of filter and of hallmarks based on "premium fee" or "contingent fee" (where the amount paid for the tax advice is proportional to the value of the tax benefits obtained under the scheme) received many comments by the private sector, during the public consultation[296].

2.5.1.1.1 International Tax Schemes.

There is a Chapter (IV) focusing only on international tax schemes, because the Draft recognizes the existence of key differences between them and the domestic ones. At that time, international context was considered "*part of the work required under Action 12*". International schemes increased its relevance during the development of the Action, to become the main focus or even an exclusivity, as it is possible to see in the EU-Directive[297].

Considering what the Draft says: "*there is nothing in principle that prevents current mandatory disclosure regimes from applying to international schemes*"[298], basically, it is putting in evidence that the previous experiences in use of MDR did not focus on cross border arrangements,

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[294] KEEN, Michael. International/OECD - *Competition, Coordination and Avoidance in International Taxation.* Bulletin for International Taxation, v. 72, n. 4/5, 2018, published online: 21 March 2018.
[295] OECD (2015). *Public Discussion Draft*. Cit., p. 31.
[296] See Chapter II, topic 2.5.2 - Comments received on Public Discussion draft.
[297] See Chapter III, topic 3.5 - The European Directive.
[298] OECD (2015). *Public Discussion Draft*. Cit. p. 56.

but they were developed thinking about their domestic systems (the UK, the US, Canada). Moreover, despite the existence of some hallmarks able to identify both international and domestic transactions, the number of cross-border disclosures was relatively low, when compared to the domestic, as the Draft recognizes[299].

When focusing on cross-border arrangements, the difficulty to set the hallmarks is significantly higher. The fact that cross-border arrangements are normally customized and may not be widely promoted makes them difficult to target with generic hallmarks. Moreover, exploring different legislations, in more than one country, makes the application of formal thresholds like the *main benefit test* very difficult[300], because the schemes "*generate multiple tax benefits for different parts in different jurisdictions and may seem unremarkable when viewed in isolation from the rest of the scheme as a whole*".

Therefore, the recommendation in the Draft is the use of specific hallmarks for international tax schemes. In this case, however, the challenge is to design a hallmark that is sufficiently broad to pick up a range of tax planning techniques and narrow enough to avoid over-disclosure. For instance, the difficulty in finding this balance may become more evident when thinking about the European Union context, where countries are submitted to the same Directive[301] (primary law) but they present different tax administration´s capacity levels.

The solution, according to the Draft, *"is to focus on the kinds of outcomes that raise concerns from a tax policy perspective rather than the techniques that are used to achieve them".* In other words, when designing hallmarks, it is more important to think about the results such a scheme produces (ends), than about the techniques it uses (means). Thus, it does not matter if the techniques are "aggressive", but if the results put the objectives and purposes of the taxation in "risk". However, such schemes can produce undesirable results not only from a tax policy perspective, as the Draft suggests, but also under a set of different perspectives, such as legal, political, constitutional or administrative, as this work mentions[302].

Specifically, the Draft mentions the use of hallmarks "*that focus on the kinds of tax outcomes*", which can be able to cover possible "*double deductions*" or "*double tax reliefs*", referring to a "*cross-border outcomes*". The reference is to a hallmark that can be specific and generic at the same time and, in this case, according to the Draft, the use of thresholds is not recommendable, for instance monetary thresholds, because the result can be small or irrelevant in a given jurisdiction, but significant in a whole.

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[299] Ibid, p. 56. In point 226. "*Several countries with mandatory disclosure regimes indicate, however, that, in practice, they receive comparatively fewer disclosures of cross-border schemes*".
[300] Ibid, p. 57 "*Such schemes may not meet the disclosure threshold if the taxpayer can demonstrate that the value of any domestic tax benefits was incidental when viewed in light of the commercial and foreign tax benefits of the transaction as a whole*".
[301] EUROPEAN UNION. Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. OJ L 139, 5.6.2018, p. 1–13.
[302] See Chapter II, topics 2.4.1 – Material scope and 2.4.1.2.2 – Specific hallmarks.

Thus, when focusing on cross-border schemes, one should try to capture all the schemes that meet the hallmark. The expectation is that, in this case, the amount of information received is not problematic and can be "limited" by the small number of international schemes if compared with the number of purely domestic schemes. Furthermore, international schemes are not easily marketable and normally they require carefully adaptations (bespoke arrangement)[303].

Another solution, the Draft suggests, is the use of the premium fee hallmark to cover arrangements where the tax planning is notably innovative that the promoter would be able to obtain a premium fee for it. However, the use of the hypothetical test, when the premium fee *could* exist, received several criticisms from the private sector and, in fact, it can cause doubts and unnecessary information.

Therefore, in the Draft´s approach, when designing MDR and especially the hallmarks, it is very important to take into consideration if the system intends to cover cross-border and/or domestic schemes. In other points, however, as who would be obliged to disclose, whether the promoter or the taxpayer, the recommendation does not differentiate between domestic and cross-border schemes. Similarly, the content of the information to be provided in both perspectives is the same, including the transaction data, the legislation in which the scheme relies and the advantages it obtains. However, in this work´s viewpoint, differences between domestic and cross-border schemes should be taken into consideration, when determining which information must be provided, because in an international context, sometimes it is quite difficult to obtain certain information about foreign legislation or foreign partners in a transaction.

Then, in an international context, because the legislation or the relevant information to be disclosed might be abroad and the person who is providing the information might not have access to it, the Draft suggests that the person making the disclosure should identify the persons who are believed to be holding the missing information. This is, in practice, very difficult to apply and creates an excessive burden on the taxpayer or promoter. Therefore, the Draft recognizes the need for further work on enhanced models of information exchange between tax administrations and this work believes that this is the most balanced solution in the case, I mean, this part of the burden, cross-checking information internationally, should fall on the tax administration and not on the taxpayer / promoter.

2.5.1.2 A description of the persons required to disclose such arrangements.

The rules aiming to disclose aggressive tax planning need to identify the person who must comply with the obligation and two possibilities may be considered: (i) the obligation can be imposed both on the promoter/intermediary and on the taxpayer, simultaneously or (ii) the obligation can be imposed first on the promoter/intermediary and, subsequently, on the taxpayer.

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[303] See Chapter II, topic 2.3.3.1 – Marketable and bespoke arrangements.

The Draft names the approach adopted in the US "*transaction-based approach*", because it requires disclosure from taxpayers and intermediaries related with a scheme which produces tax benefit; and the approach adopted in the UK "*promoter-based approach*", because it has a greater focus on the role played by the promoters/intermediaries. The last option was also adopted in Portugal, Ireland and South Africa. Actually, the focus is on the promoter/intermediary and only if it is not possible to ensure compliance, because the promoter is offshore or because there is no promoter, the obligation is shifted to the taxpayer.

Additionally to the issue involving the enforcement, the question arising refers to the quantity of information received in each of them. That is why the transaction-based approach can result in over reporting. For instance, in the case of the US, taxpayers must provide information about specified transactions, regardless of whether the promoter has previously disclosed the same transaction. Moreover, the promoter´s obligation to provide information will not be satisfied by a taxpayer´s disclosure of the same scheme. At the end, promoters and taxpayers are obliged to disclose the same scheme, in many situations. However, receiving information from both sides, the crosschecking is much more effective. Therefore, each country should choose the better option, based on the administrative costs.

2.5.1.2.1 Scheme number and client lists.

It would be wise, furthermore, to take into account eventual promoters' legal or professional privileges under the domestic law. Because the Draft suggests the use of schemes´ identification number (promoters receive a number for the disclosed scheme or transaction which they provide to taxpayers who have implemented the scheme and the taxpayers must inform that number on their tax returns) or to require promoters to provide a report of their clients using schemes (client lists) to the tax authority.

In the case of the client lists, it opens up the possibility of great discussions about professional privileges, confidentiality and free professional activity. For example, the tax administration could use the amount of clients on the list to check if the income reported by the promoter on his/her tax return matches that many clients or not, which would mean using information provided in MDR scope for another kind of tax assessment, deviating from the objectives. Another situation would be if a particular client is related to the use of a specific tax planning but is also a client of the same "promoter" for other reasons and in other cases and not want this relationship, which overflows the use of tax planning, to come to the knowledge of the tax administration.

My position is against providing client lists. Once the taxpayer provides a schemes´ identification number, the tax administration can crosscheck the information on its own. Thus, there is no obligation to provide clients lists, no allegation of interference with professional activity or service market. The crosschecked information is "generated" by tax administration, in the specific interest about a particular planning (object) and not about a specific professional (subject).

The use of schemes identification number, on the one hand, is not as complete as the *transaction-based approach* required in the US in allowing for crosschecking between the information provided by clients and promoters. On the other hand, it decreases costs for the tax administration by avoiding double information, and the taxpayers do not need to supply any other information than the scheme number. Notwithstanding, the Draft demonstrates worries about these sensitive issues, because at the end of its considerations, two questions are addressed for consultation: "*Are there any other ways in which to identify scheme users other than scheme number or client lists? What might prevent the automatic provision of client lists to the tax administration and how could this be dealt with*?"[304]

Finally, the Draft states that MDR shall "*avoid imposing disclosure obligations on persons that are not subject to tax in the reporting jurisdiction",* because "*tax authority would have limited practical ability to enforce them"*[305]. Thus, in the context of international arrangements, which aim, after the disclosure, to have the information exchanged automatically in a broad international coordination, it would be more practical and have faster results if the information was provided in the jurisdiction where the planning effectively produces its results or where the results are more relevant. For instance, if the taxpayer is in country A, the intermediary in country B, and the scheme produces the most relevant results or explores the loopholes in Country C´s laws, the latter would be the first to be informed, since it is them who must counteract first, correcting legislation or closing the gaps. The problem, however, is that having no jurisdiction on the intermediary/promoter, in the case of non-information, it cannot apply any sanction.

2.5.1.3 A trigger for the imposition of a disclosure obligation.

Connecting the personal aspect with the issue of the time to disclose the planning, if the obligation relies on the promoter/intermediary, the Draft suggests the disclosure should be done at the time when the scheme is offered. Otherwise, if the obligation relies on the taxpayer, the recommendation is to do the mandatory disclosure from the moment of the implementation and not from the availability. The settings of "implementation" and "availability" can vary for each system.

Normally, the time for disclosing varies from 5 working days to 30 days after the trigger event and the Canadian system described in the Draft is not reasonable:

> *In Canada a reportable transaction must be disclosed by 30 June of the calendar year following that in which the transaction became a reportable transaction. The timeframe for reporting the transaction occurs once it has been implemented. This trigger event combined with a long reporting timescale means that information is received much later than under the UK, Irish and*

[304] OECD (2015). *Public Discussion Draft*. Cit. p. 46.
[305] Ibid, p. 57.

Portuguese regimes. This will inevitably impact on a tax administration's ability to react quickly, potentially leading to greater revenue loss and a reduced deterrent effect[306].

This once-a-year disclosure was also considered in the Brazilian legislation, as will be mentioned[307]. However, in this work´s point of view, it is totally inconsistent with MDR objectives to quick reaction, closing loopholes and adjusting mismatches in the legislation, in order to avoid a given tax planning to be spread and/or continue working. However, it is important to take into consideration if disclosure rules focus on certain transactions that meet some characteristics (hallmarks) in order to control some risky tax planning, or if they represent a preventive reporting mechanism for any transaction that could be subject to a GAAR[308].

Because the definition of a *reportable scheme*, for MDR purposes, will generally be broader than the definition of tax avoidance schemes covered by a GAAR and should also cover transactions that are perceived to be high-risk from a tax planner perspective. Moreover, from a compliance perspective, the purpose of a MDR is to provide the tax administration with information on a wider range of tax policy and revenue risks other than those raised by transactions that would be classified as avoidance under a GAAR.

Canada has a general anti-avoidance rule, introduced in 1988, along with tax shelter reporting rules, a reportable transaction regime and promoter penalties[309]. In the Canadian case[310], and in any other, the once-a-year disclosure could be applied if the objective is a preventive reporting mechanism for any transaction that could be subject to a GAAR. However, if the objective is early information on risky planning, quick reaction in legislative and policy level, increase compliance and acting as deterrent tool in the tax planning market, there is no reason to adopt it.

2.5.1.4 Appropriate penalties or other mechanisms to address non-compliance.

In the event of failure to comply with the reporting obligation, the Draft states, penalties have been recommended in order to enhance compliance, choosing penalties that are consistent with national tax systems. Penalties can be monetary (proportionate to tax savings or promoter's fee or daily penalties) or non-monetary (for instance, a failure to disclose suspends the efficacy of the scheme and taxpayers can be denied any tax benefit arising from the scheme).

However, this work stresses it is also important to take the possibility of rewarding previously disclosed schemes into consideration, which has been described to exist in Ireland[311],

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[306] Ibid, p. 41.
[307] See Chapter III, topic 3.5 - The Brazilian proposal.
[308] LARIN, Gilles. *Some Thoughts on Disclosure Rules in Canada: A Peek into the Future*. Canadian Tax Journal, v.61, special supplement, 2013, p. 209 – 220. In Canada, they have more than one disclosure regime, with different objectives.
[309] OECD (2015). *Comments received on Public Discussion draft. BEPS Action 12: Mandatory Disclosure Rules.* OECD Publishing, p. 81. Published on 4 May 2015. Available at: http://www.oecd.org/tax/aggressive/public-comments-beps-action-12-mandatory-disclosure-rules.pdf. Accessed on: 09 May 2019.
[310] LARIN (2013). Op. Cit., p. 213.
[311] OECD (2011). *Tackling aggressive tax planning through improved transparency and disclosure.* Cit., p. 15.

where there would be the possibility of reducing fines and interest, in a possible audit, if the taxpayer revealed, within 90 days of the transaction, the tax planning applied.

When describing the advantages of using MDR, the Draft does not consider an important issue about the taxpayers´ willingness to comply with the rules. Taxation is a State activity that has coerciveness as an essential characteristic. If it is not mandatory, we are not talking about taxes. Likewise, ancillary activities in order to verify the correct fulfillment of the payment, according to the law, are also compulsory and therefore there are always penalties for those who do not comply. However, as discussed here in the tax administration's risk analysis, the taxpayer also does a cost-benefit (risk) analysis of meeting obligations or not. The mere existence of penalties for non-compliance does not mean that after the enactment of the law creating the obligation there will be a high degree of adherence or observance. So, in the Draft, the advantages are described taking into consideration that everyone will faithfully provide the information, but if it is considered that not everyone will provide them, even if there are penalties, the balance of benefits certainly decreases because other management efforts and costs are needed to increase the compliance rate.

On the other hand, the Draft talks about the consequences of compliance. The fact that a transaction is reportable does not necessarily mean that it involves tax avoidance and providing the information does not imply any acceptance of the validity, or tax treatment, of the transaction by the tax authority. In other words, the lack of tax authority response does not give rise to a legitimate expectation and the Draft recommends that the tax administration make this clear in the legislation.

However, this work stresses that making these aspects are clear in the legislation is only a formal solution, which is not enough to guarantee the system´s well-functioning, because the absence of responses can lead to issues involving uncertainty and (dis)proportionality. An efficient system must be designed in a way so that tax administration has the objective of providing responses covering all (or the maximum of) arrangements informed, in particular or in general - the last as it was designed in Portugal[312] -, in a reasonable time.

2.5.1.5 A description of what information is required to be reported.

According to the Draft, the information to be provided, in terms of the personal scope, should include identification of promoters and users of the scheme. Moreover, in the material scope, it should include details of the provision that makes the scheme reportable, a description of the arrangements, statutory provisions on which tax advantage is based and a description of tax benefit and amount of expected tax saved. This means a real self-assessment, which can be challenging specially to countries still adopting tax systems in which the taxpayer declares the

[312] See Chapter III, topic 3.2.2 - The Portuguese experience. In practice, the Tax Administration then issues an opinion, on its Website, of its understanding that a certain tax scheme or planning, described in general and abstract terms, is considered abusive and may be reclassified or corrected or if it is necessary to establish a procedure for the application of anti-abuse provisions.

relevant facts but the tax administration has the role of analyzing them and quantifying the amount of tax to be paid.

Besides the systematic approach, the quantity of information is related to the tax administration´s capacity to process it. Therefore, once the results are focused on international schemes and the efficiency is linked to mutual assistance between the *Fiscos*, in a quick and broad exchange of information, it is necessary to bear in mind the potential differences between tax administrations in capacity, human resources and equipment level, because reports or information may arise beyond what an administration can handle.

As was explained[313] in relation to the hallmarks, if the action is designed to capture international schemes, the information collected might be different. Substantially, because in many cases involving foreign legislation it is quite difficult to provide information about statutory provisions on which tax advantage is based, a description of the tax benefit and the amount of expected tax saved, at the moment of the implementation of the scheme.

Interim conclusion and remarks.

According to the 2011 Report, as described above, if mandatory disclosure regimes were in place only in the United States, Canada, Portugal and the United Kingdom, the Draft registers that amongst the OECD and G20 countries, MDR had been introduced also in Ireland, South Africa, Israel and South Korea. Ireland introduced its mandatory disclosure regime in 2011 and since then South Korea and Israel have also introduced mandatory disclosure rules. Moreover, it mentions the South African case, not included in the *2011 Report,* but as stated in the Draft "*South Africa introduced disclosure rules in 2003 and revised them in 2008*"[314]. There is almost no information about the system in Israel and South Korea, and in the Annex "*Comparison between different countries with Mandatory Disclosure Rules"*[315]*,* there is a large table comparing the system in six different countries (the UK, the US, Canada, Ireland, South Africa and Portugal).

One of the objectives of MDR is an early identification of the main tax planning techniques, determining which ones do not fit within the objectives and purposes of the taxation, and to legislate to prevent these schemes from being used in the future. Another effect, according to the OECD, should be deterrence.

The Draft concentrates on demonstrating the deterring effects of MDR, mentioning cases in the UK, Canada and South Africa. However, it recognizes that "[*Not*] *all of the countries with mandatory disclosure regimes have collected data on the effectiveness of their regime in terms of these objectives. Much of the information in this section focuses on data and statistics provided by the United Kingdom*". Thus, about DOTAS[316], the number of schemes disclosed annually has

[313] See Chapter II, topic 2.5.1.1.1 - International Tax Schemes.
[314] OECD (2015). *Public Discussion Draft*. Cit., p. 20.
[315] Ibid, p. 72-80.
[316] THE UNITED KINGDOM (2014). HM Revenue and Customs. *Disclosures statistics*. Data for the period from 1 August 2004 to 30 September 2014. Available at:

reduced over the years and the Draft implies that tax advisers have stopped promoting the marketed avoidance schemes and the number of reportable schemes decreased. The OECD registers reductions in the number of arrangements disclosed annually also in South Africa[317]. The issue to be analyzed is whether a decrease in the number of schemes reported really means a decrease in the number of schemes in use, in a given jurisdiction.

Over time, it is necessary to compare the number of schemes reported and the compliance gap. If both measures are decreasing, it is possible to infer that the system is working efficiently. However, if the number of schemes reported is decreasing but the compliance gap remains the same or increases, this means that the system is weak in its enforcement or its hallmarks need to be adjusted to catch the new schemes working in the market.

The HMRC produced a report "Measuring tax gaps *2019 edition - Tax gap estimates for 2017-18*"[318]. The report registers that *"[The] tax gap provides a useful tool for understanding the relative size and nature of non-compliance*" and database covers the period between 2005 and 2018, including the tax gap by type of tax and by different behaviors, for instance, avoidance, evasion and legal interpretation. This is a very good analysis to verify if the number of planning being disclosed is due to MDR promoting deterrence and closing gaps in the legislation, keeping the schemes from working, or because intermediaries are adjusting their strategies to avoid the information or because the system has no sufficient enforcement[319].

The Draft took care of two very important issues, at the end: compatibility between MDR and the non-self-incrimination and interaction of disclosure requirement and penalty regimes. Finally, in this work´s viewpoint, a positive aspect is that the OECD indicates that just as disclosure initiatives such as rulings and cooperative compliance programs are not a good substitute for a mandatory disclosure regime, equally mandatory disclosure cannot replace or remove the need for these other types of disclosure and compliance tools.

2.5.2 Comments received on Public Discussion draft. BEPS Action 12.

After publishing the Draft, the OECD opened a public debate on it, inviting public comments. They received 39 large and broad comments, which were organized in a document[320] (hereinafter "*the*

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/379821/HMRC_-_Tax_avoidance_disclosure_statistics_1_Aug_2004_to_30_Sept_2014.pdf. Accessed on: 19 Nov 2019.

[317] OECD (2015). *Public Discussion Draft*. Cit., p. 23.

[318] THE UNITED KINGDOM (2019). HM Revenue and Customs. *Measuring tax gaps 2019 edition*. Tax gap estimates for 2017-18, p. 21. Published on 20 June 2019. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820979/Measuring_tax_gaps_2019_edition.pdf. Accessed on 21 Jan 2020.

[319] See Chapter III, topic 3.2 - The system in the UK and topic 3.2.6 – The impact of the DOTAS regime on compliance.

[320] OECD (2015). *Comments received on Public Discussion draft. BEPS Action 12: Mandatory Disclosure Rules*. Paris: OECD Publishing, published on 4 May 2015. Available at: http://www.oecd.org/tax/aggressive/public-comments-beps-action-12-mandatory-disclosure-rules.pdf. Accessed on: 09 May 2019.

Comments"), including the expected BEPS Monitoring Group and the "Big Four" group[321] and, for instance, the Brazilian National Industry Confederation (CNI), the Japanese Foreign Trade Council (JFTC) and the Mexican IFA Group, among bank federations, accounting organizations and law firms (hereinafter "*the Institutions*"), representing a diversity of opinions. Notwithstanding, several comments are repeated, not only in substance, but in the form itself, that is, the same text, giving the impression that the institutions discussed the subject among them before sending their comments.

Some comments are very specific and focus on hallmarks, with detailed observations and suggestions. It is possible to observe that these more detailed comments mainly refer to the DOTAS regime, and they are based on experiences in the UK. This topic has the intention to synthesize those comments, in order to bring out the private sector´s initial concerns about the proposal to introduce MDR. Other comments are generic and argue about BEPS as a whole. In respect to these generics, this work has already provided considerations when describing the system, in topic 2.4, despite the fact that some of these will be mentioned here, from the private sector´s perspective.

In terms of principles guiding MDR, it is possible to stress that the comments ask for adequacy and proportionality, clearance, transparency and flexibility. On the other hand, there are concerns involving uncertainty and complexity. Moreover, they cast doubts on the real intentions behind the proposal and how the information provided will be used.

Questioning the real necessity of MDR to assure the BEPS objectives, generally speaking, some comments state that "*the Draft goes beyond BEPS, so the MDR designed in the Draft possibly capture more schemes than those specifically promoting base erosion "via" profit shifting*"[322]. More specifically, an Institution[323] mentions that disclosure for information purposes is an understandable objective if it is to improve current regulations for an ever-changing economic environment, however, there is a strong feeling that the disclosure intends to exceed a purely informative function. This issue was discussed in this thesis, pointing out the advantage of using MDR to improve the tax legislation in order to meet the new economic and business reality[324] and the feeling the information could also focus on political issues[325].

Some comments raise worries involving the adequacy of MDR, in terms of balance between benefits and costs. For instance, "*a sound impact assessment of the costs and benefits of*

[321]The currently four dominant multinational accountancy firms: Deloitte, PricewaterhouseCoopers (PwC), Ernst & Young (E & Y) and KPMG.

[322] OECD (2015). *Comments received on Public Discussion draft.* CNI, p. 35 and BUSINESSEUROPE, p. 61.

[323] Id. MEDEF, p. 220.

[324] See Chapter II, topic 2.1.1 Influences of globalization and the new economic and business reality.

[325] NOTE. Besides economic, social and tax policy effects, some "political effects of globalization", especially in the democracies of the OECD since the 1960s suggests an important relationship between globalization and populism, for instance. Thus, a direct relationship appears to exist between globalization and changes in party platforms. For instance, Globalization seems to be generating a political backlash against itself and mainstream democratic politics. See MILNER, Helen V. *Globalization and its Political Consequences: The Effects on Party Politics in the West*. Published on-line: 03 December 2018. Available at: https://scholar.princeton.edu/hvmilner/publications/globalization-and-its-political-consequencesthe-effects-party-politics-west. Accessed on: 18 May 2020. Some concerns seem to relate the information required in MDR with the intentions to support or combat these political effects.

introducing a MDR may question the overall necessity of introducing a mandatory disclosure regime in jurisdictions that do not have a complex corporation tax system, offer limited tax incentives and provide for transparent tax reporting and filing requirements"[326]. The Institution mentions as an example the case for Hong Kong where, for these reasons, "*mass-marketed abusive tax schemes are uncommon*".

In another case, the incapacity to use the information was connected to negative effects. "*it can be mentioned that, in 2009, the Swedish National Audit Office conducted an evaluation on how the Swedish Tax Administration processed information gathered from the automatic exchange of information system*" [327]. According to the Institution, it was found that the information was poorly and ineffectively processed, maybe never used by the tax administration. The Swedish authorities came to the conclusion that "*this lack of effective processing of information diminished the tax administration's ability to maintain the deterrent effect of the information exchange system*".

Many comments ask for precise and detailed information, in MDR, "*accordingly, ambiguous or subjective criteria, such as transactions that do not appear to be consistent with the intent of the law, should be avoided*"[328]. As this work mentions, however, it is necessary to find the balance between how strict and how flexible to be when establishing MDR rules and concepts. Because very narrow and precise conceptualization can lead to inefficiency. On the other hand, a very open system can produce more information than necessary and excessive uncertainty. This way, especially in cross-border context, "*it would be very difficult to devise hallmarks which meet the principle of being clear and easy to understand and that would capture tax planning tools which take advantage of mismatches in (different) tax regimes, but could not be regarded as abusive or aggressive in any single territory*"[329].

For example, an Institution[330] says that terms such as '*material*' need further clarification, asking is this based on a normal audit concept of materiality or some other concept? Another Institution states that a ´*tax benefit*´ which could either be the main or one of the main purposes or a "*material impact*" are not sufficiently explained. Many others argue about the definition of "*promoter*", stating that "*the use of the term 'promoter' is misleading and can create false assumptions as far as lawyers are concerned*"[331].

Moreover, they ask for clarity and more objectiveness about who to report to and which transactions to report, arguing that it is necessary to ensure the taxpayers' predictability and to reduce excessive administrative burden for both taxpayers and tax authorities[332]. Finally, they infer that "*if complexity and uncertainty are not avoided, the outcome will be an increase of double*

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[326] OECD (2015). *Comments received on Public Discussion draft.* AOTCA, p. 97.
[327] Id. Confederation of Swedish Enterprise, p. 107.
[328] Id. Banking and Finance Company Working Group on BEPS, p. 9.
[329] Id. CIOT, p. 73.
[330] Id. KPMG, p. 214 and MEDEF, p. 221.
[331] Id. CCBE, p. 113.
[332] Id. Japan Foreign Trade Council - JFTC, p. 191

taxation and resulting legal disputes, which could have a substantial and negative impact on cross border trade and investment, but also on tax administrations with limited resources"[333]. Thus, another balance, between enforcement and compliance, shall be met.

An interesting point is the note recognizing that there will necessarily be differences in approach caused by different tax systems and cultures, and that many jurisdictions - including the UK - have already spent several years developing local disclosure regimes and local taxpayers shall have become used to complying with the requirements of a local regime[334].

Furthermore, there are many comments about the real results reached in countries already adopting MDR. For instance, "*in most countries where they have been introduced they affect mainly small and medium enterprises and wealthy individuals, and do not cover most avoidance by large multinational enterprises (MNEs)*". Thus, the institution mentions as an example the so-called '*Lux Leaks*', when documents published in November 2014 revealed that 343 multinational companies were involved in questionable international structures between 2002 and 2010. They state that these were "*individual arrangements, each tailored to the needs of individual clients, and implied that they did not need to be notified under the UK's mandatory disclosure scheme (DOTAS)*"[335].

Corroborating this opinion, many other institutions says that one cannot only focus on marketable arrangements but also on be-spoke arrangements, again quoting the UK experience: "*For example, in the UK the large corporate market, and their tax advisors, have moved away from generic schemes to a much more tailored approach to tax planning which typically does not require disclosures*"[336].

On the other hand, if MDR are most effective at identifying "mass marketed" or "prepackaged" schemes and if the scope of disclosure rules is broadened beyond that, they risk imposing an enormous compliance burden. The solution would be to design specific hallmarks "*in order to avoid inundation of the tax authorities with volumes of useless information*"[337].

Moreover, the purpose of early identification of new schemes is best served in domestic situations as the tax administrations can respond promptly as information is provided, including by proposing and enacting legislative changes if necessary[338]. The worries or mistrusts in terms of time to react effectively within the traced goals in cross-border situations are that "*this may not be possible as the information could be provided to another jurisdiction and the affected jurisdiction might not receive the information promptly. Thus, the principal benefit that is, upfront information that facilitates a quick response, would not be realized for cross-border arrangements*"[339].

The conclusion is that there are differences between mass-marketed and be-spoke arrangements which can influence the quantity of information and the ability to react whether in

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[333] OECD (2015). *Comments received on Public Discussion draft*, CBI, p. 68.
[334] Id. AFME-BBA, p. 4.
[335] Id. BEPS Monitoring Group, p. 18-19.
[336] Id. Taxand Canada, p. 247.
[337] Id. Banking and Finance Company Working Group on BEPS, p. 10.
[338] Id. BIAC, p. 29.
[339] Id. CPA, p. 81.

purely domestic or in international MDR. Thus, each country should check which type of scheme most worries it and whether the schemes in its focus are mass-marketed or be-spoke. Thus, depending on these characteristics, just copying the UK or any other standardized set of hallmarks might not be a good solution.

2.5.2.1 A description of arrangements that are required to be disclosed.

There is a great discussion involving the setting of hallmarks. Moreover, how to apply generic and specific hallmarks, if in one or two steps. The US adopts a *single-step approach* where the domestic tax benefit does not need to be identified as tax avoidance or as the main benefit of the transaction. The UK, Irish, Canadian, and Portuguese regimes adopt a *multi-step approach* and require all schemes to meet a threshold condition as part of their mandatory disclosure regime[340].

In the opinion of an Institution:

> *[...] since the transactions that have to be reported should be limited to those whose main purpose is to enjoy tax benefit, multi-step or threshold approach would be originally desirable. However, it is difficult to determine what has to be reported, especially when the promoter discloses the information. In addition, it is unclear how the "main benefit test", which is suggested as the threshold in multi-step approach, works. Therefore, when the compliance cost is considered, a single-step approach would be a realistic choice*[341].

However, another Institution argues that "*the BEPS Project's objective of curbing abusive tax avoidance transactions implies that the reportable transactions should be limited to ones whose main benefit is to obtain tax advantages. From that standpoint, multi-step or threshold approach seems preferable on paper*"[342].

2.5.2.1.1 The main benefit test.

Particularly to the use of the main benefit test as a threshold, several comments stress that it creates complexity and uncertainty about what should be disclosed:

> *The use of a main benefit test to determine whether disclosure is required, particularly if the test is "one of the main benefits" rather than the main benefit, may result in a test that (...) will result in the following consequences: taxpayers will be uncertain whether disclosure is required, transactions that governments would want to be made aware of may be omitted, and taxpayers may be subject to penalties when they genuinely believed disclosure was not required.* [343]

This work mentions this complexity in topic 2.4.1.2.1, because the main benefit test is connected to the concept (unclear) of tax advantage. Other issues are raised in the Comments,

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[340] OECD (2015). *Public Discussion Draft*. Cit., p. 30.
[341] OECD (2015). *Comments received on Public Discussion draft.* Japan Foreign Trade Council JFTC, p. 191.
[342] Id. Keidanren, p. 198.
[343] Id. International Chamber of Commerce - ICC, p. 186.

such as practical difficulties in defining which tax arrangements should be taken into consideration when measuring the tax benefit: "*should this be the individual transaction step or should it be the wider commercial transaction?*"[344] However, as an Institution remarks, "*the absence of a 'main benefit' threshold in a regime might cause particular difficulties for countries where there is an established General Anti-Avoidance Rule (GAAR) which has a similar requirement*"[345].

Once more, it is important to highlight that MDR and GAAR must work as complementary measures. MDR is a previous step, which does not mean that a GAAR, if existent, will be applied to all disclosed tax planning. On the other hand, if the scheme was not disclosed because of not meeting the MDR requirements, for instance in a multi-step approach, it does not mean that a GAAR is inapplicable in any way. As a conclusion, the hallmarks setting shall be adjusted rather to the tax administration risk analysis and capacity to process and to react to the information, than to the application of GAAR. That is why, as I see it, the best application is a multi-step approach, in which the first step might be the main benefit test and the following step might be established by specific hallmarks.

2.5.2.1.2 Hallmarks.

There is much criticism related to the use of "*premium fee*" or "*contingent fee*" hallmarks, in which the amount the client pays for the advice can be attributed to the value of the tax benefits obtained under the scheme. Equally, to the use of "*confidentiality hallmark*", in which the use of a confidentiality clause in an agreement between promoters and clients may mean that the hallmark is met. Moreover, to the use of the *hypothetical application of generic hallmarks*[346], in which the confidentiality and premium fee hallmark targets not only schemes that are sold to clients for a premium fee but also schemes that *could be* sold by a promoter for a premium fee[347].

In the material scope, institutions argue that this introduces an unacceptable level of uncertainty and complexity[348] and that there is a significant risk that ordinary business arrangements could be swept in by these hallmarks, because transactions that do not involve any significant tax planning that could raise concerns, nevertheless often include confidentiality requirements for competitive or commercial reasons[349]. Moreover, hypothetical hallmarks could require a promoter/ taxpayer to consider the whole tax services market, which will not be possible in practice[350].

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[344] Id. BASF, p. 16.

[345] Id. CIOT, p. 74.

[346] Id. BIAC, p. 31. *BIAC strongly objects to the use of 'hypothetical generic hallmarks'. Taxpayers should be judged by their actions, not by what they might have done. For instance, the reference to 'premium fees' and whether a promoter could have charged a premium fee, but did not, introduces uncertainty and encourages second guessing as to the actual conduct of the parties.* BUSINESSEUROPE, p. 64, *strongly objects to using hypothetical generic hallmarks.*

[347] OECD (2015). *Public Discussion Draft*. Cit., p. 35. *Under the UK and Irish regimes, the confidentiality and premium fee hallmark targets not only schemes that are sold to clients for a premium fee but also schemes that could be sold by a promoter for a premium fee.*

[348] OECD (2015). *Comments received on Public Discussion draft*, BASF, p. 16.

[349] Id. EY, p. 135.

[350] Id. Deloitte, p. 119.

In the personal scope, they state that a mandatory disclosure regime should not seek to discourage tax advisers from charging fees that reflect the quality of advice given and the value of the matter. Therefore, the mere amount of a fee, without any contingency element, should never give rise to a disclosure obligation[351].

Providing a historical and factual analysis, one of the comments states "*although such fees were used in the past, it is increasingly unlikely that a promoter of an aggressive tax scheme would charge a transaction fee that is contingent on realization of the tax benefit*"[352]. They note that when the US and the UK regimes were first implemented, confidentiality and contingent fee arrangements were appropriate general hallmarks of reportable transactions. However, in light of developments since that time, they have ceased to be and they do not believe that a contingent fee filter would generate a substantial number of valuable disclosures.

Moreover, many criticisms to the *hallmarks for loss transaction,* specifically against the inclusion of acceleration of losses as a standard for determining whether a loss transaction ought to be disclosed. An Institution demonstrates the mistrust in MDR application raising doubts about how one determines whether a loss has been accelerated and defending that economic losses which have been realized ought generally to be recognized and allowed (subject to any general limitations on the ability to use losses). Their argument is *"although the discussion draft states the disclosure has no impact on whether the loss would be allowed or not, the overall notion is that "schemes" are subject to disclosure and the reported behavior is in fact suspect*"[353].

Another argument for casting doubts on the real outcome of MDR is the ability to provide a timely response and international tax schemes, because as stated in the Draft, MDR is primarily of benefit to tax administrations when information is provided upfront, therefore permitting an expedited response. The concern is that international tax schemes proposals will not provide that benefit, and will only represent a tool for the receiving assessing officer only relevant for unilateral domestic tax purposes[354].

The conclusion is that taxpayers and intermediaries at that time, and still today, demonstrate mistrustfulness in relation to MDR and its objectives and many arguments against specific hallmarks are based on the normality or legality of one specific transaction or tax behavior, no matter how much the OECD stresses that the disclosure does not mean anomaly.

2.5.2.1.3 International Tax Schemes.

Some doubts are raised from the practical knowledge in countries that are already applying MDR. Specially, comments refer to the validity of applying MDR internationally and the lack of credible statistical data is most concerning in supporting the OECD's "*premature*"

[351] Id. CFE - AOTCA, p. 93.
[352] Id. Banking and Finance Company Working Group on BEPS, p. 10
[353] Id. USCIB, p. 260.
[354] Id. BIAC, p. 32.

recommendations for MDR[355]. They state that the introduced MDR have not been aimed mainly at international tax avoidance techniques, nor indeed at corporate tax avoidance. Hence, "*as the Draft itself points out countries with such regimes have experienced comparatively few disclosures of international tax schemes*"[356].

Specifically about the use of thresholds and international schemes, many comments criticize the OECD position about the *de-minimis* threshold and that it could imply that tax avoidance in small amounts was acceptable[357]. The argument is that MDR "*are not meant to advance or replace tax returns, but are intended to be an exceptional measure to limit severe damage to state revenue. Such damage does not arise from minimal tax savings*"[358]. The advantage should be that proposing disclosure only where tax avoidance is a main benefit of the arrangement and including a *de-minimis* test could reduce the compliance burden[359].

Moreover, there is a suggestion, when dealing with cross-border arrangements, of how to reduce the compliance burden. Thus, in this context, MDR "*should identify one jurisdiction for a specific tax arrangement, rather than having a multiple reporting requirement to tax administrations in multiple jurisdictions regarding one tax arrangement*"[360]. The hallmarks should also identify which jurisdictions are directly affected (a "material jurisdiction"), and it may be appropriate that only one jurisdiction is notified[361].

Another problem involves international transactions and "group companies" (parent-subsidiary). The Draft recommends that MDRs should apply to international tax schemes, either where the scheme is executed entirely within the taxpayer's controlled group or where the taxpayer is a party to the arrangement[362]. However, several comments stress material practical difficulties with the operation of MDR for taxpayers in controlled group situations which cannot be easily mitigated without the need to perform any further intragroup due diligence in regards to the tax and/or commercial impact of other associated group companies linked to the transactions[363].

Furthermore, for the purposes of a disclosure regime, it is stressed that it sounds unreasonable to expect that taxpayers will obtain information regarding the tax behavior of an unrelated counterparty, beyond what is learnt during the course of an ordinary commercial due

[355] Id. Taxand Canada, p. 245.
[356] Id. BEPS Monitoring Group, p. 18-19.
[357] See Chapter II, topic 2.5.1.1 – A description of arrangements that are required to be disclosed.
[358] OECD (2015). *Comments received on Public Discussion draft*, CIOT, p. 75.
[359] Id. CPA, p. 80.
[360] Id. BIAC, p. 30.
[361] Id. CBI, p. 71.
[362] Id. International Alliance for Principled Taxation, p. 175. *The Discussion Draft proposes to create a disclosure requirement for an entity that is a member of an affiliated group and would require that member to provide information on an intra-group transaction.*
[363] Id. BASF, p. 17.

diligence, in a transaction. Requiring a taxpayer to obtain that information will compromise the speed at which transactions can be closed and, in some cases, may even hinder the transaction[364].

2.5.2.2 A description of the persons required to disclose such arrangements.

The discussion is around who must be in MDR focus: the promoter/intermediary exclusively, or the promoter/intermediary primarily and the taxpayer/user only in specific situations. The option most supported is that the primary responsibility for disclosing should be with the promoter, to the tax authority where a tax advantage is achieved. Taxpayers should then just include a reference/scheme number on their tax returns. Taxpayers should only disclose where there is no promoter or the promoter is outside of the jurisdiction[365]. The point in several comments is that the obligation to report should only ever rest with one party, because a dual reporting regime would give rise to significantly greater costs for the tax administrations, taxpayers and promoters[366]. There are many claims, notwithstanding, that the definition of "promoter" requires further consideration by the OECD.

In a smaller quantity of suggestions, it is mentioned that the obligation should focus primarily on the taxpayers/users of a reportable scheme[367]. This kind of proposal comes essentially from Bank Federations, because they show concern about the fact that banks or financial institutions could come into the concept of "promoter" when providing advice or help to taxpayers/promoters using/developing a reportable scheme. The argument is that it is hard for those institutions to understand the real purpose of a given transaction, if mainly commercial or targeting tax benefits. Exemplifying:

> *[...] we believe that it needs to be made clear that in order to create a disclosure obligation, the promoter must be responsible for or involved in designing, marketing, organizing or managing the tax aspects of the arrangement. For example, a bank which determines the terms of a loan to a customer – as we would expect it to do in the course of its general lending activity - should not trigger a disclosure obligation for the bank purely because the customer intends to use the loan, or the proceeds of the loan, in its own tax planning[368].*

2.5.2.2.1 Professional privilege and client lists.

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[364] Id. Matheson, p. 216 – 217. Moreover, the Confederation of Swedish Enterprise says, p. 109, *the Draft recommends that taxpayers that are not a direct party of the cross-border outcome should be obliged to disclose a cross-border arrangement. In our view, this seems overly zealous and go beyond what is necessary to target BEPS issues. It should be sufficient that only parties directly involved in the transaction have a reporting obligation.*

[365] Id. CBI, p. 67.

[366] Id. CIOT, p. 75 and Keidanren, p. 198.

[367] Id. Federation Bancaire Française, p. 140.

[368] Id. AFME-BBA, p. 5.

There is also a great claim from the lawyer´s party[369]. This is expected because many tax advisers are lawyers and most national legislations grant professional privileges to lawyers. However, as discussed in topic 2.4.2.2, many tax advisers and other persons able to act as promoter or intermediary in the tax planning market are not lawyers and, therefore, are not equally privileged. The point is which definition of "lawyer" applies to the definition of "promoter" as presented in the Draft. The same institutions demand, furthermore, a more precise definition of promoter. In this line of thinking, after providing a definition of "lawyer"[370], an institution states that "*lawyers are not 'promoters' (of tax schemes)*", because "*lawyers provide legal advice to their clients on different legal matters, including tax matters or defend clients, having regard to the laws and rules in force within a certain country*".

In this case, as this work discusses in topic 2.4.2.2, it is necessary to identify if the role is legal advice and legal defense or regarding to commercial activities and trade interests. Moreover, as the *Abogacía Española*[371] mentioned, regarding the liability of a lawyer and legal privilege, the Institution seems to agree that if the tax planning offered constitutes a crime, the lawyer can be held responsible. Although this quote does not go much further, it is important to highlight the professional acting as a lawyer and the professional acting as a co-author, which leads to different approaches and legal consequences. Thus, that Institution states: "*If, on the contrary, an advice is illegal then the lawyer will be committing a tax offence or a crime and has no legal privilege or professional secrecy as he is not acting under his capacity as a lawyer but as co-author or accomplice or any relevant figure under the respective national criminal law".*

They, however, conclude differently from what has been put in this work, disagreeing on whether to similarly treat tax adviser / planner activity regardless of which professional is performing it. They state that, "*in this sense, even if the advice on taxation issues is shared with other professions such as economists the condition of lawyer has to prevail over the one of tax advisor as the practice of Tax Law is an unquestionable field of activity of the legal profession*"[372].

There also is a suggestion to the question that was raised in the Draft about the use of client lists, as this work mentioned in topic 2.5.1.2.1. An Institution proposes perhaps only the *quantity* of clients for who a given tax scheme was offered could be informed, based on what they interpret to be a "political intention" of MDR. Therefore, "*to establish an early warning system for tax schemes and provide the tax authorities with an impression on how critical a tax scheme is in terms of avoided tax revenue, it is sufficient if promoters of such tax schemes communicate the number of taxpayers having implemented such scheme*". Moreover, they point out this system has an advantage over the use of schemes reference numbers, which should be informed in the clients' tax returns, because it could avoid redundancies and further efforts from the involved parties,

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[369] Id. Consejo General de la Abogacía Española and Council of Bars and Law Societies of Europe – CCBE, p. 110 and 113.
[370] Id. CCBE, p. 113. A lawyer is a *"person qualified and authorized according to the national law to plead and act on behalf of his or her clients, to engage in the practice of law, to appear before the courts or advise and represent his or her clients in legal matters. See introductory recitals to the Council of European Recommendation on the freedom of exercise of the profession of lawyer 25 October 2000"*.
[371] Id. Consejo General de la Abogacía Española, p. 111.
[372] Ibid.

"without any additional value in achieving the intended political goal to gain early information about mass-marketed tax schemes"[373].

Last, but not least, they stress differences existent in the role of lawyers whether in civil-law or common-law countries, referring to the possibility considered in the Draft that in MDR application, although the existence of professional legal privilege, the client could have the option of waiving any right to legal privilege. Thus, one Institution stresses that contrary to common law jurisdictions, in continental Europe and civil law countries professional secrecy cannot always be waived by the client and in many cases the lawyer is unable to disclose information and documents provided by his/her client. Even if the client were to decide to waive professional secrecy, is the lawyer who will need to decide in the last resort about disclosure taking into account the client's best interests[374].

2.5.2.3 A trigger for the imposition of a disclosure obligation.

Regarding the time to disclose, several comments agree with the options placed in the Draft, which should be linked with the person required to comply with the obligation. Therefore, it is suggested that the primary disclosure obligation is placed on the promoter, who is then required to disclose information at the time of the availability of a scheme. If, however, the obligation exceptionally touches the taxpayer/user, the scheme must be disclosed at the time of the implementation.

Exemplifying, an institution states that "*we agree that the trigger for disclosure by a promoter should be the 'making available' of a scheme, as a promoter may not necessarily know the date of the implementation*"[375]. There are, however, opinions in contrary, and in another institution viewpoint, "*large international companies are often approached by promoters of tax planning schemes, and most of them are not implemented upon subsequent due diligence or for other reasons not related to the tax plan itself*"[376]. As a solution, according to them, a disclosure should not be required unless and until the planning has been adopted. A third option suggested with which this work totally disagrees, nevertheless, is that taxpayers should be required to disclose covered transactions in their annual tax returns[377].

Specifically, following the worries about financial institutions being considered as "promoters", the related institutions defend that:

> *[...] promoters should not be required to disclose transactions until actual implementation of the subject transaction because financial institutions cannot possibly police when and how the employees involved in discussing potential transactions with their clients are crossing some undefinable line of making an idea or product "available for use" by the clients*[378].

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[373] OECD (2015). *Comments received on Public Discussion draft.* Federation of German Industries, BDI, p. 149.
[374] Id. Council of Bars and Law Societies of Europe – CCBE, p. 115.
[375] Id. CIOT, p. 76.
[376] Id. CPA, p. 82.
[377] Id. Banking and Finance Company Working Group on BEPS, p. 11.
[378] Ibid.

Notwithstanding, there is a complaint that a more clarified guidance should be provided, "*since the definition of availability of scheme solely mentioned that at this point all the information on how the scheme works must be available, in paragraph 141*"[379] . However, the concept of "availability" is clear to some commentators, as they register *"What further information or detail is needed in respect of the concept of availability or is this clear? This is a concept with which UK advisors are familiar; we think its meaning is clear"*[380].

As a result, at least in the beginning, law firms and promoters already working in countries where MDR is adopted seem to feel more confident about the application, comparing to others without previous experience. It means that, first, MDR, as most of the other tax obligations requires a period of softer adaptation for the taxpayers and second, each association defends their member´s interests, whether lawyers, banks, *etc.*

About the definition of "*making available*" there is a suggestion to take two requirements into consideration: the putting in place of all the necessary elements for the implementation of the (deemed) tax planning scheme and the communication to the client that the client may consider entering into transactions. Thus, "*mere preliminary or preparatory communication should not trigger disclosure*"[381].

An interesting and specific point is about MDR application in the context the planning is exploring tax treaty advantages, because they expect MDR will be applied in a very limited number of such a cases. Thus, an Institution understands that "*it should be questioned whether early reporting under an MDR is necessary in the context of treaty related matters and whether these should be reportable only at the time of the tax return*"[382]. Moreover, there is a statement that "*given the limited utility of mandatory reporting that would be implemented through treaty exchange*", tax authorities should publish international tax schemes they consider aggressive or make a list of such tax schemes available to other tax authorities[383].

2.5.2.4 Appropriate penalties or other mechanisms to address non-compliance.

There are several suggestions about penalties for non-compliance. The options would be for penalties to be fixed "for failure", i.e., per scheme undisclosed, or proportional to the tax benefit provided by the scheme[384]. There could still be a combination of both, which would mean that for a future tax administration assessment disregarding the tax advantage in a disclosed scheme, it would imply a certain penalty grade, which would be increased if the scheme had not been revealed. However, there are suggestions considering not applying any penalty for a disclosure

[379] OECD (2015). *Comments received on Public Discussion draft.* Keidanren, p. 199.
[380] Id. Deloitte, p. 120.
[381] Id. AOTCA, p. 94.
[382] Id. PwC, p. 229.
[383] Id. USCIB, p. 264.
[384] Id. BIAC, p. 30-31, *believes that monetary penalties should be related to the 'tax saving' or 'tax liability' and not be a specific sum. Penalties ought not to include those unrelated to taxes, such as restrictions over the ability to apply for future government tenders.*

failure where the tax benefits from the underlying transaction are completely allowed[385]. Moreover, there is the argument that it is often impossible to determine how extensive the tax benefit of a tax scheme is or might be and this leads to disputes regarding how the tax benefit should be calculated[386].

Again, comments demonstrate mistrust in the possible application of MDR by tax authorities and, trying to avoid any excess, state that "*the problem with a "per failure" penalty rule is that it can operate to encourage tax examiners to conduct audits to find mere "foot-faults" (i.e., technical disclosure failures pertaining to transactions that are not abusive)*"[387].

On the other hand, stressing the possibility of enhancing the relationship between tax administration and taxpayers, many institutions suggest that for a co-operative disclosure, penalties should be limited or that there should even be the introduction of rewards. In this context, "*it would be more appropriate to provide exemptions from mandatory disclosure requirements to companies entering into co-operative compliance relationships*"[388] or "*elimination of penalties for taxpayers who voluntarily disclose information beyond the requirement of MDR (for instance for taxpayers that seek guidance in the form of ruling requests*"[389]. Furthermore, broadening the possibility of awards, the opinion is that to improve the effectiveness of mandatory disclosure, the system should also include elements of positive reinforcement rather than just recommending implementing additional reporting requirements and subsequent penalties for non-compliance[390].

A complaint exists regarding that the Draft "*does not make any recommendation in relation to the confidentiality of disclosures and how they would be shared among the countries. Clear guidelines will be required to ensure that information is protected and shared in an appropriate way*"[391]. From some suggestions, one can see the concern about the information that will be provided under MDR. This would give taxpayers more confidence if sanctions were also specified in the event of leakage or misuse of this information by the receiving authorities. Although this type of administrative sanction is common and general, not only within the scope of MDR but for the entire public administration, the law introducing MDR could make express reference to sanctions in such cases.

Finally, there is a suggestion: "*for those jurisdictions that impose criminal sanctions for taxpayers that enter certain transactions, the privilege against self-incrimination should control, and such taxpayers should not be required to disclose those transactions that give rise to criminal liability. Moreover, civil penalties should not apply where a taxpayer does not disclose because of concerns of self-incrimination"* [392] demonstrating that, as this work has already mentioned in topic

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[385] OECD (2015). *Comments received on Public Discussion draft*. Banking and Finance Company Working Group on BEPS, p. 12.
[386] Id. Confederation of Swedish Enterprise, p. 108
[387] Id. Banking and Finance Company Working Group on BEPS, p. 12.
[388] Id. BIAC, p. 27.
[389] Id. CNI, p. 41.
[390] Id. BUSINESSEUROPE, p. 62.
[391] Id. BIAC, p. 27.
[392] Id. International Alliance for Principled Taxation, p. 179.

2.4.4, the relationship between civil-penalties and criminal-penalties is controversial, in MDR cases. The issue is especially grave if the system includes certain tax avoidance transactions for which countries impose criminal liabilities on taxpayers who undertake them, in the existence of the principle against self-incrimination[393].

2.5.2.5 A description of what information is required to be reported.

The comments demonstrate worries about the quantity of information to be provided in a MDR context and the administrative cost to produce it, thus many suggestions link Action 12 with other BEPS Actions, such as Action 5 and Action 13. For instance, *"the disclosure requirements under the model mandatory disclosure regime also should be coordinated with the reporting and documentation required under other BEPS Actions, particularly Action 13"*[394]. Additionally, some institutions also believe that many of the arrangements expected to be targeted under international MDR are likely to be caught under BEPS Action 2 on anti-hybrid rules, Action 6 on treaty abuse or Action 7 on permanent establishment[395].

In this work´s viewpoint, this is really an issue to be considered when determining the hallmarks and the information to be disclosed, preserving the proportionality, which means, the cost-benefit of MDR. In terms of coordination between countries, it is also important to bear this broad application of BEPS in mind, because such a design framework will result in different requirements across jurisdictions, as countries will be in different levels of implementation in each Action of the Plan[396].

The implementation of BEPS, therefore, shall be coordinated in two levels. In a domestic level, not requiring information, which is already available from other Actions, and an international level, to make sure that there is coordination and the same level of requirements between different countries. An extremist suggestion[397] is to "*defer further action on mandatory disclosure until the outputs of the other Actions in the OECD's Action Plan are finalized*" moreover, they further state that many of the examples used in the Draft *"are or would be addressed by existing domestic anti-avoidance measures."*

My reference to it as *extremist* is because it means that Action 12 would be residual, only activated when and where other BEPS actions were not enough, by themselves, to solve the problems concerning base erosion and profit shifting. Moreover, only in cases where GAAR is not enough. As has been stressed several times, first my opinion is that MDR and GAAR are complementary and the existence of one does not preclude the co-existence of the other and MDR

[393] Id. TEI, p. 242.
[394] Id. EY, p. 134.
[395] Id. IFA Mexican Group, p. 166.
[396] Id. CIOT, p. 73. *In this regard, the additional information which will be available to tax administrations, as a result of other BEPS actions (e.g. Country by country reporting) and generally as transparency with regard to tax increases globally (e.g. Tax Information Exchange Agreements), should be considered when considering what other information would be useful to tax administrations to respond to tax risks posed by tax planning schemes.* See more in BUSINESSEUROPE, p. 63.
[397] Id. CPA, p. 79 and 81.

has further functions beyond the collection of information, which could be collected by other means/actions.

Finally, there is a point suggesting the differentiation of the level of information, which means the complexity and the details, if the disclosure regards the promoter, in this case assuming that minimal details may be required, or the taxpayer, which in this case could be harder to comply with if minimal details of the scheme are required. Moreover, it is stressed that informing details of all parties involved in a transaction could be particularly useful in case of bespoke arrangements being reported, but unreasonable in case of mass-marketed arrangements. Furthermore, if regarding an intra-group arrangement, details of the parties involved would be available, however, if the arrangement were structured as an investment into a partnership, which provided a tax loss for the partners, the partners may not have information about each other[398].

Interim Conclusion

Comments show some uncertainty about the MDR's real objectives and how the information will be used, including questioning the system of penalties that may apply, in case of non-compliance. Therefore, Tax Administrations need to increase the level of trust in the relationship with taxpayers and it requires further efforts in explaining and making the system transparent, so that the efficiency of the measure increases.

Specifically, there is a great rejection in relation to the so-called “generic hallmarks” and “hypothetical hallmarks”, as well as concerns about “professional privileges” and who should really be defined as a “promoter”. Moreover, there are several questions about the concepts of what are reportable arrangements and who the people required to disclose in different circumstances are, for instance involving economic-groups or international transactions. Some are authentic; others seem to create controversy to defend corporatist interests.

Previous experiences, especially in the US and the UK, have a major influence on taxpayer/promoter behavior. Thus, those already working under those systems demonstrate more confidence than others, for whom MDR is really new. The conclusion is that MDR is a system that requires adaptability by taxpayers, intermediaries and tax administration. The best results will not come soon after the measure is implemented, and it will certainly be necessary to adjust hallmarks to “balance” the amount of information received, the tax administration's work capacity and the trust of taxpayers / promoters in providing the information. All existing systems, such as the American, the British, Canadian, South African, have undergone major transformations a few years after the introduction.

Cultural, administrative and legal differences have a significant influence on how taxpayers view the measure. For instance, many commentaries refer to common-law *v.* civil law, comparing the DOTAS system and the possible implementation in continental European countries.

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[398] Id. Deloitte, p. 121.

2.5.3 The Final Report.

Conclusively, the OECD has issued a Mandatory Disclosure Rules, Action 12 – Final Report in 2015[399] (hereinafter *"the Final Report"*), with final considerations on BEPS Action 12. They begin by reminding us that the Action Plan relies on three key pillars: introducing coherence in the domestic rules that affect cross-border activities, reinforcing substance requirements in the existing international standards and improving transparency as well as certainty.

In relation to MDR, it is possible to see that closing gaps and loopholes in the legislation can lead to an increased coherence in the domestic tax system. Additionally, the system can make evident mismatches and favorable treatments in an international context, therefore reinforcing international standards and, more obviously, it is a measure to improve transparency. It is more difficult, maybe, to demonstrate how the system could improve certainty and this only comes if the level of trust in the relationship between the tax administration and taxpayers increases and transparency goes both ways.

This topic´s main objective is to demonstrate what has changed since the concept of "aggressive tax planning" emerged in 2002 until the publication of the Final Report, in order to evidence the improvements or what, besides comments or critics, remains at the same position. The question is how much the OECD is really open to comments and inclusive framework? For instance, in the Executive summary[400], there is a point that seems to be assimilated from the comments on the Draft. When mentioning the intention to cover international tax schemes, it is stressed that taxpayers that enter into intra-group transactions with material tax consequences are obliged "*to make reasonable enquiries*" as to whether the transaction forms part of an arrangement that is specifically identified as reportable under their home MDR[401].

The Final Report is designed in a structure slightly different from what this work is applying, but in substance, the same points are under consideration. Notwithstanding, the OECD states that the following features need to be considered: what information to report; who must report; when must the information be reported, and the consequences of non-reporting[402]. The bullet points, at the beginning of the Final Report, are the same this work has been discussing:

i) include a mixture of specific and generic hallmarks;
ii) impose a disclosure obligation on both the promoter and the taxpayers or impose the obligation to disclose primarily on either the promoter or the taxpayer;
iii) crosscheck disclosed information with promoters and users, by using reference numbers and/or client lists;

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[399] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project, Paris: OECD Publishing.
[400] Ibid, p. 11.
[401] See Chapter II, topic 2.5.2.1.3 - International Tax Schemes.
[402] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, p. 10.

iv) link the timeframe for disclosure to availability of the scheme (when the disclosure is imposed on the promoter) or to the implementation (when the disclosure is imposed on the taxpayer), and
v) use penalties consistent with countries´ domestic laws.

In the introduction of the Final Report, it is possible to see the concern over justifying why MDR differs from other sources of information, such as rulings and co-operative compliance programs or from the information recorded on a tax return. Thus, they state that MDR advantages "*can enable an accelerated response (statutory, administrative or regulatory) to transactions that are considered to be tax avoidance*"[403]. Two points are important to highlight here in this statement: first, the responses expected and second, the reference to "tax avoidance".

In another part, the Final Report states "*early warning allows tax administrations to respond more quickly to tax policy and revenue risks through operational, legislative or regulatory changes*" [404], and, following, they state "*tax administrations have a wider range of options for addressing these risks through compliance, legislative or regulatory responses*" [405]. So, what kind of responses are exactly expected and which is the competent body to take them?

The issue is that tax administration, in many countries, is not the government body in charge of establishing tax policy, which may be defined in a broad economic and financial planning. Thus, tax administration, referring to tax and customs offices, which are normally in charge of administrative, operational and enforcement measures, can have the "*early information*" and take "administrative and operational" responses, when it is necessary, but not "*respond quickly to tax policy risks*" by legislative changes.

For instance, according to Article 4(2) regulation (EU) 473/2013, the Draft Budgetary Plan, in Austria, is supposed to contain the draft budget for the subsequent year for the Federal Government. The main parameters for the other sectors of the state and most of the tax policy is also there, in a way that it cannot be "quickly changed" after MDR revealing some "policy risks". It has to be published and forwarded to the European Commission and the Eurogroup. In 2019, the draft budget was prepared by the Federal Ministry of Finance (BMF) on the basis of the assumption of an unchanged policy ("no-policy change"). This is intended to facilitate the coordination of economic and monetary policy in the Economic and Monetary Union (EMU). The future Federal Government will present a new, amended draft budget (together with the update of the Austrian Stability Program) by April 2020 at the latest[406].

Therefore, it is arguable if the Tax Administration, after receiving information disclosed by MDR, could, in any case, promote quick changes and reactions. Implementing legislative changes must wait at least for the next fiscal year, if this involves changes in tax policy and budgetary laws or even changes in the tax law. That is why to change the law it is necessary to have the intervention

[403] Ibid, p. 13.
[404] Ibid, p. 22.
[405] Ibid, p. 25.
[406] AUSTRIA (2019). Federal Ministry Republic of Austria. Finance. *Austria Draft Budgetary Plan.* Available at: https://english.bmf.gv.at/budget-economic-policy/DBP_2015.html. Accessed on: 27 Nov 2019.

of the Parliament and even if the change is accepted, the implementation takes some time, considering the limits established in the annual budgetary law and principles of law (non-retroactivity).

The Administrative body cannot be in charge of all the steps, from defining which kind of planning must be disclosed, by the hallmarks, to receiving and processing the information and at the same time for establishing the country´s tax policy and promoting legislative changes. It represents an excess of power and can compromise the transparency and trust of an MDR system.

The second point is about the reference to "tax avoidance". The Final Report, stressing the advantages of MDR in relation to other measures, states that: "*in contrast to mandatory disclosure regimes, additional reporting obligations do not focus on tax avoidance (…)*"[407]. Following, it states that: "*while other disclosure and compliance initiatives can also produce similar outcomes (…) do not target or provide the same level of information on avoidance (…)*"[408], moreover, when quoting as a successful example in numbers from the UK-DOTAS, the Report states that: "*925 of the 2.366 avoidance schemes disclosed up to 2013 have been closed by legislation (…)*"[409]. Therefore, the question is whether MDR is advantageous in relation to other disclosure initiatives especially because it can handle "avoidance".

In this work´s viewpoint, the answer is negative and the Final Report should not connect MDR advantages to avoidance. First because as it was discussed[410] is very hard to distinguish tax avoidance and tax planning and even tax avoidance and tax evasion. If the MDR advantages are considered as a function of tackling tax avoidance, the definition of hallmarks not connected with what one could, even superficially, understand as avoidance, for instance the confidentiality clause or the main benefit test, is quite controversial. Second, this numerical example from the UK-DOTAS is repeated in several of the OECD works and they continue the abovementioned excerpt: "*one legislative change can close more than one scheme and schemes can also be shut down very quickly. For example, on one occasion, a scheme was closed down within a week of the disclosure (…)*"[411]. However, as explained above, depending on the counteraction needed, for instance a legislative change, doing this in a week after the disclosure is impracticable in the majority of the countries.

As a conclusion, the Final Report presents some advantages of MDR that are not practical or precise, if analyzed carefully, and they repeatedly defend the advantages of MDR in relation to other kinds of disclosure initiatives based on the fact that MDR can deal with "avoidance" and others cannot.

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[407] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report,* p. 22.
[408] Ibid, p. 23.
[409] Ibid, p. 25, paragraph 37. Note: "*this section focuses on data and statistics provided by the United Kingdom*".
[410] See Chapter II, topic 2.4.1.1 – Aggressive or Abusive Tax Planning.
[411] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, Cit., p. 25.

2.5.3.1 A description of arrangements that are required to be disclosed.[412]

Paradoxically, a very well placed point is that countries need first to decide what types of schemes and arrangements should be disclosed under MDR[413]. Which means the definition of "reportable scheme" has nothing to do with avoidance or "aggressive", but can vary from system to system based on what a given tax administration understands as relevant information. As a matter of criterion, it shall derive from technical and objective analysis, for instance using risk analysis methodology. As a matter of proportionality, the quantity of information expected shall be within the capacity to deal with it, so as concluded in the Final Report, the identification of hallmarks is a key factor and "*countries need to consider how to make full use of the information collected in order to improve compliance*"[414].

The Final Report starts the analysis explaining the use of a single-step approach and a multi-step-approach, which uses a threshold requirement or precondition to apply the hallmarks. The most common threshold is the main benefit test. Moreover, they explain that the main benefit test can result in no disclosing tax schemes, which are of interest to a tax administration and make the enforcement more complex, additionally creating uncertain outcomes for taxpayers.

In this work´s viewpoint, that is why the definition of tax advantage and the measure of the tax benefit in relation to other benefits in a given transaction, especially if it involves cross-border transactions, is hard to establish, as was discussed. On the other hand, the single-step requires large experience and a very good analysis of the interesting transactions, because it makes it more difficult to set the hallmarks efficiently and this could generate a very large or very small number of disclosures.

As discussed in topic 2.5.2.1.3, the Comments on the Draft´s criticism about the use of "*de-minimis* filter" seems to make the Final Report analyze the use of this kind of threshold better and advantages and disadvantages are presented[415]. Thus, whether the main criticism, concerning the OECD statement that this kind of filter could suggest that tax avoidance in small amounts is acceptable didn´t avoid that the consideration be made; the Final Report mentions the US example and recognizes that this filter could be easier to apply and have a clearer impact where it is used in conjunction with a specific hallmark and a high number of disclosures are expected. The more important point, however, remains, which concerns the use of this kind of filter in cross-border situations, in which the tax advantage could be small in each jurisdiction but big as a whole.

Moreover, in the Comments on the Draft criticism was made to the use of a confidentiality clause or premium or contingent-fee as generic hallmarks. The Final Report ponders that a confidentiality clause might not meet the hallmark, if the scheme is "*reasonably well-known in the tax community*"[416]. But the issue is: what does "reasonably well-known" mean and that this

[412] NOTE. The Final Report refers to this topic as "*what has to be reported*".
[413] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, Cit., p. 18.
[414] Ibid. p. 19.
[415] Ibid, p. 38-39.
[416] Ibid, p. 40.

definition is decided by tax authorities, so the promoter does not know, previously, at the time of disclosure, if that scheme is considered “reasonably well-known in the tax community”, unless the tax administration provides a list of the “well-known” schemes. In this case, the system contains positive lists, establishing which kind of schemes must be disclosed and negative lists, indicating which kind of schemes, despite meeting some generic hallmark, like the confidentiality clause, does not need to be disclosed.

A better solution, in this work´s viewpoint, is to include the confidentiality clause as a “first-step” or precondition in a multi-step system. Thus, if there is a confidentiality clause and the scheme meets a specific hallmark, the disclosure should be done. However, this precondition should not be absolute and even if the clause is not present, it might be possible that the scheme met the disclosure obligation.

Premium or contingent-fee means that the taxpayer´s fee for the scheme is linked to the amount of tax benefit they expect to achieve. About their use as generic hallmark, the Final Report mentions divergences among countries, presenting three main-streams: (i) only using in case of the existence of an increased charge that is built into the transaction itself, rather than a separate fee for legal or tax advice (which meets the criticism, especially from the lawyers). (ii) Using a definition broad enough to also capture this kind of charge, which could raise compliance difficulties. (iii) Substituting such hallmarks with other types of hallmarks, in other words, not using them.

Yet, most criticism was directed at the “hypothetical application” of those generic hallmarks (the clause *might be in the agreement*)[417], and the Final Report clarifies that the use is appropriate only if the scheme is sufficiently innovative and the use of an explicit confidentiality agreement may indicate that this test is met. Besides from this work´s point of view this hypothetical application creates a great deal of uncertainty, I believe the confidentiality agreement represents the commercial and economic interest of the scheme rather than just legal advice and could therefore change the view on professional privilege and tax liability for the scheme's results. Therefore, the clause must be present in the contract in fact, and not hypothetically.

If these above-mentioned generic hallmarks mainly focus on arrangements, in which special interests from the promoter’s side are present, there are also hallmarks focusing on “standardized tax products”, which intends to capture “mass-marketed schemes”. In one of the few references to Korean experience[418], the Final Report mentions that a similar hallmark is used in that country, targeting standardized “financial” products. Therefore, in that regime, financial institutions offering products, which contains tax benefits, must disclose the product to the tax authorities.

On the other hand, as the Final Report stresses, specific hallmarks can evidence which the special interests of the tax administration are, i.e., which are the transactions representing potential risks to it. The Final Report, thus, mentions possible transactions to be targeted, such as

[417] Ibid, p. 43.
[418] Ibid, p. 41.

loss creation schemes, leasing transactions arrangements, employment schemes (using indirect salaries for employees) and schemes involving entities located in low-tax jurisdictions, or simply listed transactions of interest[419]. More importantly, in this work´s point of view is that there are no patterns of this kind of hallmark and each tax administration can set them, taking into consideration the target or common areas of risk.

2.5.3.1.1 International Tax Schemes.

The Final Report gives much of its attention to international schemes. Starting in the Executive summary, it states: "*pressure is also placed on the tax avoidance market as promoters and users only have a limited opportunity to implement schemes before they are closed down*"[420]. This topic has already mentioned the multiple references to "avoidance", but the point now is that it is hard to think that international schemes, working in different countries and exploring mismatches in different systems of law or maybe in tax treaties, can be closed before they are implemented. The main argument is that it depends on multiple legislative changes after an exchange of information between the involved countries. No doubts that MDR puts pressure on the market and in this perspective can work in a preventive character, but is not believable that the reaction, in these cases, can be so quick[421].

Thus, the Final Report states that "*there are a number of differences between domestic and cross-border schemes that make the latter more difficult to target with mandatory disclosure regimes*"[422] and this work has already discussed this, for instance when setting the hallmarks. The point is that even if the differences, when establishing hallmarks or defining the persons obliged to disclose, are considered, the outcomes will never be the same and one example is the time to react, as explained above. Moreover, the Final Report developed its recommendations drawing on experiences of "*the increasing number of countries*"[423] but those countries did not focus on international schemes. The most relevant example considered was no doubts the UK-DOTAS, which was not designed for international schemes and exchange of information[424].

Based on the existent experiences, the number of international schemes disclosed is fewer, compared to the domestic schemes, despite the fact that the hallmarks were not designed to distinguish them, generally. According to the Final Report, the problem is that international schemes have multiple tax benefits, from different parties in different jurisdictions and seem to be unremarkable when viewed in isolation, thus it is necessary to have a global picture[425].

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[419] Ibid, p. 46-47.
[420] Ibid, p. 9.
[421] NOTE. Nevertheless, the disclosure may make it possible for a country to see that anti-hybrid rules apply, or that the anti-treaty abuse provision in the MLI can be invoked, if the scheme depends on treaty benefits. These are some examples of how MDR can interact with other international actions.
[422] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, Cit., p. 10.
[423] Ibid, p. 14.
[424] BAKER, Philip. *The BEPS Project: Disclosure of Aggressive Tax Planning Schemes*. Intertax, v. 43, issue I, The Netherlands: Kluwer Law International BV, 2015, p. 88.
[425] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, p. 68.

For instance, they state that a tax benefit for a foreign counterparty could be converted into a commercial benefit for the taxpayer in the reporting jurisdiction. Although this option increases the level of uncertainty (what must be disclosed?) and can cause over-reporting, the solution the Final Report found to the problem, focusing on international tax schemes, is to "*explore a wide definition of tax benefit in order to capture such transactions*"[426].

Additionally, other solutions such as the use of hypothetical premium fee test, which covers arrangements where the tax planning is sufficiently innovative that a promoter "*would be able*" to obtain a premium fee for it, and the recommendation to not use thresholds in the generic hallmarks, in order to capture transactions that could be insignificant in a given jurisdiction but relevant as a whole, were broadly criticized, in the Comments on the Draft. The first because it could cause uncertainty about what must be reported, considering it is based on a hypothesis, the second because it can cause over-reporting and tax administration can receive information that is not relevant.

Further, the Final Report contains a suggestion to focus on base erosion and profit shifting outcomes that raise concerns from the tax policy perspective, more than on the mechanisms that are used to achieve them. As this work describes in topic 2.4.1.2.2, each undesirable result requires a different set of hallmarks and this is the correct strategy to use in MDR, which shall not be concerned about the instruments or definitions, but about looking at the results they produce.

In fact, international schemes are much more challenging than domestic, that is why my suggestion is to start with MDR focusing on domestic arrangements, and then to evolve into international ones. In the European Union´s case, for reasons and principles presents in the TFEU, they are starting with international schemes and some countries are not taking into consideration the opportunity and the cost-benefit to also introduce MDR for domestic schemes, a decision with which this work disagrees[427].

2.5.3.2 A description of the persons required to disclose such arrangements[428].

It is possible to note the use of the term "promoters" rather than "intermediaries" as was set in the 2008, Study[429]. In the Final Report, there is a note[430] explaining that the term "promoters" is applied broadly to capture both those who promote a tax shelter or avoidance scheme and intermediaries (such as material advisors) who facilitate the implementation of a reportable scheme. Analyzing different legislations (the UK, the US, Ireland, Canada and South Africa), the Final Report concludes that "promoter" is any person responsible or involved in designing, marketing, organizing or managing "*the tax advantage element*" of any reportable scheme and this

[426] Ibid, p. 14.
[427] See Chapter III, topic 3.5.4.1.
[428] NOTE. The Final Report refers to this topic as "*who has to report*".
[429] See Chapter II, topic 2.3.2 – The 2008 Study.
[430] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, p. 29.

definition can include any person who provides any material aid, assistance or advice in tax aspects of a transaction[431]. Thus, this represents a new categorization of persons who must provide the disclosure going further that designed in 2008 and this distinction made between promoters and intermediaries seems to enlarge the scope of MDR, encompassing not only tax planning, but any assistance that might result in tax advantage. The problem is to delimitate the tax advantage element and that this definition might include those who only have knowledge about the scheme, as was done in the EU-Directive[432], for instance.

Notwithstanding the foregoing, in the Comments on the Draft[433] many institutions required a more precise definition to what the term *promoter* encompasses. It seemed to have an effect, especially the complaining posed by banks and financial institutions. In its concluding remarks, the Final Report states that countries are free to introduce their own definition of promoter or advisor. However, it will be important to hear "*the relevant domestic stakeholders*"[434], for example to ensure that those who have knowledge of the scheme are included but not if they provide "*services incidental*", not regarded to the tax aspects of the scheme.

The Final Report understands that MDR applies to all taxpayers (both large and small) and not simply those who choose to disclose through a voluntary compliance measure. Additionally, the system covers third parties, the so-called intermediaries or promoters. However, as mentioned in the Comments on the Draft, it depends on how the hallmarks are set and if they focus on marketable arrangements, they largely reach small and medium business.

Although the Final Report recognizes that the distinction between *the transaction-based approach* and *the promoter-based approach*[435] may not in reality be significant because they can end up in a similar place and none of the existing MDR exhibits a purely transaction or promoter-based approach[436], it states that the first will place more reliance on specific hallmarks, while the second is more focused on the supply-driven of tax planning schemes, hence may rely more heavily on generic hallmarks. Considering that this promoter-based approach is the one used in the UK-DOTAS, this observation is in consonance with many Comments on the Draft which pointed out the British system mostly caught mass-market schemes and in consequence, small and medium business. Therefore, it is an important point when introducing MDR and the consequences in terms of quantity and effectiveness of this choice were discussed in this work[437].

Furthermore, the Final Report states that the use of client lists and scheme identification numbers "*allows the tax administration to rapidly obtain an accurate picture of the extent of the tax risk (...). Access to client lists also opens up the possibility of using other tax compliance tools*

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[431] Ibid, p. 35.
[432] See Chapter III, topic 3.5.4.2, about the persons required to disclose in EU-Directive.
[433] See Chapter II, topic 2.5.2 – Comments received on Public Discussion draft.
[434] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, p. 36.
[435] See Chapter II, topic 2.5.1.2 – A description of the persons required to disclose such arrangements.
[436] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, p. 32.
[437] See Chapter II, topic. 2.5.1.2 – A description of the persons required to disclose such arrangements.

such as direct communication with taxpayers"[438]. Therefore, as it was identified in this work[439] the use of client lists might go beyond the objectives of MDR and BEPS, and assessments or investigations which are not in the system´s focus might happen.

The recommendation in the end is that countries are free to decide to introduce a dual reporting (promoter and taxpayer) or a reporting which falls primarily on the promoter and which is switched to the taxpayers only when the promoter is offshore, there is no promoter or the promoter has legal professional privilege[440].

2.5.3.2.1 Scheme number and client lists.

The Final Report also stresses the recommendation to identify scheme users and two possibilities, which were already discussed in this work, are presented: the use of schemes numbers or client lists[441]. It starts by describing the process for using scheme numbers, quoting the examples from the UK and the US. Basically, when the scheme is disclosed, tax authorities provide a reference number and the promoter must inform it to the user, who must include it on his/her tax return. The report advances proposing a combination of both reference numbers and client lists. The latter are provided in preset periods, as quarterly, or when requested by the tax authorities[442].

If the tax authorities request the list, in this work´s viewpoint, the promoter must provide it, because there was a previous assessment or specific interest motivating and justifying the request. If the obligation is automatic, like "every quarterly", my position is that this represents an administrative excess in the application of MDR, by the reasons discussed in topics 2.5.1.2.1 and 2.5.2.2.1.

2.5.3.3 A trigger for the imposition of a disclosure obligation[443].

The Final Report states that this time can vary from days, months to longer. As was discussed in this work, a scheme can be disclosed under MDR either at the time of the availability or at the time of the implementation. Disclosure after these events does not make sense in a system that focuses on early information, quick reaction and information that is not obtained in the annual tax returns.

Availability is connected with the promoter´s obligation. If there is no promoter or the obligation does not rely on the promoter, it is not reasonable to demand the taxpayer/user to disclose at the moment of the scheme´s availability. The Final Report provides further clarification

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[438] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report* Ibid, p. 22.
[439] See Chapter II, topic 2.5.1.2.1 – Scheme number and client lists.
[440] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report,* p. 36.
[441] Ibid, p. 53.
[442] Ibid, p. 54.
[443] NOTE. The Final Report refers to this topic as "*when the information is reported*".

about the concept of availability used in the UK, which means "*all the elements necessary for implementation of the scheme are in place and a communication is made to a client*".[444] Other countries applying MDR use this parameter; however, the disclosure is set in some days after the scheme was made available, from 5 working days (the UK) to 20 days following the end of the month in which the trigger event is verified (Portugal). It depends on the tax administration´s capacity to process information and on the deadlines to comply with each tax, because the intention is to keep the undesirable scheme from working for several "tax periods" and the tax administration´s ability to react is an important factor in the compliance level. Notwithstanding, in this work´s point of view, this is in essence the correct trigger to apply in consonance with the MDR objectives set by the OECD.

Other examples setting the disclosure at the moment of the implementation of a scheme, such as in South Africa and Canada[445], are suitable to in-house or "self-arrangements" aiming extra refunds or undue compensations (South African case) and it should be effectively avoided with use of technological tools and artificial intelligence, not exactly requiring MDR. In the Canadian example, this work already stressed the particularities in topic 2.5.1.3.

The situation is different when the obligation relies on the taxpayer, which must occur only in limited circumstances (when the promoter is offshore, there is no promoter or the promoter has legal professional privilege). In this case, the trigger event must be the effective implementation of the scheme. The Final Report observes, however, that countries modify the period within the disclosure must be made in this case, and the period is longer, such as "*30 days from the first transaction entered into by the user*"[446]. Thus, it is possible to infer that *implementation* means performing transactions with the application of a reportable scheme.

2.5.3.4 Appropriate penalties or other mechanisms to address non-compliance[447].

If the information is provided within the scope of MDR, the Final Report raises two topics: first, the "*legitimate expectation*" and second "*the issue of self-incrimination*". Both were raised as concerns in the Comments on the Draft. In this work´s point of view, the first can only be addressed by the development of trust between tax authorities and taxpayers and by the efficient use of the information provided. Thus, despite the fact that tax administration makes it clear that disclosure does not mean that there is something wrong with the arrangement nor does the lack of response mean that the arrangement was accepted; if the taxpayers do not trust in tax authorities or those authorities use MDR to start assessments beyond the system´s scope, the expectations will continue to cast doubts about the disclosure´s effects.

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[444] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report,* p. 50.
[445] Ibid, p. 51.
[446] Ibid, p. 51.
[447] NOTE. The Final Report refers to this topic as "*consequences of compliance and non-compliance*".

The issue of self-incrimination is more complex and it must be carefully observed. My point of view is in line with what the Final Report explains concerning the use of MDR to target transactions that could give rise to criminal liabilities and where the promoter could have criminal liability in relation to the promotion of a scheme[448]. Therefore, these kinds of liabilities are incompatible, this work understands, with an efficient application of MDR[449].

Despite the fact that this work stresses that it is not enough to be mandatory when it comes to MDR, in its point of view penalties cannot be disregarded. MDR, as any other tax obligation, is compulsory and penalties imposed in its rules must be coherent with the other penalties existent in a given tax system, no more, no less.

The Final Report, from the British, Canadian, South African and American examples, describes the use of daily penalties and penalties proportionate to tax savings or promoter´s fees. Moreover, non-monetary penalties, for instance denying tax benefits.

Additionally, they mention initiatives targeting promoters, quoting the Mexican[450] case, where a penalty is imposed on a tax advisor who provides an advisory service in order to reduce or omit taxes. However, this penalty is not applicable if the advisor warns the taxpayer that the scheme might not be accepted by tax authorities. As a result, the penalty aims to deter any taxpayer from engaging in an uncertain tax position involuntarily and in this work´s point of view, this is very interesting.

2.5.3.4.1 Deterrence.

The Final Report makes clear that countries have reported some different experiences with respect to the deterrent effect[451]. As this work stresses, differences in cultural, legal and administrative environment have a significant relevance in MDR outcomes, so that even if two countries are applying exactly the same hallmarks and focusing on the same intermediaries/taxpayers, the quantity and the quality of the information provided will not be the same. Thus, deterrence depends not only on MDR and on the size of its sanctions/penalties but further on the administrative capacity to effectively react and apply the statutory penalties. As mentioned by Cesare Beccaria: "*Crimes are more effectually prevented by the certainty than the severity of punishment*"[452].

Additionally, about deterrence, the Final Report states "*under legislation introduced in 2014, the United Kingdom may also require disputed tax in disclosed schemes to be paid before the*

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[448] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, p. 57.

[449] See Chapter II, topic 2.4.4 – Appropriate penalties to address non-compliance and Chapter V, topic 5.1.2 – The issue of non-self-incrimination, the adviser´s liability and MDR.

[450] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report,* p. 60.

[451] Ibid, p. 18.

[452] BECCARIA, Cesare Bonesana. *An Essay on Crimes and Punishments.* A New Edition Corrected. Albany: W.C. Little & Co., 1872. Available at: https://oll.libertyfund.org/titles/beccaria-an-essay-on-crimes-and-punishments/simple#lf1476_label_114. Accessed on: 27 Nov 2019.

dispute is settled, thus ensuring that the Exchequer, not the taxpayer, holds the benefit of the money during the dispute". [453] In the Comments on the Draft, an institution had stressed, "*these kinds of rules suggest that reportable transactions are presumptively illegitimate and inappropriately stigmatize legitimate tax planning. They would also seem to go directly against the spirit and object of an MDR regime that is intended to be simply a reporting regime rather than a declaration that the tax structure is not legally effective in any way*"[454].[455]

Moreover, this kind of rule is not possible in many countries, for instance in Brazil, where the Constitution and administrative laws prohibit the requirement even of "*administrative deposits*" of part of the tax being disputed, previously or during the tax dispute. According to a binding Supreme Court´s decision:

> *It is unconstitutional to require prior deposit in cash or listing of assets for admissibility of administrative appeal. Representative Precedent - The requirement of deposit or prior listing of assets and rights as a condition of admissibility of administrative appeal constitutes a serious (and insurmountable, for considerable portions of the population) obstacle to the exercise of the right of petition (CF / 1988, art. 5, XXXIV), besides characterizing offense to the adversarial principle (CF / 1988, art. 5, LV). The requirement to deposit or pre-register goods and rights may, in practice and in certain situations, become a suppression of the right to appeal, thus constituting a clear breach of the principle of proportionality*[456].

About penalties, this work discusses them further in Chapter V, essentially proposing the joint and several liability between users and promoters, as an extension of abovementioned Mexican example, for non-compliance with disclosure obligations and suggesting that non-monetary penalties should exist as part of the co-operative compliance program.

2.5.3.5 A description of what information is required to be reported[457].

The Final Report contains a key description of the information to be reported: it must be sufficient to enable Tax Authorities to understand how the scheme operates and how the expected tax advantage arises[458]. Therefore, at this point, it is expected that the reader is able to understand why and how MDR deals with promoters and users, in the tax planning market, however, in essence, MDR focuses on the object - the scheme - and not on the subjects - the promoters and users. As this work has already sustained, the information about the scheme is more important than the information about the persons involved. Thus, the persons - mainly promoters and

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[453] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, p. 27.
[454] OECD (2015). *Comments received on Public Discussion draft*, Taxand Canada, p. 249.
[455] NOTE. However, I do not believe this is a valid criticism. It is not the reporting that triggers the obligation to pay; it is the fact that, having considered the report, HMRC has disputed the tax outcome and issued an accelerated payment notice. See Chapter III, topic 3.2.4 - Appropriate penalties or other mechanisms to address non-compliance.
[456] BRAZIL. Federal Supreme Court. *ADI 1.976,* Min. Joaquim Barbosa, DJE n. 18 on 18.5.2007. General binding thesis (Súmula Vinculante n. 21): *É inconstitucional a exigência de depósito prévio como requisito de admissibilidade de recurso administrativo*. *AI 698.626 QO-RG,* Min. Ellen Gracie, DJE n. 232 on 5.12.2008, Topic 314.
[457] NOTE. The Final Report refers to this topic as "*types of information to be reported*".
[458] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report,* p. 60.

secondarily users - are the means to obtain knowledge about the ends - early information about a scheme –, increasing the ability to quickly closing the ways by which a scheme is working.

Therefore, in an efficient and proportional MDR, there is no formula to establish the information to be reported. The answer is whether all the information required is necessary and sufficient to identify "*how the scheme operates and how the expected tax advantage arises*" and, additionally, how to stops it, which includes, in some circumstances, the identification of promoters and users.

One point is, for instance, to describe the key provisions of law relevant to the disclosed transactions and details of all parties involved in the transaction, whether disclosing cross-border transactions. It can be quite difficult for the promoter to obtain details of the foreign legislation or of the parties resident abroad. Some concerns stress that this could be even more challenging if the obligation relies on the taxpayer. However, it is necessary to consider that such complex planning will rarely not involve tax consultants and promoters with international experience and knowledge.

Another point is if requiring the promoter/user to identify the amount of expected tax benefit could be included in the meaning above (*how the scheme operates and how the expected tax advantage arises)*. It is important to stress the concerns involving the balance between the cost of introducing this additional tax burden and the benefits eventually produced by it. In this work´s point of view, providing information about the amount of expected tax benefit creates additional burden to taxpayers/promoters, therefore this is arguable and depends on the tax administration practice, at least if we are not talking about the Anglo-Saxon system, whose particularities will be exposed in the next Chapter. Notwithstanding, all the required information is justifiable if used as a means to reduce administrative costs and increase efficiency. Thus, the tax administration should make clear to the taxpayer that, by obtaining further information about tax schemes, it could then focus its administrative efforts on what really matters.

Interim conclusion.

The ideas posed on the Draft were not substantially modified by the Public Comments. Those comments made the OECD expand the examples, possibilities and explanations about the most criticized points, but they are still there.

The study of the whole process leads to the conclusion that most of the proposal is based on the UK-DOTAS and some justifications, for example, the use of schemes numbers or client lists, are borrowed from the existing US system. However, the relationship between attorneys and clients and between attorneys and the US legal system is quite particular compared to most civil-law countries. Other justifications are looking at the Canadian system, where they have more than one disclosure regime, with different objectives.

A positive point is that there are no impositions and as has been pointed out several times, countries have a range of combinations to adopt according to their needs. What is worrisome, and which ultimately becomes one of the motivations of this thesis, is whether indeed each administration will warrant sufficient study in introducing MDR or whether the “inclusive framework” based more on political propaganda than technical analysis will prevail and various administrative problems and legal issues may arise.

III. EXISTING MDR SYSTEMS.

Introduction to Chapter 3.

After describing the main characteristics of a MDR, regarding the OECD proposals, in this Chapter the focus is on describing and analyzing some existing MDR, which were in force before the release of BEPS or were proposed soon after that. As mentioned in the OECD/BEPS Action 12 - Final Report, amongst G-20 and the OECD countries, mandatory disclosure rules had been introduced in the United States, Canada, South Africa, the United Kingdom, Portugal, Ireland, Israel and Korea[459]. However, two bits of information, which are presented in the Final Report, are many times repeated, without any deeper analysis: "*Action 12 takes advantage of the experiences of the growing number of countries that already have disclosure rules. The recommendations included in the report do not constitute a minimum standard, so individual countries can freely decide whether or not to introduce mandatory reporting regimes*"[460].

First, it is necessary to analyze some different contexts in which MDR was introduced, because not all the experiences listed above can really be considered broadly successful. For instance, Yariv Brauner suggests: "*One should however note that the United States' experiences with the reporting of tax shelter activities may not be as positive as believed. Further, the context is different because it is naturally simpler to identify reportable transactions pursuant to a specific and single legal regime than pursuant to general principles*"[461]. Second, the Final Report provides flexibility in the application, since the recommendations "*do not constitute a minimum standard*", however many countries simply reproduce the general rules[462], without the recommended adaptation. Therefore, this study about the previous experiences, stressing some important points from a practical perspective, is relevant.

> *Regimes that provide revenue authorities with timely information about potentially abusive schemes are of undoubted utility. They have a place in the modern armoury of a revenue authority committed to the reduction of avoidance activity. However, disclosure regimes do raise a number of issues. To properly assess a particular regime, one must have a closer look at its detail to determine how these issues are dealt with.*[463]

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[459] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report,* p. 23.
[460] GUTIÉRREZ. Jorge A. Ferreras. *Mandatory Disclosure Rules for Tax Planning Schemes and Automatic Exchange*. Combating Tax Avoidance in the EU: Harmonization and Cooperation in Direct Taxation. EUCOTAX Series on European Taxation, v. 61. The Netherlands: Kluwer Law International BV, 2019, p. 326.
[461] BRAUNER (2014). Op. Cit., p. 109.
[462] KPMG. Euro Tax Flash from KPMG's EU Tax Centre. *EU Mandatory Disclosure Requirements – Update*. The fifth Special Edition summarizes the most recent implementation updates of the new rules into EU Member States´ domestic legislation. Available at: https://assets.kpmg/content/dam/kpmg/xx/pdf/2019/10/etf-415-special-edition-mdr-implementation.pdf. Accessed on: 14 Jan 2020.
[463] DEVEREUX, Michael; FREEDMAN, Judith and VELLA, John. *Review of DOTAS and the tax avoidance landscape (2012)*. Monograph. Oxford University Centre for Business Taxation. Deposited on 18 Mar 2013. Paper 2 – The Disclosure of Tax Avoidance Schemes Regime, p. 14.

In this work point of view, the OECD proposal is largely based on the UK system, named DOTAS. That is why, for instance, that most of the considerations done during the public discussion Draft on BEPS Action 12 referred to the UK, as can be observed in topic 2.5.2. Therefore, the UK system was included as the first example, here.

Portugal was the first civil-law country to introduce MDR, in 2008. All the other countries applying MDR at that time were common-law countries. In order to explore possible differences when introducing MDR in a country adopting one or other system of law, Portugal was included in this analysis. Moreover, according to some data, the Portuguese experience was not really successful, and a few years after the introduction, there was no planning being reported to the tax authorities.

In Ireland, this work observed interesting points related to the application of MDR in a context in which previous research suggested that deterrence is important but not sufficient to explain the level of tax compliance in society. Other factors are shown to be important, particularly the influence of personal norms and the level of trust in the tax administration. This is in accordance with one of my strongest points, searching for efficiency. That is why the Irish experience was included.

Brazil is a big economy with a large and well equipped tax administration. In 2015, soon after the launch of BEPS, the government proposed the introduction of MDR, which was rejected by the Parliament, before producing any results. The proposal, however, was broadly discussed in the tax community, considering peculiar characteristics that I believe are very relevant to take into consideration when applying MDR, for instance: level of trust, complexity of the legal system, capacity to quickly change the law, after receiving the disclosure, if it is the adequate measure, among others.

Furthermore, during the development of this work, on June 25, 2018, MDR entered into force in the European Union. When it presented the proposal of amending the Directive 2011/16/EU (DAC), on 21 June 2017 (2017/0138 CNS)[464], the European Commission expressed the objective of creating a deeper and fairer single market and explained its decision for adopting this kind of legislation based on the criteria of effectiveness, efficiency and coherence. Specifically, the amendment created the obligation for EU-Member States of introducing mandatory disclosure rules on aggressive tax planning, transposing the Directive (DAC6) into domestic law, before December 31, 2019. It constituted a European response to BEPS, precisely to Action 12, in general following other EU initiatives, in the search for transparency in tax matters. Taking into consideration the particularities of the EU context and framework, this Directive is important to illustrate my analysis of MDR.

[464] EUROPEAN UNION (2017). European Commission. Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. COM/2017/0335 final - 2017/0138 (CNS). Brussels, 21 Jun. 2017. Available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/intermediaries-proposal-2017_en.pdf. Accessed on: 08 Feb. 2019.

As mentioned in this work's Introduction, the objective is not to criticize the existing MDR, but to evidence some of their characteristics and the context in which they were proposed or introduced, in order to derive some specific conclusions to optimize the system. That is why I am neither mentioning all the existent aspects and characteristics in a given existing MDR, such as DOTAS or other included system, nor exhausting the analysis of a given experience. Therefore, some aspects I believe are interesting and relevant in connection with the points this work supports as positive or negative, searching for an efficient MDR, are so described and analyzed.

3.1 The Anglo-Saxon and the Continental.

Within the tax administration, Jose Juan Ferrero Lapatza[465] describes the existence of two major Western systems: the Anglo-Saxon and the Continental. He says that at the end of the twentieth century the models grew in similarity, more by the first influencing the second, than in the opposite direction. He observes that the Anglo-Saxon system exerts its influence on the grounds of the model developed and consolidated in the US, which is based on self-assessment, that is, on the tax management by the taxpayers both with regard to the tax returns' information (assets) and with respect to the amount of tax to pay.

The Anglo-Saxon system, considering the bigger possibilities of conflicts, as a result of procedure based on self-assessment, normally is accompanied by the possibility of a system of out-of-court disputes resolution based on the agreement between the tax administration and the taxpayer that prevents litigation from reaching the courts delaying its resolution, to the detriment of both.

The continental system, in turn, uses a different line: the taxpayer declares the relevant facts but the tax administration analyzes them and quantifies the tax payable. In this case, Ferrero Lapatza understands that the possibilities of conflict are smaller, because the tax administration establishes the amount to pay, focusing its further activity on the "discovery" of income that is undeclared. He says that conflicts arise in the continental system when the taxpayer believes that the tax administration has exceeded the limits of the legally reasonable and therefore a chance exists of winning the litigation.

As examples, Ferrero Lapatza mentioned that France, already in 2004, migrated from the continental system to self-assessment, first in relation to the companies; Italy, at that time, was completely migrating, and in Germany, the continental system had been maintained, but there was still a possibility of a "final agreement" as an alternative dispute resolution.

Then, it is possible to envisage a specific goal for MDR. When introducing and developing their disclosure systems, in 1980´s, the main intention in the US was not to obtain early and

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[465] LAPATZA, Jose Juan Ferrero. *Solucion Convencional de Conflictos em el Ambito Tributario: uma Propuesta Concreta*. Direito Tributário Internacional Aplicado, v. II, Coord. Heleno Taveira Torres. São Paulo: Quartier Latin, 2004, p. 294-312.

relevant information about tax planning to close gaps and loopholes in the legislation. The goal was creating a system that could make auditing easier and briefer and prevent or reduce many litigations, in a complex and changing tax environment, as described in topics 2.1.1 and 2.1.2. *"The historic framework of the U.S. income tax has been one of voluntary compliance in which taxpayers self-report their income, deductions, and resulting tax liability. This self-assessment system is based on the assumption that taxpayers will act honestly and in good faith in meeting their tax obligations"*, state Hennig and Sonnier[466]. Therefore, the intention was to show co-operation by the tax administration to help taxpayers pay taxes properly by reducing the cost of audits and the risk of fines. Thus, the tax administration made itself available to clarify how much who "wanted to pay" should pay correctly.

This perception, in line with what is supported in this work, was marked in the Comments received on Public Discussion draft – BEPS Action 12. An institution[467], recognizing that MDR is designed to provide for relevant information on tax planning strategies, states that the rules can be considered as a risk assessment tool which might help to reduce the promotion and use of the identified schemes. They explain that "*risk assessment is a usual practice in common law countries in which off-site audits based on transmitted documents are carried out and it makes sense where on-going dialogue process with tax administration exists: tax auditors have an advisory role. Disclosure is a then way to work in concert and to evaluate the potential risks before they arise*".

Therefore, in a system strictly based on the so-called Continental-European tradition, mandatory disclosure rules will find barriers to working effectively if introduced without a system of exchange for better services and management assistance[468]. In addition, this type of rule does not intend to capture unreported income or deliberate tax evasion. In its origin, the objective is to place the tax administration and that taxpayer who wishes, within the limits of the law, to pay the minimum tax burden, on the same side. These points will be explored in this Chapter.

The next point to consider relies on the differences existing in each country, in the relation between taxpayers and tax intermediaries (especially lawyers). In France, promoters are most of the time - if not always - lawyers or members of regulated professions. If professions are privileged differently by the law, from country to country, it can create discrepancies[469].

The OECD/BEPS Action 12 – Final Report[470], while discussing who has to report the information under mandatory disclosure rules, offers two options: (i) promoters and taxpayers or (ii) promoters or taxpayers. The first option is observed in Canada and in the US; in the second option, the promoter has the primary obligation to disclose and the taxpayer (scheme´s user) has

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[466] HENNIG, Cherie J. and SONNIER, Blaise M. *Schedule UTP: IRS Mandates Disclosure of Uncertain Tax Positions*. The Tax Adviser. Published online: 1 May 2011.
Available at: https://www.thetaxadviser.com/issues/2011/may/hennig-may2011.html. Accessed on: 13 Jan. 2020.
[467] OECD (2015). *Public Discussion Draft*. Cit. MEDEF, p. 221.
[468] Ibid. "*On the contrary, and logically, it does not exist in most civil law countries, such as France, where on-site audits are conducted and data directly collected in the company. Tight connection between accounting and taxation in the French system already allows the administration to get a good knowledge of the operations and transactions carried out in the company. Disclosure would then be assimilated to a request for a tax audit*".
[469] Ibid, p. 222.
[470] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report,* p. 34.

the obligation to disclose only in special circumstances: where the promoter is offshore; where there is no promoter or where the promoter asserts legal professional privilege. The UK, Portugal, Ireland and South Africa used this second option. Portugal, however, decided for not applying it where the promoter asserts legal professional privilege[471].

Specifically about the legal professional privilege, "*as recognized under the UK and the Irish law*"[472], it may act to prevent the promoter from providing the information required. In this circumstance, the obligation falls on the scheme user. Alternatively, the client has the option of waiving any right to legal privilege and, in this case, the obligation remains with the promoter.

The relevant point, however, is the existence of a note[473], which clarifies that except for those cases where the litigation is in actual contemplation, the legal privilege generally only applies to the confidential legal advice but does not extend to documentation prepared in the course of the transaction or to the identity of the parties involved. Moreover, the note states that "legal professional privilege" is "*similar to attorney-client privilege recognized under the US common law*", clarifying that like the attorney privilege, a statutory protection for communications between a taxpayer and a practitioner authorized to practice before the IRS, the privilege generally does not extend to the identity of the taxpayer.

Also in the Comments received on Public Discussion draft – BEPS Action 12[474], many institutions bring up possible implications when applying MDR in civil-law or common-law countries. For instance, it is stressed that examples provided by the OECD are – except Portugal (a civil law country) – all members of the Anglo-Saxon case law tradition, where taxpayers are required to complete a self-assessment tax return and consequently the role of tax advisers and taxpayers in these countries is widely different from the continental-European countries like Germany and France[475]. They continue stating that, in Germany, tax advisers are an independent body of the administration of justice, subject to professional secrecy and, consequently, obliged to fulfill their duties in a narrow range.

Advancing in that point, another institution[476] highlights that "*the OECD discussion draft is largely based on terminology and concepts used in common law countries ('legal professional privilege'), thus ignoring the principles and concepts of continental Europe and civil law countries ('professional secrecy')"*. Commenting the statements in the Final Report quoted above, they punctuate that in continental Europe and civil law countries, *professional secrecy* goes beyond the so-called "litigation privilege" and "legal advice privilege" of common law countries, also covering documentation prepared in the course of a transaction or legal advice, the facts involved on this and the identity of the parties. Therefore, having a broader scope than legal professional privilege.

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[471] See Chapter III, topic 3.3.2.1 - Legal Professional Privilege.
[472] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report,* p. 34.
[473] Ibid, p. 65.
[474] See Chapter II, topic 2.5.2 – Comments received on Public Discussion draft – BEPS Action 12.
[475] OECD (2015). *Public Discussion Draft*. Cit. BUNDESSTEUERBERATERKAMMER, p. 55.
[476] Ibid. Council of Bars and Law Societies of Europe - CCBE, p. 113.

The third issue concerns the role of the principle of legality and the ability to promote quick changes in the law, closing loopholes and "opportunities for tax avoidance"[477], as posed as an objective of MDR. For instance, in Portugal only the Assembly of the Republic can legislate on certain matters. These are matters of absolute reserve of legislative competence, whose scope includes the so-called political constitution, organization and functioning of the Constitutional Court, political parties, State budget, referendum, information of the Republic and the State´s secrets, among others. In other matters that fall within the competence of the Legislative House, the Government may legislate, however through legislative authorization of the Assembly, within the so-called relative reserve of legislative competence. The list includes rights, freedoms and guarantees; the definition of crimes and penalties; the basis of the social security system; the creation of taxes and the tax system[478]. This means that the government cannot promote legislative changes, in tax matters, without submitting them to the Legislative House.

In several countries, the principle of legality plays a very important role in the constitutional structure. It is held as a basic pillar for taxpayer protection against possible State abuse, when exercising taxing powers. Legal provisions and exhaustive descriptions, as strict as possible, are necessary when defining all the aspects of taxable liability hypothesis. This way, although tax administration is informed about a scheme, which requires legislative changes or adjustments, it cannot close the gap as quickly as suggested by the OECD, because only the Legislative branch has the Constitutional role of changing the law.

Moreover, as pointed out in in the Comments received on Public Discussion draft – BEPS Action 12, "*it would require countries to very quickly change a country's laws at the first indication of an undesirable tax scheme even before the courts have had a chance to rule on such a scheme*"[479]. For example, in topic 2.4.1.1[480], this work mentions the conceptualization of "tax advantage", which in the UK, is often defined by the Courts of Justice. The question that arises is how to determine if a given tax planning meets the characteristics of an "undesirable tax planning" because it pushes the limits of the law or deviates from its objectives and purposes and so adjust the law in order to avoid it from continuing to work, before hearing the Courts´ opinion about that specific tax advantage?[481]

In common-law countries like the United Kingdom, which lacks a written Constitution, this can sometimes determine a more frequent exposure to changes in the principles of tax procedures, at least to the extent that they are not formalized into statutes. Moreover, it is important to note that income taxes in the UK are "annual taxes" and must be renewed each year, so that means there is a Finance Bill every year (and sometimes more than one, say if there is an election). This is

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[477] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report,* p. 18, paragraph 14.

[478]PORTUGAL. Assembleia da República. Legislative Competence. Available at: https://www.parlamento.pt/Parlamento. Accessed on: 20 May 2019.

[479] OECD (2015). *Public Discussion Draft*. Cit. BUSINESSEUROPE, p. 62.

[480] Chapter II, topic 2.4.1.1 – Aggressive or Abusive Tax Planning. *"In the context of the legislation for transactions in securities, they explain, the Courts considered the meaning of 'tax advantage' on a number of occasions".*

[481] NOTE. This is a question of practical tax policy making. It may make sense to put the issue beyond doubt, by amending the law, even if the tax administration believes it has an arguable case should the matter go to litigation. Indeed, past transactions may be litigated, if there is enough tax at stake, and legislative action be taken to protect the future. See more discussion involving MDR and "the future" in Chapter IV, topic 4.4.1 - Time aspect.

because income tax was introduced as a “temporary measure” to pay for the Napoleonic wars, which is why it must be renewed by Parliament every year[482].

On the other hand, following the model introduced in 1919 in Germany with the *Reichsabgabenordnung*, several countries of European continental legal tradition include a General Tax Law. The purpose of this measure is to provide for a comprehensive legal framework of the formal and material rules applicable to taxation[483]. General Tax Law operates as gateways to tax law. In their presence, the tax system therefore defines the conditions at which general legal principles and rules established elsewhere within the legal system apply to tax matters.

In the absence of a General Tax Law, the application of general legal principles to tax matters is possible without limitations and subject to the interpretation by the judiciary in the framework of the so-called unitary nature of the legal system. However, some countries do not have a comprehensive General Tax Law but include laws that implement the constitutional principles to tax matters which do not exclude the application of general principles for issues that they do not expressly regulate and to the extent that is compatible with such laws.

These different structures for the tax system influence the result of MDR, insofar as they allow greater or lesser flexibility in the application of constitutional and legal principles and allow greater or lesser possibility of changing tax laws, as this work will demonstrate in the following Chapters.

Interim conclusion.

The OECD proposals were largely based on the experiences of countries adopting common law. This produces some interesting reflections that should be explored.

First, the objectives of some disclosure systems listed by the OECD were not the same as those described in the BEPS. This is pointed out by authors such as Brauner, in the US, and Baker, in the UK. *Second,* if professions are privileged differently by the law in different countries, it could create discrepancies. *Third*, in common-law countries like the United Kingdom, which lacks a written Constitution, this can sometimes determine a more frequent exposure to changes in the principles of law, at least to the extent that they are not formalized into statutes. However, several countries of European continental legal tradition include a General Tax Law. In their presence, the tax system therefore defines the conditions at which general legal principles and rules established elsewhere within the legal system apply to tax matters, so compromising MDR’s goal to quickly promote changes in the law, closing down opportunities for tax avoidance.

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[482] GROSSFELD, Bernhard and BRYCE, James D. *A Brief Comparative History of the Origins of the Income Tax in Great Britain, Germany and the United States*. American Journal of Tax Policy, v. 2, 1983, p. 211-252.

[483] SLIFIRCZYK. Maciej. *Law on Tax Obligations as Part of the General Tax Law Codification*. In Tax Codes Concepts in the Countries of Central and Eastern Europe, ed. by Leonard Etel and Mariusz Poplawski. Temida 2, Faculty of Law, University of Bialystok, Poland, 2016, p. 489-490.

These reflections will guide the following analysis, describing some existing or proposed mandatory disclosure rules, bearing in mind the following questions:

a) Which are the primary objectives when using MDR?
b) What is the treatment to legal professional privileges?
c) How much is necessary to change the law and how quickly could a law be changed, avoiding tax planning from continuing to work?
d) Which are the results of the regime in tax compliance and tax gap?

3.2 The system in the UK.

The United Kingdom (UK) has a program called DOTAS[484], an acronym for *Disclosure of Tax Avoidance Schemes*. The program is about what to do if the taxpayer promotes or uses structures (including any scheme, transaction or series of transactions) that tend to produce benefits when paying taxes or national insurance contributions as compared to the adoption of different and possible ways of action. By itself, the disclosure of a tax planning has no effect on the tax position of the taxpayer who employs it; however, a disclosed tax arrangement may be rendered ineffective by Parliament, possibly with retrospective effect[485].[486]

Philip Baker[487], who analyzed the proposals of BEPS Action 12 comparing it to the DOTAS program, states that this program is fundamentally domestic, concerned almost exclusively with the national tax administration, never aiming specifically to combat international planning nor intending to provide the United Kingdom with knowledge that could be reported to the OECD such as aggressive tax planning. Conversely, the main function of the British system would be to reduce the time between the creation or implementation of the scheme and the tax administration's knowledge about that specific structure. Being aware of the strategy and the fragility or "interpretation" of the legislation, tax administration could react quickly by introducing counter-attack legislation, occasionally with retroactive effect.

According to the DOTAS Guidance (hereinafter "*the Guidance*"), the objectives of the disclosure rules are to obtain early information about tax arrangements and how they work, and

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[484] THE UNITED KINGDOM. HM Revenue and Customs. *DOTAS - Disclosure of tax avoidance schemes: guidance*, p. 1-187. Available at: *https://www.gov.uk/government/publications/disclosure-of-tax-avoidance-schemes-guidance.*

[485] This possibility is acknowledged by HMRC in the Guidance. See Philip BAKER, *Retrospective tax legislation and the European Convention on Human Rights*, British Tax Review, n. 1, 2005, p. 1-9.

[486] THE UNITED KINGDOM. House of Commons Library. *Retrospective taxation*. Published on April 08 2020. Available at: https://commonslibrary.parliament.uk/research-briefings/sn04369/. Accessed on: 19 May 2020. NOTE. In practice, Ministers have used retrospective legislation very sparingly. Retrospective tax legislation imposes or increases a tax charge prior to the legislation being introduced. Although this is a controversial practice, retrospective provisions are often introduced to mitigate the risks to the Exchequer from tax avoidance.

[487] BAKER, Philip. *The BEPS Project: Disclosure of Aggressive Tax Planning Schemes*. Intertax, v. 43, Issue I, The Netherlands: Kluwer Law International BV, 2015.

information about who has used them[488]. In this sense, in this work´s point of view, as will be evidenced, HMRC wants to understand and control the tax planning market in the UK.

The Guidance refers to Income Tax, Corporation Tax, Capital Gains Tax, National Insurance contributions (NICs), Stamp Duty Land Tax (SDLT), Annual Tax on Enveloped Dwellings (ATED), Apprenticeship Levy and Inheritance Tax (IHT). It is long and detailed and provides several "*tests*" in order to check if a scheme is reportable and if a person is a promoter or someone else who has the obligation to disclose a reportable scheme. Unless otherwise stated, this work refers to the "*main regime*", which applies to Income Tax, Corporation Tax and Capital Gains Tax.

The core idea in the DOTAS moves around the concept of "*tax advantage*", which means the result obtained from the application of a given scheme. HMRC recognizes that the design of a scheme will typically consist of a number of elements, for example: a partnership, a loan, partner's contributions, the purchase of assets, structured to deliver the expected tax advantage. As a result, DOTAS qualifies differently persons who must disclose, depending on their participation in the structure.

Keen and Slemrod[489] consider the *tax gap* as an *"indicator of the effectiveness of a revenue administration",* with "*clear advantages over the comparison between cost-revenue ratios*". The HMRC agrees that the *tax gap* is a useful tool for understanding the relative size and nature of non-compliance. Thus, they produce Official Statistics, released annually. In the 2019 edition - Measuring tax gaps[490], which contains the tax gap estimates for 2017-18, it is stated that:

> *Avoidance is exploiting the tax rules to gain a tax advantage that Parliament never intended. It often involves contrived, artificial transactions that serve little or no commercial purpose other than to produce a tax advantage. It involves operating within the letter but not the spirit of the law.*
>
> *Some forms of base erosion and profit shifting (BEPS) are included in the tax gap where they represent tax loss that we can address under UK law. The tax gap does not include BEPS arrangements that cannot be addressed under UK law and that will be tackled multilaterally through the Organization for Economic Co-operation and Development (OECD). The OECD defines BEPS as "tax planning strategies that exploit gaps and mismatches in tax rules to make profits disappear for tax purposes or to shift profits to locations where there is little or no real activity but the taxes are low resulting in little or no overall corporate tax being paid".*
>
> *Tax avoidance is not the same as tax planning. Tax planning involves using tax reliefs for the purpose for which they were intended. For example, claiming tax relief on capital investment, saving in a tax-exempt ISA or saving for retirement by making contributions to a pension scheme are all forms of tax planning.*

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[488] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 16.

[489] KEEN, Michael and SLEMROD, Joel B. *Optimal Tax Administration*. IMF Working Paper n. 17, Issue 8, 2017. Available at: https://ssrn.com/abstract=2924371. Accessed on: 30 Nov 2017.

[490] THE UNITED KINGDOM. HM Revenue and Customs. *Measuring tax gaps 2019 edition*. Tax gap estimates for 2017-18, p. 21. Published on 20 June 2019. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820979/Measuring_tax_gaps_2019_edition.pdf. Accessed on 21 Jan 2020.

Therefore, under the HMRC conceptualization, "*avoidance is exploiting the tax rules to gain a tax advantage that Parliament never intended",* which involves evaluating the *"spirit of the law".* This evaluation is provided by the Courts, in the UK, which, according to Devereux, Freedman and Vella[491] "*now interpret, or, at least, are meant to interpret, statutes purposively*". Moreover, the authors state that using this purposive approach to interpretation, a court interprets the statute in a manner that furthers its purpose. For this reason, there should not be any gap between the way the law is actually interpreted and Parliamentary intention. In many cases covered by DOTAS, therefore, it is not necessary to change the law, but only necessary to obtain a court interpretation to close an avoidance scheme.

First, this topic describes the main aspects of the DOTAS program, in order to call the attention to some positive and negative points, within those characteristics this work understands to be important in achieving an efficient MDR. At the end, this topic intends to provide some information about the application of DOTAS, specially focusing on its view on "avoidance", the influence of the Courts' interpretation, the tax gap measured in the UK and the relation with disclosure initiatives.

Another crucial point is that tax avoidance under DOTAS is not the same as tax planning focused in the OECD/BEPS, which exploit gaps and mismatches in tax rules, involving either mismatches in more than one system of laws and intended tax reliefs. Obviously, the results obtained in DOTAS will not immediately be observed in BEPS Action 12.

3.2.1 A description of arrangements that are required to be disclosed.

In general, under DOTAS a tax arrangement should be disclosed where it will, or might be expected to, enable any person to obtain a tax advantage. Moreover, that tax advantage is, or might be expected to be, the main benefit or one of the main benefits of the arrangement. Finally, the arrangement must fall within any description (the 'hallmarks') prescribed in the relevant regulations[492]. Schemes involving both UK and non-UK based promoters are subject to the disclosure rules but they only apply to the extent that the scheme enables or is expected to enable a tax advantage to be obtained in the UK.

About the hallmarks, some of those are designed to capture new and innovative arrangements. Others are designed to capture areas of specific concern (risk), therefore they may include schemes that are well known or commonly used. For these reasons, it is expected that the range of hallmarks will change over time, so as to respond to perceived changes in the avoidance market place or the effectiveness of a Counter-Avoidance measure[493]. The hallmarks are not mutually exclusive and planning can fit into more than one of them. The fact that there is no

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[491] DEVEREUX, Michael; FREEDMAN, Judith and VELLA, John. *Review of DOTAS and the tax avoidance landscape (2012).* Monograph. Oxford University Centre for Business Taxation. Deposited on 18 Mar 2013. Paper 1 – Tax Avoidance, p. 11.

[492] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 17.

[493] Ibid, p. 35.

hallmark for a certain scheme or planning does not mean that the practice is accepted by the Administration. Likewise, not all practices that are defined would immediately be disapproved of and a case-by-case analysis is required. There are generic hallmarks, such as the confidentiality clause or the premium fee, and specific hallmarks, such as loss schemes and leasing arrangements, described in the Guidance. Next, this work evidences some relevant characteristics in their application.

3.2.1.1 - Confidentiality clause.

The confidentiality clause is applicable if it might reasonably be expected that a promoter would wish to keep any element of the arrangements confidential, which gives rise to the tax advantage (including the way in which the arrangements are structured), from any other promoter and/or from the HMRC. The 2013 Regulations states beyond doubt that there does not need to be an explicit confidentiality agreement between the promoter and the user, before the test is met[494]. Additionally, a reason for doing so is to facilitate repeated or continued use of the same element, or substantially the same element, in the future. In other words, the "*repeated use*" test examines whether the key element that achieves the tax advantage is being kept confidential in order to insert it into further schemes used by either other clients or the same client.

The controversial point here is the expression "*it might reasonably be expected that*", because it is vague. This hypothetical test received many criticisms in the Comments on the OECD´s Draft[495] and it is quite difficult to apply in an international context, targeted by BEPS, because it is relativized to the existence of a given "tax community". The Guidance states that even if certain sectors promoting the scheme would routinely insist on an explicit confidentiality agreement from their clients, HMRC would accept the test is not met if the scheme is reasonably well known in the tax community and this could be evidenced from, for example, articles in the tax press, textbooks or case law. There is, moreover, the point when the promoter is off-shore and so the disclosure obligation shifts to the taxpayer. In this case, the scheme user must evaluate if the promoter would have the interest to keep the scheme or part of it confidential, once the clause cannot be expressed in the contract.

The Guidance also refers to the confidentiality clause in case of in-house developed schemes, where the user himself wants to keep it confidential, for "competitive" reasons from other competitors in the market.

Observing the Guidance, in the application of the confidentiality clause, it is possible to deduce that the main motive of its existence is not because a promoter or user (personal aspect) wants to be out of the HMRC radar, but because the scheme (material aspect) could be used repeatedly, before the HMRC is aware about it. Second, it is interesting that the confidentiality test applies not only in relation to the HMRC, but also in relation to other promoters/taxpayers (competitors). The reasons demonstrate the clear existence of a commercial (business) interest in

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[494] Ibid, p. 36.
[495] See Chapter II, topic 2.5.2.1.2 – Hallmarks.

the planning/scheme, beyond a simple "tax advice", which could exist in the relation between attorney-client.

3.2.1.2 - Premium fee.

A premium fee is a fee chargeable by virtue of any element of the arrangements (including the way in which they are structured) from which arises the expected tax advantage. It is to a significant extent attributable to that tax advantage, or to any extent contingent upon the obtaining of that tax advantage as a matter of law.

This hallmark applies to both promoted and in-house arrangements and like as the confidential clause, it contains a hypothetical test. Thus, it does not depend on a premium fee actually being received and considers whether in the absence of the DOTAS regime a premium fee *could be* obtained. 'Fees' for these purposes are drawn very widely and include amounts paid directly or indirectly to the promoter.

This premium fee hypothetical test also received much criticism from the private sector as mentioned in topic 2.5.2.1.2. Notwithstanding, there is an explanation in the Guidance, stating that they are aware that "*the size of fee charged is not the only reason why a client may choose a particular accounting or law firm*". Thus, is mentioned that there are several circumstances related to localization, number of available advisers acting in the market, urgency, for instance, which could justify the existence of a premium fee, all not related to the potential tax advantage after the implementation of a tax arrangement.[496]

Notwithstanding, the hallmark is no more than a broad attempt to identify tax advice that is innovative and valuable and which the promoter can use to obtain premium fees from a client who is experienced in receiving services of the type being provided. The consideration of a fee as a "premium" is relative and the hallmark works on the assumption that where a promoter is able to market a tax arrangement that is innovative then not all promoters will be in a similar position and potential users will be prepared to pay more to the promoter for that scheme.

3.2.1.3 Standardized tax products.

This hallmark is met if a promoter makes the arrangements available for implementation by more than one person and the main purpose of the arrangements is to enable a person to obtain a tax advantage. It is intended to capture what is often referred to as '*mass marketed schemes*'. As noted before in this work, the problem here is the high number of disclosures that can happen, many of which are not of real interest to the tax administration.

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[496] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 45-46.

3.2.1.4 Loss schemes.

This hallmark only applies where there is a promoter of the arrangements, there is more than one individual expected to implement the tax arrangements and it is intended to capture various loss creation schemes that are typically used by wealthy individuals. The schemes vary considerably in detail but they are normally designed to generate trading losses for wealthy individuals that can then be offset against income tax and capital gains tax liabilities or generate a repayment[497].

What is interesting here is the reference to "wealthy individuals", which can be linked to the OECD work on HNWI, described in topic 2.3.3. This hallmark, thus, focuses on certain individuals who have special characteristics and so it requires a previous knowledge or behavioral analysis conducted by the tax administration. Moreover, it is relevant to note that it is only applicable if there is a promoter and it tries to capture "various loss creation schemes", hence "in-house" schemes are out of reach.

3.2.1.5 Leasing arrangements.

This hallmark applies in any agreement or arrangement under which a person grants another person the right to use an industrial plant or machinery for a period and which in accordance with generally accepted accounting practice falls, or would fall, to be treated as a lease. There are two conditions for its application: the arrangement includes a plant or machinery lease and the lease is not a short-term lease[498]. It applies, moreover, both to promoted and 'in-house' arrangements, but for in-house arrangements it does not apply where the person intended to obtain the tax advantage is a small or medium enterprise.

Interesting here is the use of a "minimum threshold" to define the relevance of the lease. Thus, the hallmark only applies to high value plant or machinery leases. The use of thresholds is possible in several occasions, to define if a scheme is relevant or not. Some critics defend that it can imply that "small avoidance" is acceptable. However, it is not the case and I believe that the use of thresholds, as filters to make a more efficient use of MDR, is possible. Furthermore, it is always important to stress that being reportable or not under MDR does not mean that an arrangement is regarded undesirable avoidance nor that it is accepted and regular from the tax administration point of view.

3.2.1.6 Employment income.

One of the relevant conditions to meet this hallmark is if the main benefit, or one of the main benefits, of the arrangements is that an amount that would otherwise count as employment

[497] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 55
[498] Ibid, p. 62.

income under the legislation is reduced or eliminated[499]. This can involve stock options for employees or the use of trustees with a recommendation that the trustees sell a number of shares to employees at market value.

The hallmark applies to both promoters and those designing notifiable arrangements for use ‘in house’ and in this case the number of “in-house” schemes can be especially large, because the scheme is not so complex to design and to implement. Therefore, unlike other hallmarks for ‘in house’ notifiable arrangements, this hallmark applies to all sizes of business, in other words, even in the absence of the promoters, all users, independently of the business size, have the obligation to disclose.

The employment income hallmark will apply for the purposes of both income tax and National Insurance Contributions. This is another important characteristic because when designing a hallmark, one must think specifically about the relevance and coverage of the whole tax system, encompassing as many taxes as possible, amongst the existent. An efficient hallmark looks at the consequences of a given tax planning in several taxes.

Interesting, moreover, in this hallmark is the ‘*contrived or abnormal step*’ condition[500]. According to the Regulation, that condition is met if the arrangements involve one or more contrived or abnormal steps without which the main benefit would not be obtained. The most crucial point is that the Guidance says terms ‘contrived’ and ‘abnormal’ are not defined in the legislation and so will be applied in their “*normal sense*”. However, the Guidance suggests the use of the same meaning as in section 207 of Finance Act 2013 (general anti-abuse rule: definition of ‘abusive’ tax arrangements). The words ’contrived’ and ’abnormal’, in Part D of the guidance about the General Anti Abuse Rule (GAAR), include a number of examples to illustrate when an arrangement might be treated as abusive in the context of the GAAR.

Therefore, definitions existent or applied in a GAAR can be used as a guidance for MDR. However, it is important to note that this is only a way to check if a scheme matches a hallmark and in this case it will be necessary to provide information on it and not that the planning is necessarily subject to the application and consequences of a GAAR.

3.2.1.7 Financial products.

This hallmark covers arrangements that include one or more specified financial products (a loan, a share, a derivative contract, a stock lending arrangement, an alternative finance arrangement). According to the Guidance, it is intended to catch arrangements using financial products where there is a direct link between the financial product and all or part of the tax advantage the arrangements are expected to enable a person to obtain[501].

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[499] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 65.
[500] Ibid, p. 71.
[501] Ibid, p. 76.

As quoted in Chapter II, topic 2.5.3, the OECD/BEPS Final Report Action 12, in one of the few references to the Korean experience[502], mentions that a similar hallmark is used in that country, targeting *standardized* financial products.

Financial institutions that offer these products are frequently worried about their possible inclusion in MDR as promoter or intermediary, as demonstrated in topic 2.5.2.2. The DOTAS system addresses this by requiring that "*the promoter or other person with a potential duty to notify HMRC about the scheme to consider whether an informed observer, who has studied the arrangements and taken all relevant circumstances into account, could reasonably be expected to conclude that all of the tests are met*"[503]. The Guidance goes on to explain what is meant by an *Informed Observer*:

> *An informed observer is to be contrasted with an 'uninformed observer' but isn't an 'expert' or necessarily a tax practitioner. The informed observer is independent, has all relevant information about the scheme and has sufficient knowledge to understand both the scheme and the relevant statutory context. To sum up, the informed observer is assumed to have the appropriate knowledge and skillset to reach the conclusions that the hallmark requires. While the promoter is not an informed observer for this purpose, the informed observer should be presumed to have access to all of the information that is available to the promoter of the scheme*[504].

Therefore, the financial products hallmark does not apply unless it would be reasonable to expect an informed observer to conclude that one of the main benefits of including a financial product in the arrangements is to give rise to tax advantage.

3.2.1.8 Other taxes covered in the Guidance.

The confidentiality and premium fee hallmarks do not apply to SDLT, ATED. However, in addition to the specific IHT hallmark, the confidentiality and premium fee hallmarks were extended to cover IHT with effect from 23 February 2016.

In relation to SDLT, the reportable arrangements are those that enable an SDLT advantage to be obtained and the advantage is the main benefit of the arrangement. However, the definition of 'arrangements' used for disclosure purposes is wider than the concept of '*linked transactions*' used for SDLT purposes. For SDLT the statistics show arrangements disclosed since the disclosure regime was extended in 2005 to include tax arrangements where the subject matter is non-residential property with a market value of at least £5 million. From April 2010, the regime was further extended to include SDLT arrangements where the subject matter of the arrangements is residential property[505].

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[502] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, p. 41.
[503] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 49.
[504] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 76.
[505] THE UNITED KINGDOM. HM Revenue and Customs. *Disclosures Statistics*. Available at: http://www.hmrc.gov.uk/avoidance/stats.pdf. Accessed on 22 Jan 2020.

In relation to ATED, descriptions are initially drawn very widely. The meaning of *arrangements* is not exhaustively defined in the primary legislation but it includes any scheme, transaction or series of transactions. The definition of *tax advantage* is widely drawn and it involves the avoidance or reduction of a charge to tax, a relief or an increased relief and the deferral of tax. The ATED disclosure admits a series of exclusions.

The IHT hallmark has two conditions, which both have to be met for the arrangement be notifiable. The first is that the main purpose, or one of the main purposes, of the arrangements is to enable a person to obtain an advantage in relation to inheritance tax. Condition 1 focuses on areas of highest risk and greatest concern to HMRC. The second is that the arrangements involve one or more contrived or abnormal steps without which the tax advantage could not be obtained. The IHT hallmark provides that an arrangement is notifiable if it would be reasonable to expect an informed observer, who has studied the arrangements and had regard to all relevant circumstances, to conclude that conditions are met. The '*informed observer*' test is crucial as this provides the context in which the conditions are to be judged.

The Guidance provides an example, in order to clarify the use of the conditions:

> *For example, the use of trusts is not itself contrived or abnormal. A gift into a discretionary trust would not, on its own, meet condition 2. The gift would be an immediately chargeable transfer. If a more complex trust structure was used instead, for example for added protection of the trust assets, the additional complexity might lead an informed observer to conclude that those additional steps are 'contrived or abnormal' in the sense that it was unusual to go to those lengths and levels of complexity. To an 'uninformed observer' the creation of a trust might seem like an unusual and, therefore, abnormal thing to do. Equally the idea of creating a trust and then making a loan to the trustees of that trust might seem contrived to an uninformed observer*[506].

Moreover, there is the *established practice* exception, which determines that arrangements will not prescribe and so will not cease to be notifiable, if they implement a proposal that has been implemented by related arrangements, and are substantially the same as the related arrangements. The concept of *established practice* is not defined in the legislation and therefore takes its ordinary meaning. *Related arrangements*, on the other hand, are defined as arrangements which at the time that the new hallmark entered into force, HMRC had indicated their acceptance. The Guidance says that this provision is designed to remove established IHT planning schemes whose workings are well understood and agreed from the scope of the hallmark. Thus, disclosure focuses only on the innovative schemes, despite the fact that the general application of the hallmark could encompass well-known schemes.

In that objective, *the proposal* is one more concept involved, which is slightly different from arrangement or scheme. According to the Guidance[507], the proposal is the specific combination of elements or steps which are designed to achieve the intended tax advantage and which is being made available to a potential user. While there may be a number of very similar proposals in

[506] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 103.
[507] Ibid, p. 104.

existence which are designed to achieve the same tax advantage, for example different companies offering their own versions of a tax saving scheme, each one would be a separate proposal.

The relevant point here is realizing that a targeted arrangement is a set of steps, which some or all of can be structured in a different way, in order to achieve the same objective. This causes the definition of a hallmark to be based on the result of the full scheme and not on a specific characteristic or transaction[508].

Finally, about the Apprenticeship levy, the tax advantage test is also the starting point. Moreover, arrangements are notifiable if they meet the main benefit test and at least one of the following hallmarks: the confidentiality hallmarks; the premium fee hallmark or the standardized tax products hallmark.

When using the idea of *tax advantage*, to determine whether a scheme is notifiable or not, in this case the Guidance expressly mentions a court decision, which was already mentioned in this work. Thus, the Guidance recognizes the definition of *tax advantage* is very widely drawn, and it can include the avoidance or reduction of a charge to tax, a relief or increased relief from tax and the deferral of tax. As a solution, the Guidance states that "*where the scheme is expected to result in tax being avoided or reduced then the long-standing judgement of Lord Wilberforce in CIR v Parker (1966 AC 141) applies and the existence of a tax advantage is tested on a comparative basis*"[509]. This is a remarkable point because a definition to apply a hallmark is not established in the law, but derived from a Court decision, which in a system applying civil-law could be unacceptable.

3.2.2 A description of the persons required to disclose such arrangements.

In the personal scope, the DOTAS has as a "*promoter*" of a tax planning the person who, in the course of a relevant transaction, is in some way responsible for the scheme´s design, acts as an intermediary between companies or who, with the intention of making the implementation of a planning, organizes or coordinates the action. Both UK-based and foreign-based promoters are subject to disclosure rules to the extent that such tax structures may bring some benefit or advantage over the UK taxation. If the promoter is not domiciled in the country and does not disclose the strategy, their clients will be required to do so. In practice, promoters are accountants, solicitors, banks and financial institutions and small firms of specialist promoters known as "*tax boutiques*"[510].

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[508] See Chapter II – topic 2.4.1.2, where this work stresses "*the fact is that tax planning usually involves the same elements*".

[509] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 116.

[510] DEVEREUX, Michael; FREEDMAN, Judith and VELLA, John. *Review of DOTAS and the tax avoidance landscape (2012).* Monograph. Oxford University Centre for Business Taxation. Deposited on 18 Mar 2013. Paper 2 – The Disclosure of Tax Avoidance Schemes Regime, p. 4.

There is an exemption for *substantially the same* scheme[511]. The consideration is that a promoter is required to disclose the same scheme only once. Minor changes, for example to suit the requirements of different clients, need not be separately disclosed providing the revised proposal remains substantially the same. This is in line with what this work understands*, i. e.,* identifying the scheme is more important than identifying the users. Therefore, MDR is a system focused on material scope. The personal scope exists eminently to identify the number of users and the risk sector, but not the users individually. The Guidance says that the analysis of *substantially the same* is a matter which needs to be considered on each occasion, however, they will "*regard schemes as 'substantially the same' where the only change is a different client including a different company in the same group".*

Furthermore, some rules are applicable where two or more persons are promoters in respect of the same, or substantially the same, scheme, whether or not it is made available to the same person, in order to enable only a single disclosure to be made, rather than a disclosure by each promoter. The rule, however, can be difficult to apply in international tax schemes, which exploits different tax systems and where the scheme could be of different tax administrations´ interest. Because, for instance, the application depends on the scheme´s reference number, which is provided by each tax administration.

In 2010, the Regulation included a new category of person for information power purposes, an *introducer*, to describe persons who advertise notifiable schemes on behalf of a promoter but whose role does not extend to that of a promoter. An *introducer* is defined in the competent regulation[512] as a person who makes a marketing contact in relation to a notifiable scheme. Thus, their role is simply to market the scheme to potential users and put them in touch with a promoter. The Guidance says that introducers will often (but not always) be Independent Financial Advisors. However, if an *introducer* is responsible to any extent for organizing or managing the arrangements implementing a particular scheme, this might mean they become a promoter in relation to that scheme and so become subject to the duties of a promoter. The disclosure rules do not impose any automatic reporting obligations on an introducer, who can, however, be required to provide HMRC with information in response to an information notice.

This final part about the *introducer* is in accordance with what this work proposes as an option to the quarterly information (automatically) of client lists. Therefore, once a relevant (risky) scheme is identified by the tax administration, and a specific administrative procedure is started, it should be possible to require the promoter or the person who provided the information to also provide a list of the clients/users, however, in a specific information notice.

The experience in DOTAS generates new concepts to be applicable to reportable schemes and its exceptions and also different categories of persons who have the obligation to report. The changes, combined, intend to ensure early information about marketed schemes, in a way that a disclosure is triggered as soon as a person takes steps to market the scheme, whether or not it is or could be made available for implementation. This demonstrates, in my view, the intention to

[511] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 119.
[512] Ibid, p. 21, quoting s.307 (1A) FA 2004 and FA 2010.

"control the tax planning market", allowing tax administration to take "marketing positions" to counteract and to avoid a scheme of being spread. Therefore, this is not a legislative issue, but it is in line with "knowing your clients" and trying to attract them.

Another figure is the *scheme designer*, who is a person only involved in the design of a scheme, neither making it available for implementation by others, nor organizing or managing it[513]. In order to establish if a person is a promoter or a scheme designer, it is necessary to apply some tests that depend on the tax planning outcome. One of them is the *benign test* and the Guidance states that: "*where the advice recommends some alteration to 'a taxpayer's affairs', then whether the advice is benign will depend on the expected tax outcomes of any transactions entered into as a result of the advice*"[514].

Moreover, from 2015, the concept of *scheme organizers and managers* was introduced. Such a person is regarded as a promoter including when they are not connected with a person that has marketed or designed the scheme or similar schemes or made such schemes available. They will often be co-promoters of the scheme with the person or persons who designed, marketed or made the scheme available. As a result, the person organizing or managing the scheme is responsible for complying with the DOTAS obligations[515].

Schemes with no promoter, including *in-house* schemes are generally only required to be disclosed where the advantage is intended to be obtained by a business that is not a small or medium-sized enterprise[516]. This means that this kind of scheme is out of the HMRC interest, first because they will not be spread quickly, so the quantity of users is not relevant; second because if they are used by a small or medium-sized businesses, the amount of tax advantage will not be so high. This is an important characteristic, searching for efficiency and proportionality to both the tax administration and the taxpayers.

However, it is necessary to be careful, because this option can lead to a series of undisclosed *be-spoke* schemes, especially involving international transactions. Because an economic group can be considered as "small or medium-sized" by its part in the UK, but be large in total or in another jurisdiction. It is important to note that in this case the parameter established in DOTAS is not the total tax advantage obtained, but the British enterprise.

3.2.2.1 Professional Privilege, scheme number and client lists.

DOTAS focuses on the scheme promoter, as stated. However, the scheme user may need to make the disclosure where the promoter is based outside the UK; where the promoter is a lawyer and legal professional privilege prevents him or her from providing all or part of the prescribed

[513] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 21.
[514] Ibid, p. 22.
[515] Ibid, p. 26.
[516] Ibid, p. 28.

information to HMRC, or where there is no promoter, such as when a person designs and implements their own scheme.

Thus, schemes promoted by lawyers are, within the scope of the norm, treated in the same way as those carried out by other promoters. However, when the consultant is protected by privileges of professional secrecy that prevent him from providing any information, he is exempt from the legal obligation. In this situation, the lawyer's client has the option to waive the privilege of confidentiality, in which case the lawyer must disclose it.

The interesting point, however, is that where a lawyer is *marketing* a scheme, he cannot assert legal privilege. This means that such marketing is subject to the disclosure obligation and the lawyer should disclose the scheme (providing the other conditions are met) to the Counter-Avoidance Directorate normally[517].

Therefore, there is a substantial difference, in line with what this work defends (see topic 2.4.2.2), which is treatment of the lawyer and the legal professional privilege in an objective manner. Thus, it is not the professional qualification and the professional register as a lawyer in the competent association, which guarantees the exemption for disclosure, but the object of the (legal) advice. If the lawyer is only marketing a scheme, acting as any other promoter, lawyer or not, in the market, he is not exempt from disclosure. Going beyond, this work suggests that an analysis of the content of the planning, the main benefit and the outcome is necessary to separate "legal advice" to protect the client´s rights and a scheme designed to obtain tax advantage.

Once a scheme has been disclosed, HMRC will normally issue a scheme reference number to the person who has made the disclosure and any co-promoters. This number must then be sent on to clients and, if appropriate, on again to further clients until the final user of the scheme has received it. The scheme user must report their use of the scheme to HMRC by including the number on their tax return or on form[518].

For instance, scheme reference numbers (SRN) were not issued to SDLT disclosures; therefore, even though HMRC obtained early information of the arrangements disclosed, it did not enable them to identify the arrangements´ users. From April 2010, SRN were issued in respect of disclosable SDLT arrangements applied to new schemes. Furthermore, in general, schemes that have been disclosed once are exempted from being disclosed again. However, in effect from November 2012, certain SDLT schemes (broadly those involving sub-sale arrangements) that were disclosed before April 2010 will have to be disclosed one additional time[519].

The problem was that as many SDLT arrangements are exempted from disclosure, because they are the same as schemes HMRC is already aware of, new users of these arrangements could not be easily identified, making it impossible to control the number of new users and hence the risk posed by the arrangements. Therefore, to enable users of certain arrangements to be

[517] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 27.
[518] Ibid, p. 17.
[519] Ibid, p. 120.

identified, the disclosure rules have been amended within both the client list rules and the rules requiring users to notify HMRC of their use of the arrangements.

The use of "scheme numbers" was introduced after it was demonstrated that they were crucial in the functioning of the system. However, the compliance rate in terms of scheme users recording their SRN as required was estimated at 60%. In a later consultation document, HMRC explained that despite the changes introduced in the Finance Act 2008, two weaknesses remained in the system. It did not provide estimates of the new compliance rate merely noting "*it was estimated that the 2008-2009 improvements to the SRN reporting system would improve SRN reporting to 90%*". This new consultation led to an obligation being imposed on promoters to provide periodic client lists in Finance Act 2010[520].

Therefore, a promoter must also provide HMRC with periodic lists of persons to whom they become liable to issue a scheme reference number. HMRC uses the information from client lists to assess and monitor the level of risk posed by disclosed arrangements.

It is possible to see, as this work supports, that schemes to be disclosed are not those "aggressive", substantively, but also those, which can represent "risk" by the number and the subjective aspects of the users, and DOTAS has been amended to make the risk analysis possible.

However, as discussed in topic 2.5.1.2.1, these client lists can be difficult to apply in many countries, because it depends on how the client-lawyer relationship is considered. The reference number is a good solution, but the point is that users inform the number once a year, in their annual tax returns. So when using the reference number, despite obtaining the information shortly after the implementation or availability of the scheme, the tax administration will only have the identification of users available after processing the annual tax returns. This is a point that must be considered when implementing MDR.

Moreover, the Guidance offers the possibility to people who sometimes wish to provide information to HMRC about potential failures of third parties to comply with the requirements but are unable to do so because of some restriction on their ability to make such disclosures. In such a case, HMRC explains that no duty of confidentiality or other restrictions on disclosure imposed by a promoter or by any other person prevents any person from voluntarily disclosing information or documents, if they have reasonable grounds for suspecting the information or documents will help HMRC determine whether any person has not complied with their obligations under DOTAS[521].

3.2.3 A trigger for the imposition of a disclosure obligation.

The DOTAS program focuses on obtaining early information on tax structures and who designs, offers, markets, intermediates or uses them. Thus, *time of information* is a key point and the tax

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[520] DEVEREUX; FREEDMAN and VELLA (2012). Paper 2. Op. Cit., p. 21.
[521] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 28.

administration needs to be prepared to work and offer a quick response so that any loopholes, weaknesses or shortcomings in the legislation can be closed or corrected.

In most situations where a promoter is required to disclose, the disclosure must be made within 5 days beginning on the day after one of these three trigger events[522]: (i) a firm approach to another person is made with the objective of making the scheme available for implementation by that person or others. (ii) a scheme is made available for implementation by another person. (iii) the promoter becomes aware of a transaction forming part of the scheme. When there is no promoter, such as when a person designs and implements his own scheme, disclosure must be made within 30 days of the scheme being implemented. The users must also disclose schemes marketed by offshore promoters.

Where the user is required to make the disclosure, the due date is by reference to the first transaction forming part of the scheme. However, the HMRC recognizes that concerns have arisen, in particular, over a UK tax advantage arising as a main benefit following a controlled foreign company entering into local tax planning arrangements and other especial circumstances. In such a case, the user is required to make disclosure as soon as he is aware, presenting "*a reasonable excuse for not disclosing earlier*" and he will not be liable to a penalty. Notwithstanding, in the Comments received on Public Discussion draft – BEPS Action 12, an institution said that "*significant work may be needed by in-house teams to confirm whether a disclosure has to be made*"[523].

Thus, DOTAS also applies the concepts of "implementation" and "make available" as a trigger to the disclosure obligation[524]. The Guidance explains that the scheme will be capable of implementation in practice only when the elements of the design have been put into place *on the ground*. Thus, for example, if the design includes a loan, it will be capable of implementation only if and when an actual loan provider is in place and funds are made available. A scheme can be made available by more than one person such as by the scheme designer or those who provide the scheme under a licensing agreement with the designer. Each such person may be a promoter for disclosure purposes and have obligations, as described in the Guidance.

Moreover, the *makes a firm approach* test exists. This test was introduced in 2010, creating a new trigger event, which has to be considered before the *makes a scheme available for implementation* test, as the Guidance explains[525], in the intention to trigger disclosure of a marketed scheme early in the marketing process. The introduction of this test was a result of the HMRC observation on the promoters' behavior, which tried to delay the disclosure.

When new hallmarks are introduced or existing hallmarks are revised arrangements which have already been marketed or made available may need to be disclosed. This means a possible retroactive effect, for instance the case of SDLT mentioned in the previous topic.

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[522] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 17. Note: 5 days is a very short term and was suggested in the first Draft to EU-Directive, after being extended to 30 days term, as it will be mentioned in the related topic 3.6.4.3.
[523] OECD (2015). *Comments received on Public Discussion draft*, CIOT, p. 73.
[524] See Chapter II, topic 2.5.3.3 – A trigger for the imposition of a disclosure obligation.
[525] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 121.

3.2.4 Appropriate penalties or other mechanisms to address non-compliance.

The British Tax Administration has an anti-avoidance board, which works closely with compliance-teams to check if schemes or tax planning have been properly disclosed. The legislation provides that the planning must be informed on a real basis and there is no provision for disclosure only as a precaution.

The Guidance states, "*a penalty regime is necessary to deter non-compliant behaviors*"[526]. The information must be provided by a specified form and manner and there are penalties for not complying with the form. In addition, taxpayers may face penalties if information is not provided at the correct time. Moreover, according to Devereux, Freedman and Vella[527], HMRC has a number of powers to be employed when they believe that a disclosable scheme has not been disclosed or only partially disclosed. They include the power to apply to the tribunal asking for a scheme to be declared notifiable.

Therefore, a scheme becomes notifiable if it not only falls within the material scope (hallmarks) but also if HMRC has reasonable grounds to suspect that it does. In such a case, a Tribunal will make an order if it is satisfied that HMRC has taken all reasonable steps to establish whether the scheme is notifiable and they have reasonable grounds for suspecting that.

The law provides the limits to the penalties for failure to comply with DOTAS obligation. However, its application is not immediate and the procedure is that HMRC will apply to a Tribunal to determine a penalty on a specified person (or persons) for breach of a specified DOTAS obligation. Therefore, after investigating a possible compliance failure and deciding whether a person had a *reasonable excuse* for not doing what they were otherwise required to do, HMRC needs to take the case before a Tribunal, to establish the penalty, in a hearing[528].

When making this decision the Tribunal will take into account all relevant considerations, including particularly the aim of deterring that person or other persons from future compliance failures of a similar nature. The amount of the penalty is fixed on a daily basis. This is quite different from several countries where the tax administration, based on the principle of legitimacy of public acts, a generally accepted assumption that administration acts are in accordance to the law, can impose penalties and the subject has a right to defense, administrative or judicially[529].

The DOTAS guidance accepts several conditions as '*reasonable excuse',* especially when related to non-compliance. HMRC tries to establish an objectiveness to "reasonable" by using examples and descriptions but in the end, case-law, which indicates that what is reasonable in

[526] Ibid, p. 175.
[527] DEVEREUX, FREEDMAN and VELLA (2012), Paper 2, Op. Cit., p. 21. Finance Act 2007, section 108. See Rebecca Bland, "Finance Act notes: disclosure of tax avoidance schemes – section 108" (2007) *British Tax Review* 584 and Finance Act 2004 s. 306 A.
[528] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 176.
[529] ATKINSON, Christopher L. *Legitimacy in Public Administration*. Global Encyclopedia of Public Administration, Public Policy, and Governance. Switzerland: Springer International Publishing AG, 2017, p.1-7.

such circumstances depends upon the particular facts, provide the parameters[530]. This is another interesting point because depends on how a country observe principle of equality and if the principle is set in written codes or not. The fact is that a public policy, in the DOTAS case, can lead to special treatments, depending on special circumstances and particular facts, even though the object - non-compliance with a general obligation - is the same[531].

If the intention of a given MDR is to improve the flow of information between tax administration and taxpayers to avoid litigation arising from audits, this need to go to the judiciary to set fines for non-compliance is controversial. On the other hand, it should be noted that, as the fine is not fixed automatically and unilaterally by the tax administration, the taxpayer´s level of trust in the regime might increase, as there will always be a room for discussion in case of non-compliance[532].

Another possibility to apply DOTAS with deterrent effect are the Accelerated payment (AP) notices, in order to require those involved in avoidance schemes within the disclosure rules, whose arrangements have been counteracted under the general anti-abuse rule (GAAR), or who have received a follower notice, to pay any disputed tax upfront. Previously they would only have been required to do so once a case had been settled in HMRC's favor. A follower notice is issued to those individuals and businesses engaged in tax avoidance that HMRC believes has in effect been shown to fail by a court ruling in another party's litigation. AP notices and follower notices can only be issued if certain conditions are met and there is an open enquiry or appeal. AP notices do not resolve the dispute, they merely allow the disputed amount to be transferred to the Exchequer while the dispute plays out; follower notices are designed to accelerate resolution of the dispute. For the most part, these routes therefore bring forward revenue that HMRC would have received eventually. To the Tax Administration, this timing effect often meant that the yield from the measures brought revenue from beyond the 5-year scorecard period into it[533].

On the other hand, since 2009, Governments have announced numerous measures where HMRC has entered into arrangements to bring in revenue from the overseas assets of UK taxpayers. These have had two main features: facilities that provide taxpayers the opportunity to disclose their information to HMRC voluntarily and to settle their tax affairs on relatively favorable terms; and information exchange agreements between the UK Government and countries where offshore accounts are located, with the intention that the loss of anonymity would prompt taxpayers to regularize their affairs as well providing information to enhance HMRC compliance activity and yield[534]. That is why this work defends the same characteristics to MDR: offering

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[530] DOTAS - *Disclosure of tax avoidance schemes: guidance*. Cit., p. 180.

[531] FILGUEIRAS, Fernando de Barros. *Political Injustice and Public Policy*. Global Encyclopedia of Public Administration, Public Policy, and Governance. Switzerland: Springer International Publishing AG, 2016, p 1-4.

[532] See Chapter II, topic 2.5.2.4 - Comments received on Public Discussion draft. BEPS Action 12.

[533] THE UNITED KINGDOM (2017). Office for Budget Responsibility. Working paper n.11. *Evaluation of HMRC anti-avoidance and operational measures*. September 2017, p. 20-21. Available at: https://obr.uk/docs/dlm_uploads/WP-No.11-Evaluation-of-HMRC-anti-avoidance-and-operational-measures.pdf. Accessed on 30 Jan 2020. Accelerated payments: extension to disclosed tax avoidance schemes and the GAAR from Budget 2014: this allowed HMRC to issue AP notices to all users of DOTAS arrangements from Finance Act 2004 onwards and to users of any schemes under the GAAR.

[534] Ibid, p. 15.

advantages and favorable treatments to people who cooperatively make disclosures, as an incentive; and the possibility to exchange the disclosed information, as a deterrence.

3.2.5 A description of what information is required to be reported.

The Guidance is about arrangements (including any scheme, transaction or series of transactions) that will or are intended to provide the user with a tax or National Insurance contribution advantage when compared to adopting a different course of action. It includes arrangements relating to income tax, corporation tax, capital gains tax, National Insurance contributions, SDLT, ATED, IHT and the apprenticeship levy. The rules for disclosing hallmarked National Insurance contributions schemes mirror those that apply to income tax hallmarked schemes with some minor differences.

DOTAS is a regime in expansion. Certain IHT arrangements were brought into the regime with effect from April 2011, extending it to require disclosure of arrangements that aim to avoid or reduce that tax. From November 2012, the descriptions of SDLT arrangements required to be disclosed were extended. The regime was also extended, with effect from November 2013, to require the disclosure of certain arrangements where the aim was to reduce or avoid the ATED. Moreover, the regime was extended with effect from December 2017 to require the disclosure of certain arrangements, which aim to reduce or avoid the apprenticeship levy. Guidance on the rules for disclosing arrangements relating to VAT can be found in a specific provision[535].

Briefly, the regulations prescribe that the following information must be provided:

a) name and address of a promoter making the disclosure or a client making a disclosure where the promoter is a lawyer, or making an 'in-house' disclosure where there is no promoter;
b) the promoter's name and address if the client is disclosing an arrangement with an off-shore promoter;
c) details of the provision, which makes the scheme disclosable and on which that tax advantage is based;
d) a summary of the proposal/arrangements and the name by which it/they are known;
e) information explaining the elements and how the expected tax advantage arises;

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[535] THE UNITED KINGDOM. HM Revenue and Customs. *VAT Notice 700/8: disclosure of VAT avoidance schemes.* Available at: https://www.gov.uk/guidance/disclosure-of-vat-avoidance-schemes-vat-notice-7008. Accessed on 27 Jan 2020.

For hallmarked schemes, the relevant hallmark should be indicated. For some schemes, more than one hallmark may apply, and in this case the preferable option is to indicate the main applicable hallmark.

Since March 2015, HMRC can publish information about schemes which have been notified and to which it has allocated a scheme reference number from that date. It can also publish information about the promoters of those schemes. The information may be published in any manner HMRC thinks appropriate and this includes: a) the name and address of the promoter; b) any of the information prescribed for the purposes of making the disclosure; c) a summary of the scheme and any name or names it is known by, d) the statutory provisions on which the tax advantage is based; e) any ruling of a court or tribunal relating to the scheme or promoter and f) any other information which HMRC considers it appropriate to publish in order to identify the scheme or a promoter of it.

No information identifying any persons who enter into the scheme may be published, however where the promoter also entered into the scheme, this does not prevent HMRC of publishing information about the promoter in relation to its activities as a promoter. In this case, HMRC must tell a person in the purpose of giving them a reasonable opportunity to make representations in contrary.

Particularly about this point, my opinion is that it constitutes an excess that breaches privacy and confidentiality[536]. As it will be seen, Portugal adopted a different line of action, publishing disclosable information, however not identifying the involved persons. The point here is to clarify a tax administration´s opinion of a scheme and their interpretation of the provision on which it relies. Therefore, in this sense, I do not see any reason to make the name of the promoter or the user public, when he is making the disclosure. In Ireland, however, this is applied to create a social discomfort and increase the deterrent effect[537].

3.2.6 The impact of the DOTAS regime on compliance.

It is important to start this analysis using two quotations:

> 1 – “*The UK Disclosure of Tax Avoidance Schemes (DOTAS) has provided early information about tax avoidance schemes, allowing the UK Government, where appropriate, to introduce legislation closing them down before significant tax was lost. 925 of the 2.366 avoidance schemes disclosed up to 2013 have been closed by legislation (one legislative change can close more than one scheme: over 200 stamp duty land tax schemes were closed by just 3 legislative changes). Schemes can also*

[536] NOTE. Although is only the fact that the promoter offers the scheme in question that is made public and, as by definition, they will have made that known to attract users, there is a breach of a right to privacy and confidentiality if the scheme is regarded as a trade (professional) secrecy. See Chapter IV, topic 4.5.1 – Confidentiality, privacy and MDR.

[537] See Chapter III, topic 3.4.6 – The impact of the regime on compliance.

be shut down very quickly. For example, on one occasion, a scheme was closed down within a week of the disclosure, protecting millions in tax revenue"[538].

2 – "The Exchequer Secretary has stated that DOTAS closed off £12.5 billion in avoidance opportunities"[539].

The Oxford University Centre for Business Taxation (OUCBT) provided an academic review of DOTAS and the tax avoidance landscape in the UK in 2012[540]. Their paper analyses the DOTAS regime by examining trends in revenue and in the tax gap. However, the authors concluded that it is unlikely that the impact of DOTAS could be isolated sufficiently to put any reliable figure on this impact.

This work intends to demonstrate that this is a problem when evaluating the impact of any MDR, using DOTAS as example and the OUCBT study as support. First, when analyzing the success or failure of a MDR, neither the number of schemes disclosed over the time nor the number of legislative changes promoted as a result of the information received are good measures. For instance, a high number of disclosures could be indicative of a number of issues. It could indicate that the regime is over-inclusive catching a considerable amount of legitimate tax planning; the scope of the regime might be uncertain or the penalties might be too high thus leading to many unnecessary disclosures driven by caution[541]. It could, also, indicate that promoters and taxpayers are willfully disclosing more than they should so as to overload the revenue authority thus rendering the job of identifying avoidance more difficult[542]. Moreover, the OUCBT study, after taking interviews with practitioners, promoters and taxpayers, realized that "*whilst some react by greater compliance, others consider it a challenge to defeat the new rules. There are known advisers who work in this space"*[543]. Therefore, if not correct and carefully applied, MDR can produce a spurring effect in the tax planning activity.

Within the conceptualization applied in DOTAS, which focuses on tax advantages and defines avoidance as *"exploiting the tax rules to gain a tax advantage that Parliament never intended",* the OUCBT study assumes that avoidance is legal, what means that it involves no criminal activity. Moreover, it is assumed that no failure to make a required disclosure occurs. They then classify two kinds of avoidance schemes.

The "*ineffective avoidance*" is a scheme that is not effective in achieving its objective of reducing tax liability, because (provided the activity is discovered and action is taken) "*the legislation enacted and treaties agreed as construed by the courts will be effective to prevent the avoidance scheme from saving tax and so ultimately there will be no successful avoidance*"[544]. Counteraction may also require international co-operation and exchange of information, but the

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[538] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*, p. 25.
[539] DEVEREUX, FREEDMAN and VELLA (2012), Paper 2, Op. Cit., p. 7. *David Gauke MP. "Where next for tackling avoidance", speech by Exchequer Secretary to the Treasury on 23 July 2012.*
[540] DEVEREUX, FREEDMAN and VELLA (2012), Paper 2, Op. Cit., p. 1.
[541] See Chapter III, topic 3.6.8.6 – The Polish proposal – The impact of the regime on compliance.
[542] DEVEREUX, FREEDMAN and VELLA (2012), Paper 2, Op. Cit., p. 19.
[543] Ibid, p. 3.
[544] DEVEREUX, FREEDMAN and VELLA (2012), Paper 1, Op. Cit., p. 3-4.

attitude of the Courts is important to the effectiveness of the legislation and their aim is to construe legislation in a way that gives effect to "parliamentary intention", according to the authors mentioned. Therefore, where there is a pure drafting defect in the legislation, this can often be dealt with by the Courts construing the legislation purposively.

This depends, however, on how much the government trusts in the Courts decisions to tackle avoidance and how relevant are the Courts´ decisions in a given legal environment. If the Courts really have a structuring power in the legal system or if they constrain themselves, especially in tax matters, to the limits established in the literalness of the law. For instance, as Juárez and Hamzaoui[545] warn, "*it has been mentioned that the main weapon that a government has against tax avoidance is to introduce amending legislation to prevent avoidance schemes being used in the future, specifically taking into account that it can be dangerous for a government to rely on courts to interpret provisions so as to prevent schemes*".

The "*effective avoidance*", on the other hand, according to the OUCBT study, may arise due to a defect in the legislation or other failure in the way the legislation is written, so that it cannot be corrected by purposive interpretation but only through legislative intervention. This is not necessarily a policy failure as such, but there may be a difficulty in applying purposive interpretation, particularly where the policy behind the legislation is not discernible, as is too often the case with technical tax legislation[546]. It demands much more time and the "*response to particular schemes can often lead to complexity and length of legislation and piecemeal rather than well designed reforms. The increased complexity may even create new opportunities for avoidance as advisers can use the carefully drafted provisions to achieve a result other than that intended*"[547]. As a conclusion, not all schemes defined as "effective avoidance" in MDR context, should lead to changes in the legislation, and this is a policy decision.

In this case, the information disclosed in MDR serves to prepare the tax administration in evaluating the convenience and opportunity to challenge the avoidance scheme under the existent law, by proceeding to litigation, or propose the competent legislative change. In such scenario, any country applying MDR must pay careful attention to the courts inclination in applying "purposive interpretation" or not to tax legislation. That is why the number of legislative changes promoted after receiving the information is not a precise parameter in measuring the success of MDR.

The OUCBT study points out two DOTAS objectives: (i) the information objective and (ii) the deterrence objective. The first objective ensures that a potentially offensive scheme does not go completely undetected, that tax administration becomes aware of schemes as early as possible thus allowing them to react expeditiously and facilitates information aggregation thus making it easier for tax administration to determine how many schemes an individual taxpayer is undertaking and also how widespread a scheme is. This helps inform tax administration´s decision as to how to respond to the scheme. The second objective might deter taxpayers, on one side, if they believe

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[545] OGAZON JUÁREZ, Lydia G. and HAMZAOUI, Ridha. *Common Strategies against Tax Avoidance: A Global Overview*. International Tax Structures in the BEPS Era: An analysis of Anti-Abuse Measures, v. 2, Amsterdam: IBFD, 2015, p. 17.
[546] DEVEREUX, FREEDMAN and VELLA (2012), Paper 1, Op. Cit., p. 5-6.
[547] DEVEREUX, FREEDMAN and VELLA (2012), Paper 2, Op. Cit., p. 11.

the tax administration will shut down the scheme legislatively before it is implemented or if they believe it will negatively affect their risk profile. On the other hand, promoters might be deterred from creating and marketing schemes, because they know that they will have a short shelf life and will not be as lucrative as they once were.

HMRC produces publicly available data on the number of disclosures made. The OUCBT study used tables published by HMRC, named "*Disclosures Statistics*", in the period from 1 August 2004 to 31 March 2012. After that, during this research, it was possible to find available tables only up to 30 September 2014[548]. Additionally, in the *2018-19 Annual Report and Accounts* it is informed that in 2018-19, 16 schemes (15 in 2017-18) were disclosed under DOTAS regime and the tax administration litigated five cases (one in 2017-18) for failure of promoters and others to disclose a scheme[549].

Financial Year			Financial	Employment	Main Regime	(NI Hallmark)	IHT	SDLT	ATED
1 August 2004	31 March 2005		340	163	0	(0)	0	0	0
1 April 2005	31 March 2006	a	94	28	0	(0)	0	485	0
1 April 2006	31 March 2007		29	7	125	(0)	0	185	0
1 April 2007	31 March 2008	**	2	0	205	(23 N)	0	70	0
1 April 2008	31 March 2009	***	0	0	102	(Fewer than 5 N)	0	28	0
1 April 2009	31 March 2010		0	0	116	(6 N)	0	61	0
1 April 2010	31 March 2011		0	0	97	(11 N)	0	21	0
1 April 2011	31 March 2012	***	0	0	116	(17 N)	Fewer than 5	13	0
1 April 2012	31 March 2013	***	0	0	59	(7 N)	Fewer than 5	18	0
1 April 2013	31 March 2014	***	0	0	28	(7 N)	Fewer than 5	10	Fewer than 5
1 April 2014	30 September 2014	*** p	0	0	Fewer than 5	0	0	Fewer than 5	0

Figure 1[550] - Data for the period from 1 August 2004 to 30 September 2014 - DIRECT TAX DISCLOSURES

[548] THE UNITED KINGDOM. HM Revenue and Customs. *Disclosures Statistics*. Available at: http://www.hmrc.gov.uk/avoidance/stats.pdf. Accessed on 22 Jan 2020.

[549] THE UNITED KINGDOM. HM Revenue and Customs. *2018-19 Annual Report and Accounts*, p. 113. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/824652/HMRC_Annual_Report_and_Accounts_2018-19__web_.pdf. Accessed on 31 Jan 2020.

[550] THE UNITED KINGDOM. HM Revenue and Customs. *Disclosures Statistics*. Cit. NOTES: 1) Data is final unless otherwise stated. Provisional status is required as amendments and corrections to the base data may occur. 2) From 1 August 2006, the 'financial' and 'employment' categories have been replaced by 'hallmark' schemes. 3) Dates refer to the date that the disclosure was received by HMRC. 4) Where the total number of disclosures received within a specific category in a 6 month period is from 1 to 4 inclusive, the specific number is no longer indicated (now shown as 'Fewer than 5').This information has previously been published but, having revisited the position, it has been decided that this data should no longer be available. This complies with the Office of National Statistics nationally agreed standards on data confidentiality. 5) Data was extracted from the HMRC database as at 1 October 2014.

			Listed	Hallmark
Financial Year				
1 August 2004	31 March 2005		341	339
1 April 2005	31 March 2006		47	44
1 April 2006	31 March 2007		40	25
1 April 2007	31 March 2008		24	5
1 April 2008	31 March 2009		10	6
1 April 2009	31 March 2010		7	5
1 April 2010	31 March 2011		8	5
1 April 2011	31 March 2012	*	Fewer than 5	Fewer than 5
1 April 2012	31 March 2013	*	Fewer than 5	5
1 April 2013	31 March 2014	*	Fewer than 5	Fewer than 5
1 April 2014	30 September 2014	* p	0	Fewer than 5

Figure 2[551] - Data for the period from 1 August 2004 to 30 September 2014 - VAT DISCLOSURES

In their study, Devereux, Freedman and Vella[552] observed that the number of disclosures made has fallen steadily since the DOTAS implementation; however, this need not necessarily be due to its deterrent effect:

> *From a high of 607 in the financial year 1 April 2005 to 31 March 2006, the number of direct tax disclosures has fallen to 131 in the year 1 April 2011 to 31 March 2012. In the past 4 years[553] the number of disclosures was 130, 177, 118 and 131. This drop in disclosures could be due to a reduction in avoidance schemes. It could also be due to a correction after an initial period of cautious over-reporting or to avoidance of the regime. The frequency with which the regime has been altered to make it more robust against avoidance necessarily suggests that avoidance is part of the explanation.*

As of July 2012, it has been stated that DOTAS informed over 60 measures in Finance Acts and "closed off" around £12.5 billion in avoidance opportunities, as was quoted here, at the beginning. However, Devereux, Freedman and Vella cast doubts about the estimates in terms of revenue saved as a measure of the DOTAS success. Their argument is that the difference between estimates of tax lost through avoidance before and after the introduction of the regime cannot be taken as a measure of tax collected as a result of the regime, since other changes took place during the period, then challenging HMRC to demonstrate that they were correct[554]. Additionally, if

[551] Ibid. NOTES: 1) Data is final unless otherwise stated. Provisional status is required as amendments and corrections to the base data may occur. 2) Dates refer to the date that the disclosure was received by HMRC. 3) The figures for hallmarks do not include voluntary disclosures, as they do not relate to the notification of a distinct arrangement. However, there have been fewer than 100 such disclosures since the introduction of the rules. 4) Where the total number of disclosures received within a specific category in a 6 month period is from 1 to 4 inclusive, the specific number is no longer indicated (now shown as 'Fewer than 5').This information has previously been published but, having revisited the position, it has been decided that this data should no longer be available. This complies with the Office of National Statistics nationally agreed standards on data confidentiality. 5) Data was extracted from the HMRC database as at 1 October 2014.

[552] DEVEREUX, FREEDMAN and VELLA (2012), Paper 2, Op. Cit., p. 25.

[553] NOTE. Reference to 2012.

[554] DEVEREUX, FREEDMAN and VELLA (2012), Paper 2, Op. Cit., p. 21. *Finance Act 2010 introduced a package of measures, including an enhanced penalty regime, which had been considered but rejected in earlier consultations.*

prospective legislation is introduced after a scheme is implemented, the legislative intervention would lead to tax being collected which might otherwise have been avoided, however one cannot estimate this amount with any certainty.

Another problem with these estimates is that the information collected through DOTAS can be used to improve the allocation of resources according to risk. The risk allocation process could also provide incentives to taxpayers to reduce the aggressiveness of their planning and thus enjoy the benefits of being low risk. The tax collected as a result of this administrative intervention cannot easily be estimated.

The Office for Budget Responsibility (OBR) was created in 2010 to provide independent and authoritative analysis of the UK's public finances. To that end, they produced two 5-year-ahead forecasts for the economy and the public finances each year, alongside the Budget and other fiscal statements. In each of these forecasts, they need to estimate and explain the likely fiscal impact of any newly announced tax and spending policies[555].

The OBR states that Governments have introduced over a hundred anti-avoidance and operational measures since its formation. They consider the prevalence and increasing reliance on the relatively uncertain revenue from anti-avoidance and operational measures to be a potential source of fiscal risk when compared to the relatively certain costs of tax cuts. They also estimate that the tax revenue from anti-avoidance measures tend to be subject to high levels of uncertainty since they target specific subsets of taxpayers who are already actively changing their behavior to lower their tax liabilities. As a result, there is usually relatively high behavioral uncertainty. Similarly, since the measures are directed at uncollected tax, there is usually less reliable data available to inform the costing[556].

Tax gap analysis, its application and its continuing development is a priority for HMRC's Knowledge, Analysis and Intelligence (KAI) directorate[557] and reports with a tax gap estimates per behavior are published annually, since 2009. This work does not attempt to explain HMRC's tax gap methodology, but it is worth reflecting on the fact that the aim of the analysis is a robust assessment of tax lost through noncompliance. HMRC's strategic approach to this aim is a customer-centric one, based on an analysis of taxpayers segments. The challenge for analysts in this approach is to integrate a tax gap analysis based on observation and statistical inference of behaviors with a customer segmentation analysis based largely on attitudinal surveys[558]. HMRC is increasingly using discrete compliance events such as targeted campaigns or task forces to improve

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The Impact Assessment for this package of measures estimated the increased yield from improved detection to be in the region of £25 m for 2010/11 and £50 m per year thereafter. It also estimated that the measures "will protect revenue in the region of £200m per year".

[555] THE UNITED KINGDOM (2017). Office for Budget Responsibility. Working paper n.11. *Evaluation of HMRC anti-avoidance and operational measures*. September 2017, p. 1. Available at: https://obr.uk/docs/dlm_uploads/WP-No.11-Evaluation-of-HMRC-anti-avoidance-and-operational-measures.pdf. Accessed on 30 Jan 2020.

[556] Ibid, p. 2 and p. 9.

[557] THE UNITED KINGDOM. HM Revenue and Customs. *Applied Tax Gap Analysis in the United Kingdom: Its use in tax administration, and future research,* THACKRAY, Mick, p. 91-99. Available: https://www.irs.gov/pub/irs-soi/12resconapptaxgap.pdf. Accessed on: 28 Feb 2020.

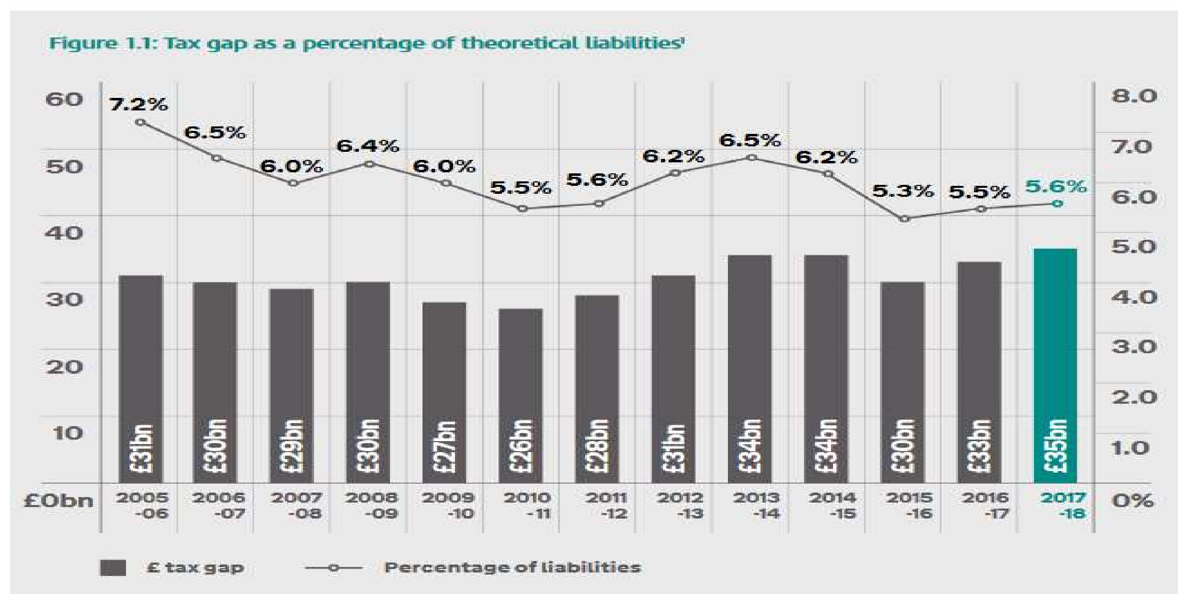
[558] Ibid, p. 94.

compliance in specific areas such as particular industrial sectors or debt collection. Currently, HMRC's tax gap analysis is built up from separate estimates for each of the main tax regimes. These estimates are for total losses, and can be broken down into some of the larger behavioral components for some of the taxes[559].

Therefore, in this work´s point of view, the optimal way to measure the efficiency of a MDR is checking the tax gaps, over the time. Additionally, MDR can be applied as a tool to collect important data to improve the risk analysis and behavioral analysis, increasing the accuracy of the tax gap measurement. Thus, it is a circular productivity.

In the HMRC report "*Measuring tax gaps 2019 edition*"[560], there are the tax gap estimates for 2017-18 and other interesting information. First, it is defined that *"the tax gap is the difference between the amount of tax that should, in theory, be paid to HMRC, and what is actually paid".* Following, it is stated that the tax gap analysis helps them to understand the reasons for losses in the tax system, and those reasons include making simple errors in calculating the tax; negligence when submitting returns; legal interpretation; evasion; avoidance and criminal attacks.

Observing the period after the introduction of DOTAS, in 2004, and in accordance with HMRC, there has been a reduction in the percentage tax gap over the past 13 years from 7.2% in 2005-06 to 5.6% in 2017-18. It is not possible to define precisely that the mandatory disclosure was more or less responsible for this reduction, but it is possible to deal with the data[561], in order to support this work´s suggestion to apply MDR.



559 Ibid, p. 97.

560 THE UNITED KINGDOM (2019). HM Revenue and Customs. *Measuring tax gaps 2019 edition*. Tax gap estimates for 2017-18. Published on 20 June 2019. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/820979/Measuring_tax_gaps_2019_edition.pdf. Accessed on 21 Jan 2020.

561 NOTE. For instance, the tax gap and the savings attributed to measures specifically resulting from DOTAS disclosures could be seen as complementary measures: reduction in the tax gap attributed to avoidance supports the attribution of yield to these measures.

Figure 3[562]

The fall in the overall percentage tax gap between 2013-14 and 2017-18 is mainly driven by the fall in income tax, National Insurance Contributions and Capital Gains Tax and excise duties. There has been a long-term reduction in tax gaps for both excise duties and Corporation Tax. Moreover, two components, one covering income tax, National Insurance Contributions and Capital Gains Tax and the other VAT, account for 73% of the tax gap. This measurement is important to define, when applying MDR, taxes and hallmarks in its focus.

Figure 4[563]

The avoidance tax gap is estimated at £1.8 billion for 2017-18. This estimate reflects the laws that were in place at the time and does not include any subsequent changes to the tax law to prevent further use of avoidance. HMRC also provides an estimate of other taxpayer behaviors attributed to the tax gap for 2017-18. These estimates give a broad indication of behaviors and are calculated using assumptions and judgment. '*Failure to take reasonable care*' and '*Legal interpretation*' account for the largest proportions of the tax gap. Tax Avoidance, however, represents only 5% of the total tax gap.

[562] THE UNITED KINGDOM. HM Revenue and Customs. *Measuring tax gaps 2019 edition*. Tax gap estimates for 2017-18, Cit., p. 6. Note: Figure 3 shows the value of the tax gap alongside the percentage tax gap, which is calculated as a percentage of the amount of tax that should, in theory, be paid to HMRC, and what is actually paid.

[563] THE UNITED KINGDOM. HM Revenue and Customs. *Measuring tax gaps 2019 edition*. Tax gap estimates for 2017-18, Cit., p. 7. Note: Figure 4 shows how the tax gap is composed of different taxes and that two components, one covering income tax, National Insurance Contributions and Capital Gains Tax (IT, NICs and CGT) and the other VAT, account for 73% of the tax gap.

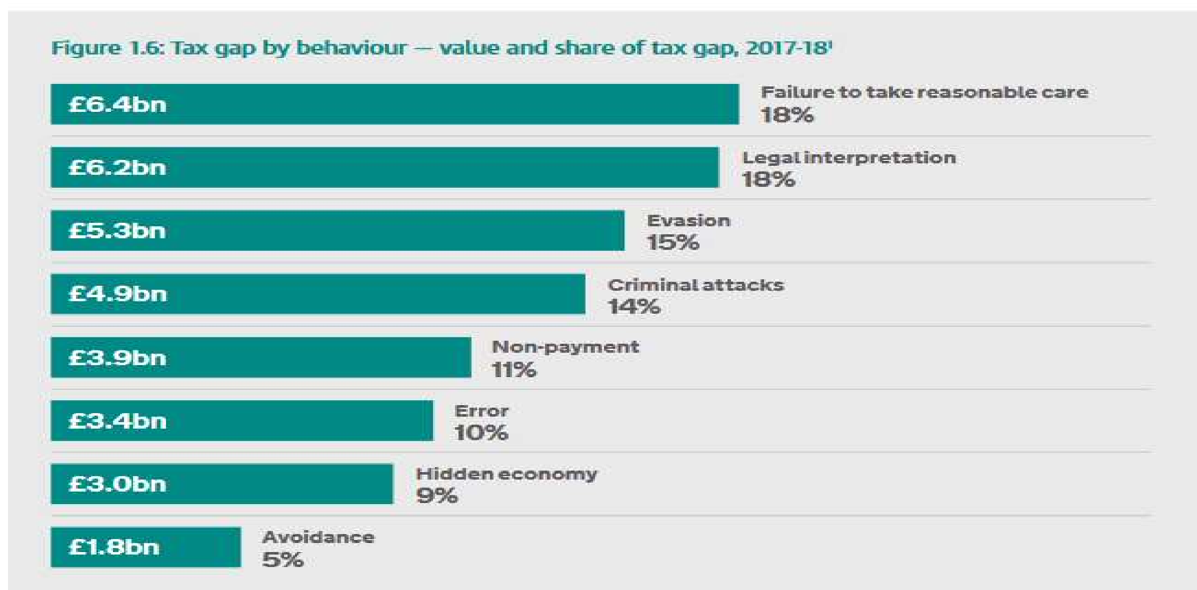


Figure 5[564]

This work, verifying the *Measuring tax gaps editions* from 2010 to 2019 and the tax gap estimates for 2009-18, produced the following table:

Behavior %	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Avoidance	17,5	14	14	11	9	8	6	5	5	5
Legal Interpretation	15	14	13	12	13	14	15	18	16	18
Criminal Attacks	12,5	16	16	13	16	15	13	15	16	14
Evasion	17,5	12	14	15	12	13	14	15	16	15
Hidden Economy	7,5	12	16	15	17	18	17	10	10	9
Non-payment	7,5	13	12	12	13	12	10	9	10	11
Negligence	15	11	9	12	12	12	15	18	18	18
Error	7,5	7	6	8	8	8	9	10	10	10
Total Tax Gap	6,4	6,0	5,5	5,6	6,2	6,5	6,2	5,3	5,5	5,6

Figure 6[565]

[564] THE UNITED KINGDOM. HM Revenue and Customs. *Measuring tax gaps 2019 edition*. Tax gap estimates for 2017-18, Cit., p. 10. Note: Figure 5 shows an estimate of taxpayer behaviors attributed to the tax gap for 2017-18. These estimates give a broad indication of behaviors and are calculated using assumptions and judgment.

[565] THE UNITED KINGDOM. HM Revenue and Customs. *Measuring tax gaps editions 2010-2019.* 2010, p.66; 2011, p. 11; 2012, p. 7; 2013, p.11; 2014, p. 11; 2015, p. 11; 2016, p. 11; 2017, p. 11, 2018, p. 11, 2019, p. 10. Available at: https://www.gov.uk/government/statistics/measuring-tax-gaps. Accessed on 01 Feb 2020. Note: 1 - The oldest Report available is relative to 2009, however I did not find the information about Tax Gap by behavior. That is why the table

As conclusions, first, this work understands that the analysis of the tax gap by behavior, as performed by the UK Tax Authorities, and the definition of which behaviors MDR should focus on, based on the analysis of the risk each of them represents for the tax administration, is very important to guide what kind of measure is really needed and how effective each possible measure might be in achieving its goals. This measuring by tax gap and behavioral analysis is much more accurate to evaluate the application of MDR than the number of changes promoted in the law or the (uncertain) estimates about the amount of tax saved after those changes, as suggested in the example in the beginning of this topic[566]. Moreover, the behavioral analysis is important to set the risk, the hallmarks, the penalties and other measures for compliance or non-compliance. This means, it is important to set the efficient functioning of the regime.

For instance and taking into account the quote mentioned at the beginning of this topic involving Stamp Duty Land Tax (SLDT) avoidance, see the report *Estimating the tax gaps for other direct taxes (2010)* [567], which analyzes the period 2008-2009, that is, the period immediately prior to the introduction of substantial changes to the SLDT hallmark[568]. HMRC holds information on avoidance schemes, which can be used to produce an estimate of avoidance of SDLT amounts approximately £0.04 billion within the overall stamp duties tax gap of £0.8 billion. Observing Figure 3, the total tax gap in 2008-2009 amounted £30 billion, thus it is necessary to consider the cost-benefit and the representability of SLDT avoidance to justify (or not) the MDR focus. The same methodology can be used to produce an estimate of the IT/NIC/CGT tax gap due to avoidance.

Second, besides the 'avoidance' ("*avoidance is exploiting the tax rules to gain a tax advantage that Parliament never intended")* that requires measures to bring the letter and spirit of the law into consonance, as explained here, an MDR could focus on the behavior that the HMRC classifies as *"legal interpretation":*

> *Legal interpretation losses arise where the customer's and HMRC's interpretation of the law and how it applies to the facts in a particular case result in a different tax outcome, and there is no avoidance. Specifically, this includes the interpretation of legislation, case-law, or guidelines relating to the application of legislation or case-law. Examples include categorization such as an asset for allowances or VAT liability of a supply, the accounting treatment of a transaction, or the methodology used to calculate the amount of tax due as in transfer pricing, or VAT partial exemption*[569].

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contains information from 2010 edition and so far. 2 – The line "total tax gap" corresponds to the percentage tax gap, which is calculated as a percentage of the amount of tax that should, in theory, be paid to HMRC, and what is actually paid. 3 – In each year, the columns represent the percentage of the total of the tax gap per kind of behavior.

[566] NOTE. Notwithstanding, indeed the measures could be seen as complementary, if they are both moving in the same direction, that gives us a greater confidence that genuine progress is being made.

[567] THE UNITED KINGDOM (2010). HM Revenue and Customs. *Measuring tax gaps 2010 edition*, p. 65. This statistical release presents the latest estimates of tax gaps for 2008-09 in HMRC administered taxes. Available at: https://webarchive.nationalarchives.gov.uk/20150612044958/https://www.gov.uk/government/statistics/measuring-tax-gaps. Accessed on 24 Jan 2020.

[568] See Chapter III, topic 3.2.1.8 - Other taxes covered in the Guidance.

[569] THE UNITED KINGDOM (2019). HM Revenue and Customs. *Measuring tax gaps 2019 edition*. Tax gap estimates for 2017-18. Cit., p. 21.

If on the one hand DOTAS (or any MDR) can control or reduce what is defined as "avoidance" because of its deterrent effect, on the other hand it is possible to realize in Figure 6, above, that the "legal interpretation" behavior has not been reduced over time, in relation to the "total tax gap". As I see it, because the "legal interpretation" behavior does not depend on the mandatory disclosure, but on the quality, clarity and stability of the legislation. Including it in MDR can be an instrument to improve the quality of the legislation/regulation. On the Tax Administration´s side, it would generate an administrative cost; however, it would be offset by an important reduction in the tax gap. Much of what they think is avoidance is actually a problem of legal interpretation, thus regarding those who could pay if helped and "encouraged" to do so. This does not involve any illicit or abusive activity, but a mandatory disclosure, an adequate response providing the correct interpretation and a quick "dispute resolution", offering the possibility to pay the due tax and interest without penalties, if it were the case, could significantly reduce the gap caused by this behavior.

Third, those behaviors such as evasion and criminal attacks are not reduced by the existence of MDR because the regime is not suitable to tackle them, as several times defended in this work. MDR also does not reduce that '*avoidance*' which is closer to '*evasion*' than to the licit tax planning. In this case, the way MDR functions causes a change in the behavior of promoters, in their techniques and arrangements, but does not close the compliance gap, over the time. What happens is the simple reduction in the number disclosures, either because the "doubt" is over or because the promoters who want to continue promoting *'avoidance'* migrate to other plans and simply do not reveal more. This percentage, it is possible to infer, is represented by the residual 5% that exist in Figure 6, practically since 2016.

3.2.7 What changes after the EU-Directive.

On 22 July 2019, HMRC published draft implementing regulations and a consultation document. The regulations stick closely to the Directive itself, cross-referencing directly to definitions and the underlying operative provisions of the Directive in many places[570], however it seems to take a pragmatic approach, exactly because of the DOTAS experience.

On 9 January 2020, the Statutory Instruments 2020 n. 25 was published, referring to the International Tax Enforcement (Disclosable Arrangements) Regulations 2020. These Regulations make provisions implementing Council Directive 2018/822, which amends Council Directive 2011/16/EU ("the DAC"). It requires persons to report information in relation to certain types of arrangements known as reportable cross-border arrangements (defined in the DAC) to HMRC[571].

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[570] FULBRIGHT, Norton Rose. *DAC 6: UK implementation of the new EU tax disclosure rules. Consultation and draft regulations for the mandatory reporting of cross-border transactions for taxpayers and intermediaries.* August 2019. Available at: https://www.nortonrosefulbright.com/en/knowledge/publications/c72547af/dac-6-uk-implementation-of-the-new-eu-tax-disclosure-rules-consultation. Accessed on: 30 Jan 2020.

[571] THE UNITED KINGDOM. HM Revenue and Customs. *The International Tax Enforcement (Disclosable Arrangements) Regulations 2020*. Available at: http://www.legislation.gov.uk/uksi/2020/25/made. Accessed on 21 Jan 2020.

HMRC has emphasized that these rules will remain in place post-Brexit to tackle international tax avoidance and evasion[572].

Interim conclusion.

DOTAS is an expanding system. It was not born complete and practice led to new taxes to be covered and new hallmarks, in the material scope of the information, and new people to be defined or not as promoters, in order to provide the relevant information, in the personal scope. As explained by HMRC, "when introduced, the disclosure regime was limited in scope to schemes concerning employment or certain financial products. This was widened with effect from 1 August 2006 to the whole of income tax, corporation tax and capital gains tax" [573].

This is an important characteristic, which this work suggests to all MDR: starting small and expanding gradually. This will bring certainty and trust in the application, both to tax administration and to promoters/users. If a MDR starts trying to encompass a great amount of information, taxes and situations, it leads to management difficulties and uncertainty in the application, which can, hence, lead to failure.

Another conclusion from DOTAS, analyzing the hallmarks description, is that the focus is on "marketable and innovative" schemes. If a scheme is marketable, and it is well known, it is not in the primary disclosure interest. If the scheme is innovative, however it cannot be easily marketed[574], it only comes to attention if used by a big enterprise. In this last case, the practitioner's comments[575] states that the system was not working very well and be-spoke schemes used by large companies were not detected while the regime was able to detect and react to marketable schemes.

The DOTAS Guidance has a series of suppositions and expressions like "could reasonably be expected to conclude" or "reasonably necessary", besides hypothetical tests. On the one hand, this makes the rules broader, because it does not contain specific definitions about the trigger for disclosure. On the other hand, this option requires, first, an open interaction between tax administration and taxpayers, providing a quick and efficient consultation process; second, it requires other mechanisms to avoid that "all schemes" come to be disclosed, which leads to unnecessary and disproportional over-reporting. This balance demands practical experience, which can be noted in DOTAS.

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[572] ANDREWS, Zoe. *UK implementation of DAC 6*. Tax Journal, Issue 1454. Published online on 23 July 2019. Available at: https://www.taxjournal.com/articles/uk-implementation-of-dac-6. Accessed on: 21 Jan 2020.
[573] THE UNITED KINGDOM. HM Revenue and Customs. Official Statistics. Tax avoidance disclosure statistics - explanatory guidance. Published on 31 Oct 2006. Available at: https://www.gov.uk/government/publications/tax-avoidance-and-disclosure-statistics/tax-avoidance-disclosure-statistics-explanatory-guidance. Accessed on 21 Jan 2020.
[574] NOTE. Reference to bespoke schemes that are not likely to be marketable precisely because they are tailor made.
[575] OECD (2015). *Comments received on Public Discussion draft*, Cit.

Concepts like “contrived or abnormal steps” in a transaction and “informed observer” are interesting because they relate to other parts of the legislation, for instance GAAR and to subjective judgements. The role of the Courts was demonstrated to be very important in the DOTAS functioning, for instance when stablishing the severity of the penalty for non-compliance and even in defining the main concept in the regime, the “tax advantage”. Moreover, applying a “purposive interpretation”, interpreting the law according to the “spirit” and the Parliamentary intention, consequently, making legislative changes, which really need Parliament intervention, as a result of the disclosure regime, less frequent and less necessary.

Finally, to measure the success of a MDR, the tax gap is much more accurate than the number of changes promoted in the law or estimates about the increasing in revenue or amount of “tax saved”. Thus, this work suggests observing the tax gap as a result of avoidance behavior or legal interpretation, both as defined in the HMRC reports, to evaluate the performance of DOTAS or other MDR.

3.3 The Portuguese experience.

Portugal introduced a mandatory disclosure regime on tax planning, always mentioned in the OECD reports, in 2008, by the Decree-Law n. 29/2008[576], which was denominated by the Portuguese doctrine as the "*law of abusive tax planning*", after the competent legislative authorization by the Law n. 53-A/2006 (State´s Budget for 2007)[577], Article 98. The referred article states that the Government had authorization to institute, in consonance with recent experiences in other countries, preventive measures to tackle evasion and aggressive tax planning practices. Such measures involve the establishment of specific communication, information and clarification obligations to the tax administration, on the schemes, operations or transactions, adopted or proposed, in which the main or one of the main objectives is to obtaining tax advantages. A Ministerial Ordinance n. 364-A/2008[578] approved the form for providing the information on schemes or transactions of tax planning. It is important to note that Portugal was a pioneer in this kind of action among continental European countries.

The Portuguese regime has undergone a substantial revision, to reintroduce the disclosure obligation after the EU-Directive (DAC6) was enacted, in 2018. Early in 2020, the Council of

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[576] PORTUGAL (2008). Ministry of Finance and Portuguese Public Finances. *Decree-Law n. 29/2008*, published in Journal of Republic n. 39/2008, Series I, on 25 Feb. 2008, p. 1205-1210.

[577] PORTUGAL (2007). Assembly of the Republic. *Law n. 53-A/2006*, published in Journal of Republic n. 249/2006, 1st Supplement, Series I, on 29 Dec. 2006. Art 98.º LOE 2007 - *Fica o Governo autorizado a estabelecer, em consonância com experiências recentes de outros países, medidas de carácter preventivo relativamente a práticas de evasão e de planeamento fiscal agressivo, mediante a consagração de obrigações específicas de comunicação, informação e esclarecimento à administração tributária sobre os esquemas, operações ou transacções adoptados ou propostos que tenham como principal ou um dos principais objectivos a obtenção de vantagens fiscais.*

[578] PORTUGAL (2008a). Ministry of Finance and Portuguese Public Finances. *Ordinance n. 364-A/2008*, published in Journal of Republic n. 93/2008, 1st Supplement, Series I, on 14 May. 2008.

Ministers approved a law proposal to be submitted to the Assembly of the Republic, "*regarding the fight against tax avoidance*"[579], through the establishment of the obligation to notify the Tax and Customs Authority of certain internal or cross-border mechanisms of tax relevance, transposing Directive (EU) 2018/822.

However, the objective of this topic is not to make a comparison between the old law and the new proposal, analyzing the new regime point by point, which, at the end of the day, is the one that shall be in force, for the future, despite the fact that several advances, in this work´s viewpoint, have been made. The objective is to analyze all the important points of the old regime, within my conception of what is a good or bad practice, when applying MDR. The intention is based on the maxim of knowing the past to be able to predict the future[580].

The Decree-Law n. 29/2008 (hereinafter *"the DL"*) presents a long consideration, justifying its implementation, its objectives and its expected advantages. It specifically refers to the experiences in the UK, the US and Canada as a source of inspiration, recognizing that all the modern tax systems rely on the exigence of information provided by the taxpayers, stressing the basic obligation to present tax returns containing all the relevant tax information. First, this demonstrates the approximation between Continental and Anglo-Saxon systems, with the prevalence of the latter over the former, as described by Ferrero Lapatza[581]. Second, this demonstrates that in the Portuguese authorities´ view, MDR is an obligation to provide information as any other, therefore, only one more ancillary obligation involving taxation interests.

Subsequently, the Seoul Declaration, 2006 and OECD meetings are expressly taken into consideration, referring to the expansion of "*unacceptable practices for reducing the tax burden*" and the "*intervention of tax intermediaries, such as tax consultants and financial entities*". Using the expression "*aggressive or abusive tax planning*", the DL states that the consultancy activity in tax matter had been developed without any regulation, disconnected of the fairness and of the taxation principles and objectives, many times lacking limits for its lawfulness.

Moreover, the DL mentions that several intermediaries have a misconception about their role, adopting behaviors not to promote the compliance with the tax law, but to explore all its weaknesses and mismatches between the letter and the spirit of the law exhaustively. Besides the tax consequences, the DL also refers to "*dangerous economic and social repercussions to the community*".

The Portuguese regime, by its strong inspiration in the British DOTAS, has as its main objective to allow tax administration to identify tax schemes in advance, so that it can promote the

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[579] PORTUGAL (2020). *Announcement of the Council of Ministers*, 16 Jan 2020. Available at: https://www.portugal.gov.pt/pt/gc22/governo/comunicado-de-conselho-de-ministros?i=318. Accessed on 04 Feb 2020.

[580] NG, Yvonne. *Understanding the past to prepare for the future.* The quote is attributed to Theodore Roosevelt: "I believe that the more you know about the past, the better you are prepared for the future". MIT Open Course Ware news and information, published on 25 Jun 2019. Available at: https://mitopencourseware.wordpress.com/2019/06/25/understanding-the-past-to-prepare-for-the-future/. Accessed on 04 Feb 2020.

[581] See Chapter III, topic 3.1 – The Anglo-Saxon and the Continental.

necessary adjustments in the laws and regulations, in order to avoid that mismatches or weaknesses be used to reduce the tax burden. Therefore, promoting the effective purposes and the "*spirit of the tax law*", and additionally avoiding unfair competition between economic agents. The DL´s introduction, however, refers broadly to different tax behaviors, mentioning "*the fight against tax evasion and fraud" and "schemes or actions of aggressive tax planning proposed, promoted and marketed by diverse several entities, generally called tax intermediaries".* In the personal scope, the focus[582] is on the "*generically called tax intermediaries*", which followed the British regime and the OECD proposals. Moreover, as stated, *"the disclosure of the tax planning schemes or actions provided for in this decree-law makes it possible to improve the transparency and fairness of the tax system".*

The Portuguese authorities were concerned with the acceptance and awareness of "*all individuals and companies, in their taxpayer´s character or not*" about the regime. Thus, they promoted previous hearings with a large number of entities representing the civil society, especially those with a close connection with tax practice, such as the Bar Association, the Chamber of Official Accountants, the Portuguese Association of Banks and Insurance, and the Securities Market Commission. In this work´s viewpoint, this is a fundamental measure, before introducing MDR; however, without losing the bases of the regime, because sometimes these entities are very influential in society and the focus could be moved from the promoters to the taxpayers. The Portuguese authorities were also concerned with the question involving administrative costs, which were discussed in this work[583]. In their opinion[584], the Portuguese regime "*at the same time ensures that the administrative costs related to these obligations do not have great significance because, fundamentally, only burden the entities that promote the use of these schemes with third parties and, therefore, which have perfect knowledge of them".*

Portugal, as a country with a continental European legal tradition, adopts a different view of law and legal system, as compared to the Anglo-Saxon system. It has a General Tax Law[585], entitled "*Lei Geral Tributária*" (hereinafter "*the LGT"*), which lists and defines the general principles that governs the Portuguese tax law, the powers of the tax administration and taxpayers' rights. For instance, the law specifically mentions the stability of the system, simplification, effective prosecution in the fight against evasion and tax fraud, promotion and creation of favorable conditions to enhance the competitiveness, amongst several others. In the presence of the LGT,

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[582] PORTUGAL (2008). *Decree-Law n. 29/2008*, Cit. "*Verifica-se actualmente, porém, que as obrigações de prestação de informações sobre factos tributários e matérias conexas devem ultrapassar o estrito campo dos contribuintes e de certos terceiros delimitados para passarem a incidir igualmente sobre as entidades que prestam serviços de consultoria no campo fiscal, dada a sua importância crescente na definição da actuação dos sujeitos passivos de imposto".*

[583] See Chapter II, topic 2.3.2.3 – Costs.

[584] PORTUGAL (2008). *Decree-Law n. 29/2008*, Cit. "*A revelação dos esquemas ou actuações de planeamento fiscal prevista no presente decreto-lei possibilita, assim, melhorar a transparência e a justiça do sistema fiscal, assegurando-se ao mesmo tempo que os custos administrativos relacionados com estas obrigações não assumem significado relevante dado incidirem, fundamentalmente, apenas sobre as entidades que promovem junto de terceiros a utilização desses esquemas e que, portanto, têm deles perfeito conhecimento*".

[585] PORTUGAL (1998). Assembly of the Republic. *General Tax Law (Lei Geral Tributária)*. *Decree-Law n. 398/98*, published in Journal of Republic n. 290/1998, Series I-A, on 17 Dec. 1998, p. 1-49. Approves the general tax law that sets out and defines the general principles that govern Portuguese tax law and the powers of tax administration and taxpayers' guarantees. Version of 28 Jan 2020.

the disclosure regime must observe these and other principles. For instance, it cannot cause instability nor increase the complexity in tax system[586], because its application could be challenged before the Courts, based on the non-observation of those principles. Moreover, it should demonstrate proportionality, in the balance between those principles and the prosecution in the fight against evasion and fraud. In order to achieve its objectives, the LGT, adopting the Constitutional rules, defines the fundamental principles in the tax law, in the procedural tax law and in the sanctioning system, and its express subjection to the principle of proportionality.

Additionally, according to Article 8 (2), 'c', 'd' and 'e', LGT establishes that the principle of legality applies to all ancillary obligations and to the definitions of the tax sanctions without criminal nature and the procedural tax rules. Considering that the DL refers to MDR as an obligation to provide information as any other involving taxation interests, the regime must observe the strict legality. Notwithstanding, Article 68-B states that it does not preclude principles of legality and equality if tax administration, observing economic and fiscal situation, deals with highly relevant taxpayers in order to permanently monitor them. This is in consonance with the ideas of risk analysis and the use of MDR as a tool in that process.

In relation to how the norms shall be interpreted, Article 11 states that "*when determining the meaning of the tax norm and qualifying the facts to which they are applied, general rules and principles must be observed*". It is interesting to stress some rules of interpretation, such as: (i) whenever, in the tax rules, specific terms from other branches of law are used, they must be interpreted in the same sense as the one they have there, unless another one derives directly from the law. (ii) If there is still doubt about the meaning of the tax rules to be applied, the economic substance of the tax facts must be taken into account. (iii) Reasoning by analogy, as a method of law interpretation, cannot be applied to the gaps resulting from tax rules included in the Assembly of Republic legal competence.

The use of meanings applied in other laws or branches of law to define disclosure obligations is broadly used in DOTAS, for instance the definition of "*contrived or abnormal*" transaction[587]. The application of the interpretation according to the "economic substance", although subsidiary, is an important instrument when applying MDR. However, the question that arises is whether considering tax matter is within the exclusive competence of the Assembly of Republic, as stated in topic 3.1, should it be admitted the purposive interpretation by the Courts, in order to bring into consonance the letter and the spirit of the law, as described to exist in the UK[588]?

In Portugal, it is the law[589] that defines "tax offenses" and that concept of tax advantage, applied in the UK, many times based on jurisprudential constructions, could not be used to determine sanctions. According to Santos:

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[586] See Chapter II, topic 2.1.2 – Influences of Globalization in complexity and instability of tax system.
[587] See Chapter III, topic 3.2.1.6 – Employment income.
[588] See Chapter III, topic 3.2.6 – The impact of the DOTAS regime on compliance.
[589] PORTUGAL (2001). Assembly of the Republic. *Law n. 15/2001*, on 5 Jun 2001. *Regime Geral das Infracções Tributárias*. It reinforces taxpayer guarantees and procedural simplification, reformulates the tax judicial organization and establishes a new general regime for tax offenses. 37th version, updated on 18 Set 2019, by Law n. 119/2019.

Not all methods accepted in the Anglo-Saxon countries are admissible under a concrete tax system. In Portugal, although the theoretical quarrel continues, there is a consensus among the majority of authors as to the inadmissibility of some methods, such as the adoption of the analogy in the rules of taxable hypothesis, economic interpretation, functional interpretation, as they are difficult to reconcile with the principle of legality or primacy for the literal interpretation[590].

Also relevant to MDR, there is LGT Article 56 (1), which states the tax administration is obliged to comment on all matters within its competence presented by taxpayers, or by any having a legitimate interest, through complaints, appeals, representations, explanations or any other means provided by the law. Paragraph (2) establishes exceptions only if the tax administration has provided its opinion less than two years before on the request of the same author with identical object and grounds. Therefore, as this work understands, tax administration has the duty to reply to all or at least in a proportional measure, to the information provided in MDR context.

LGT Article 63, guarantees that the access to information protected by professional secrecy or any other duty of secrecy legally regulated depends on judicial authorization, under the terms of the applicable legislation. This is highly important to the disclosed information under MDR and the relation attorney-client or any other information protected for professional secrecy. Additionally, Article 64 determines that all information regarding the tax position of the taxpayers and any other elements of the private nature obtained by tax administration´s agents must be taken as confidential, especially those regarding professional secrecy. The tax administration duty of confidentiality only ends by the authorization of the taxpayer in relation to his/her tax position or on the interest of the cooperation between tax administration and other public institutions. Therefore, the methods used in the UK[591], regarding that the information obtained in DOTAS may be published in any manner HMRC thinks appropriate is not possible in Portugal. This is important because it represents two different views about an individual tax position and has substantial consequences in the deterrent effect pursued by MDR.

Finally yet importantly, the LGT contains, in Article 38, the general anti-avoidance rule. It is stated in paragraph (2), in short, that the transactions or series of transactions in which the main purpose or one of the main purposes is obtaining a tax advantage, frustrating the objective and purpose of the taxation, can be disregarded when assessing the due tax and the tax affects. In this scope, all the relevant facts and circumstances must be taken into consideration, and the conduct can be verified either through abuse of the letter of the law or because the transactions are regarded non-genuine. Paragraph (3) states that the economic substance test must be observed.

It is remarkable to note that the definitions or clauses applied in a GAAR might be applied analogously to MDR but they do not create, absolutely, the same juridical effects. Moreover, as stressed in this work, MDR might have a broader scope than GAAR and schemes described in the Hallmarks might not result in the application of a GAAR.

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[590] SANTOS, Antonio Carlos dos. *Planeamento Fiscal, Evasão Fiscal, Elisão Fiscal: o Fiscalista no seu labirinto.* Fiscalidade. Revista de Direito e Gestão Fiscal. Edição do Instituto Superior de Gestão, n. 38. Apr-Jun, 2009, p. 78.

[591] See Chapter III, topic 3.2.5 – A description of what information is required to be reported.

3.3.1 A description of arrangements that are required to be disclosed.

The DL, Articles 2 and 3, states that it applies to 'tax planning' schemes or activities in which there are underlying, "*exclusively or predominantly"*, tax advantages. The word "predominant" is indeterminate and opens doors to opposite effects: on the one hand, promoters can claim excess of care and overloading the tax administration with the existent schemes. On the other hand, promoters can find in this a "reasonable excuse"[592] for many tax administration's requests, arguing the undefined character of the concept, whose definition depends on the subjective view of both the tax administration and the promoter. In this case, the tax administration can be led to a dispute, before the application of the statutory penalty, as described to exist in the UK.

Tax advantage is defined as the reduction, elimination or temporary deferral of tax or the obtaining of a tax benefit, which would not be achieved, in whole or in part, without the use of that scheme or *modus operandi*. *Scheme* is defined in a broad sense, as any planning, project, proposal, advice, instruction or recommendation, provided expressly or not, concrete or hypothetically, in an agreement or transaction.

It is possible to imply that the rule refers to *agreement or transaction* with economic relevance and hence reflecting in the taxation. Moreover, it is relevant to stress the inclusion of "advice" and "recommendation", what can have implications to "legal advice" and the attorney-client relationship. Finally, that the action does not need "express exteriorization" and it can be taken as a relevant scheme even if it is not implemented.

It is relevant, furthermore, to note that the concept of tax advantage limits itself to the Personal Income Tax (IRS), the Corporation Tax (IRC), the IVA, the Immovable Property Tax (IMI), the Tax on Real Estate Transactions (IMT) and the Stamp Duty Tax (IS). Therefore, encompassing the taxes in which the revenue is more significant, despite the fact that National Insurance Contributions were not included in the regime, differently from the DOTAS.

In the Portuguese tax legislation there is no the distinction between tax evasion (*evasão*) and fraud (*fraude*), resulting in a large terminological fluctuation. Sometimes, the Portuguese word "evasão" is used in a broad sense, encompassing the tax fraud, sometimes it is applied in narrower sense, referring to tax offenses, which are not so grave[593]. For example, Saldanha Sanches[594] uses the term fraud (fraude fiscal) instead of tax evasion to refer to behaviors considered as tax offenses, thus bringing the concept of tax avoidance (elisão fiscal) closer to that of tax fraud. However, he highlights that it is not possible to find a perfect distinction, dichotomous and exact, for fraud itself in general and tax fraud, in particular.

Furthermore, in Portugal, tax planning can be seen as a taxpayer´s fundamental right, though which he/she aims to reduce the statutory tax burden, resulting in *tax saving*. In this sense,

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[592] See Chapter III, topic 3.2.3 – A trigger for the imposition of a disclosure obligation.
[593] SANTOS (2009). Op. Cit., p. 61.
[594] SALDANHA SANCHES, José Luís. *Os limites do planeamento fiscal. Substância e Forma no direito fiscal português, comunitário e internacional*, 3 ed. Coimbra: Coimbra Editora, 2006, p. 24.

tax planning might be defined as a set of acts, through which the taxpayer aims to achieve, deliberately, a tax advantage, choosing the less onerous transactions and the more favorable norms in the tax legislation, in order to produce *tax savings*[595].

However, this is not an unequivocal definition and the Portuguese doctrine considers that there is no consensual appreciation about the phenomenon. They agree, nevertheless, that the taxpayer can reduce his/her tax burden acting "*intra legem*" (legitimate tax planning) if the legislator, when establishing negative taxation rules, expressly or implicitly admits the tax advantage/tax saving; "*extra legem"* (abusive or aggressive tax planning, or tax avoidance) if the advantage is achieved through acts or transactions, which are not predicted by the tax law. This practice is seen as a licit but illegitimate "tax saving", because the outcome is circumventing or "avoiding" the purpose and objective of the principles established in the law. "C*ontra legem*" (illicit tax planning or fraud) if the tax saving is achieved as a result of illicit acts or transactions, violating the rules direct and intentionally as a way to harm the taxation. The taxpayer intentionally aims not to pay taxes[596]. Nevertheless, providing an analogy with the Anglo-Saxon doctrine, Santos[597] states that "*as a rule, tax planning designates the acts and transactions that lead to an 'intra legem' tax saving*". The author also mentions the German and Spanish terminologies, to conclude that they are facing a "*Tower of Babel terminology*", with regard to the notion of tax planning.

These (in)definitions, however, were not taken precisely into consideration in the DL and all the notions are indistinctly mixed: evasion, fraud, aggressive tax planning. In its motivation and justification[598], it is stated that the DL aims to make concrete a fundamental guidance from the Constitutional Government towards the reinforcement of the effectiveness in combating '*fraud and tax evasion'*. Subsequently, it is announced "*among the measures that have been developed in other systems of laws, specifically in the United States of America, in the United Kingdom and in Canada, aiming to reinforce the combat against tax evasion, as well as fraud itself, the obligation to communicate, inform and clarify on schemes or actions of aggressive tax planning are highlighted…*"

In this work´s point of view, this has two implications, which deserve notice. MDR is not suitable for tackling fraud or evasion in the sense described as "*contra legem".* First because the intention is not to pay, so one cannot worry about problems of interpretation or deficiencies in the law. The law can be perfect and clear and the agent is deliberating breaching it. Second because in this case one deliberately breaching the law cannot be reasonably punished for not incriminating

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[595] CAMPOS, Diogo Leite de et al. *A Norma Geral Anti-Abuso. Autonomia Fiscal*, v. I, Edições Almedina, 2008, p. 5. See also Chapter II, topic 2.4.1.1 "In Portugal, Saldanha Sanches defended the legitimacy of tax planning, which he calls "*the taxpayer's subjective right and a necessary condition for legal certainty in tax relations*". He supports that "*we are beyond the time when it was enough for the taxpayer to just sit back and wait for a paternal and authoritarian State, to tell him how much to pay in taxes*", and SOUSA, Carlos Cunha. *O planeamento fiscal abusivo, O Decreto-Lei 29/2008 de 25 de Fevereiro e os esquemas de planeamento fiscal abusivo.* Universidade do Minho, 2012, p. 18. In Brazil, see LEÃO, Martha Toribio. *O Direito Fundamental de Economizar Tributos*. Malheiros Editores, 2018.

[596] SANTOS (2009). Op. Cit., p. 62-64.

[597] Ibid. See also POÇO, Maria de Lurdes Cruz. *Perceção da evasão e fraude fiscal em Portugal: um estudo sociológico*. Dissertação de Mestrado em Contabilidade e Fiscalidade Empresarial. 93 pp. Instituto Superior de Contabilidade e Administração de Coimbra. Coimbra, 2013, p. 13-14.

[598] PORTUGAL (2008). *Decree-Law n. 29/2008*. Cit. p. 1205-1206.

himself, there is a prohibition against self-incrimination. Thus, as stated in the DOTAS analysis[599], this work understands that is necessary to delimitate and define different kinds of “undesirable” behaviors, which in the end contribute to the tax gap. For example, several different behaviors that result in a reduction in payable taxes, have been listed by the UK Tax Authorities and only one (or two) is subject to disclosure and for each of them a counteraction is more or less indicated and may or not take effect depending on the legal system.

The other implication is that in Article 2(1) and Article 3(a), the DL refers to tax planning schemes, which aim to obtain tax advantage. This seems to be a copy of the British regime. However, it is argued that when the “tax saving” stems from different behaviors that are however legally defined, in a system that has a written General Tax Code where the general principles to be applied are established, the MDR needs to identify which behaviors it focuses on and not, generically, to any “tax advantage”. The setting would depend on which behaviors represent risks for the tax administration and against which it could effectively react after the disclosure. In this risk analysis, the proportionality of the cost-benefit and the effectiveness of the reaction would be the parameters for the efficiency of the system, the result of which would be measured by the reducing the tax gap.

3.3.1.1 Hallmarks.

Article 4 of the DL lists the tax planning schemes, “*as defined in the previous Articles*”. Thus, obtaining tax advantage is a general condition, and the specific hallmarks are those:

a) Involving the participation of an entity or company enjoying a privileged tax regime. ‘*Privileged tax regime*’ includes those listed by the Ministry of Finances[600] referring to low or non-tax jurisdictions, in relation to the existent conditions in the Portuguese jurisdiction. This hallmark focuses especially on schemes involving transfer pricing and the fact that the entity is in a place mentioned in the “*black list*” does not immediately mean the existence of price deviations. However, the taxpayer will have to prove that there are no substantive reasons why the price is not a market price or even prove that the price charged is a market price.
b) Involving the participation of an entity or company totally or partially exempt of tax obligations.
c) Involving financial or insurance transactions resulting in a change in the profit qualification or in the beneficial ownership, specifically leasing, financial hybrid instruments, derivatives or contracts involving other financial instruments.
d) Involving loss schemes.
e) Independently from the previous clauses, containing clauses that limit or exclude the promoter´s liability.

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[599] See Chapter III, topic 3.2.6 – The impact of DOTAS regime on compliance.
[600] PORTUGAL (2004). Ministry of Finance. *Ordinance n. 150/2004*, published in Journal of Republic n. 37/2004, Series I-B, on 13 Feb. 2004, p. 860. Approves the list of countries, territories and regions with privileged tax regimes, clearly more favorable.

3.3.1.2 Confidentiality clause.

The DL does not contain a "confidentiality clause" or "premium fee" hallmarks, differently from the British and American regimes. According to Article 4 (2), although the DL obliges disclosure in the existence of exclusion or limitation of liability clauses, the same requirement is not placed in relation to the confidentiality clause. As was stated in this work, the interest in keeping the scheme confidential from both the tax administration and from the other promoters in the market is taken as a strong indicative of risk posed by the scheme, because it is supposedly innovative.

The Portuguese legislator, however, opted to include the limitation of liability clause, as a general clause determining the disclosure. In fact, this clause, in several situations aims only to safeguard possible consequences inherent to the technical risk of the professional activity as a tax adviser and not a safeguard against the specific risk posed by the scheme and not the tax risk posed because the scheme is innovative and contains market interests. It is important to take into consideration, in each legislation, if the promoter is allowed to limit his professional liability or it is personal and unlimited, imposed by law on some of the professions.

Another point is that this limitation of liability clause works not as a filter but as an amplifier of the hallmarks, I mean, even though the scheme is not hallmarked by the other characteristics, its existence determines the disclosure, realizing the expression *"independently of the correspondence with one of the situations referred in the previous paragraph…"* Thus, its interpretation shall be restrictive, otherwise if interpreting extensively, as a general clause regulating the relationship client-promoter, there is the risk of a spillover effect in relation to the DL objectives[601].

The OECD Final Report[602] registers the existence of this "contractual protection" clause in the Canadian and Portuguese regimes, as a hallmark triggering the disclosure obligation. According to them, in Canada it means, in short, an insurance, compensation or reimbursement to the promoter, as an indemnity of expenses, losses or services arising from the transaction or transactions included in the tax planning. In Portugal, however, as is possible to note, the application is quite different.

3.3.2 A description of the persons required to disclose such arrangements.

The figure of the promoter appears more specifically defined in the Portuguese DL than in the UK legislation. Nevertheless, in my opinion, given the lack of practical experience in dealing with MDR, Portugal did not advance in defining other figures, such as intermediaries, scheme designers or organizers and managers[603].

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[601] FERNANDES DE OLIVEIRA, Antônio. *A legitimidade do planeamento fiscal – as cláusulas gerais anti-abuso e os conflitos de interesse.* Coimbra: Coimbra Editora, 2009, p. 185.

[602] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*. Cit., p. 40-41.

[603] See Chapter III, topic 3.2.2 – A description of the persons required to disclose such arrangements.

Thus, promoter is any person or entity that in the exercise of its *economic* activity provides consultancy or analogue services in tax matters. The promoter can be registered formally or only "*de facto*"; must be resident or be established in the Portuguese jurisdiction, and their services or advices must be related to the tax position or tax obligations of clients or third parties. The DL, moreover, in a non-exhaustive list, refers to credit and other financial institutions; accountants and auditors; lawyers and law firms.

It is interesting to note that the wording in Article 5 (1) refers to "economic activity" and not to "professional activity". The point is that the tax planning in this case is characterized in economic terms and not in legal terms, highlighting the existence of economic interest when providing or implementing a scheme, going beyond a limited "legal advice", which could be covered by legal professional privileges. Article 5(3) specifies which kind of actions are considered for triggering the disclosure obligation: participation or cooperation in designing, preparing, adopting or implementing the reportable scheme.

3.3.2.1 Professional privilege.

The DL, Article 6(1), however, states that a performance as promoter, for disclosure purposes, does not involve advices on schemes or planning by lawyers, law firms or solicitors in a context of evaluating the juridical position of a client, in the scope of providing defense or representation in a judicial process or relating to a judicial process. This includes the means to demand in or avoid a judicial process, irrespective of the information being accessed before, during or after that process, as well as within the scope of legal advice, defense or representation in process and, in general, the specific acts defined in the law[604]. According to Article 6(2), the official accountants or official societies of accountants, by its recommendations in a scheme or planning in a context and to the ends of their public interest role, are also exempt.

In this work´s opinion this is a good practice, so that, observing the reference to "economic activity" plus the specification about the context in which lawyers and/or accountants are exempt to provide the information, the professional privilege is respected but limited. The only slightly unclear point, as I see it, is about the moment in which the professional obtains the relevant reportable information. The paragraph refers to judicial defense or representation, including advice to demand in or avoid a process, "*irrespective of the information being obtained before, during or after the process*". However, if the lawyer obtained the information before the judicial defense or representation, it is necessary to investigate if he/she is a promoter who designed, prepared or implemented a disclosable scheme and, after that and as a legal/administrative consequence, the scheme was challenged before the Courts. In this case, he/she is defending the client *because of* the scheme they created themselves.

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[604] PORTUGAL (2004). Assembly of the Republic. *Law n. 49/2004*. Published in Journal of Republic n. 199/2004, Series I-A, on 24 Oct. 2004, p. 5656 – 5657. Defines the meaning and scope of the acts of lawyers and solicitors and typifies the crime of unlawful attorney.

If there is no promoter or the promoter is offshore, the obligation shifts to the user. Article 10(3), however, limits this possibility, in order to avoid excessive burden to some taxpayers. Thus, if the taxpayer is a company or entity, the rules apply in all cases. If the taxpayer is an individual, the rules only apply if the scheme is hallmarked because involving the participation of an entity or company enjoying a privileged tax regime (jurisdictions in "black list) or an entity or company totally or partially exempt of tax obligations.

There is no provision for communication by the user if the promoter is protected by legal professional privilege; nor the possibility that the user will waive the LPP, thus forcing the promoter to reveal the scheme.

3.3.2.2 Scheme number and client lists.

According to Article 8(2), the disclosure obligation has an abstract character, because it does not include any indication or list of the promoter´s clients, for which the scheme had been proposed or implemented.

In fact, the DL focus is on the scheme and not on the users. This way, the objective is eminently promote deterrence and can sometimes lead to a legislative change, in abstract, but there will not be any interaction between tax administration and taxpayers/users. Therefore, by not identifying the quantity and the group/sector of users, the risk analysis is broadly harmed.

Compared to the British experience, especially the case involving the SDLT, it is possible to conclude that the Portuguese regime could gain in effectiveness if scheme reference numbers[605] were applied, which means the tax administration provides a number to each scheme disclosed by the promoter and after that the user must include the reference number in his/her tax return.

3.3.3 A trigger for the imposition of a disclosure obligation.

The DL establishes two kinds of obligation, to be fulfilled by the promoter (or exceptionally, by the user): (i) the duty to communicate and (ii) the duty to clarify, provided, respectively, for in Articles 7 and 9.

As in DOTAS, it is not necessary for the real implementation of the scheme to occur, for there to be a duty to communicate. Thus, when the promoter has the obligation, the communication must be made *"20 days after the end of the month in which the scheme had been proposed by the first time",* according to Article 7(2). Therefore, the communication follows a monthly basis, and all the schemes proposed in a given month, shall be communicated 20 days after the end of that month.

[605] See Chapter III, topic 3.2.2.1 – Legal Professional Privileges, reference numbers and client lists.

The paragraph (3) states that in the existence of co-promoters, who take part or cooperate in the scheme *implementation,* they shall provide the information "*20 days after the end of the month in which they start to acting in the scheme".* In order to avoid double communication, in this case, the co-promoter is exempt if the other promoter proves the previous communication.

There is, however, a slight difference in the wording of the two paragraphs, (2) and (3), because the first refers to a scheme´s proposition and the latter to a scheme´s implementation. The DL, by its wording, disregards that a scheme can consist in a series of steps or transactions and different promoters can "propose" it, even before its implementation.

The duty to clarify only exists for promoters, as expressed in Article 9(1) and it is triggered by a specific notification, issued by the competent authority. It refers exclusively to the obligation to provide explanations about the precise description of a scheme or planning, including the kind of transactions, business structures and operational steps proposed or implemented, as well as the tax advantages sought, and to indicate the number of times the scheme was proposed or implemented and the number of clients involved. The information shall be provided "*30 days after the notification*".

In my view, this duty focuses on mass-market schemes, because it only exists if there is a promoter and not in the situation when the scheme is '*in-house'* or the promoter is offshore. However, as mentioned in the previous topic, the number of users could be obtained by the implementation of a scheme reference number system, with more efficient results, as I see it, and the specific notification could demand information about the list of clients/users, if it were considered necessary[606].

When the obligation relies on the user (if there is no promoter or the promoter is offshore), the trigger event is the *implementation.* Thus, Article 10(1) establishes that the duty to communicate "*shall be complete by the end of the month subsequent to the month of the respective implementation*".

3.3.4 Appropriate penalties or other mechanisms to address non-compliance.

The lack of communication or the untimely communication is punishable first by pecuniary fines (*coimas*), and then there might be other ancillary sanctions according to Article 28 of the general regime of tax violations[607], such as limitation or prohibition for using tax benefits, although in this case the punishment is not automatic. There is no provision to administrative advantages, special treatments, waives or reductions for the compliant promoters/users.

In Portugal, the LGT, Article 106(2) establishes two "levels" of tax violations, therefore "*tax infringements can constitute crimes or administrative offenses*". The non-observation of the duties to communicate and/or to clarify is considered as administrative offense (*ilicítos de mera*

[606] See Chapter II, topic 2.5.3.2.1 – Scheme number and client lists.
[607] PORTUGAL (2001). *Law n. 15/2001.* Cit.

ordenação social). Therefore, it can be punished in the presence of intention (*dolus*) or for negligence only (Article 17 (4)).

The DL establishes maximum and minimum limits to the pecuniary fines. According to the LGT, Article 115, when determining the amount of a fine, must take into consideration, specifically: a) the objective assessment of the gravity of the infringement; b) the graduation of the agent's fault; c) the assessment of the agent's economic situation; d) the actual economic benefit resulting from the offense.

A significant difference in relation to the UK, where the fines should be defined in a Tribunal, after they are proposed by the tax administration, as was stressed in topic 3.2.4, is that in Portugal the competent authority is administrative (*director de finanças*), in the promoter´s or taxpayer´s jurisdiction, according to the DL, Article 19. Significant because it increases the tax administration power of reaction on the one hand; however, on the other hand, it also increases the mistrust of the taxpayers/promoters, if the regime could be used excessively, only imposing penalties without the proportional results in terms of efficiency, by the tax administration.

3.3.5 A description of what information is required to be reported.

The DL provides a list of the information that integrates the duty to communicate. It includes:

a) A precise description of the scheme or planning, including the kind of transactions, business structures and operational steps proposed or implemented, as well as the tax advantaged aimed.
b) The legal provision on which the planning relies and its relation with the tax advantage aimed.
c) The identification of the promoter.

Article 8(2) expressly states that the promoter´s duty does not include on communicating any list or identification of the clients interested or using the disclosed scheme.

3.3.6 The impact of the regime on compliance.

The duty of confidentiality to which the persons or entities covered by the DL were legally or contractually subject should not exempt them from the obligations. The DL understands that the information provided in its scope does not constitute a breach of any obligation of confidentiality nor does it imply, to anyone who provides it, responsibility of any kind.

As mentioned, the LGT, Article 64[608] provides a general duty of confidentiality to tax administration, regarding to the taxpayers data. Thus, there is no "confidentiality protection" on data or personal information between taxpayers and tax administration, because the information cannot be made public and this duty is only shared or transmitted to other authorities or in cooperation with other countries, in the strict terms of the law. The DL applies this general rule to the information provided in its context, according to Article 16.

The information collected is compiled in a national database, by each type of tax. After receiving and processing the information, and considering the confidentiality above mentioned, the tax administration then issues a public opinion, on its Website, describing a scheme in general and abstract terms. Then, they (*Direcção-Geral dos Impostos*) express their understanding if a certain tax scheme or planning is considered abusive and might be reclassified or corrected or, after the competent legal procedure, might be subject to GAAR. Moreover, that authority determines studies and legislative proposals to react to the use of tax planning schemes and the inclusion of actions and inspections against those schemes that represent broader use or relevance.

Finally yet importantly, the LGT, Article 64-B states that the Government must present to the Assembly of Republic, every year, a detailed report[609] about the evolution in combating fraud and tax evasion. The report must contain, amongst other information, the results obtained with the use of the various legal instruments to combat fraud and tax evasion and relevant statistical information on the performance of tax inspection, tax justice, and other areas that collaborate in the fight against tax and customs fraud and evasion.

Two years after the DL´s entry into force, an academic work[610] analyzed its results, in general number of disclosures, also discriminating the disclosures by tax and hallmarks. The author registers that:

> *Two years after the entry into force the DL n. 29/2008, we only can carry out a limited evaluation of its performance in the fight against abusive tax planning, due to scarcity of information. Right away, we realized that when the diploma came into force, it did not achieve the desired success, since only a small number of communications were carried out. In fact, according to the report made by the Ministry of Finances, by November 2008 there were 21 communications on tax planning, 9 of which from the users' initiative and 12 from the promoters´ initiative. Most of the situations (60%) related to cases in which companies participated in 'offshores'. In terms of*

[608] PORTUGAL (1998). *General Tax Law (Lei Geral Tributária). Decree-Law n. 398/98,* Cit., Article 64 - *Os dirigentes, funcionários e agentes da administração tributária estão obrigados a guardar sigilo sobre os dados recolhidos sobre a situação tributária dos contribuintes e os elementos de natureza pessoal que obtenham no procedimento, nomeadamente os decorrentes do sigilo profissional ou qualquer outro dever de segredo legalmente regulado.*

[609] PORTUGAL (2019). The last report version - Report on Combating Fraud and Tax Evasion, prepared by the Ministry of Finance and Portuguese Public Administration is Available at:https://www.portugal.gov.pt/pt/gc21/comunicacao/documento?i=relatorio-de-atividades-desenvolvidas-de-combate-a-fraude-e-evasao-fiscais-e-aduaneiras, Accessed on 03 Feb 2020.

[610] NEVES, Mariana Rocha. *O Regime da Comunicação Prévia no Combate ao Planeamento Fiscal Abusivo*. Dissertação de Mestrado, 2011. 53 p. Ciências Jurídicas e Econômicas - Faculdade de Direito da Universidade do Porto, Portugal. Available at: https://repositorio-aberto.up.pt/handle/10216/63897. Accessed on 03 Feb 2020.

taxes, the benefits obtained by using reported schemes mostly referred to income taxes - IRC and IRS - (18 schemes), the rest being related to stamp duty tax – IS (3 schemes).

The drastic fall in terms of quantity of information between 2008 and 2010, was noted in another academic work[611] published in 2014, registering slightly different numbers. The author obtained the data presented in the 2010 Report on Combating Fraud and Tax Evasion, prepared by the Ministry of Finance and Portuguese Public Administration. In that period, there were 87 cases reported, 9 of them reported by users and 78 reported by promoters. In 2008, it was only possible to communicate tax planning under the regime, from May 15th, when the DL came into force. In that year, schemes were revealed both by users (9) and by promoters (15). During the subsequent year (2009), the high number of communications (57) was remarkable, but promoters carried them all out. In contrast, in 2010, the number of communications declined dramatically to 6. In the report on Combating Fraud and tax evasion in 2011, there was a lack of data on the disclosure of abusive tax planning.

A study conducted in 2013[612] realized that around one third of the Portuguese taxpayers interviewed in a survey admitted that tax evasion is "*justifiable under certain circumstances*". The main arguments presented by them in this regard are connected to unfairness of the tax system, high tax burden, misuse of the public revenue and corruption in the political class. On the other hand, one of the weakest arguments is related to the fact that taxpayers can be "discovered" by the tax authorities, realizing, therefore, this possibility is not a dissuasive element for tax evasion and tax fraud in Portugal. In April 2017, an article entitled *Aggressive Taxation and Amiable Tax Administration* was published criticizing the results of the Portuguese experience[613].

3.3.7 What changes after the EU-Directive.

According to Article 23, the DL should be reviewed within three years after the date of its entry into force and the useful elements resulting from its application should be collected for the introduction of any changes that may prove to be necessary. It has never happened. However, the

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[611] VIEIRA, Lauriana Rita Pires. *Planeamento Fiscal Abusivo: Exemplificação de Alguns Esquemas*. Dissertação de Mestrado, 2014. 99 p. Contabilidade e Finanças - Instituto Superior de Contabilidade e Administração do Porto, Portugal. Available at: *http://recipp.ipp.pt/bitstream/10400.22/5437/1/DM_LaurianaVieira_2014.pdf,* Accessed on 11 May 2018.

[612] POÇO. Maria de Lurdes Cruz. *Percepção da evasão e fraude fiscal em Portugal: um estudo sociológico*. Dissertação de Mestrado em Contabilidade e Fiscalidade Empresarial. 93 pp. Instituto Superior de Contabilidade e Administração de Coimbra. Coimbra, 2013, p. 5. "*Verificou-se, ainda, que cerca um terço dos contribuintes inquiridos admitiu que a evasão fiscal é justificável em determinadas circunstâncias. Os principais argumentos justificativos da evasão fiscal estão associados à injustiça do sistema fiscal, à elevada carga tributária, ao desperdício ou má utilização do dinheiro dos impostos e à corrupção entre a classe política. Ao invés, um dos argumentos menos forte encontra-se relacionado com o facto de os contribuintes poderem vir a ser descobertos pelas autoridades fiscais, verificando-se, então, que este não é um elemento dissuasor da prática da evasão e fraude fiscais em Portugal*". Available at: https://comum.rcaap.pt/bitstream/10400.26/14577/1/Maria_Po%C3%A7o.pdf. Accessed on: 28 May 2019.

[613] GOMES, Ana. Fiscalidade Agressiva e Fisco Amavel. "*The best proof that this Decree-Law was nothing more than a scam in the fight against tax evasion and fraud is that in 9 years, since 2008, the Tax Authority has only published 13 schemes of tax planning that it considered abusive! The most recent being communicated to them ... in 2010.*" Available at: https://www.publico.pt/2017/04/30/economia/opiniao/fiscalidade-agressiva-e-fisco-amavel-1770472. Accessed on: 10 May 2018.

Portuguese regime has undergone a substantial revision, to reintroduce the disclosure obligation after the EU-Directive (DAC6) was enacted, in 2018. Then, on May 28, 2019, the Portuguese Government published draft legislation for public scrutiny[614] (*"the Proposal"*).

Exposing its motivation, the Proposal intends, repealing the DL 29/2008, to introduce a "*totally new, reinforced and stronger regime*". It is stressed that the schemes on disclosure focus are those meeting defined hallmarks or key-characteristics, indicating potential risks, "*which means, there is no need, therefore, of any definition to tax evasion or – in the Directive´s terminology – aggressive tax planning*". This is exactly the point this work supports. Furthermore, the Proposal also states that differently from the DL 29/2008, which tried to define "*tax planning, scheme and tax advantage*", it disregards those definitions because they are useless.

However, the Proposal understands that, although a definition of "*tax evasion*" by itself is unnecessary, it is important to connect the notion of the "*potentially risky schemes*" to tax evasion. So, evasion, apart from its distinction as avoidance or fraud, in the Portuguese or English language, needs to be connected to the idea of unfairness in taxation, because jeopardizing principles as ability to pay and equality[615].

Moreover, it is stated that although the Proposal follows in general the hallmarks presented in DAC6, which focus exclusively in cross-border situations, it presents an integration, including domestic planning, and for this reason adapting some of the key-characteristics (hallmarks) presents in DAC6. In this work´s point of view, this is also positive, because a country, introducing MDR, should not lose the opportunity to also consider domestic planning. As will be discussed in topic 3.6, the EU primary law must observe certain principles and this way the Directive could not bind the introduction of the rules exclusively touching to national interests, but in practical meaning, focusing exclusively on cross-border situations is very inefficient. Differently, my suggestion is to start by only considering domestic planning and then to expand the system to cover cross-border schemes. Portugal, despite the apparent ineffectiveness of the previous system, is following this path, at least by its experience.

The Proposal includes, furthermore, generic hallmarks not included in the DL and commented in this analysis, such as the "confidentiality clause" and the "premium fee".

In relation to the personal scope, the Proposal focuses on the intermediaries, but presents a restriction to the inclusion of "*who knows or is reasonably expect to know*" about the reportable scheme, admitting the exemption for legal advice in the context of an already existent juridical or administrative processual dispute. Furthermore, the Proposal, insisting in the position taken by the

[614] PORTUGAL. Autoridade Tributária e Aduaneira – AT. Portal das Finanças. Available at: http://info.portaldasfinancas.gov.pt/pt/destaques/Documents/Anteprojeto_DAC_6.pdf. Accessed on 03 Jun 2019.

[615] NOTE. There might be some ideas here that need to be unpacked. For instance, how the notion of "potentially risky" is defined exactly and how it relates to the notion of risk, discussed at the outset of the thesis. However, the idea in this paragraph is not to discuss the Portuguese proposal but pointing out that changes are expected in the concepts, after the EU-Directive. About the connection between "undesirable tax planning" and unfairness in taxation, because jeopardizing principles as ability to pay and equality, SEE Chapter IV, topic 4.3 – What is a fair taxation?

DL 29/2008, opts for not including the possibility of shifting the obligation from the intermediary to the taxpayers, when the former is protected by legal professional privilege.

Understanding that the Proposal, by its terms, relativized the professional secrecy, the Portuguese BAR Association (*Ordem dos Advogados*), published, immediately after the launch of the draft for public consultancy, an opinion criticizing "*the intention of taking the disclosure in higher consideration than the professional secrecy, when even the Directive does not require this*"[616]. The issue to be taken into consideration, as was stated in topic

In relation to what information is required to be reported, was added, considering the EU interest and the cross-border scope, the "*identification of the EU Member-State susceptible of being related with the reportable scheme",* as well as, the identification of any person, in other Member-State, susceptible of being linked with the scheme.

There is, obviously, the provision establishing the automatic exchange of the information collected in the scope of the Proposal. The scope, furthermore, includes proposing suitable normative changes; making the inspections program adequate for the following periods; publication in the Website of the opinion, in abstract and general approach, about the disclosed schemes, additionally including schemes that the tax administration became aware of by itself. By the way, this publication about schemes that the tax administration became aware of by other means, like inspections, and not by disclosure, seems to have become the common practice, over the past years[617].

The Council of Ministers approved the Proposal, according to an announcement on 16 January 2020[618] and then submitted it to the Assembly of the Republic, mentioning "*the fight against tax avoidance*". At this moment, the Proposal is still under consideration. However, as stated, irrespective to the final text, the objectives traced for this topic were fulfilled.

Interim conclusion.

An important factor for MDR to work efficiently is to be open for constant adaptation of the rules, in view of the expected change in the taxpayers and promoters´ behaviors, the change based on risk analysis and the new planning practices that will certainly arise or be adapted. Flexibility,

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[616] PORTUGAL. BAR Association (Ordem dos Advogados). Announcement – Directive´s (UE) 2018/822 transposition. Professional secrecy violation. Published online on 31 May 2019. Available at: https://portal.oa.pt/comunicacao/comunicados/2019/comunicado-transposicao-da-directiva-ue-2018822/. Accessed on 04 Feb 2020.

[617] PORTUGAL (2019). The last report version - Report on Combating Fraud and Tax Evasion, prepared by the Ministry of Finance and Portuguese Public Administration, p. 196-203. Available at:https://www.portugal.gov.pt/pt/gc21/comunicacao/documento?i=relatorio-de-atividades-desenvolvidas-de-combate-a-fraude-e-evasao-fiscais-e-aduaneiras, Accessed on 03 Feb 2020.

[618] PORTUGAL (2020). Announcement of Council of Ministers, on 16 Jan 2020. Available at: https://www.portugal.gov.pt/pt/gc22/governo/comunicado-de-conselho-de-ministros?i=318. Accessed on 04 Feb 2020.

therefore, is a determining factor. Moreover, as was evidenced in DOTAS, the recommendable procedure is to start with a smaller number of tax and schemes covered, then to expand over the time. The American and Canadian systems also followed this path. The Portuguese regime, nevertheless, remained unchanged over ten years.

The existence of a General Tax Law, the high level of adherence to the principle of legality, the establishment of principles in a written code and the very limited or impossible use of purposive interpretations, trying to bring into consonance the letter and the spirit of the law are difficulties to circumvent when applying MDR. Moreover, the capacity of the tax administration to react quickly, closing the existing gaps, improving the tax legislation, and the necessity of developing the compliance studying the taxpayers' behaviors by their outcomes in taxation and not by conceptual definitions are important.

The Portuguese regime introduced the obligation focusing on the promoters (supply driven) but was very limited in relation to the taxpayers (demand driven)[619]. For instance, when not determining that the taxpayer could waive legal professional privilege, it lost the opportunity to put pressure on the client-promoter relation. The same observation by not having confidentiality clause as a general hallmark, using a contractual protection, which is not exactly related to the reportable scheme but rather to the professional protection. Additionally, by not introducing the scheme reference number, it lost the ability to react, in terms of risk analysis, disregarding a useful tool to identify the quantity of users and their sector of activity in a certain scheme. The regime seems to be uncertain about how to treat confidentiality and professional secrecy, adopting an intermediary position.

The setting of the hallmarks, which were the same in relation to all taxes covered, was poor in reach and deepness, because the regime seems to rely more on legal definitions than on the key-characteristics of the reportable schemes. Recently, some legal definitions such as "tax planning" or "tax advantage" were regarded useless. The new proposal for a review, after the EU-Directive (DAC6), takes the right path, focusing on potentially risky tax planning, from the analysis that some behaviors, irrespective of being conceptually or legally defined as evasion, avoidance or abusive, produce outcomes that harm the objectives and purposes of taxation. In this work´s point of view, this idea is, furthermore, the best one, after the system starts to work and produce results, to measure its efficiency.

3.4 The Irish system.

The inclusion of the Irish mandatory disclosure regime, which exists since 2011, in this work has some specific reasons, besides the simple fact that the OECD has listed it in order to subsidize the BEPS Action 12 proposal. The first reason is that a work published in 2012 called my attention to it, in recognizing:

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[619] See Chapter II, topic 2.3.2.1 – Supply and Demand.

Research in Ireland suggests that deterrence, the more traditional tax administration tool, is important but not sufficient to explain the level of tax compliance in society. Other factors are shown to be important, particularly the influence of personal norms and the level of trust in the tax administration. Perceptions of the prevailing social norms are also important determinants of compliance but appear to exert less influence on taxpayers than personal norms[620].

The issue of "*personalization*" of the norms and the level of trust are points that this work considers extremely relevant in the application of MDR. Personalization, in this case, means treating taxpayers in different situations in relation to the potential risk they may offer for taxation differently, when applying tax planning. Trust is a fundamental concept to ensure that taxpayers are encouraged to effectively reveal their planning, without fear that this will be used simply as a reason for audits and inspections against them. Let us see for example that, in the Portuguese case, the reportable schemes are used, expressly, to direct the auditing programs for the following years, as mentioned in the previous topic[621]. That is one reason, I believe, that not many disclosures are received.

The second reason was the broad repercussion on the case involving the US´s giant tech company Apple, Ireland and tax avoidance. In the case, the European Commission found that Ireland gave Apple preferential tax treatment, which amounted to US$ 14.5 billion between 2003 and 2014[622]. Thus, in the existence of a MDR since 2011, how could Apple enjoy a tax advantage by supposed "*tax avoidance*"? The issue leads to the discussion in topic 2.1.1.4, on MDR application, international competition and "consensual avoidance" and how a '*mandatory*' automatic exchange of information, involving disclosed tax planning, could modify domestic positions.

The third point involves the existence of a GAAR in Ireland and its relation with the existing MDR, considering that the former is much older than the latter. The GAAR is set out in the Taxes Consolidation Act 1997. After 23 October 2014, the GAAR is intended to defeat tax avoidance schemes, which have little or no commercial purpose and are primarily entered into to obtain a tax advantage. The taxpayer is not entitled to claim the tax advantage when submitting their tax return if the transaction falls under GAAR. In addition to the GAAR there are many targeted anti-avoidance rules throughout tax legislation. These rules are intended to deny the benefit of a loss, relief or exemption, which may otherwise be available. Schedule 33 of the Taxes Consolidation Act 1997 classifies a number of these provisions as specific anti-avoidance provisions (SAAR). A tax avoidance surcharge, which can be up to 30%, applies where a person seeks to obtain the benefit of any tax advantage[623].

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[620] WALSH, Keith. *Understanding Taxpayer Behavior – New Opportunities for Tax Administration*. The Economic and Social Review, v. 43, n. 3, 2012, p. 470. Dublin: Office of the Revenue Commissioners.
[621] PORTUGAL (2019). *Report on Combating Fraud and Tax Evasion*. Cit.
[622] BARRERA, Rita and BUSTAMANTE, Jessica. *The Rotten Apple: Tax Avoidance in Ireland. The International Trade Journal*, v. 32, n. 1, p. 150-161. Published online 02 Aug 2017.
[623] IRELAND. Irish Tax and Customs. *Revenue.* Available at: https://www.revenue.ie/en/self-assessment-and-self-employment/tax-avoidance/legislative-tools-to-challenge-tax-avoidance.aspx. Accessed on 02 Feb 2020.

The fourth point is taking into consideration the regime introduced in Ireland by the *Mandatory Disclosure of Certain Transactions Regulations*, 2011[624] (hereinafter "*the Regulations*"). The Regulations apply to transactions that fall within any description set out in a provision, using the concept of hallmarks ("*a specified description"*) and the idea of obtaining tax advantage, and focuses on the promoters. In special, there is, at the end, a list of "transactions to which these Regulations do not apply"[625]. Thus, the tax authorities specifically indicate some schemes that are out of their interest, reducing the possibility of receiving a large number of useless information and increasing certainty to promoters/users obliged to disclose.

Thus, the questions to consider are: how did the behavioral analysis influence the construction of the Irish regime? Why did not Irish MDR control Apple? How did the existence of a strong GAAR influence the functioning of the Irish regime? What are the particularities existing in Ireland, influencing MDR?

An interesting characteristic, they clarify that the Regulations are made by the Revenue Commissioners under section 817Q of the Taxes Consolidation Act 1997 (introduced by the Finance Act 2010), with the consent of the Minister for Finance. Therefore, it is possible to imply that MDR is defined in an administrative provision (secondary legislation), which could be changed by administrative acts, significantly amplifying the possibility to react quickly, without the need of submitting it to the Parliament.

In Ireland, the primary legislation consists of Acts of the *Oireachtas* (the Irish National Parliament) and the secondary legislation consists of legal measures the making of which are delegated by the *Oireachtas* (in primary legislation) to another body (e.g. Ministry of Finance, Revenue Commissioners). The task of producing legislation within Revenue is undertaken by the Revenue Legislation Services (RLS), "*which embodies an experienced and skilled legislative capability across all tax*"[626]. RLS has undergone significant transformation of its systems and practices since its establishment in 2004, not least in regard to the legislative process. Many tax policy initiatives originate from within Revenue itself. Additionally, *"by way of regular continuous dialogue between RLS and other Revenue areas responsible for the comprehensive monitoring of the conduct of the taxation system, RLS is in pole position to identify opportunities for legislative change, be it by way of administrative/regulatory correction and/or the pursuit of large scale legislative reform*"[627]. All these capabilities, within the role of Irish Revenue body, are very important, in this work´s point of view, in contributing to MDR efficiency, specifically in terms of time to react closing loopholes and correcting weaknesses in the tax legislation, after receiving disclosed information about tax planning. However, it is important to remember that the Revenue body does not have so many capacities everywhere.

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[624] IRELAND (2011). Ministry of Finance. The Revenue Commissioners, in exercise of the powers conferred on them by section 817Q (inserted by section 149 of the Finance Act 2010 (n. 5 of 2010)) of the Taxes Consolidation Act 1997 (n. 39 of 1997), with the consent of the Minister for Finance, hereby make the following regulations. PART 1 General Citation. These Regulations may be cited as the *Mandatory Disclosure of Certain Transactions Regulations 2011*.
[625] Ibid, p. 16.
[626] IRELAND (2016). Revenue Commissioners. Guide to the Legislative Process. Dublin: Published by the Revenue Commissioners, 2004, Revised in 2016, p. 10-11. Available at: https://www.revenue.ie/en/tax-professionals/documents/legislative-process.pdf. Accessed on 06 Feb 2020.
[627] Ibid., p. 16.

The first version of the Guidance Notes on the Irish Mandatory Disclosure Regime was enacted in January 2011. After that, a new amended version was enacted in 2015 and updated by September 2019 [628] (hereinafter "*The Notes*"). In this work, I will consider the last version.

The Notes clarify that MDR do not influence ordinary day-to-day tax advice between a tax adviser and a client, providing a list of examples, such as schemes involving exemptions and reliefs in a routine fashion for *bona fide* purposes, as intended by the legislature. Examples are approved Profit Sharing Schemes, approved Salary Sacrifice Arrangements and approved Retirement Benefit Schemes. They understand that it is reasonable to assume that the tax advice given by most tax advisers to clients would be of an ordinary routine nature. This demonstrates the concern with possible rejection to the system, trying to eliminate fears that might lead to under or over information.

On the Revenue website[629], they acknowledge that taxpayers are not obliged to organize their tax affairs in such a way that they pay the maximum possible tax. Therefore, people are fully entitled to structure their tax affairs in a tax efficient manner. However, they warn, "*there is a difference between claiming the benefits of a relief, exemption or allowance in the way intended by the legislature, and unacceptable tax avoidance*". Therefore, tax avoidance, according this definition, has two branches: one resulting in a tax advantage intended by the legislature and other, called "unacceptable", because it is not intended. In conclusion, Irish MDR focuses on schemes designed to obtain, as their main purpose, a tax advantage not intended by the legislator. Moreover, this "*unacceptable tax avoidance*" is characterized by often involving contrived, artificial transactions that serve little or no purpose other than to gain a tax advantage. When establishing the hallmarks, they try to catch schemes in transactions in which these characteristics might be present.

3.4.1 A description of arrangements that are required to be disclosed.

The Notes says that the MDR impact on certain tax transactions relating to Income Tax, Corporation Tax, Capital Gains Tax, the Universal Social Charge, Value Added Tax, Capital Acquisitions Tax, Stamp Duties and Excise Duties. It does not encompass Customs Duties[630]. Moreover, irrespective if the promoter is in Ireland or outside, the disclosure rules only apply to the extent that the scheme enables, or is expected to enable, an Irish tax advantage to be obtained. Therefore, it is a "domestic" MDR, not focusing on cross-border arrangements, which could be on the interest of other countries.

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[628] IRELAND (2015). Irish Tax and Customs. *Guidance Notes on Mandatory Disclosure Regime, 2015*. Available at: https://www.revenue.ie/en/tax-professionals/legislation/notes-for-guidance/mandatory-disclosure-regime.aspx. Accessed on 05 Jan 2020.

[629] IRELAND. Irish Tax and Customs. *Revenue.* Available at: https://www.revenue.ie/en/self-assessment-and-self-employment/tax-avoidance/what-is-tax-avoidance.aspx. Accessed on 07 Feb 2020.

[630] IRELAND (2015). *Guidance Notes on Mandatory Disclosure Regime, 2015*, Cit., p. 2.

They also provide a distinction between "*marketed or off the shelf*" and "*bespoke or tailored*" schemes. The first classification refers to schemes designed for no specific client or where they are designed with a view to marketing them to a particular class of user, for example to high worth individuals, large companies or employers. The second classification applies where the scheme is a tax arrangement that is designed in response to a taxpayer's particular requirements. Typically, the promoter of a "*bespoke*" scheme is likely to be working exclusively with a client with a particular and complex set of financial/tax circumstances. Therefore, at least by its intentions, the Irish MDR focuses on both schemes, not excluding bespoke arrangements designed for a specific client involving complex circumstances and the Apple case should be, by definition, caught. It should be noted that in the case of "bespoke" schemes and "in-house" schemes only those schemes that have actually been implemented are required to be disclosed, disregarding plans, proposals or simple ideas.

They apply the main benefit test, as a generic test to define if a transaction is reportable, stating that this test requires the promoter, or user, to objectively consider the value of the expected tax advantage as compared with the value of any other financial benefits likely to arise under the transaction. Thus, the main benefit is a relative test, depending on each transaction. Nevertheless, they provide a clue, adding that "*obtaining a tax advantage will be one of the main benefits of a transaction if the person would not have entered into the transaction, in its current form, if the possibility of the tax advantage had not been there*"[631].

The hallmarks, referred to as "*specified descriptions*", are essentially of two types[632]: '*generic*' in nature and primarily designed to capture new and innovative tax planning schemes. These are the descriptions relating to "confidentiality" and "fees". '*Specific*', targeting areas of specific concern and perceived high risk, *i.e.,* those relating to standardized transactions and particular types of tax advantage. Therefore, the particularity here is the reference to the specific hallmarks as those focusing not on avoidance or 'aggressive' schemes, but on "*areas of concern and perceived high risk*".

This differentiation, which could seem to be only textual at first glance, produces two significant effects, in this work's point of view: first, a psychological effect on the promoters/users obliged to disclosure, because the schemes are not defined as "aggressive" or "abusive", but simply schemes that are "risky". Thus, they can be risky because they involve complexity, international interests or policy concerns and not exactly because they push the limits of the law and being so, could be challenged by a GAAR or in an inspection. Second, because by applying this idea tax administration can avoid litigations or challenges before the Courts, especially in countries where the Courts look at the letter of the law to provide its interpretation. Therefore, if a regulation introducing MDR provides definition to "tax advantage", "scheme" and "avoidance" and subsequently sets the hallmarks as characteristics related to a scheme producing an advantage that represents abuse or avoidance, is possible to raise a discussion on whether the hallmark really catches those schemes or not, *i.e.*, the "quality" of the hallmark. Thus, the Irish Revenue makes it

[631] Ibid, p. 4.
[632] Ibid, p. 9.

clear after some other considerations that “*the nature of the mandatory disclosure regime is such that it may require the disclosure of some schemes that are not avoidance*”[633].

Therefore, in the Irish regime, a transaction is disclosable if it enables a person to obtain a tax advantage, which is the main benefit of the transaction. Moreover, if it falls within one of four classes of specified description: confidentiality; premium fee; standardized documentation or a class or classes of tax advantage (loss schemes, employment schemes, income into capital schemes, income into gift schemes, discretionary trusts). Some hallmarks such as “standardized tax products”, “loss schemes” and “employment schemes” are also included in the British regime; however, considering that this work has already discussed them in DOTAS (topic 3.2.1), it will not be done again.

3.4.1.1 Confidentiality clause and premium fee.

The confidentiality hallmark is applied in a hypothetical basis, however meeting two cumulative reasons: “*if it might reasonably be expected”* that the promoter/user would wish to keep the arrangement confidential from Revenue and to facilitate repeated or continued use and/or to prevent Revenue from using that information to enquire into any return or any request for repayment. The second part of the confidentiality hallmark requires promoters to ask themselves if it might reasonably be expected that they would wish to keep the arrangement confidential from any other promoter with the purpose of maintaining their competitive advantage over other promoters.

The premium fee test is also a hypothetical one and applies to both promoter-based and “in-house” schemes. The term “premium fee” is defined as a fee that is to a significant extent attributable to the tax advantage or is contingent upon a tax advantage being obtained. The test is designed to identify tax advice that is innovative and valuable and which the promoter could use to obtain premium fees. Fees charged or calculated purely based on “scale rates” or “time and materials” are not to be considered as premium fees, neither is a “premium fee” considered that solely on account of factors such as the adviser’s location; the urgency with which the advice is sought; the size of the transaction involved, or the skill or reputation of the adviser.

3.4.1.2 Income into Capital Schemes and Income into Gift Schemes.

This hallmark targets schemes that seek to convert income into capital with a view to avoiding the higher rate of income tax and the social contribution and having any gain taxed at a lower rate or relieved or exempted from tax altogether. The legislation also ensures that situations where the scheme creates a capital receipt but without creating a potential capital gain tax liability, due to capital gain tax reliefs or exemptions, also come within this specified description. Similarly, if the

[633] See Chapter III, topics 3.3.6 and 3.3.7 – The Portuguese experience.

schemes seek to convert income into gifts, having the gain taxed at the lower gift tax rate or possibly relieved or exempted from tax altogether.

3.4.1.3 Discretionary Trusts.

This specified description targets schemes that seek to gain a tax advantage using a discretionary trust, wherever located. Revenue recognizes that some discretionary trusts are trusts created under a will. Many such trusts will not obtain, or seek to obtain, a tax advantage as one of the main benefits of the will trust. Therefore, when applying this hallmark, the main benefit test is especially important and depends on how a promoter has given advice to an individual in relation to creating a will trust and largely on the promoter evaluation about the advantage obtained.

3.4.2 A description of the persons required to disclose such arrangements.

The primary duty to disclose falls on the promoter of a scheme, but the client or user of a scheme may have to disclose in certain circumstances. These are where the promoter of the scheme is outside Ireland and there is no promoter in the State; where there is no promoter or where the promoter is a legal professional and asserts that legal professional privilege prevents a disclosure being made. They forewarn, however, it should be noted that the client of a legal professional has the option of waiving any right to legal privilege and, if that happens, the obligation to disclose remains with the legal professional. This follows the OECD proposals and DOTAS, but specifically in relation to this third possibility, was not followed in Portugal.

The Notes provide a general description that a person may be a promoter if during the course of a relevant business he/she is to any extent responsible for the design of a scheme; or has specified information about the scheme and makes a marketing contact; or makes a scheme available for implementation by other persons, or is to any extent responsible for organizing or managing the implementation of the scheme. Additionally, the Notes narrow the definition, referring to some persons who participate in the design or in the marketing or the implementation of a scheme. This way, where a person is only involved in the design of a scheme and is not involved in marketing the scheme, he/she must make the disclosure. Moreover, where a person is considered for “making a marketing contact”, he/she is, therefore, a promoter when the scheme has been substantially designed and he/she describes the general nature of the scheme to another person aiming to have that person make it available for implementation. Finally, a scheme can be “made available for implementation” by more than one person, e.g. by the scheme´s designer or by those who provide the scheme to others, consequently, each such person may be a promoter for disclosure purposes and have obligations under the legislation.

The regime, therefore, considers that a reportable scheme many times, if not always, consists in a chain of acts. Moreover, in each phase, it is possible to perceive different persons

promoting different actions. Thus, the Irish system seems to follow the evolutions made in DOTAS, discriminating designers, marketers, implementers, etc.

3.4.2.1 Professional privilege, scheme number and client lists.

Where a scheme is disclosed, Revenue will either notify the discloser that the scheme was not disclosable or it will assign a unique number to the scheme and notify the discloser of that transaction number within 90 days. The assigning of a transaction number to a scheme does not necessarily mean that Revenue intends to challenge the scheme. This is particular because before assigning the reference number, there is an analysis of the disclosure. Thus, the scheme is kept under control only if the Revenue understands it is really in MDR´s focus. Moreover, it means that the intention is to analyze all the disclosed arrangements[634], at least in a preliminary analysis on the compatibility of the scheme with the rules that determine disclosure.

A person who obtains, or seeks to obtain, a tax advantage must include the transaction number in relation to that scheme on his/her tax return for any year he/she either enters into a scheme or seeks to obtain a tax advantage from it. This is also particular, because the scheme number shall not be informed once, but as many times as the scheme is producing tax advantages.

Promoters asserting legal professional privilege must advise Revenue of that fact. The legal professional privilege does not arise in the context of marketed schemes (because Revenue states that the reference date for disclosure is the first date a marketing contact is made which will pre-date any professional relationship with a client in respect of the scheme), the claiming of legal professional privilege will be confined to bespoke schemes. As such, a promoter claiming legal professional privilege must do so within 5 working days of first becoming aware that a transaction forming part of the scheme has been implemented by the client[635].

This is in line with what this work supports, in the sense that professional privilege can only apply, in MDR context, when the professional is acting to provide legal advice within the specific interest of a client, in a specific situation, and not when he is acting in the tax planning market as any other person could act. It might go further, analyzing even in the case of bespoke schemes, the content of the scheme, if it is a case of legal advice and in which moment it is provided.

The Irish regulations require a promoter to provide Revenue at regular intervals with information on persons to whom a disclosable transaction has been made available for implementation, unless the promoter has satisfied him/herself that the client has not actually implemented the scheme at the time such information is required. This is known as "*the client list*"[636], provided to Revenue in respect of the scheme within the period of 5 working days after the end of each calendar quarter.

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[634] IRELAND (2015). *Guidance Notes on Mandatory Disclosure Regime, 2015*, Cit., p. 24.
[635] Ibid, p. 20. NOTE. It is interesting to compare this aspect with the Portuguese rules. See Chapter III, topic 3.3.2.1 – Professional privilege.
[636] Ibid.

A separate client list must be provided to Revenue for each disclosable transaction made available by the promoter within the period of 30 working days after the disclosable transaction is made available for implementation, where the scheme is marketed. Where the scheme is a bespoke scheme, within the period of 30 working days after the transaction having been implemented.

It is up to the promoter to take all reasonable steps to establish if a client to whom he/she has made a scheme available has actually implemented the scheme. This will only be an issue in relation to "marketed" schemes, because for "bespoke" schemes the matter of a client list only arises after the scheme has been actually implemented. This kind of rule establishes a connection between the promoter and the client, especially in case of marketed schemes, because of MDR obligations. Thus, after marketing a scheme, the promoter is still linked to it, checking with the client the effective implementation, so that the client knows his/her name will be included in a list and provided to Revenue. It is another way for MDR to put pressure on the promoter-client relation and creates a possible deterrence effect.

3.4.3 A trigger for the imposition of a disclosure obligation.

Depending if the scheme is considered "marketed" or "bespoke", the trigger for the obligation to disclose is marked by different events and the regime works with the concepts of "availability" and "implementation"[637]. Thus, the disclosure must be made within the period of 5 working days commencing on the day following the relevant date.

The "relevant date"[638] can be the date the promoter has specified information about the scheme and first makes a marketing contact so that a person interested in the scheme could seek further information on it or seek to have it made available for implementation. In relation to "marketed schemes", the relevant date is most likely to be the date on which the promoter makes the transaction available for implementation by another person. On the other hand, specifically to promoters dealing with "bespoke" schemes, the relevant date is the date the promoter first becomes aware of any transaction forming part of the reportable transaction having been implemented. These "combinations" setting different triggers demonstrate how important the time to inform is, as early as possible, considering the circumstances.

In the cases in which the obligation relies on the taxpayer/user, the disclosure obligation arises by reference to the date of the first transaction entered into by the user, which forms part of the scheme. Thus, the disclosure must be made within 5 working days, where the promoter is offshore or legal professional privilege is asserted, and within 30 working days in the case of "in-house" schemes[639]. Therefore, except for the case where there is no promoter, the user has no more than the "normal 5 working days" to comply. This can be especially difficult when the

[637] See Chapter II, topic 2.5.2.3 - A trigger for the imposition of a disclosure obligation.
[638] IRELAND (2015). *Guidance Notes on Mandatory Disclosure Regime, 2015*, Cit., p. 17.
[639] Ibid, p. 18.

promoter is offshore, because of the short period of time, but considers that during the contact or offer between promoter and taxpayers, the former will advise the latter about MDR.

3.4.4 Appropriate penalties or other mechanisms to address non-compliance.

The Notes clarify that a failure to comply with any of the obligations imposed by the Mandatory Disclosure regime may leave a person liable to a civil monetary penalty. The level of civil penalty that may apply varies depending on the nature of the failure; nevertheless, the liability to a penalty and the amount of the penalty is to be determined by the Courts, in all cases.

They divide the penalties in "lesser failures" and "more serious failures". *Lesser* are considered those such as a promoter asserting legal professional privilege failing to inform client´s lists or a person failing to provide a scheme reference number or a person failing to respond to an administrative notice requiring further information or documents. *Serious* are applied in a daily increasing basis, to deter promoters from deliberately delaying a scheme´s disclosure.

Notwithstanding, the regime establishes flexibility to the Courts when setting the amount of the penalties, so that it is designed to allow taking into account the promoter´s fee income and the tax advantage gained by the client/user[640]. It is interesting because it creates, in this work's point of view, a proportional relation between the potential risk/damage and the liability of the promoter, if the scheme is not disclosed.

3.4.5 A description of what information is required to be reported.

There is no difference in relation to the Irish regime, in this topic. Thus, the disclosure must identify promoters and users, the scheme, the provisions in which it relies and the expected tax advantage, allowing Revenue to understand how the scheme operates and a possible reaction to close down by legislative action, or use of anti-avoidance provisions.

3.4.6 The impact of the regime on compliance.

MDR sets as its objectives to obtain early information about certain tax schemes, how they work and information about who has availed themselves of the schemes, in order to close down by legislative action, or by use of anti-avoidance provisions, any such schemes that are viewed as avoidance. They clarify that the nature of MDR is such that the "net it casts" is wider than simply a self-assessment against the GAAR parameters and it may, therefore, result in the disclosure of some schemes that would not be considered as avoidance. Large elements of the tax system in

[640] Ibid, p. 32.

Ireland are based on self-assessment. In this context, there is clearly potential to influence behavior to improve compliance[641].

The consequences of disclosure will be two-fold: firstly, the Government of the day and the *Oireachtas* may decide that a particular scheme disclosed is indeed a scheme producing undesirable result, not envisaged by the law, so that it should be closed down and may move to close it down by appropriate legislative action. The relevant characteristic in the Irish system, differing for instance from the Portuguese system, is that this may be done immediately by way of a Media Statement by the Minister for Finance, or in the next available Finance Bill[642]. Secondly, and more importantly in my view on the Irish case, regarding individual users of a disclosed scheme, Revenue may seek to challenge the scheme under the general anti-avoidance provisions, specific anti-avoidance legislation contained elsewhere in the various Tax Codes or through other anti-avoidance mechanisms (e.g. abuse of rights in the context of VAT).

The Irish regime has received a small number of disclosures, since it was introduced. By January 2020, 11 (eleven) disclosures from promoters. In 2011, 3 disclosures involving employment schemes; 1 disclosure related to standardized tax product/employment scheme; 1 disclosure related to standardized tax product/loss schemes and 2 disclosures related to restructuring of a partnership. In 2012, 1 scheme related to employment scheme/income into capital scheme. In 2014, 1 disclosure related to loss scheme and 1 related to standardized tax products/employment schemes. In 2017, 1 disclosure related to standardized tax product. In 2013, 2015, 2016, 2018 and 2019, none disclosures were received[643].

According to the Revenue[644], an amendment was made to section 812 TCA in Finance Act 2014 in response to a scheme disclosed involving artificial losses. The scheme had sought to use section 812 for a purpose for which it was not intended. Therefore, a legislative amendment was made in order to clarify the purpose of section 812 and remove any doubt as to its interpretation. Audits were also undertaken on the individuals who entered the scheme and assessments were made withdrawing the benefit of the losses claimed. Following the passing of the Finance Act 2014 a number of Qualifying Avoidance Disclosures were received with full payment of the tax as required by the legislation. In relation to the other loss scheme, audits were concluded and amended assessments were issued. A number of Qualifying Avoidance Disclosures were also received with full payment of the tax as required by the legislation. The remaining taxpayers appealed the amended assessments and Revenue is currently liaising with the Tax Appeal Commission in relation to these appeals. Interventions are ongoing in relation to the employment scheme disclosures. In respect of the 2017 standardized tax product, disclosure interventions have been opened on all relevant cases and are currently ongoing to determine the nature of the transactions. In relation to two of the schemes, on review it was determined that they were related to commercial restructuring and therefore were not abusive.

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641 WALSH (2012). Op Cit., p. 453.

642 IRELAND (2015). *Guidance Notes on Mandatory Disclosure Regime, 2015*, Cit., p. 2.

643 COYLE, Seamus. E-mail to Sales Parada, Marcio Henrique from IRELAND, *Revenue (scoyle@revenue.ie)*. 19 Feb 2020. Mandatory Disclosure.

644 Ibid. NOTE. The reactions are described as examples of possible countermeasures and therefore are not exhausting all the schemes disclosed.

Notwithstanding, the Revenue poses as a competent expert body to clear doubts of those who engaged in a doubtful scheme, which could be regarded as avoidance and challenged by a GAAR. In this context, MDR is an available tool. The Revenue´s website states that:

> *You should know that if something sounds too good to be true, it probably is. If you are unsure about a transaction you should always seek a second opinion. You should seek advice from an independent, reputable tax advisor who has the particular expertise to understand the transaction. This should be someone who is not connected with the scheme. Preferably not someone who has introduced you to the promoter. If you have implemented a transaction which you think was tax avoidance, you should not claim this tax advantage when submitting your tax return. If you have claimed the tax advantage you should consider* ***informing Revenue*** *with a view to settling any tax liabilities. You should consult the 'Informing Revenue of tax avoidance' section* ***for details of how to make a disclosure.***[645] *(Emphasis added)*

Moreover, it is stated that Revenue will examine any scheme to determine whether or not it complies with the applicable tax legislation under first principles. If so, the taxpayer will be regarded to have submitted an incorrect tax return, which could attract a penalty ranging from 3% to 100%. Moreover, the taxpayer may be liable to interest and a penalty, or a 30% tax avoidance surcharge. Nevertheless, by making a disclosure, he/she may receive a reduction in the 30% tax avoidance surcharge.

Thus, if engaging in tax avoidance, besides tax, interest and penalty, there is a "special" 30% tax avoidance surcharge. However, if the scheme had been disclosed, this avoidance surcharge can be reduced. Furthermore, the Irish regime allows a "protective notification" within 90 days of the date of implementation of a scheme. Thus, if a taxpayer is concerned that Revenue may challenge a scheme under the GAAR, it is possible to file a protective notification, which will ensure that he/she will not have to pay the tax avoidance surcharge of 30% and the interest will not begin to add up until 30 days after Revenue's assessment[646]. Furthermore, taxpayers will not have details published on the list of tax defaulters[647].

As a result, as was mentioned in the Comments on the Draft:

> *There have been very few disclosures in Ireland under the new disclosure rules and the view of our (Irish) member Institute is that that is because the GAAR has been successful in eliminating the more egregious and abusive schemes that might otherwise have been in existence and would have required disclosure under the new regime. This experience can be contrasted with that of the UK where its own disclosure rules (DOTAS) were introduced in 2004 and a GAAR was introduced many years later in 2013*[648].

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[645] IRELAND. Irish Tax and Customs. *Revenue.* Available at: https://www.revenue.ie/en/self-assessment-and-self-employment/tax-avoidance/what-to-do-if-you-think-you-are-engaged-in-tax-avoidance.aspx. Accessed on: 10 Feb 2020.

[646] Ibid.

[647] Ibid.

[648] OECD (2015). *Comments received on Public Discussion draft.* Cit. Global Accounting Alliance, p. 157.

Besides the existence of GAAR and the offer of some "advantages" if disclosing, it is important to state that Revenue has conducted four surveys involving small or medium sized enterprises or '*pay as your earn*' (2006-2010). The results and analysis provide information on a number of areas that can be evaluated against the behavioral factors. In addition to these four surveys, Revenue also commissioned an independent survey of attitudes and behavior towards taxation from a third party market research company in 2008/09. The results demonstrate that:

> *Concern at having to pay interest charges for late payment of tax is indicated as the most influential within the topics related to deterrence. Other deterrence factors such as Concern that Revenue will obtain a court judgment against you for failure to pay tax and publish details of that judgment; Concern that you will be published on the Quarterly Defaulters List and Concern that you will be audited by Revenue are influential for a sizeable share of the respondents. Concern that a 3rd party owing you will pay Revenue is influential only for small share of cases*[649]*.*

In conclusion, the relation between GAAR, penalties and MDR creates a unique situation in Ireland. The main effect, in my opinion, is deterrence. Moreover, it is important to note that MDR seems to be part of a tax policy developed to improve understanding of taxpayer behavior and attitudes to help tax administrations to develop stronger and more effective compliance risk treatments, as well as to improve customer service programs.

Traditional tools of tax administration to increase the risk feeling (audit for example) are an expensive way to attempt to improve compliance even when targeted at specific tax risks. Influencing behavior may offer an effective but less expensive option[650]. The tax administration has other options to reduce opportunities for evasion as well as increasing the likelihood of audit or imposing harsher sanctions. Examples of this in Ireland are Revenue's extensive use of third party data or withholding tax systems (such as pay as you earn (PAYE) income tax)[651]. In this context, it is possible to conclude that MDR designed in Ireland, by increasing the level of deterrence can positively influence taxpayer compliance[652].

However, one must pay attention to the fact that the deterrence we are talking about is not to harm the freedom to organize business in order to pay less taxes, but influencing the risk and cost analysis, on the taxpayer side, to engage in a scheme offered by promoters (supply side).

In such context, I believe that in Ireland, MDR is applied as a deterrence tool, based on self-assessment, penalty system, which offers an increase in risk of avoiding tax and some reductions or benefits if the avoidance scheme has been disclosed before the tax administration assessment. Furthermore, the system was developed taking taxpayers´ behaviors and perceptions into consideration, in relation to tax administration and in relation to the tax system, as a whole.

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[649] WALSH (2012). Cit., p. 461-462.
[650] Ibid., p. 452.
[651] Ibid., p. 454.
[652] SLEMROD, Joel. *Cheating Ourselves: The Economics of Tax Evasion,* Journal of Economic Perspectives, v. 21, n. 1, 2007, p. 25-48.

3.4.7 What changes after the EU-Directive.

In Ireland, Finance Bill 2019 was published on October 17, 2019 and provides for the transposition of EU Directive 2018/822 (DAC6) into the Irish domestic law. The Irish President signed the bill into law on December 22, 2019. The provisions will come into operation on July 1, 2020[653], therefore, following the DAC6 deadline. The draft proposes to amend the 'Anti-Avoidance' rules of Ireland's Taxes Consolidation Act (TCA) by transposing DAC6 as an addendum to the domestic MDR that were enacted in 2011[654]. Thus, Ireland is expanding for "reportable cross-border arrangements" in addition to the existing and separate regime, which applies to domestic transactions[655].

The proposed legislation includes definitions for terms "tax advantage" and "arrangement". The definition of arrangement mirrors the definition in Ireland's controlled foreign corporation (CFC) rules while the definition of tax advantage mirrors the equivalent definition in Ireland's existing mandatory disclosure for domestic transactions[656]. The scope of the legislation is closely aligned with the Directive – no extension of scope proposed for VAT, customs duties or excise duties. Therefore, in Ireland, some taxes will be covered only for domestic purposes.

Interim conclusion.

In previous topics, this work tried to answer the questions on what are the particularities existing in Ireland, influencing MDR. For instance, the effective possibility to change the law and the provision to publish a *Defaulters List,* which was demonstrated in a survey to be a worry to the taxpayers. Thus, this seems to have a strong effect in deterrence, associated to MDR. On the other hand, the proportional circumstantial adjustment of the sanctions applied to promoters who do not disclose and the reductions of the amount taxpayers must pay if the disclosure is provided, are '*incentives*' to MDR. Taking into consideration the existence of previous research, as quoted, and these rules, it is possible to imply that efficient deterrence rules are applied on a basis of the taxpayers' perceptions and the level of trust in the tax administration.

As stated in this work, the existence of a GAAR is not a *sine qua non* condition. Thus, MDR can be introduced and receive the information. However, a GAAR can interact to optimize the output, I mean, the efficiency increases in a regime where GAARs and other anti-avoidance measures are effectively working.

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[653] KPMG. Euro Tax Flash from KPMG's EU Tax Centre. *EU Mandatory Disclosure Requirements* - Special Edition. Available at: https://home.kpmg/xx/en/home/insights/2019/11/etf-416-eu-mandatory-disclosure-requirements-special-edition.html. Accessed on 31 Jan 2020.
[654] EY. Tax Alert - Ireland DAC6 Finance Bill 2019. *Ireland publishes draft proposal on EU Mandatory Disclosure* Regime. 24 October 2019. Available at? https://eyfinancialservicesthoughtgallery.ie/ireland-publishes-draft-proposal-on-eu-mandatory-disclosure-regime/. Accessed on 11 Feb 2020.
[655] KPMG. Mandatory Disclosure Rules. *Ireland enacts DAC6 transposition bill*. January 2020. Available at: https://assets.kpmg/content/dam/kpmg/xx/pdf/2020/01/mdr-factsheet-ireland-january-2020.pdf. Accessed on 15 Feb 2020.
[656] Ibid.

The last point is that MDR is not a *panacea* by itself. Its introduction will not immediately control or deter tax avoidance, especially international, as intended by the OECD. It depends on the tax policies in place in the country. For instance, it depends on how "tax avoidance" is seen in terms of tax policy.

Despite the fact that I can say that the Irish MDR is very well developed in its basic elements, in the Apple case, the question raised was if Ireland gave Apple an unfair tax advantage by allowing it to pay substantially less than the statutory corporate rate for a long period[657]. Thus, it is not enough to establish MDR as a tool to tackle schemes, which the main benefit, or one of the main benefits, is to obtain "tax advantage" dissociated of the "spirit of the law". It is important to take into consideration if that "tax advantage" is a kind of tax policy or not, because, certainly, the *spirit* of the Irish corporate tax law was not that on the Apple case outcome. Moreover, it is necessary to analyze what is "fair taxation" and which layer of fairness we are talking about[658].

The European Parliament agreed on a set of recommendations on how to deal with the large-scale tax avoidance uncovered by the Paradise Papers, released in November 2017. One of these recommendations, passed by a massive majority, was that Ireland along with the Netherlands, Malta, Cyprus and Luxembourg should be regarded as an "*EU tax haven*" until substantial tax reforms are implemented[659].

After the implementation of EU-Directive, what effectively changes, in this case, is related to the automatic exchange of information. Thus, a company such as Apple, utilizing intricate structures and favorable regimes or exploring loopholes, even though those loopholes are deliberately granted as tax policy, must comply with MDR and the information, in the case of the EU, will be exchanged with other Member-States and the EU-Commission. Thus, it will no longer be possible to keep the same scheme hidden for more than ten years. The issue, therefore, moves to the level of sovereignty of the EU Member States in being able to choose their own tax policies, knowing that another state might question them for doing so[660].

3.5 The Brazilian proposal

In Brazil, BEPS also produced reactions. The Brazilian Minister of Finance proposed the adoption of a program called the *Program for the Reduction of Tax Litigation – PRORELIT* to the Government.

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[657] BARRERA and BUSTAMANTE (2017). Cit., p. 150.
[658] NOTE. One answer to the question raised here in relation to the Apple's case could be that Apple structure did not involve any avoidance of Irish taxes. This is likely to be central to the dispute. Apple and Ireland might say they are right and the profits were properly attributed to the holding of IP by the Head Quarter, on the basis of transfer pricing rules as they then stood and were not taxed by the US thanks to deficiencies in the US regime. Subtext: It is US tax that is being avoided, not Irish tax. Thus, Ireland might argue that it taxed profits made in Ireland at statutory rate and the lowly taxed profits were not part of its tax base. See Chapter IV, topic 4.3 – What is a fair taxation?
[659] THE IRISH TIMES. *Why is Ireland facilitating tax avoidance?* Published on 1 Apr 1, 2019. Available at: https://www.irishtimes.com/opinion/letters/why-is-ireland-facilitating-tax-avoidance-1.3844547. Accessed on 11 Feb 2020.
[660] See Chapter II, topic 2.1.1.4 - MDR application and International Relations.

The proposition had three specific reasons: to allow the payment of tax debts, which were being discussed administrative or judicially, by giving up the litigation; to introduce the obligation to disclose tax planning strategies, in order to increase legal certainty in the country's business environment, moreover generating savings in public resources, by reducing unnecessary and time-consuming disputes, and to propose the authorization for the Executive Branch to carry out the monetary update of some federal tax rates[661]. The first point is that the MDR proposition was part of a program, of which the main objective was to reduce pending litigations between tax administration and taxpayers, at the same time promoting the federal tax collection.

According to the Minister[662], MDR has as main objective to provide tax administration with timely information on tax planning, besides providing legal certainty to companies making the disclosure of the transactions. The disclosure makes it possible, in case tax administration disagree with the scheme adopted, to pay the due taxes only adding interest rates. Furthermore, it is stressed that the proposed measure encourages a more cautious posture when applying aggressive tax planning. Thus, he expressly refers to certainty and deterrence. Moreover, he proposes an *advantage* for those making a disclosure, that in case the Administration disregards their planning, for tax purposes, no sanctions would be applied, so the taxpayers should pay only the due tax plus interest.

Finally, the influence of BEPS and the experience in other countries is expressly mentioned:

> *In this line, the BEPS Action Plan, OECD, 2013, developed within the OECD / G20 and counting with the participation of Brazil, recognized, based on the experience of several countries (US, United Kingdom, Portugal, South Africa, Canada and Ireland), the benefits of mandatory disclosure rules to tax administrations. Thus, there are recommendations related to the elaboration of such rules regarding* **aggressive or abusive** *transactions, arrangements or structures. (Emphasis added)*

Next, the Government enacted the Provisional Measure n. 685/2015[663] (hereinafter "*the MP"*, acronym in Portuguese to *'Medida Provisória'*) that instituted the proposed Program – PRORELIT. Among other provisions, the obligation to inform Tax Authorities about any transactions, business and contractual acts that entailed the suppression, reduction or deferral of taxes, which the main benefit, or one of the main benefits, were to obtain a tax advantage, was created. The information was also required if the form adopted was not usual or when using indirect transactions with clauses aiming to deny or denature, although partially, the effects of a typical contract. Moreover, if the transaction was dealing with specific legal acts or business, which should be specified only in a future regulation. In case of non-compliance, the arrangement could be regarded as fraud and heavy sanctions should be applied.

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[661]BRAZIL (2015). Ministry of Finance. *EM n. 00080/2015/MF*. Brasília, 7 Jul. 2015. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Exm/Exm-MP%20685-15.pdf. Visited at: 27 Oct 2018.

[662] Ibid.

[663] BRAZIL (2015a). Presidency of the Republic. *Provisional Measure n. 685/2015***.** In force from 22.07.2015 to 18.11.2015, converted into Law n. 13.202, of 08 Dec. 2015, partially rejected. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13202.htm. Accessed on: 12 Feb 2020.

According to Torres[664], the BEPS Action Plan should enter into force in countries cooperating with it by September 2015, and Brazil, in this regard, had the duty of elaborating the competent mandatory disclosure rules on abusive or aggressive tax transactions, schemes or structures. However, this statement seems to be mistaken, once it was not observed in the majority of the EU Member States, for instance, in which the rules, as will be mentioned in topic 3.6, only come into force by July 2020. Notwithstanding, Torres identified among several advantages the measure could bring up, legal certainty for the private sector and a reduction of costs with litigations, as well as the benefits for competitiveness and fair economic competition. Moreover, he understood the measure represented *"a rational coherence with the new times for compliance in Business Law and Criminal Law*".

Differently, however, several voices in the Brazilian tax community cried out against a "*wave of punitivism*", coming from the criminal law to the tax field[665]. Furthermore, the community complained the provision had not been sufficiently discussed with the society and pointed out that this kind of measure could be a result of the State´s inability to assess the taxpayers efficiently, imposing one more tax obligation on the private sector, which was already overburdened.

Additionally, experts as Lodi Ribeiro[666] suggested, relating the proposal for MDR with a GAAR, such initiative seemed to be an attempt to transversely regulate the National Tax Code (CTN), Article 116 and its paragraph, which introduced in the Brazilian tax law the general anti-avoidance rule. He specifically referred to the issue that a general anti-abuse clause was introduced in the CTN, in 2001, which causes, until now, great divergence in the doctrine as to whether it could be applicable, although dependent on specific regulations. There was an attempt to establish such regulation by the Provisional Measure n. 66/2002[667], however rejected by the National Congress. Thus, in Lodi Ribeiro's view, the proposal for the MDR was a new attempt, although with new characteristics, to regulate the GAAR.

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[664] TORRES, Heleno Taveira. *O planejamento tributário abusivo é o novo alvo do Fisco Global***.** Revista Consultor Jurídico, 26 Jul 2015. Available at : *https://www.conjur.com.br/2015-jul-26/heleno-torres-planejamento.* Accessed on: 09 Mai de 2018. "*... o Plano de Ação deveria entrar em vigor nos países cooperantes do BEPS até setembro de 2015, cabendo ao Brasil a elaboração de normas de declaração obrigatória de transações, esquemas ou estruturas de caráter agressivo ou abusivo*". (...) "*racionalidade coerente com os novos tempos de compliance do Direito Comercial e do Direito Penal*"**.**

[665]RODAS, Sérgio. *Com MP 685, punitivismo conhecido no Direito Penal chega ao Tributário*. Revista Consultor Juridico, 31 Aug 2015. Available at: *http://www.conjur.com.br/2015-ago-31/mp-685-punitivismo-direito-penal-chega-tributario.* Acesso em: 26 jun 2017.

[666] RIBEIRO, Ricardo Lodi. *Planejamento tributário, mesmo mal feito, não é o mesmo que sonegar imposto*. Revista Consultor Jurídico, 23 Jul 2015. *"(...) a iniciativa é uma tentativa de, por via transversa, regulamentar o parágrafo único do artigo 116 do Código Tributário Nacional (CTN), que introduziu em nosso direito a cláusula geral antielisiva, e que não foi regulamentada desde a rejeição pelo Congresso Nacional da Medida Provisória 66/02".* Available at: https://www.conjur.com.br/2015-jul-23/ricardo-lodi-planejamento-tributario-mal-feito-nao-sonegar. Accessed on: 13 Feb 2020.

[667] BRAZIL (2002). Presidency of the Republic. *Provisional Measure n. 66/2002***,** converted into Law n. 10.637, of 30 Dec. 2002, partially rejected.
Available at: http://www.planalto.gov.br/ccivil_03/MPV/Antigas_2002/66impressao.htm. Accessed on 16 Feb 2020. *"Art. 13. Os atos ou negócios jurídicos praticados com a finalidade de dissimular a ocorrência de fato gerador de tributo ou a natureza dos elementos constitutivos de obrigação tributária serão desconsiderados, para fins tributários, pela autoridade administrativa competente, observados os procedimentos estabelecidos nos arts. 14 a 19 ss."*

After analyzing the MP n. 685/2015, the National Congress also rejected the introduction of MDR. In this scenario, when the Provisional Measure was converted in Law n. 13.202, on December 08, 2015, the Parliament decided not to include Articles 7 to 12, which specifically addressed the issue. Therefore, there were no effects.

Actually, there was a Direct Action of Unconstitutionality (ADI) n. 5366 / DF[668], filed by the Brazilian Socialist Party (PSB) against Articles 7 to 12 of MP n. 685/2015. Defending the legitimacy of tax planning, the ADI Authors related it, in the Brazilian scenario, to licit tax avoidance. Additionally, they explain that the administrative jurisprudence has evolved over time, pointing out that "*in the past*" the general anti-avoidance provision[669] was taken to disregard all tax planning arrangements that did not have what was called a "business purpose". According to this "*outdated understanding*", only transactions motivated by some business purpose, although producing tax savings, were considered legitimate. *A contrario sensu,* those aimed solely and exclusively at achieving tax advantages were considered abusive. "*Recently*" (considering 2015), however, CTN Article 116, sole paragraph, was seen as an anti-simulation clause, with the aim of preventing fraud and/or tax evasion. Thus, every time the taxpayer performs a tax planning arrangement, it is done with a business relevant reason, namely: to adopt the least costly tax option, in the search for more efficient allocation of resources[670]. Moreover, "*it is known that the simple fact that there is no business purpose is not enough to characterize the occurrence of simulation in the legal business transaction*"[671].

It is interesting because they, basically, state against the "main benefit test", inferring that a tax planning, although seeking tax advantage as a main benefit or one of the main benefits, should still be considered licit and legitimate. The point is that the main benefit test in MDR is only an indication or "filter" to make the scheme disclosable and not a parameter to disregard the tax planning effects.

However, after the regular manifestations of the Attorney General Office and the Federal Republic Prosecution Office[672], both supporting the provisions in discussion, considering that the National Congress had excluded those Articles during the legislative process, the Federal Supreme Court decided the case was solved and the ADI extinct, without judgment on the main issues. The decision argues that MP n. 685/2015 was converted into Law n. 13.202/2015, which did not reproduce the contested provisions, making significant changes to the texts initially proposed by the President of the Republic. According to the Judge, in effect, the Court has already held that the

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[668] BRAZIL (2015). Federal Supreme Court. *Ação Direta de Inconstitucionalidade n. 5.366 - Distrito Federal*. Rel: Min. Luiz Fux. Brasília, 10 Dec. 2015. Available at: http://portal.stf.jus.br/processos/detalhe.asp?incidente=4827786. Accessed on: 12 Mar 2020.
[669] BRAZIL (1966). Presidency of the Republic. *National Tax Code (CTN). Law n. 5.172, of 25 Oct. 1966*. Article 116, sole paragraph: "*Parágrafo único. A autoridade administrativa poderá desconsiderar atos ou negócios jurídicos praticados com a finalidade de dissimular a ocorrência do fato gerador do tributo ou a natureza dos elementos constitutivos da obrigação tributária, observados os procedimentos a serem estabelecidos em lei ordinária*". (Included by Supplementary Law n. 104, of 2001).
[670] BRAZIL (2015). *Ação Direta de Inconstitucionalidade n. 5.366 - Distrito Federal*. Cit. Initial Petition, p. 8.
[671] Ibid, p. 25.
[672] The Initial Petition (Federal Supreme Court - ADI n. 5.366/DF) arguing the unconstitutionality of MP n. 685/2015 and the respective information provided in the Action by the Attorney General´s Office (AGU) and the Federal Republic Prosecution Office (PGR) are mentioned in Chapter IV, topic 4.1.2.

substantial change introduced during the procedure for converting the Provisional Measure into Law constitutes a hypothesis of impairing the abstract constitutionality assessment proposed by the ADI and it makes it possible to extinguish the suit without a resolution on the merits.

Notwithstanding, during the legislative process, a special Joint Committee was created to analyze the proposal. In Opinion n. 90/2015[673] (hereinafter "*the Opinion"*), it noted that the rules had received criticism from the tax law community, various parliamentarians and a large number of taxpayers, especially by the use of generic expressions, such as "relevant reasons", "unusual form" and "indirect legal transactions". Moreover, if the disclosure had not been made or if the tax administration disregarded the form adopted, for tax purposes, the Opinion stressed the possibility to penalize the taxpayer with a 150% fee on the amount of due tax. Finally, the possibility that the non-disclosure, according to the legal rules, should be considered as intentional commitment of tax fraud, which, by the principle of law, is considered crime, in Brazil, was understood as problematic. Thus, the Opinion stated that, conversely to the intention to promote certainty, the MP was creating uncertainty and threatening the taxpayers with disproportional sanctions.

The Opinion understood, however, that it would be possible "*to establish a legislative framework that would improve relations between the Tax Administration and taxpayers*" within the introduction of mandatory disclosure rules, in such a way that the taxpayer could receive a tax administration´s opinion about tax planning schemes eventually implemented. Objectively, to achieve that aim, the Opinion suggested MDR should be restricted to "*specific actions or business listed in a Tax Administration Act*". Thus, overcoming the generic idea of schemes designed to achieve tax advantage, only accepting the disclosure when specific hallmarks (or listed characteristics) were met.

Moreover, it suggested the possibility of present an "*optional disclosure*", then, improving the interlocution between tax administration and taxpayers. According to the Joint Committee, with respect to the tax planning structures used, it would be advantageous if the taxpayer could obtain a previous statement from Tax Authorities about their eventual planning, before any sanctions or restrictions. Therefore, closer to a ruling procedure than to the MDR proposed by the OECD.

Furthermore, they included the possibility to present "*reasonable excuses*", justifying the implementation of a specific structure or scheme. On the other hand, if the tax administration disagrees with the structure adopted, the decision should be motivated, based on legal fundaments and on an analysis about the documents and facts presented by the taxpayer, and a notice should be issued no longer than two years after the date of the disclosure.

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[673] BRAZIL (2015b). National Congress. *Opinion n. 90/2015.* Joint Committee on Provisional Measure (MPV) n. 685, of 21 Jul 2015. Available at: https://legis.senado.leg.br/sdleg-getter/documento?dm=3491451&disposition=inline. Accessed on: 11 Ago 2018.

Yet, the 150% penalty, connected with the idea of intentionally practicing fraud, was rejected, justifying that this decision could incentivize the compliance with the disclosure and increase the relation between tax authorities and taxpayers.

In conclusion, after the Joint Committee´s decision to propose some changes in the MP, the Proposal of Converting into Law n. 22 of 2015[674] (hereinafter *'the PLC'*) was sent to the House of Deputies. It is the PLC proposal I will refer to in the following analysis, considering that it contains the original Executive proposal altered by the Legislative committee and better reflects the Brazilian scenario. The main idea in this topic is to explore similarities and differences between this Brazilian initiative and other programs, putting into evidence how important it is to really understand the MDR, its origins and its objectives, to avoid mischaracterization. Moreover, considering the view about the obligation to disclose tax planning expressed in the PLC and the recent results presented by the Brazilian Tax Administration in the 2018/2019 "*Annual Program for Auditing*", this work will analyze if it would be advantageous to introduce MDR in that country.

3.5.1 A description of arrangements that are required to be disclosed.

According to the PLC, Article 7(I), only the set of transactions meeting specific descriptions listed in a regulatory act to be prepared by the tax administration and resulting in suppression, reduction or deferral of taxes, should be included in mandatory disclosure. Therefore, the PLC did not deal with tax advantage and the main benefit test. This future Tax Administration Act, which has never been issued, should list 'specific' hallmarks.

Differently from other existent systems described in this work, Article 7(II) predicts the possibility of an "*optional disclosure*"[675], where the involved transaction had no relevant business purpose or the form was unusual, the transaction contained indirect steps or clauses changing the typical effects of a common contract. Therefore, in this part, the MP[676] was changed and in these 'generic' situations, linked to the business purpose test and indirect transactions or unusual form or clauses, the disclosure should occur only in the interest of the taxpayer, as a ruling or consultation process, asking for a tax administration´s opinion.

Moreover, when presenting the disclosure, the taxpayer could demonstrate the existence of "*reasonable excuses*", justifying and explaining the motives by which he had adopted those transactions or schemes.

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[674] BRAZIL (2015c). House of Deputies. Joint Committee of MPV n. 685/2015. Presentation of Proposal of Converting into Law n. 22/2015, which institutes the *Program for the Reduction of Tax Litigation – PRORELIT and provides for other measures.* Available at:
https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2025621&ord=0. Accessed on 13 Feb 2020.

[675] BRAZIL (2015c). House of Deputies. Joint Committee of MPV n. 685/2015. *Presentation of Proposal of Converting into Law n. 22/2015.* Cit. '*Facultativamente*', in Portuguese.

[676] BRAZIL (2015a). Presidency of the Republic. *Provisional Measure n. 685/2015*. Cit.

Reinforcing the provision for ruling or consultation process, Article 8 expressly referred to specific regulations in this aspect, if the taxpayers were submitting the disclosure before the implementation of the transactions or schemes.

3.5.2 A description of the persons required to disclose such arrangements.

As it is possible to note, in the Brazilian proposal the figure of the promoter/intermediary and other similar classifications or resulting from it, such as scheme designer or scheme marketer, were completely disregarded. They did not appear in the Government proposal or in the Parliamentarian discussions. Thus, the MDR only involved tax administration and taxpayers.

Consequently, all those points explained in this work[677] about the OECD´s 2008 Study, supply and demand, the role of the tax intermediaries and how they influence in the tax planning market and the pressure posed in the relationship promoters-clients, as a deterrence factor, did not receive any attention. As a result, hallmarks involving a confidentiality clause or premium fee, client lists and specific penalties to promoters/intermediaries were not discussed.

It is interesting, therefore, to realize a gradation when referring to professional privilege. In the UK, schemes promoted by lawyers are, within the scope of the norm, treated in the same way as those carried out by other promoters. When the consultant is protected by privileges of professional secrecy that prevent him from providing any information, the lawyer's client has the option to waive the privilege of confidentiality, in which case the lawyer must disclose it[678]. In Ireland, promoters asserting legal professional privilege must advise Revenue of that fact and the legal professional privilege will be confined to bespoke schemes. As such, a promoter claiming legal professional privilege must do so within 5 working days of first becoming aware that the client has implemented a transaction forming part of the scheme[679]. In Portugal, the Decree-law stated that a performance as promoter, for disclosure purposes, does not involve advice on schemes or planning by lawyers, law firms or solicitors in a context of evaluating the juridical position of a client, in the scope of providing defense or representation in a judicial process or relating to a judicial process. Moreover, there is no provision for communication by the user if the promoter is protected by legal professional privilege; nor the possibility that the user will waive the LPP, thus forcing the promoter to reveal the scheme[680]. In Brazil, the figure of the promoter was disregarded.

In the proposal, no reasons were presented for this choice. Most likely, to avoid problems with legal professional privilege and the BAR Association, which, in Brazil, has a great influence on the civil society. Thus, a serious and ample discussion with society will be necessary, before implementing MDR, because this point can make the system inefficient.

[677] See Chapter II, topic 2.3.2 – The 2008 Study.
[678] See Chapter III, topic 3.2.2.1.
[679] See Chapter III, topic 3.4.2.1.
[680] See Chapter III, topic 3.3.2.1.

3.5.3 A trigger for the imposition of a disclosure obligation.

The PLC, Article 10 established that specific tax administration regulations should determine "*the form, the time and the conditions to present the disclosure*". However, in the MP, *i.e*, the Executive´s proposal, Article 7 established that "*the set of reportable transactions must be declared by the taxpayer to the Federal Revenue Service, by September 30 of each year*". When establishing this date, the intention was to adapt this information within the Brazilian annual schedule for providing other tax returns or accounting information, trying to keep the additional costs at minimum.

However, this means an annual disclosure, encompassing all the disclosable transactions of the previous year. Therefore, the idea of providing information about tax schemes "in advance" and as early as possible was disregarded[681].

3.5.4 Appropriate penalties or other mechanisms to address non-compliance.

In the event the tax administration understood, for tax purposes, the transactions disclosed were not genuine or they were missing other purposes than a tax advantage, it should notify the taxpayer to pay the due tax plus interest, without any penalty. This understanding should be accompanied by reasoning and descriptions, referring specifically to the form, acts and documents adopted. Only if, after the notification, the taxpayer did not pay the tax plus interest, then in an *ex-officio* procedure, the tax administration could include a penalty, limited to 75% of the due tax, according to Articles 9 and 11.

Therefore, in its protective view, the PLC eliminated the initial proposal for a penalty, which could achieve 150% of the due tax, and the possibility to consider the scheme, under the conditions of the law (*intention of fraud*) as a criminal offense, in case of non-compliance and it did not predict any specific penalty.

On the other hand, the PLC established the obligation for the tax administration to notify the taxpayer by 30 September of the second after the disclosure was made. In case this term were not observed, the claim of late payment interest on the due tax should be interrupted.

3.5.5 A description of what information is required to be reported.

As stated, Article 10 established that specific tax administration regulations should determine "*the form, the time and the conditions to present the disclosure*". As noted by Oliveira[682], the tax

[681] See Chapter II, topic 2.5.1.3 - A trigger for the imposition of a disclosure obligation.
[682] OLIVEIRA (2018). Op. Cit., p. 285- 286.

administration, during the short period in which the MP remained in force, issued a guidance[683], providing for three different kinds of information: operation information, related taxes and information about the previous tax periods. In relation to the operation information, one should inform, amongst others, the period in which the scheme had been applied, a summary of the facts, a justification of the business purposes, years in which the tax advantage was achieved, the related parties involved, if involving tax havens, as well as if shifting profits or other taxable base to abroad.

Oliveira[684], moreover, after analyzing the MP and the abovementioned guidance, concluded that the intention was to encompass not only income tax and corporate tax, but also "*all federal taxes*", under the Federal Revenue Tax Administration, which would include, for instance, social insurance contributions.

3.5.6 The impact of the regime on compliance.

Considering that the National Congress rejected the MDR proposed, it did not produce effects. Therefore, there are no measurements, statistics or scientific works evaluating its impact, as presented in other cases analyzed here. However, it is possible to infer some results "in theory", taking into consideration the Brazilian state of art in compliance and auditing and the proposal presented in 2015.

As other tax administrations, like the British and the Portuguese, the Brazilian Tax Administration issues an annual report (hereinafter '*Sufis report*') presenting its results and predicting the actions for the next period[685]. Thus, in 2018/2019, the Sub-secretariat for Auditing (Sufis) presented the results and the planning on: (i) monitoring the largest taxpayers; (ii) promoting tax compliance; (iii) realizing research and selecting the relevant taxpayers for inspection procedures; and (iv) proceeding internal (automatic review) and external (auditing) inspections.

The Sufis report states that with a review of the working process for selecting the most relevant taxpayers, *i.e*, those who present greater ability to pay, it was possible to provide better specialization for tax auditors, since 2010. Thus, they have been determining who is a relevant person to be inspected and executing, with a higher degree of precision, auditing in large evasion schemes embodied in abusive tax planning. It is known that the average values of the assessments made by the Sufis have been increasing consistently over the last few years. The High Performance Inspections Project – Fape (acronym in Portuguese), started in 2017, consists of an automated selection and inspection process that aims to increase the "auditing presence" of as many taxpayers as possible and, thus, induce an increase in tax collection creating a broader perception

[683] BRAZIL (2015d). FEDERAL REVENUE. *Executive Act* (Ato Declaratório Executivo*) Cofis n. 60/2015*, published on 28 Oct 2015.
[684] OLIVEIRA (2018). Op. Cit., p. 295.
[685] BRAZIL (2019). Federal Revenue. *Annual Plan for Auditing 2019 and 2018´s Results* (Plano Anual da Fiscalização da Receita Federal do Brasil para 2019 e Resultados de 2018), p. 1-59. Available at: http://receita.economia.gov.br/dados/resultados/fiscalizacao. Accessed on: 13 Feb 2020.

of subjective risk[686]. Based on the 2018 results, when selecting taxpayers for auditing, the expectative for 2019 was the recovery, by conducing assessments, of US$ 41 billion[687].

Therefore, the recovery of tax collection in relation to the largest taxpayers, including abusive tax planning[688], has been based on specialization in the selection processes and specific audits and not in cooperative compliance. Thus, such taxpayers are subject to constant monitoring, through actions based on internal and external information, in order to induce them to pay their taxes effectively, in accordance with statutory tax rate.

In addition, to focus on combating the large evasion mechanisms, the Sufis is responsible for monitoring the behavior of the largest taxpayers, who, given their high economic potential, exert great influence on the levels of federal revenue and account for 60% of the total federal tax collection. The activity of monitoring the different taxpayers is structured in the following areas of activity: monitoring of the tax collection, analysis of potential distortions, sectorial analysis and analysis of economic groups.

When mentioning the intention to promote compliance, besides this closer monitoring, based on the average of tax collection and sectorial risky analysis, the Sufis report states that two actions are complementary: self-regulation and simplification of ancillary obligations. A factor that induces self-regulation is the certainty that the tax authorities will adopt sanction mechanisms for those who do not comply with the tax rule.

Brazil adopts a large number of regular tax returns, involving different taxes and different areas, including personal income tax, corporate income tax, social insurance contributions, turnover taxes, etc. The crossing of information provided in those returns has been also an important source, in order to verify the regularity of the fulfillment of tax obligations[689].

In terms of cross-border situations, international agreements to which Brazil is a signatory allow automatic exchange of financial information and relevant information for the prospection of tax omissions and irregularities[690]. Based on this experience, tax auditors now work with data received from more than 80 countries in order to segregate regular situations from those that still remain outside the limits of the law. The inspection of abusive tax planning in corporate reorganizations with use of goodwill is one of the fronts to be dealt with in MNE case.

In this scenario, it is possible to infer some conclusions. First, there is not a trusting relationship between tax administration and taxpayers, as it is possible to derive from the analysis and arguments presented by the National Congress Joint Committee, which changed all the

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[686] Ibid, p. 13-16.
[687] Ibid, p. 39. Close to BR$ 164.96 Billion (Brazilian currency).
[688] Ibid, p.47. Attention in combating abusive tax planning is constant. In a recent survey, 93 procedures resulted in assessments of more than BR$ 25.1 billion. For 2019, 31 new cases have been scheduled to be audited, with an expected result of around BR$ 8 billion. (*A atenção em combate a planejamentos tributários abusivos é constante. Em recente levantamento realizado, 93 procedimentos resultaram em autuações superiores a R$ 25,1 bilhões. Para 2019, já foram programados 31 novos casos a serem auditados, com valor esperado de lançamento da ordem de R$ 8 bilhões).*
[689] Ibid, p. 55.
[690] Ibid, p. 45.

possible effects envisaged in the Brazilian MDR proposal, when comparing to the OECD objectives, and, at the end, the proposal was rejected. Second, the tax administration is dealing with larger taxpayers (the most relevant part of tax collection) based on data-crossing, automatization, specialization and auditing. In this environment, MDR can be taken as only one more costly information to increase auditing performance. The number of auditing procedures, as quoted in the Sufis report, is increasing year after year. Third, tax administration has a large number of direct information based on the existent tax returns, or indirectly, crossing data with third parties information. Brazil is the country in the world where the most hours are consumed to fulfill the tax obligations[691], despite the fact that there have been significant advances recently in reducing this burden. The point is how much, in terms of cost-benefit, MDR could improve the tax administration´s performance in collecting information. Forth, despite the fact that the Sufis report mentions the intention to promote compliance, the actions are based on closer monitoring and sectorial risky analysis. The mentioned "self-regulation" is based on risk and on the 'certainty' that the tax authorities will adopt sanction mechanisms for those who do not comply with the tax rule.

Interim conclusion

Brazil proposed the MDR introduction in July 2015, expressly motivated by the OECD/BEPS Project. However, the BEPS Action 12 Final Report was published only in October of that year[692]. Therefore, taking the opportunity when introducing a Government program for reducing tax litigations and improve the federal revenue, MDR was included and proposed, however superficially analyzed and discussed.

Opinion 90/2015[693] stated that despite the fact that the Government´s proposal was promoting uncertainty and disproportional penalties, simply cutting the Articles providing for mandatory disclosure in the MP was not the best solution, because *"that opportunity could be taken to create suitable and secure rules to tackle abusive tax avoidance, it means, illicit tax planning*". First, as this work defends, MDR is not an efficient measure for tackling "illicit tax planning"; second, as it was designed, the proposal became quite ineffective in this objective.

The Brazilian proposal, adopting different approaches, changed basic points in relation to the OECD proposal. For instance, the personal scope was not focusing on the promoters/intermediaries, and the time for providing the disclosure, which should be as soon as possible after the scheme is implemented or made available, was disregarded. As this work has

[691]THE WORLD BANK. *Time to prepare and pay taxes (hours)*. Available at: https://data.worldbank.org/indicator/IC.TAX.DURS?locations=BR-BO-US-SN-FR-PT-IE-GB-MX. Accessed on 16 Feb. 2020. See also FORBES. Joe Harpaz, 17 Dec 2013. Available at: https://www.forbes.com/sites/joeharpaz/2013/12/17/brazil-ranked-most-time-consuming-tax-regime-in-the-world/#677c86e14c2dBrazil Ranked Most Time-Consuming Tax Regime In The World. Accessed on 16 Feb 2020.
[692] OECD (2015). *Mandatory Disclosure Rules, Action 12 - 2015 Final Report*. In series: OECD/G20. Base Erosion and Profit Shifting Project. Published on October 05, 2015. Available at: https://www.oecd.org/tax/mandatory-disclosure-rules-action-12-2015-final-report-9789264241442-en.htm.
[693] BRAZIL (2015b). National Congress. *Opinion n. 90/2015*. Cit.

analyzed, the example for providing information only once a year, existent in Canada, has special circumstances. The other systems, like the British, the Irish and the Portuguese adopts different views. Moreover, the obligation relying exclusively on the taxpayers has no parameters in other previous experiences quoted in the OECD/BEPS Action 12 and this can subvert MDR effects considerably.

As it was designed, the Brazilian proposal could not offer any result as envisaged by the OECD. During the discussions in the Joint Committee, the proposal was changed from a taxpayer obligation to a taxpayer right to have an official opinion on their tax planning, as if it were a ruling or consultancy procedure. This demonstrates the mistrust existent in the relationship between tax administration and taxpayers; that is why this work has repeatedly insisting in this attribute, before introducing MDR.

The question, nevertheless, is if MDR is necessary in Brazil. If yes, where it could be posed in the existent "tax environment" and how to apply it efficiently. The conclusion is that in a mistrustful environment, where there are several other sources of relevant information and several advanced technological instruments for risk analysis, MDR can be unnecessary and disproportional, in terms of cost-benefit. The only reason, if it is interesting, is to take part in the automatic exchange of information and if the international community has made MDR introduction a requirement.

3.6 The European Directive.

Introduction to Topic 3.6

The Treaty on the Functioning of the European Union (TFEU), Article 115, provides for the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, to issue directives for the approximation of such laws, regulations or administrative provisions of the Member States, as directly affect the establishment or functioning of the internal market. Some recommendations and legislation (Directives and Regulations, i.e. "*secondary legislation*") have been adopted in the personal tax, company tax and capital duty areas[694].

This topic refers to the proposal of amending the Directive 2011/16/EU (Directive on Administrative Cooperation, hereinafter '*the DAC*`), on 21 June 2017 (2017/0138 CNS)[695] regarding

[694] EUROPEAN UNION. European Commission. *The Lisbon Treaty and tax legislation in the EU*. Available at: https://ec.europa.eu/taxation_customs/general-information-taxation/eu-tax-policy-strategy/lisbon-treaty-tax-legislation-eu_en. Accessed at: 11 Jun. 2019.

[695] EUROPEAN UNION (2017). European Commission. Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable

to the obligation for EU-Member States of introducing mandatory disclosure rules on aggressive tax planning. It constitutes a European response to BEPS Action n. 12 and follows other EU initiatives in the search for transparency in tax matters. It is important to illustrate this work´s analysis on MDR, taking into consideration the particularities of the EU context and framework.

First, the Explanatory Memorandum is analyzed, in order to provide a view on which context the above-mentioned proposal emerged. Second, the topic considers the decision for implementing the system by using a directive and the compatibility with principles of subsidiarity, proportionality and good governance, bringing up specificities of MDR. Third, identifying BEPS Action n. 12´s framework for mandatory disclosure rules (the same structure applied in this entire Chapter) within the EU-Directive´s perspective. Finally, some initiatives and concerns in countries like Poland, Spain and the Netherlands are mentioned, in order to provide examples. The Polish legislation is presented as an example, considering that Poland was the first country to implement the Directive´s rules domestically. Thus, based on my points and arguments, the objective is that the reader will be able to identify the main characteristics and to criticize that initiative and any other, in the future.

Considering the timeframe prescribed in the Directive amendment, EU-Members should publish domestic laws implementing MDR domestically by 31 December 2019 and the rules should enter into force by July 2020. The majority[696] is following this schedule. Thus, a limitation this work faces are the changing times and the lack of effective results or data statistics resulting from the new rules, which shall be available only after the automatic exchange of information collected, expected by October 2020. The results of this proposal (which amends the DAC) will be included in the evaluation report to the European Parliament and to the Council, which will be issued by 1 January 2023.

The questions arising are to which extent is the Council Directive (EU) 2018/822 of 25 May 2018, amending Directive 2011/16/EU, in line with BEPS Action 12 and with BEPS principles, specifically transparency and certainty. Thus, is it innovative or is it just reproducing the OECD guidelines? Moreover, does the existence of particularities such as internal market and

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cross-border arrangements. COM/2017/0335 final - 2017/0138 (CNS). Brussels, 21 Jun. 2017, p. 1-44. Available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/intermediaries-proposal-2017_en.pdf. Accessed on 08 Feb. 2019.

[696] KPMG. Euro Tax Flash from KPMG's EU Tax Centre. *EU Mandatory Disclosure Requirements – Update*. This seventh Special Edition Euro Tax Flash summarizes the most recent status of the implementation of the new rules into Member States' domestic legislation, as at January 8, 2020. At the date of this publication, fifteen EU Member States (Austria, Belgium, Bulgaria, Croatia, Estonia, France, Germany, Hungary, Ireland, Lithuania, Malta, the Netherlands, Poland, Slovakia and Slovenia) had finalized their respective legislative processes to implement DAC6. The DAC6 implementation deadline of December 31, 2019 was therefore not met by the remaining thirteen Member States. However, Cyprus, the Czech Republic, Denmark, Finland, Italy, Luxembourg, Portugal, Romania, Spain, Sweden and the United Kingdom have made progress on the transposition of the Directive and it is expected that most of these Member States will have their rules in place in early 2020. Greece and Latvia are yet to make public the text of their respective DAC6 implementation bills. Published on 10 Jan 2020. Available at: https://home.kpmg/xx/en/home/insights/2020/01/etf-421-eu-mandatory-disclosure-requirements-state-of-play.html. Accessed on 17 Feb 2020.

fundamental freedoms create more justifications or more obstacles for MDR introduction and use within the EU?

In an international environment, whether on the one hand, it may be helpful to allow flexibility to apply specific disclosure rules for each country, this would create an additional administrative and compliance burden. Confusion could also result where promoters/intermediaries and users/taxpayers need to follow different specific disclosure rules for different tax authorities on the same international tax scheme. Thus, it is important to take into consideration that all countries be encouraged to apply consistent disclosure rules to the same international tax scheme. The main point is to find the balance between flexibility and consistency.

3.6.0.1 The proposal. Explanatory Memorandum.

In Chapter IV[697], this work describes the steps taken over the last decades of the 20th Century, until the publication of the Directive 2011/16/EU – the DAC. After being demanded by the European Council and the European Parliament, to rapidly develop concrete ways to improve "*the fight against tax fraud and tax Evasion*", including in relation to third countries, the Commission adopted a Communication (the "*June Communication*"), which outlined how tax compliance can be improved and fraud and evasion reduced, through a better use of existing instruments[698]. Following up, the Commission presented an Action Plan, which, in essence, "*contains practical actions which can deliver concrete results to all Member States…*" Among the "*new Commission initiatives*"[699], there is "*recommendation on aggressive tax planning",* which the text relates to the concept of *"advantage of mismatches in national laws to ensure that certain items of income remain untaxed anywhere or to exploit differences in tax rates*".

In the June Communication´s conclusion, the EU-Commission states "*tax fraud and tax evasion is a multi-facetted problem which requires a coordinated and multi-pronged response. Aggressive tax planning is also a problem which requires urgent attention*". Thus, it is possible to see that when developing a plan with the primary objective to tackle fraud and tax evasion, the Commission also includes "*tax planning*", demonstrating its view that such kind of planning is closer to tax evasion than to tax avoidance. The same view is expressed, as it will be demonstrated, in the EU-Directive. Focusing on practical actions and solutions, tax avoidance, tax evasion and aggressive tax planning are mentioned indistinctly.

When it presented the proposal of amending the DAC, on 21 June 2017 (2017/0138 CNS)[700], the European Commission contextualized the initiative within the fight against tax avoidance and evasion, placing it as a "*political priority*" and expressing the objective of creating a deeper and fairer single market. Stating that enhancing transparency is one of the key pillars in the

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[697] See Chapter IV, topic 4.1.1 – The European Union framework and its Fundamental Freedoms.
[698] EUROPEAN UNION (2012). European Commission. Communication from the Commission to the European Parliament and the Council. An Action Plan to strengthen the fight against tax fraud and tax evasion, COM (2012) 722 final, Brussels, 6 Dec. 2012, p. 1-16.
[699] Ibid, p. 5.
[700] EUROPEAN UNION (2017). *Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU*. Cit.

strategy to combat tax avoidance and evasion, the Commission, moreover, recognizes the exchange of information between tax administrations is crucial in order to provide them with the necessary information to exercise their duties efficiently.

The proposed legislation amends the DAC to provide for the mandatory disclosure of potentially aggressive tax planning arrangements, moreover extending the scope of the automatic exchange of information between tax authorities to include such arrangements[701]. Clearly, it is part of a political initiative, therefore requiring more than legal and administrative measures taken by Member States, individually.

The amendment (well known as *DAC6*)[702] constitutes the Fifth Amendment to the DAC since 2014. Thus, it follows Directive 2014/107/EU (DAC2), which introduced automatic exchange of financial accounts information; Directive 2015/2376/EU (DAC3), which concerns automatic exchange of tax rulings and advance pricing agreements; Directive 2016/881/EU (DAC4), which concerns automatic exchange of country by country reports, and Directive 2016/2258/EU (DAC5) which, differently from previous amending directives, does not broaden the scope of automatic exchange of information, but rather ensures tax authorities have access to beneficial ownership information collected, pursuant to the anti-money laundering legislation[703].

When commenting on the Explanatory Memorandum for DAC6, my analysis is legal and technical. Therefore, the objective is not to criticize the political choices or analyze possible economic or social results, but to provide a specific view of the Directive, within the general structure of mandatory disclosure rules, as designed by the OECD, and based on the experience of some countries, which were discussed in this work.

In line with the BEPS pillars[704], the Commission places MDR as an instrument for transparency. The Action Plan identified actions along three key pillars: introducing coherence in the domestic rules that affect cross-border activities, reinforcing substance requirements in the existing international standards, and improving transparency, as well as certainty. The challenging points are, however, taking transparency as a route in both directions, between tax administration and taxpayers, and applying MDR in a way to promote, and not harm, tax certainty.

According to the Commission, tax-planning structures become ever more sophisticated and take advantage of the increased mobility of capital and persons within the internal market. These harmful structures commonly consist of arrangements, which develop across various jurisdictions

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701 Ibid, p. 7.

702 EUROPEAN UNION (2018). Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. OJL 139, 5 Jun. 2018, p. 1–13.

703 EUROPEAN UNION. European Commission. Report from the Commission to the European Parliament and the Council on the application of Council Directive (EU) 2011/16/EU on administrative cooperation in the field of direct taxation. COM/2017/0781 final. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0781. Accessed on: 12 Apr. 2019.

704 OECD (2015). OECD/G20 BEPS Project. OECD presents outputs of OECD/G20 BEPS Project for discussion at G20 Finance Ministers meeting. Paris: OECD Publishing. Available at: http://www.oecd.org/ctp/oecd-presents-outputs-of-oecd-g20-beps-project-for-discussion-at-g20-finance-ministers-meeting.htm. Accessed on: 26 Feb 2019.

and shift taxable profits towards beneficial tax regimes. As a result, Member States often experience considerable reductions in their tax revenues that hinder them from applying growth-friendly tax policies.

One of the strongest points when justifying the measure is the existence of a single market and, in parallel, the fundamental freedoms to the movement of persons, capital, goods and services. Despite the fact that the problematic involving aggressive tax planning is not a European exclusivity, these factors can, surely, increase the possibilities for designing and using cross-border tax planning.

The Commission mentions "recent leaks"[705] to highlight the role of tax intermediaries. However, that role has been studied within the OECD for a long time. Generally, the increasing participation of the Intermediaries is due to two factors: the lack of trust between tax authorities and taxpayers and the increasing complexity of tax laws. In relation to the first, the OECD Study (2008)[706] is correct in its conclusion to strengthen the relationship between tax authorities and taxpayers, gradually eliminating the third side, in other words, the intermediaries. Nevertheless, it is necessary for tax administration to be prepared to fulfill their absence.

Indeed, the complexity of the tax planning is connected to the complexity of the tax system, in consequence of the special and occasional tax policies, and to the existence of differences in the national laws. An effective measure to reduce the complexity of the planning is to reduce the complexity of the tax laws. The more laws are simple and general, the more the existence of gaps and possible interpretations are reduced. Therefore, a harmonized international system can work better than domestic and individualized initiatives. The problem is finding the balance between this harmonization and the particularities and specific national realities, affecting MDR efficient application.

As stated, in many references throughout the proposal, tax avoidance, tax evasion, harmful practices and potentially aggressive tax planning are used to justify the introduction of MDR, indistinctly. The Commission seems to put several elements in the same basket to make the proposal more robust. In this work´s viewpoint, despite the proposal mentioning illegal and criminal activities, connected with money laundering, the use of MDR to identify this kind of tax behavior is not recommended, as was explained in topic 2.4.1[707]. MDR is suitable for structures developed within the limits of the law. The focus should never be identifying criminal or unlawful activities, which can occur eventually, during the development of the information analysis by the tax administration, but not primarily, when designing the rules. For instance, the Commission, although recognizing that some transactions and corporate structures may have entirely legitimate purposes, is including in its reasoning the existence of offshore structures "*often involving a company located in a jurisdiction with low tax or non-transparent*, *in order to ensure low or no*

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705 Panama Papers, for instance. The scandal refers to the 11.5 million leaked encrypted confidential documents that were the property of Panama-based law firm Mossack Fonseca. The documents were released on April 3, 2016 by the German newspaper Süddeutsche Zeitung (SZ), dubbing them the "Panama Papers." Available at: https://www.investopedia.com/terms/p/panama-papers.asp. Accessed on 30 Jun 2019.

706 OECD (2008). Study into the role of Tax Intermediaries ("2008 Study"). Cit.

707 See Chapter II, topic 2.4.1 – Material scope.

taxation and/or to launder the proceeds of criminal activity, which may not be legitimate and in some cases, may even be illegal"[708].

This represents a mistake, because these concepts and their effects are completely different. As Koen Lenaerts[709] explains *"in the field of direct taxation, it is of paramount constitutional importance to draw a conceptual distinction between 'tax mitigation' (or 'tax avoidance') and 'tax evasion', since that distinction is essential for the European Court of Justice in determining the extent to which EU law places limits on the exercise of national taxing powers".*

Another sensitive point comes when the proposal mentions "*jurisdiction which is low tax or non-transparent*", because it is dangerously affecting the countries' sovereignty[710]. The OECD has for a long time created multilateral instruments to force countries to become more "transparent" and "cooperative". However, each country is free to establish its own policies. International interference, trying to control undesirable effects of the globalization should pass through political agreements and cooperation[711]. MDR, again, is eminently an instrument to improve transparency and certainty, not to control or avoid other countries harmful competition. As it is possible to verify, however, the Directive is adding the possibility to put other countries´ policies in evidence, besides the intermediaries' activities and their tax planning.

As is designed in the Directive, especially in relation to the review and control rules, as will be explained, MDR has two effects: controlling relevant taxpayers/intermediaries and countries "*inspecting*" other countries´ weaknesses, gaps and tax benefits/policies. It is possible to point out the Commission´s intention for using MDR not as only an administrative tool, increasing the tax administration power to react to tax avoidance, but also as a political tool, because the MDR application, in the case, can identify low or non-tax jurisdictions and non-transparent jurisdictions. Obviously, it will generate political pressure on those jurisdictions.

The proposal is presented as a supplement for the Common Reporting Standard (CRS) on foreign account information, in force in the EU through the rules laid down in Council Directive (EU) 2014/107 of 9 December 2014[712]. The idea is to reach that information not covered or which has escaped from the CRS, focusing on the role of the intermediaries on potentially aggressive tax planning arrangements. However, MDR has a much broader scope than CRS. Even though it is possible to follow the money with CRS, and though it is a very important tool for the tax administration, MDR also has the objective of identifying weaknesses in the tax law and enabling countermeasures. Specifically, defending the advantages of MDR introduction, the Commission argues that if tax authorities receive information about potentially aggressive tax planning

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[708] EUROPEAN UNION (2017). *Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU*. Cit., p. 2.
[709] LENAERTS, Koen. *Tax mitigation vs. Tax evasion in the case law of the European Court of Justice.* Vilnius University Publishing House, v. 89, 2013, p. 219.
[710] NOTE. Although the actions taken against harmful tax practices are based on the notion that it is not a legitimate exercise of national sovereignty to gouge the tax base of another state, or, at least, states that do this can expect to face some retaliation, the justifications and parameters for these actions can open a broad discussion.
[711] See Chapter II, topic 2.2 - From Competition towards Coordination and Transparency.
[712] EUROPEAN UNION (2014). Council Directive (EU) 2014/107 of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. OJ L 359, 16 Dec. 2014, p. 1–29.

arrangements before their implementation, they should be able to track the arrangements and respond by acting appropriately to curb them, which means enabling the authorities to react to close loopholes in the legislation and prevent tax revenue losses.

The Explanatory Memorandum, in its reasoning, mentions tax certainty, stating the amendment is "*fully compatible with the G20 priorities*"[713]. Once more, they express one of the BEPS pillars, abovementioned. How do European mandatory disclosure rules affect the taxpayers´ right to legal certainty and legitimate expectations is one of the questions raised by Nevia Čičin-Šain[714]. The author, promoting a deep analysis of legal certainty, professional privileges and privacy within the MDR introduction by the Directive, says "*one should distinguish between the effect that the Directive itself will produce directly and the effect that it will have indirectly, since it will introduce measures that in turn facilitate subsequent legislative changes in national tax laws*".

Čičin-Šain marks the difference between "direct retroactivity", which means that the proposal for Directive amendment was supposed to have a "limited" retrospective effect and "indirect retroactivity", which means that the Directive has the aim to create a system that "*enables legislators to have access to information about tax schemes that they can afterwards rapidly close down*". She concludes that although the Commission initially argued the urgency was necessary, the direct retroactive effect had been removed in the amendment. However, in her view, the Directive will indirectly compromise the taxpayers´ right to legal certainty because its aim is to facilitate regulatory and legislative changes based solely on the subjective estimations of the tax administrations about a tax regime legally provided by the legislator himself. There is a statement in her Article that I believe was fundamental to arrive at the conclusion about MDR compromising legal certainty rights, *i. e.*, "*the tax administration´s primary purpose is to raise revenue. Can one truly expect an interested party to be objective and impartial in assessing whether a legal behavior is harmful or not?*"[715]

In this work´s point of view, as mentioned in topic 2.1.2.1[716], further discussions are possible. Thus, it is necessary to analyze who will benefit from legal certainty, presenting a citizen (legal certainty can take on a strictly individual dimension when its use aims to protect an individual´s private interest), the entire collectivity and the State and who serves as a criterion for measuring legal certainty. Additionally, it is necessary to decouple the content of legal certainty in two dimensions: static certainty and dynamic certainty. Moreover, it is arguable that in MDR application the primary purpose of the tax administration is to "raise revenue". The administration works within the limits of the law, trying to approximate the actual revenue and the statutory revenue, that is, reducing the compliance gap.

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[713] EUROPEAN UNION (2017). *Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU*. Cit., p. 3.
[714] ČIČIN-ŠAIN, Nevia. *International - New Mandatory Disclosure Rules for Tax Intermediaries and Taxpayers in the European Union – Another "Bite" into the Rights of the Taxpayer?* World Tax Journal, v. 11, n. 1, 2019. IBFD. Published online: 18 January 2019.
[715] NOTE. However, in short, the tax administration is not the final arbiter. If the scheme is litigated, the Courts decide; if the law is changed, the legislature decides.
[716] See Chapter II, topic 2.1.2.1 – MDR Application and Legal Certainty.

Upon receiving the information and reviewing whether a tax planning is in conformity with the objectives and purposes of the law or not, the tax administration is performing the same role it already has during audits or when applying GAARs. The difference is that information within MDR is received earlier and, if it is deemed necessary, an adjustment in the legislation can be promoted to prevent future schemes from using the same weaknesses in order to obtain a tax benefit not desired by the law. Furthermore, in case of marketed schemes, it is possible to evaluate the risk posed by their use, in terms of quantity of users.

The ultimate objective is to design a mechanism that will have a deterrent effect; that is, a mechanism that will dissuade intermediaries from designing and marketing such arrangements[717]. About deterrence, it is not recommendable to design MDR where it is taken as an express objective. MDR should be designed as an important instrument for tax administration to use in the practical application of the tax law, in order to achieve the objectives and purposes of the law, obtaining the necessary and timely information. Deterrence is only a collateral effect, not under control of MDR scope. The deterrence effect will be greater to the extent that the system is efficient. If deterrence is posed among the objectives of the law, when introducing MDR, strong arguments can be presented about the State´s illegitimate intervention in business freedom and in the right to self-organization, in order to pay the minimum tax burden.

Furthermore, the Commission poses as a future objective[718] to extend the obligation to disclose information to auditors that are engaged to sign off on a taxpayer's financial statements. The idea is to complement the mandatory disclosure of similar schemes by intermediaries, i.e. designers, promoters, advisers, etc. also reaching the in-house designed planning. Besides the above comments in relation to the "deterrence effect", additionally this proposal creates obstacles for free professional activity. Moreover, the proposal disregards possible ethical problems involving those professionals and their clients or even their employers, in case they are internal auditors. What could be done, as I see it, is to extend the tax liability to them, in case of harmful effects of the planning, which they eventually have designed, introduced or have knowledge of. However, this is also a consequence, not an objective of MDR, obliging them to disclose previously tax strategies.

3.6.0.2 EU - Legal bases and legitimacy.

The Commission states, *"the Treaty on the Functioning of the European Union (TFEU) is the legal base for legislative initiatives in the field of direct taxation"*[719]. After taking into consideration some policy options as legislation or soft law in the form of a Recommendation or Code of Conduct, based on the criteria of effectiveness, efficiency and coherence, the conclusion was MDR introduced by a *Directive* should fit the current scenario better.

[717] EUROPEAN UNION (2017). *Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU*. Cit., p. 3.
[718] Ibid, p. 5.
[719] Ibid, p. 5.

In summary[720], article 288 of the TFEU defines the various types of legal acts that the EU may adopt, including directives. The directive forms part of the EU's secondary law. Once adopted at EU level, it is then implemented, or transposed, by EU-Member States. Therefore, for a directive to take effect at national level, EU countries must adopt a law to transpose it, in a way in which this national measure achieves the objectives set by the directive. In the case of minimum harmonization, a directive sets minimum standards, often in recognition of the fact that the legal systems in some EU countries have already set higher standards. In this case, EU countries have the right to set higher standards than those set in the directive. Thus, the challenge is how to design a proportionate system to target the undesirable forms of tax planning[721].

According to the Commission, MDR introduced by a binding legal instrument in EU framework could increase pressure on the tax planning market, both on intermediaries (designing and offering) and taxpayers (using); moreover, the data could be used for the tax administration´s purposes (risk assessment and audit). Therefore, influencing the three perspectives, which means taxpayers, Tax Authorities and intermediaries, considered in the OECD 2008 Study. The measure could also provide, the Commission said, results in a political perspective, protecting Member States direct tax bases and, in a societal perspective, creating a fairer tax environment.

Finally, the Directive was presented as the competent legal instrument to introduce the new rules stating this option is in accordance with TFEU article 115, in order to improve the functioning of the internal market. Moreover, it should also be able to reduce or avoid the possible unfair tax competition against businesses that refuse to engage in illegitimate activities and the users of aggressive tax planning[722].

Most of the EU-Member States are also OECD Members and, therefore, participated in the BEPS discussions and consultancies, from 2013 to 2015. The Commission remembers that targeted discussions with representatives of Member States who already have practical experience with mandatory disclosure rules at national level were organized, clarifying that, at the time of the proposal, only the UK, Portugal and Ireland[723] were applying MDR in the EU. That is why those experiences were considered, previously, in this work.

It is imperative to note that using this argument about the presence of several EU Members in the OECD, and in consequence, in the BEPS project´s development, to support the legitimacy of the measure, is controversial at the extent of their real role and effective participation[724]. Furthermore, among other arguments, let us remember that the UK system did not focus on international tax schemes and exchange of information, the Portuguese system was not producing

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[720] EUROPEAN UNION. *Summaries of EU Legislation*. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3Al14527. Accessed on: 27 Mar 2019.

[721] Effectiveness, efficiency, coherence and proportionality are concepts not explained in the proposal, nevertheless they are analyzed at the beginning of this work. See topic Introduction - The efficient, the effective, the proportional and the reasonable.

[722] EUROPEAN UNION (2017). *Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU.* Cit., p. 6.

[723] Ibid, p. 8.

[724] See Chapter II, topic 2.5 - The BEPS project.

significant results and the Irish system was connected with other elements such as behavioral analysis, which is not mentioned in the EU-Directive[725].

Even if a country is not an EU-Member State and in consequence not submitted to TFEU, it is always important to bear in mind some broadly used and respected taxation principles, which will be analyzed in the next Chapter IV. However, concentrating on the EU framework, it is important to start shedding light in the principle of subsidiarity[726].

3.6.0.2.1 Subsidiarity.

In areas in which the European Union does not have exclusive competence, the principle of subsidiarity, laid down in the TFEU, defines the circumstances in which it is preferable for the Union, rather than the Member States, to take action. Therefore, under Article 5(3) TFEU, there are three preconditions for the Union´s institutions intervention to be in accordance with the subsidiarity principle: (i) the area concerned does not fall within the Union's exclusive competence (i.e. non-exclusive competence). (ii) the objectives of the proposed action cannot be sufficiently achieved by the Member States (i.e. necessity). (iii) the action can therefore, by reason of its scale or effects, be implemented more successfully by the Union (i.e. added value)[727].

The Commission, in order to justify the principle´s application, starts with the explanation that tax planning arrangements are complex and those most challenging have a cross-border element, with a dimension beyond a single jurisdiction. Thus, MDR is presented as a "complementary" action to other already existent collective initiatives, at the EU level.

Moreover, the Commission states "*uncoordinated action undertaken by Member States based on own initiative would create a patchwork of rules (...). As a result, the chances would be that unfair tax competition [distorting the functioning of the internal market] amongst Member States persists*"[728]. The problem would be that, if each Member-State creates its own rules, instead of closing loopholes and avoiding mismatches, this could produce an unfair competition amongst them, because intermediaries would prefer operating where the MDR rules were less severe or even inexistent.

The Commission says that the actual level of protection of the internal market is overall defined by reference to the "*weakest*" Member State and this is why a cross-border potentially aggressive tax planning arrangement that engages one Member State in reality affects all States[729].

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[725] See Chapter III, topics 3.2, 3.3 and 3.4.

[726] EUROPEAN UNION. Glossary of Summaries. Specifically, it is the principle whereby the EU does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at national, regional or local level. It is closely bound up with the principle of proportionality, which requires that any action by the EU should not go beyond what is necessary to achieve the objectives of the Treaties. Available at: https://eur-lex.europa.eu/summary/glossary/subsidiarity.html. Accessed at: 19 Feb 2019.

[727] EUROPEAN UNION. European Parliament. The principle of subsidiarity. Available at: http://www.europarl.europa.eu/factsheets/en/sheet/7/the-principle-of-subsidiarity. Accessed at: 24 Jun. 2019.

[728] EUROPEAN UNION (2017). *Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU.* Cit., p. 6.

[729] Ibid, p. 6.

Considering this statement, there is a very important concept to be discussed: in terms of MDR, would the "*weakest*" be referring to the tax legislation enforcement, to the tax administration capacity or to both?

In the first option, it is necessary to return to the aspect of sovereignty, because the supposed weakness in the legislation can be a result of a political decision. If it is not, MDR can effectively help to identify the existent weaknesses and gaps, improving the domestic legislation, and, at the same time, increasing the level of harmonization within the EU, reducing the field of play for the avoidance arrangements. In the second option, the issue is: is the less prepared or equipped tax administration expected to deal with more or less tax planning in its jurisdiction?

If a country chooses to apply a "friendly" tax legislation, most likely in order to attract companies and business, after MDR introduction it will receive a larger amount of information about tax planning. Is its tax administration able to deal with that information? On the other hand, if a given country has a strong system of laws and in consequence only a few arrangements are working in its jurisdiction, it could receive an enormous quantity of information provided by its taxpayers/intermediaries whose schemes are being developed in other jurisdictions and avoiding its taxes, despite it being the weakest in terms of tax administration capacity. Considering its less equipped tax administration, it will not be able to deal with the information received.

The point is that well equipped tax administrations could receive a large amount of information, if intermediaries are linked to its jurisdiction. However, after the automatic exchange of information, the necessary measures shall be adopted not where the intermediary is, but where the scheme is working. On the other hand, a less equipped tax administration can receive a large amount of information, because several intermediaries are acting in its jurisdiction, and it does not have the capacity to deal with all the information received.

Considering the system designed by the Directive, and supposing the arrangements are more connected to the "weakest" Member State, after those considerations about what "weakest" refers to, it is important to reflect where the intermediaries are, because as is exposed below, the intermediaries´ status is the reference point in determining where the information shall be provided.

The question, for the future, is what can be done when a Member State, after identifying a loophole or weakness in its domestic legislation, allowing a cross-border arrangement, which causes reduction in other Member State´s taxable base, does not take the competent actions to keep this from happening. When a country does not transpose a directive, the Commission may initiate infringement proceedings and bring proceedings against the country before the Court of Justice of the EU (the non-enforcement of the judgment on this occasion can lead to a new conviction, which may result in fines). However, it is not the case and there are political implications not reached in the objective of this work, despite it being foreseeable, after MDR introduction.

Tax administrations shall exchange information obtained in MDR context every quarter of a year, according to the Directive, Article 8 AB (18)[730]. Considering that only arrangements in which the cross-border element is present are in focus, there will be at least two countries involved. Thus, the Commission states: "*the tax authorities most strongly connected with the arrangement will obtain sufficient input to undertake action against tax avoidance early on*"[731]. The expression "*most strongly connected with the arrangement*" leaves wide margins for interpretations and subjectivism. The point is what occurs if a tax authority does not undertake any action against the scheme because it understands that the other one is more "strongly connected" with the scheme and being so it should undertake the competent actions? The possible negative conflicts of competence occur when two authorities decline their competence at the same time. Therefore, it is necessary to establish, in this case, who has the competence to indicate the tax authority who should effectively act.

As discussed above, controlling State policies by the identification of favorable or preferential tax regimes, which allow arrangements to work in their jurisdiction can be an international interference or pressure. The proposal, however, stressed "*the harmonized approach reaches up to the point that the competent national authorities come to know about the potentially aggressive arrangements. Thereafter, it is for Member States to decide how they pursue cases of illegitimate arrangements*"[732]. This is very important because the Directive defines that it only covers the identification of the problem; each Member State shall take the adequate measures to solve it.

Nevertheless, it is the Commission's intention to monitor the results. As is expressed in the Directive, under the Member States' obligations they shall communicate a yearly assessment of the effectiveness of the automatic exchange of information, as well as of the practical results achieved. The results of DAC6 provisions will be included in the evaluation report to the European Parliament and to the Council, which will be issued by 1 January 2023.

The periodic evaluation of MDR is remarkably important to adjust the hallmarks and maintain the proportionality and effectiveness of the system, considering that tax planning structures are changed very quickly. In order to address the potential need for updating the hallmarks based on information derived from disclosed arrangements, the power to adopt acts in accordance with Article 290 of the TFEU is conferred upon the Commission[733]. However, more than this, the European authorities will be assessing the countries' application and results.

Finally, reinforcing its intention to create the minimum necessary common framework, the Commission says penalties for non-compliance with MDR, by intermediaries/taxpayers, will remain under the sovereign control of Member States.

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[730] EUROPEAN UNION (2018*). Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU.* Cit.
[731] Ibid, p. 12.
[732] Ibid, p. 10.
[733] Ibid, p. 13.

3.6.0.2.2 Proportionality.

The principle of proportionality is laid down in Article 5 (4) of the TFEU. Under this rule, the action of the EU must be limited to what is necessary to achieve the objectives of the Treaties. It works in much the same way as the principle of subsidiarity and it means that the content and form of the action must be in keeping with the aim pursued[734].

The Commission states, considering the principle of proportionality, that MDR "*represents a proportionate answer to the identified problem since they do not exceed what is necessary to achieve the objective of the Treaties for a better functioning internal market without distortions"*[735]. Therefore, proportionality, in the Commissions view, must be verified by measuring the adequacy and necessity of the means. As Humberto Ávila[736] explains, a suitable means is that capable of promoting its end, and a necessary means is the least restrictive, among all those equally adequate, with respect to fundamental rights. In other words, a legal or administrative measure is proportional if the advantages it promotes outweigh the disadvantages it causes.

That is why the discussion involving the tax administration capacity and the quantity of the information collected is very important. If a given tax administration is demanding/receiving more information than it is able to deal with and effectively provide an answer about, the level of uncertainty generated can result in disproportional disadvantages.

In order to preserve the proportionality and reasonableness of the measure, within the Commission´s intention to create the minimum necessary common framework for the disclosure of potentially harmful arrangements and thinking about the tax administration´s operational costs, they punctuate there is no publication requirement of the reported tax schemes, only automatic exchange of information between EU Member States.

However, no publication requirements are not necessarily an advantage in the system. Where on one hand it reduces the tax administration costs, on the other hand, it decreases the system´s general efficiency. One arrangement informed and analyzed by the tax administration can be a good example/guidance for several other intermediaries/users. It means that analyzing and publishing a general opinion, tax administration could reach a large number of taxpayers, furthermore increasing the level of certainty about the possible use or not of a given arrangement. The Portuguese system[737], although having other problems, adopted this publication, which is recommendable, for the abovementioned reasons.

For the automatic exchange of information within the EU, the Commission remembers the existence of a mechanism introduced by Council Directive (EU) 2015/2376, i.e., common communication network (CCN). Thus, further instruments do not need to be created or implemented.

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[734]EUROPEAN UNION. Glossary of Summaries. Proportionality Principle. Available at: https://eur-lex.europa.eu/summary/glossary/proportionality.html. Accessed on 24 Jun. 2019.
[735] EUROPEAN UNION (2017). *Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU.* Cit., p. 7.
[736] ÁVILA (2018). Op. Cit., p. 102.
[737] See Chapter III, topic 3.3.6 - The impact of the regime on compliance.

Analyzing whether and how the information received should be exchanged, the results indicated limiting the exchange of information to spontaneous exchanges would appear inconsistent with other initiatives that the Commission has lately undertaken in the field of transparency. Thus, it is stressed that "*the framework for information exchange, both in the rules that implement the common reporting standard (CRS) in the EU and in advance cross-border rulings, involves automatic exchanges*"[738] .

On the other hand, it is necessary to consider the possibility of receiving "double reporting", which, if not properly treated, generate an imbalance in the cost-benefit of the measure. Although the proposal mentions this aspect, stating that "*it is common place that an intermediary maintain a presence in several States by way of offices, firms, etc. and that it also engages other local independent actors in providing tax advice on certain arrangements"* [739], the explanations and solutions presented are not convincing, as I will demonstrate. This way, it is very likely that countries will receive double reports and it is necessary to deal with this issue creating "filters" or means to identify a scheme reported more than once.

Measuring the proportionality on the taxpayers´ side, in terms of costs, the consideration is that intermediaries already have all the information about the arrangements available. Thus, further efforts to produce the information are not necessary, and only under a limited set of circumstances, would taxpayers be required to report such schemes themselves and incur costs related to the reporting obligations[740].

3.6.0.2.3 Good Governance.

Despite the fact the principle is not expressly mentioned in the Proposal[741], the concept of good governance in tax area was introduced in the European Union context in the Economic and Financial Affairs Council (ECOFIN) meeting, on 14 May 2008[742]. The Council, in a topic related to "*tax issues in agreements with third countries*", underlined the importance of implementing the principles of good governance in the tax area, in the sense of the principles of transparency, exchange of information and fair tax competition. Moreover, it was stated that good governance in the tax area is not only an essential means for combating cross-border tax fraud and evasion, but can strengthen the fight against money laundering, corruption, and the financing of terrorism.

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[738] EUROPEAN UNION (2017). *Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU.* Cit., p. 9.
[739] Ibid, p. 11.
[740] Ibid, p. 10.
[741] EUROPEAN UNION (2017). *Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU.* Cit., p. 6/7.
[742] EUROPEAN UNION. Council of the European Union. 2866 Council Meeting. Economic and Financial Affairs. Brussels, 14 May 2008. Press Release, p. 22.
Available at: https://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ecofin/100339.pdf. Accessed on 19 Feb 2020.

After that, the Commission[743], discussing economic crisis and globalization, as a problem, and building "*fair and efficient tax systems*", as a solution, stressed the need for international tax cooperation and common standards, "*i.e., good governance in the tax area*", and then the concept has become a constant presence in the international debate. That Communication[744] aimed to identify the particular EU contribution to good governance in the area of direct taxation. There is an interesting point to my MDR analysis, relating to how to strengthen the principle of good governance in the tax area, within the EU and internationally:

> *Promoting good governance in the tax area must involve a combination of better tax governance within the EU and actions aimed at third countries. Good governance in the tax area within the EU will strengthen Member States' efforts in fighting against tax fraud. At the same time, the argument for other jurisdictions to engage in efficient and effective administrative cooperation with the EU will be reinforced. In any event, under equal treatment rules, a Member State should provide to another Member State the level of cooperation that it has accepted in relation to a third country*[745].

Thus, from another perspective, when introducing measures to fight against undesirable tax practices, such as abusive avoidance, evasion or fraud, based on the principle of good governance, the EU institutions does not focus only on the internal market. Additionally, based on the argument of their "*efficient and effective administrative cooperation",* they take a position of requiring in relation to a third country the same level of cooperation existent amongst Member States.

This work has been emphasizing this issue. Thus, when a country, or in this case a community like the European Union, is making the decision to introduce MDR, it is not focusing only on its problems with tax planning, but also on the possibility to require other countries to introduce MDR themselves and make an automatic exchange of information on tax planning strategies. That is, even if the problem is not real and immediate, having access to information represents a future possibility of reaction. This, domestically, was the initial idea in DOTAS; that is, having access to information about what was happening in the tax planning market. Internationally, one country, knowing the tax planning arrangements working in the other countries, can exert international political pressure to close existent gaps or to change favorable tax policies, which causes base erosion and profit shifting. It seems, however, that this finding, the use of MDR as a tool for harmonizing legislation by applying international political pressure, based on the sharing of information obtained, causes a certain 'discomfort' and it is not expressed in the EU proposal or in the OECD/BEPS Action 12 Final Report.

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[743] EUROPEAN UNION (2009). European Commission. Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee. *Promoting Good Governance in Tax Matters.* COM (2009) 201 final. Brussels, 28 Apr 2009, p. 4.
Available at: https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0201:FIN:EN:PDF. Accessed on 23 Feb 2020.

[744] Ibid., p. 5.

[745] Ibid., p. 9.

Continuing the development of good governance in tax matters, in the *Action Plan to Strengthen the Fight against Tax Fraud and Tax Evasion*[746], the Commission reinforced the application of the concept (as a meaning of the principles of transparency, exchange of information and fair tax competition), adding a fourth element in the composition: addressing aggressive tax planning. Additionally, the Commission stated that aggressive tax planning could be considered contrary to the principles of Corporate Social Responsibility[747].

The Commission recommended measures intended to encourage third countries to apply minimum standards of good governance in tax matters, arguing the potential and actual damage caused by jurisdictions not complying with minimum standards of good governance in tax matters, among which jurisdictions commonly considered as tax havens[748]. The finding was that each Member State has responded in a different way in its relation to third countries and the overall level of protection to the internal market is given by "*the weakest response*".

Thus, good governance involves the fight against aggressive tax planning, encompassing transparency, exchange of information and fair tax competition. However, an exclusively internal solution to the EU market it was not enough, because of the reasons abovementioned. The standards of good governance in tax matters has evolved in its external dimension, being extended in the ECOFIN meeting on the 26 April 2018, with the addition of the four Minimum Standards of the G20-OECD/BEPS project[749]. Mosquera Valderrama states that the EU have one more important role regarding international tax developments, however, this new role generates tensions between EU and non-EU countries. Her point is the standard of good governance in tax matters has been introduced as a precondition for third countries that receive EU aid, economic partnership and free trade agreements, and, more recently, should be included in a single EU common (black) list of non-cooperative jurisdictions.

In other words, the fight against "aggressive tax planning" is part of what EU considers a good governance policy. MDR is the Action proposed in BEPS to tackle aggressive tax planning and the BEPS minimum standards were included in the good governance policy[750]. The relation between the EU initiatives towards transparency and international coordination in tax matters were discussed in topic 2.2[751]. Conditions to be considered *cooperative-jurisdiction* already involve automatic exchange of information and, in this work´s point of view, they will involve the implementation of MDR, in a short future.

Stepping further, the Commission stated that as part of the EU's agenda to promote tax good governance amongst its international partners and support the smooth and coherent implementation of G20/OECD BEPS globally, special attention needs to be given to the situation of developing countries. In that context, having full regard to the principle of subsidiarity, there is a

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[746] EUROPEAN UNION (2012). Communication from the Commission to the European Parliament and the Council. *An Action Plan to strengthen the fight against tax fraud and tax evasion*, Cit., p. 2.
[747] Ibid., p. 6.
[748] Ibid., p. 5.
[749] MOSQUERA VALDERRAMA, Irma Johanna. *The EU Standard of Good Governance in Tax Matters for Third (Non-EU) Countries.* Intertax, v. 47, Issue 5, The Netherlands: Kluwer Law International BV, 2019, p. 454-467.
[750] NOTE. MDR is not a minimum standard but BEPS Action 5 is, for instance.
[751] See Chapter II, topic 2.2 and, specifically, topic 2.2.2 – A broad exchange of information.

need to ensure more coherence between Member States' individual positions in the international tax arena, and the agreed good governance principles, such as in bilateral tax treaties with third countries. Moreover, when applying EU tax good governance standards, "*the inclusion of developing countries in the global good governance network can prevent weaknesses in the international tax structure that may create opportunities for base erosion and profit shifting*" [752].

Summarizing, the conceptualization of a fair and efficient tax system, introduced in 2009 in the context of good governance in tax matters, evolved into a broader new meaning. It encompasses the goal of eliminating tax obstacles within the European Union (double taxation and administrative burdens) and addresses aggressive tax avoidance and harmful tax competition both within the EU (harmonization and coordination) and externally (promoting the standard of good governance in tax matters).

3.6.0.3 The Directive - Amendment.

Introducing Directive 2018/822/EU[753], the Council, after making a brief list of amendments, of which Directive 2011/16/EU had been the subject over the last few years, describes this more recent amendment as a tool, which tax authorities can use to react to aggressive tax planning. Moreover, as a measure needed to reinforce certain specific transparency aspects of the existing taxation framework. Finally, it is stated that MDR can contribute effectively to the efforts for creating an environment of fair taxation in the internal market.

It is known that tax planning arrangements are sophisticated structures, connected to the great mobility of persons and capital, especially involving transnational schemes. Not affecting States individually, those arrangements can reduce the global tax revenue, consequently reducing the possibilities for tax policies able to favor the economic growth. In this scenario, tools to provide timely information about potentially aggressive tax planning exploring gaps and loopholes in tax legislation are important to enable a quick reaction, promoting the competent changes in the legislation, undertaking adequate risk assessments, and carrying out specific tax audits.

The Directive says if tax authorities do not react to a reported arrangement this does not imply acceptance of the validity or tax treatment of that arrangement. However, the point is whether a non-reaction could mean the scheme was not evaluated and, therefore, the information was in vain. In the case of MDR, one of the measures of proportionality is given by the ability to react, as has already been said. Reacting to all information brings an additional benefit to the taxpayer, who can see the measure as an increase in certainty and trust level and not only as an exchange for non-sanction.

[752] EUROPEAN UNION (2016). European Commission. Communication from the Commission to the European Parliament and the Council on *an External Strategy for Effective Taxation*. COM (2016) 24 final, Brussels, 28 Jan 2016, p. 7/14.

[753] EUROPEAN UNION (2018*). Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU. Cit.,* p. 1–13.

The European initiative expressly mentions its inspiration in BEPS Action 12, for instance, the focus on the "intermediaries", including in this categorization *"certain financial intermediaries"* and *"other providers of tax advice".* However, it is adding new elements, such as possible ways to address arrangements designed to circumvent reporting under the CRS or aimed at providing beneficial owners with the shelter of non-transparent structures.

These issues were discussed in a meeting in Bari, Italy, where the G-7 Finance Ministers and Central Bank Governors agreed with the adoption of the Joint Communiqué and three documents, including the G-7 Bari Declaration of 13 May 2017 on fighting tax crimes and other illicit financial flows[754]. The Bari Declaration lists initiatives since 2013, stressing beneficial ownership transparency for combatting tax evasion, corruption and other activities generating illicit flows of finance. The authorities in Bari also mentioned they support that the fight against financial crimes, which involve illicit financial flows, including foreign bribery, should be effectively investigated, prosecuted and sanctioned. The Directive´s amendment mentions said document, in its recital 4[755]. Nevertheless, as I see it, this subject is connected to CRS and AEOI, but not exactly to MDR.

In its scope for the MDR integrative use, the Directive suggests that Member States, when implementing its parts addressing CRS avoidance arrangements and arrangements involving legal persons or legal arrangements or any other similar structures, can use the OECD´s work, insofar as they are aligned with the EU provisions. It is referring to the OECD Model Mandatory Disclosure Rules for Addressing CRS Avoidance Arrangements and Opaque Offshore Structures[756] and its Commentary, which proposes specific mandatory disclosure rules.

According to the OECD, the Model and the '*opaque offshore structures*' included in that report were approved by the Committee of Fiscal Affairs (CFA) on 8 March 2018, therefore only a few months before the Directive´s amendment. The report points out the use for compliance purposes and support for tax policy design, and an additional deterrent effect against the use of the arrangements covered by the rules as objectives. As thought about MDR, the main actors are the arrangement´s intermediaries and tax administrations.

Although the initiative is limited only to "direct taxation", excluding VAT and other indirect taxes, Member States could include indirect taxes in their legislation, as I see it. The HM Revenue and Customs (HMRC), for instance, has information about 3 different disclosure regimes: VAT disclosure regime (VADR); Disclosure of Tax Avoidance Schemes: VAT and other indirect taxes

[754] G-7 (2017). *Bari Declaration on Fighting Tax Crimes and Other Illicit Financial Flows. G7 Finance Ministers and Central Bank Governors*. Bari, Italy. 13 May 2017. Available at: http://www.g8.utoronto.ca/finance/170513-crime.html. Accessed on: 29 May 2019.

[755] EUROPEAN UNION. *Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU.* Cit., p. 2.

[756] OECD (2018). *Model Mandatory Disclosure Rules for CRS Avoidance Arrangements and Opaque Offshore Structures,* Paris: OECD publishing. Available at: www.oecd.org/tax/exchange-of-information/model-mandatory-disclosure-rules-for-crs-avoidance-arrangements-and-opaque-offshore-structures.pdf. Accessed on: 20 Jul 2019.

(DASVOIT) and Direct taxes (including Apprenticeship Levy and National Insurance contributions - DOTAS)[757].

3.6.1 A description of arrangements that are required to be disclosed.

"*Cross-border arrangement*" means an arrangement concerning either more than one Member State or a Member State and a third country. In essence, the Directive refers to arrangements in which the participants are present in more than one jurisdiction or to those that have tax-related impact on at least two jurisdictions. Moreover, the text clarifies that an arrangement shall also include a series of arrangements or it may be comprise of more than one-step or part. Additionally, the concept includes any arrangement with a possible impact on the automatic exchange of information or the identification of beneficial ownership.

The Directive applies "*Hallmarks*", in the meaning of characteristics or features of a cross-border arrangement, which presents an indication of a potential risk of tax avoidance. The hallmarks are listed in an annex. Not defining what is specifically considered "aggressive" or "abusive" follows the OECD guidelines and meets previous experiences in the UK and Portugal, for instance. Thus, agreeing with this solution, this work understands that even if in a certain place and time an especially broad and precise definition of "aggressive" could be provided, it would not be applicable everywhere or for a long time. It is important to remember that tax-planning arrangements become increasingly more complex and are always subject to constant modifications and adjustments, especially as a possible defensive reaction by the promoters and intermediaries, after MDR implementation.

According to Nevia Čičin-Šain[758], "*the amendment and its list of hallmarks are necessarily vague in order to capture all of the potentially aggressive tax schemes*". She adds that the list of generic hallmarks must be linked to the main benefit test. The Commission explains the hallmarks determine what arrangements are reportable, clarifying there is no presumption of tax avoidance and the authorities may investigate whether there is an illegitimate tax practice based on the information received[759].

The text refers to "*reportable cross-border arrangement*" as an arrangement that meets at least one of the *hallmarks.* This single definition seems obvious to the reader in the whole context. First, however, it is important to note the inclusion of two other definitions in the Directive´s text,

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[757] THE UNITED KINGDOM (2018). Guidance Disclosure of tax avoidance schemes. "*The disclosure regime for VADR applies to arrangements entered into before 1 January 2018. VADR doesn't apply to arrangements that are notifiable under DASVOIT, which came into force on 1 January 2018*". Available at: https://www.gov.uk/guidance/disclosure-of-tax-avoidance-schemes-overview. Accessed on 18 Jan 2020.

[758] ČIČIN-ŠAIN (2019). Op. Cit., p.1.

[759] EUROPEAN UNION. European Commission. *Directive on the Mandatory Disclosure of Potentially Aggressive Tax Planning Arrangements* – 5th Amendment to the DAC.
Available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/intermediaries_platform.pdf. Accessed on: 03 Apr 2019.

which were not included in the original proposal: *(i.)* "*marketable arrangement*", which means a cross-border arrangement that is designed, marketed, ready for implementation or made available for implementation without a need to be substantially customized; *(ii.) "bespoke arrangement*", which means any cross-border arrangement that is not a marketable arrangement. This is important because the OECD identifies two different "threats", as a consequence of this classification, respectively: first, it is in the "quantity" of possible users and second because the "quality" of the arrangement, which is especially challenging to the tax administration[760].

Second, it occurs that MDR experiences started with focus on domestic arrangements, was expanded during the BEPS Action 12, which was originally limited to cross-border schemes and in its final report reaches a wider scope, covering domestic and cross-border planning[761]. Thus, a Member State may or may not include domestic schemes in its legislation, although in the first case it will not be obliged to automatically share the information with other Member States. It might share, however, on demand or spontaneously.

For instance, the UK-DOTAS program started with domestic situations, not focusing on cross-border arrangements[762]. The DOTAS regime was originally designed to enable HMRC to keep up to date with what types of tax avoidance schemes are in circulation, not to provide information internationally. By requesting the promoters to make a disclosure, HMRC would be given the opportunity to review and, if necessary, to amend legislation to block any scheme which the government considers aggressive and unfair[763]. The OECD´s initial proposal focused only in cross-border arrangements. According to an institution on Public Discussion Draft Action 12[764], BEPS Action Plan identified three key outputs, among them "*a focus on international tax schemes and consideration of a wide definition of tax benefit to capture relevant transactions and designing and putting in place enhanced models of information sharing for international tax schemes."*

In the European Directive, the scope is limited to cross-border arrangements, structurally because it is an argument to justify the proportionality of the measure[765]. Moreover, the obligations for disclosure should be limited to arrangements with a cross-border element, because the main objective set out in the Directive is "*to ensure the proper functioning of the internal market*".

However, it seems neither reasonable nor efficient to exclude possible domestic arrangements with the same effects aimed in the Directive and in the OECD report, which means, those arrangements exploring loopholes or weaknesses in tax law, obtained results not in

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[760] See Chapter II, topic 2.3.3.1 – Marketable and bespoke arrangements.
[761] See Chapter II, topic 2.5.1.1.1 – International Tax Schemes.
[762] See Chapter III, topic 3.2 – The system in the UK.
[763] ROSS MARTIN. Penalties & Compliance. *DOTAS: Disclosure of tax avoidance schemes.* Last Updated: 19 July 2018. Available at: https://www.rossmartin.co.uk/penalties-a-compliance/403-disclosure-of-tax-avoidance-schemes-dotas. Accessed on 18 Feb 2020.
[764] OECD (2015). *Comments received on Public Discussion draft.* Cit., AFME-BBA, p. 6. See Chapter II, topic 2.5.2.
[765] EUROPEAN UNION (2018). Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU. Cit. "*In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective, especially considering that it is limited to cross-border arrangements concerning either more than one Member State or a Member State and a third country".*

consonance with the objectives and purposes of the law. Therefore, although the exclusively domestic arrangements eventually disclosed are not included in the automatic exchange of information within the EU-Members, when introducing MDR countries should not lose the opportunity to receive information about them.

Summarizing, the hallmarks are established in the Directive, Annex IV. Basically, they are classified in "generic" and "specific" and the tax planning, in order to be informed, must be linked to the "main benefit test"; cross-border transactions; automatic exchange of information and beneficial ownership, and transfer pricing.

3.6.1.1 The main benefit test.

Hallmarks linked to the main benefit test can be generic or specific. The "generic" ones are three: two linked to the relationship between the promoter/intermediary and the user(s) and depend on the terms of the contract. Thus, whether there is a condition of confidentiality[766] between the user and the arrangement provider, which is intended to ensure that the arrangement is not brought to the other intermediaries or even the tax authorities' attention; or if the fees, remuneration and other charges are fixed in proportion to the tax advantage that the scheme produces, it must be disclosed. The last one is connected to the concept of *marketable arrangement*, which means that, if the scheme can be widely used, without requiring adaptations, it should also be informed. The "specific" ones include arrangements in the intention of producing artificial losses, converting income into capital or other categories of revenue or involving interposed entities without other primary commercial function, in order to reduce its tax liability.

The Directive says that the main benefit test will be satisfied if what a person may reasonably expect to derive from an arrangement is the obtaining of a tax advantage. However, it does not define what a "tax advantage" is. Referring to a category of hallmarks linked to the main benefit test, the Directive recalls to the general anti-abuse rule as set out in Article 6 of Council Directive (EU) 2016/1164 (ATAD)[767]. It states that aggressive cross-border tax-planning arrangements, of which the main purpose or one of the main purposes is to obtain a tax advantage that defeats the object or purpose of the applicable tax law, are subject to ATAD.

Taking this hallmark aspect into consideration, two questions are raised. The first is whether MDR is nothing more than part of GAAR and the second is whether MDR can only be

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[766] See Chapter II, topic 2.4.2.2 – Trade Secrets and Confidentiality. See more in PETERSON, Andrew Franklin. *Trade Secrets and Confidentiality: Attorney Ethics in the Silent World of Tax Planning*, Brigham Young University Journal of Public Law, v. 17, Issue 1, 2002, p. 163-190. Available at: https://digitalcommons.law.byu.edu/jpl/vol17/iss1/8. Accessed on: 31 May 2018.

[767] EUROPEAN UNION (2016). 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 L 193, 19 July 2016, p. 1. Article 6 says that "*for the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances.*"

applied where there is a legislation establishing GAAR, in force. These questions were answered in Chapter II, topic 2.2.4.

It is important to highlight here that as this work defends, MDR needs a co-operative compliance program, based on trust and transparency, as a flip side of the coin. Reversely, when applying GAAR, this is not necessary. Moreover, even if an arrangement is literally and formally licit, MDR has as its objectives to improve the tax law system, closing loopholes that allow it to work. Nevertheless, MDR has an eminently preventive character, allowing the tax administration to know the arrangement before it is in use or able to produce undesirable effects.

3.6.1.2 Specific hallmarks related to cross-border transactions.

The arrangement must be disclosed if it involves deductible cross-border payments, made between two or more associated enterprises, which are not supposed to be taxed anywhere, because: the recipient is not a resident for tax purposes in any tax jurisdiction; or the recipient´s jurisdiction offers benefits from a preferential tax regime, full exemption or tax at the rate of zero or almost zero. Furthermore, whether the recipient jurisdiction is included in a list of third-country jurisdictions which have been assessed by Member States collectively or within the framework of the OECD as being non-cooperative. In this case, the principal objective is avoiding double non taxation.

This category also includes the need for disclosing if deductions for the same depreciation on the asset or relief from double taxation in respect of the same item of income or capital are claimed in more than one jurisdiction. Additionally, if involving an arrangement that includes transfers of assets and there is a material difference in the amount being treated as payable, in consideration for the assets, among different jurisdictions. Therefore, the principal objective is to avoid the double use of a tax benefit, moving through different jurisdictions.

Some concepts can produce uncertainty, when a Member State is introducing MDR domestically. For instance, "*preferential tax regime*" and "*associated enterprises*" are full of subjectivism and relativity. Moreover, this specific hallmark carries the risk of restricting the free movement of capital (TFEU, Article 63) in relation to third countries[768], consequently producing discrimination.

3.6.1.3 Specific hallmarks related to AEOI and beneficial ownership.

[768] PwC. Tax Policy Bulletin. Tax Insights from International Tax Services. *EU proposes mandatory disclosure of tax information for reportable cross-border arrangements*. 31 August 2017. Available at: https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-eu-proposes-mandatory-disclosure-of-tax-information.pdf. Accessed on: 31 May 2019.

The original proposal's wording[769] was changed in the Directive´s amendment and it is important to mention the now existent reference to "*arrangement with a possible impact on the automatic exchange of information or the identification of beneficial ownership*". In practice, the Directive is proposing a specific hallmark to address arrangements designed to circumvent reporting obligations involving automatic exchange of Financial Account information.

The Directive´s introduction explains the intention to cover financial account information, mentioning the CRS introduced by Directive 2014/107/EU, which is a significant step forward in establishing a framework for tax transparency. As explained in the proposal, MDR and CRS can work as complementary measures. The Directive also mentions "*for the purposes of that hallmark, agreements on the automatic exchange of financial account information under the CRS should be treated as equivalent to the reporting obligations laid down in Directive 2014/107/EU*".

Directive 2014/107/EU[770] (DAC 2), which defines as "automatic exchange" the systematic communication of predefined information on residents in other Member States to the relevant Member State of residence, without prior request, at pre-established regular intervals, entered into force on the twentieth day following its publication in the Official Journal of the European Union, which occurred on 16 December 2014, and Member States should adopt and publish, by 31 December 2015, the laws, regulations and administrative provisions that are necessary to comply with it. After implementing them, each Member State shall take the necessary measures to require its Reporting Financial Institutions to perform the reporting and to exchange the competent information.

The automatic exchange, specially related to bank account information, follows the negotiations between the United States of America and several other countries, including all EU-Member States, on bilateral agreements to implement the United States' Foreign Account Tax Compliance Act (commonly known as 'FATCA'), the OECD and the G-20 standards[771]. These international pressures and influences are mentioned in this work[772].

Then, the Expert Group[773] was implemented in an attempt to provide advice to the Commission, which can assist the Council and Member States in order to ensure that EU legislation on automatic exchange of information in direct taxation was being effectively aligned and fully compatible with the OECD Global Standard on automatic exchange of financial account information.

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[769] EUROPEAN UNION. Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU. Cit. See Article 3 (18) 'e'.
[770] EUROPEAN UNION. Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation. OJ L 359, 16.12.2014, p. 1–29.
[771] Ibid, p. 1.
[772] See Chapter II, topic 2.2.3 – Transparency.
[773] EUROPEAN UNION. European Commission. Commission Expert Group on automatic exchange of financial account information. Available at: https://ec.europa.eu/taxation_customs/business/tax-cooperation-control/administrative-cooperation/commission-expert-group-automatic-exchange-financial-account-information_en. Accessed on: 04 Apr 2019.

This hallmark also focuses on a non-transparent legal or beneficial ownership chain. Basically, it has the intention of identifying schemes using the interposition of third persons, which increases the distance between the economic fact and its real actor. In this sense, it refers to the use of persons, legal arrangements or structures without "*a substantive economic activity*" and the use of different jurisdictions, in the chain. Moreover, there is a reference to where the beneficial owners of such persons, legal arrangements or structures, as defined in Directive 2015/849/EU[774], are made unidentifiable.

Directive 2015/849/EU presents among its justifications "*money laundering, terrorism financing and organized crime remain significant problems which should be addressed at Union level*". The proposal is to target and avoid the use of the financial system for those crimes. The Directive defines as '*beneficial owner*' any natural person(s) who ultimately owns or controls the customer and/or the natural person(s) on whose behalf a transaction or activity is being conducted, using corporate entities or trusts. The Directive also includes legal professionals (as defined by the Member States). Thus, they should be subject to those rules when participating in financial or corporate transactions, including when providing tax advice, where there is the greatest risk of their services being misused for the purpose of laundering the proceeds of criminal activity or for the purpose of terrorist financing. This is important in the MDR context, when defining responsibilities for disclosing and the tax liability.

On the other hand, this is a good example of what this work refers to as "putting MDR and crime identification in the same basket"[775]. Therefore, if someone is taking a scheme to finance terrorist acts, involving intermediaries and where the beneficial owners of such persons are made unidentifiable, he/she should disclosure such scheme to tax administration, under MDR, providing all the information described in topic 3.6.4. This conclusion, obviously, is not reasonable, for the reasons explained in topics 2.4.1.1 and 5.1.2[776].

3.6.1.4 Specific hallmarks related to transfer pricing.

In the European Commission´s view, transfer pricing refers to "*the terms and conditions surrounding transactions within a multi-national company. It concerns the prices charged between associated enterprises established in different countries for their inter-company transactions*". Moreover, the Commission explains tax authorities' worries that multi-national entities may set transfer prices on cross-border transactions to reduce taxable profits in their jurisdiction, which

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[774] EUROPEAN UNION (2015). Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) n. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Text with EEA relevance). OJ L 141, 5.6.2015, p. 73–117.

[775] See Chapter III, topic 3.6.0.1 - The proposal. Explanatory Memorandum. "*The Commission seems to put several elements in the same basket to make the proposal more robust*."

[776] SEE Chapter II, topic 2.4.1.1 – Aggressive or Abusive Tax Planning and 5.1.2 – The issue of non-self-incrimination.

has led to the rise of transfer pricing regulations and enforcement, making transfer pricing a major tax compliance issue[777].

3.6.1.4.1 Unilateral safe harbor rules.

The Directive has a specific hallmark, which determines the disclosure of arrangements that involve *unilateral safe harbor rules*. According to the OECD´s definition[778], a safe harbor in a transfer-pricing regime is a provision that applies to a defined category of taxpayers or transactions and that relieves eligible taxpayers from certain obligations otherwise imposed by a country's general transfer pricing rules. In summary, a safe harbor represents simpler obligations than the general transfer-pricing regime. The availability of safe harbors for a given category of taxpayers or transactions, the OCED warns, may have adverse consequences, such as causing taxable income to be reported not in accordance to the arm's length principle (ALP); increasing the risk of double taxation or double non-taxation when adopted unilaterally; potentially opening avenues for inappropriate tax planning or raising issues of equity and uniformity.

The European Commission, based on some case-laws of the CJEU, considers that a measure by which the public authorities grant certain companies a favorable tax treatment that places them in a more favorable financial position than other companies, amounts to state aid[779]. In an analysis of this hallmark, some experts demonstrated worries about its application, exactly because "*there is currently a lack of clarity about the ALP within the EU, particularly following a series of State aid cases in which conformity with the ALP has been investigated. The lack of clarity makes this hallmark particularly difficult to judge"* [780].

The obligation to disclose, particularly, does not constitute recognition of any illegitimate action. It only brings more information to tax administration, in an early moment, who can verify, in fact, if one using the transfer pricing simpler rules really meets the required characteristics, avoiding inappropriate tax planning. Moreover, it is possible to increase, after an automatic exchange of information, harmonization of the ALP rules and its applications within the EU. In addition, within the EU context, it can evidence if any Member State is not observing Article 107(1)

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[777] EUROPEAN UNION. European Commission. *Transfer pricing in the EU context.* Available at: https://ec.europa.eu/taxation_customs/business/company-tax/transfer-pricing-eu-context_en. Accessed on 20 Feb 2020.

[778] OECD (2013). *Revised section e on safe harbors in chapter IV of the transfer pricing guidelines.* Paris: OECD Publishing, p. 4. Available at: https://www.oecd.org/ctp/transfer-pricing/Revised-Section-E-Safe-Harbours-TP-Guidelines.pdf. Accessed on 15 Jun 2019.

[779] PETROPOULOS, Georgios. *State Aid and Tax Rulings*. CPI- Competition Policy International. Published on 4 Apr. 2018. Available at: https://www.competitionpolicyinternational.com/state-aid-and-tax-rulings/. Accessed on 18 Jun. 2019. "*See DG Competition working paper on State aid and tax rulings: Case C-105/14 Taricco and Others EU:C:2015:555, paragraph 61; Case C-6/12 P Oy EU:C:2013:525, paragraph 18; Joined Cases C-106/09 P and C-107/09 P Commission and Spain v Government of Gibraltar and United Kingdom, paragraphs 72 and 73; Joined Cases C-78/08 to C-80/08 Paint Graphos and Others EU:C:2009:417, paragraph 46; and Case C-387/92 Banco Exterior de España EU:C:1994:100, paragraph 14."*

[780] PwC. Tax Policy Bulletin. Tax Insights from International Tax Services. *EU proposes mandatory disclosure of tax information for reportable cross-border arrangements.* 31 Aug 2017.
Available at: https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-eu-proposes-mandatory-disclosure-of-tax-information.pdf. Accessed on: 31 May 2019.

of TFEU[781] correctly. The Article considers that "*any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market*".

3.6.1.4.2 Hard-to-value intangibles.

The hallmark also covers the transfer of hard-to-value intangibles (HTVI), referring to intangibles or rights in intangibles which, at the time of their transfer, have no reliable, highly uncertain or difficult to predict transactional results. BEPS Action n. 8 mandated the development of transfer pricing rules or special measures for transfers of hard-to-value intangibles aimed at preventing base erosion and profit shifting by moving intangibles among group members. Therefore, there is a connection between this specific hallmark and other BEPS´ Actions. In the *Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles - BEPS Actions 8-10*[782], the OECD explains that the nature of the approach to HTVI inevitably requires some consideration of timing issues. In some cases, the elapsed time between the transfer of the HTVI and the emergence of *ex-post* outcomes may not correspond with audit cycles or with administrative and statutory tax period. That is why the tax administration considers it important to know about an eventual arrangement involving HTVI as soon as possible, and this hallmark inclusion meets the whole concept of MDR, about "timely" information.

3.6.2 A description of the persons required to disclose such arrangements.

In the concept of *"intermediary"*, the Directive includes any person that designs, markets, organizes or makes available for implementation, or manages the implementation of a reportable cross-border arrangement. This part does not differ from the UK or Portuguese definitions, for instance, neither from the OECD´s 2008 Study[783]. Thus, when posing the intermediaries in the focus of MDR, the EU-Directive (article 8º-AB) reproduces the OECD´s statements.

The intermediary must be legally connected, which means being a resident, being registered as a professional or having a permanent establishment, with at least one Member State jurisdiction.

Besides all the arguments justifying why the primary obligation for disclosure must rely on the intermediaries, in terms of efficiency and effectiveness, there is also the issue about the inexistence of additional compliance costs. Essentially, the taxpayers have no additional costs

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[781] EUROPEAN UNION. European Commission. *The Lisbon Treaty and tax legislation in the EU.* Cit.
[782] OECD (2018). Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles - BEPS Actions 8-10, OECD/G20 Base Erosion and Profit Shifting Project, Paris: OECD. Available at: www.oecd.org/tax/beps/guidance-for-tax-administrations-on-the-application-of-the-approach-to-hard-to-value-intangibles-BEPS-action-8.pdf. Accessed on 31 May 2019.
[783] OECD (2008). Study into the role of Tax Intermediaries ("*2008 Study*"). Cit.

because the obligation lies on the intermediaries´ shoulders, who already have a complete understanding about the scheme and all the information available to fulfill the requirements.

There are two exceptions to the rule in case: (i) where intermediaries reporting obligation would breach the legal professional privilege under the Member State´s national law. In such circumstances, the waived intermediary shall take the necessary measures to notify any other intermediary or, if there is no such intermediary, the relevant taxpayer, who has, therefore, the reporting obligation. (ii) where there is no intermediary, then the obligation to provide information on a reportable cross-border arrangement lies on the relevant taxpayer.

Additionally, there is an explanation referring to "*any person that, having regard to the relevant facts and circumstances and based on available information and the relevant expertise and understanding required to provide such services, knows or could be reasonably expected to know that they have undertaken to provide, directly or by means of other persons."* This seems to refer to the '*intermediary of the intermediary*' or any person who, despite not having a direct participation in the action, "*knows that they have undertaken to provide, directly or by means of other person*" a reportable arrangement. Thus, the Directive´s scope includes those persons who only know about the arrangement[784].

Even though a possibility for proving evidence "*that such person did not know and could not reasonably be expected to know that that person was involved in a reportable cross-border arrangement*" is predicted, additionally to the imprecise wording of the provision, in practice this extended definition of intermediary may create difficulties for the application. For instance, it may generate over-reporting when more than one person is informing about the same arrangement.

3.6.2.1 Professional privilege.

In this specific regard, the Directive´s provision is not binding, it only indicates to each Member State, which can grant the waiver or not. Moreover, the extension of the possible grant is under the discretion of each Member State, considering their domestic law. Obviously, this possibility can produce uncertainties and mismatches, because States have different levels of professional protection. It is possible to imagine, for instance, intermediaries migrating their professional register to a State granting a more extensive protection to professional privilege than others.

Trying to avoid this undesirable "competition", the Directive, this time using the term "shall", strongly indicates each Member State "*shall take the necessary measures to require intermediaries to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations*".

Therefore, even if an intermediary moves his/her professional register to another country, trying to avoid the obligation to provide the information, the relevant taxpayer will be required to

[784] EUROPEAN UNION. Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU. Cit. See Article 3 (21).

inform. However, this causes problems because tax administration, instead of receiving the information about a certain scheme compiled by one intermediary, can receive the same information from several users and many times only after the automatic exchange of information.

3.6.2.2 Schemes without intermediary´s interference.

In case of reportable schemes developed in-house by professionals working for a specific company as employers, despite the idea not being included in the Directive, the Commission is foreseeing possible future initiatives, focusing on MDR deterrent effect. Therefore, there is a proposal that MDR could be enhanced if the obligation to disclose information to the tax authorities were extended to auditors that are engaged to sign off on a taxpayer's financial statements. The justification is those auditors come across considerable amounts of data in the course of pursuing their professional tasks. *"The potential benefits from disclosing these arrangements to the authorities would indeed constitute a complement to the mandatory disclosure of similar schemes by intermediaries"*[785].

3.6.2.3 Over-reporting.

Considering the existence of a common market in EU and the focus on cross-border arrangements, it is expected that an intermediary (or intermediaries) can be involved in more than one reportable arrangement working in more than one Member State. The Directive tries to provide some answers to avoid over-reporting, which could cause unnecessary costs both for the intermediary and for the tax administration.

The reference to defining where to file information on reportable cross-border arrangements is the intermediary´s status. If the intermediary is liable to file information on reportable cross-border arrangements before more than one Member State´s competent authorities, such information shall be filed only in the Member State which first meets one of the following criteria: the intermediary is resident; has a permanent establishment; is governed by the laws or registered as a professional. Consequently, if the obligation relies on the relevant taxpayer, such information shall be filed considering only the State where, in sequence: he/she is resident for tax purposes; has a permanent establishment benefiting from the arrangement; receives income or generates profits or carries on an activity.

[785] EUROPEAN UNION (2017). Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU. Cit., p. 5.

3.6.2.4 The burden of proof.

The Directive establishes many obligations to the intermediaries, who in several cases must prove the facts or circumstances. For instance, in cases where there is a multiple reporting obligation, the intermediary shall be exempt from filing the information if he/she has proof, in accordance with national law, that the same information has been filed in another Member State. The same guidance is applicable in a case where the relevant taxpayers have a multiple reporting obligation.

Similarly, if there is more than one intermediary, the obligation to file information on the reportable cross-border arrangement lies with all intermediaries involved in the same reportable cross-border arrangement. However, an intermediary shall be exempt from filing the information only to the extent that he/she has proof, in accordance with national law, that another intermediary has already filed the same information.

Considering cross-border arrangements and diverse schemes, these rules are very difficult to follow, in practice. The problematic involves the competent procedure to provide these proofs and if a Member State does not approve them, how the discussion should develop. Thus, the emergence of collateral litigations is possible, not involving the MDR substance, but its formalities.

Most likely, intermediaries and taxpayers will provide over-information, and tax administrations will have the burden of identifying similarities and superposition, when analyzing the information. This is not a hard task, however, because marketable arrangements will be quickly identified and tailor-made arrangements will not incur significant repetitions.

3.6.3 A trigger for the imposition of a disclosure obligation.

The Directive also points out the importance of timely disclosure. The idea is the arrangements should be brought to the tax administration´s knowledge before they are effectively in use. Considering, however, the focus on cross-border arrangements and that the information should be exchanged among Member Sates quarterly, some difficulties can arise in this objective.

According to the Directive Article 8º ab (1), each Member State shall require intermediaries to inform the competent authorities about reportable cross-border arrangements within 30 days, beginning on the day after the arrangement is implemented, available, or ready for implementation. Thus, even if an arrangement is not effectively in use, not yet producing any tax effects, however it is ready to do it, the intermediary shall provide the information.

Relating to who was referred to above as the “intermediary of the intermediary”, i.e., any person who, despite not having direct participation in the action, “*knows that they have undertaken to provide, directly or by means of other person*” a reportable arrangement, they shall also file information within 30 days beginning on the day after they provided, directly or by means of other persons, aid, assistance or advice.

The relevant taxpayer, in the specific cases, shall file the information within 30 days, beginning on the day after the reportable cross-border arrangement is made available for implementation or it is ready for implementation, or when the first step in its implementation has been made in relation to the relevant taxpayer, whichever occurs first.

These terms were significantly extended, in comparison with the initial proposal, which established "*five working days*" to provide the information (as it occurs in Ireland, for instance)[786]. Their effectiveness, however, depends on each domestic legislation and the terms to fulfill tax obligations. If the tax obligations have monthly terms, an arrangement could not be repeated without first being informed. In the case of obligations that occur instantly, such as customs duties (*dazi doganali, droits et taxes de douane*), an arrangement could be repeated for a whole month before being informed. The EU proposal only starts with direct taxation, as mentioned above, however, if a given country considers including other kinds of taxes, these arguments should be taken into consideration.

Considering the objective focused on "cross-border" arrangements, even though the Directive establishes a 30 days' term for the information, the AEOI only occurs every three months (quarterly). Although the receiving State could immediately promote reactions, in many cases other States involved (and in the scope of the Directive there will always be other States involved) will only be informed about the scheme after 3 months. Thus, in such cases, one cannot expect reactions or countermeasures in "one week", as reported by the OECD in the case of the UK[787].

The Directive establishes, moreover, two different obligations for time-to-time reportable updates. First, in the case of marketable arrangements, Member States shall require the intermediary to provide an update every 3 months, which contains new reportable information as referred that has become available since the last report was filed (Article 8º AB (2)). Second, Member States may require that each relevant taxpayer file information about their use of the arrangement to the tax administration in each of the years for which they use it (Article 8º ab (11)).

Taking into consideration that Paragraph 2 only refers to marketable arrangements and this kind of arrangements is normally linked to the existence of the intermediaries working, the 3 months update should never be required to the taxpayers directly, therefore not creating excessive burdens to the taxpayers.

3.6.4 A description of what information is required to be reported.

The extension of the information required is under the Member State decision. The Directive, however, establishes a sort of "minimum standard" to the information to be exchanged. Therefore, Member States could require, at least, the following information:

[786] See Chapter III, topic 3.4.3 – A trigger for the imposition of a disclosure obligation.
[787] See Chapter III, topic 3.2.6 – The impact of the DOTAS regime on compliance.

1 - the identification of intermediaries and relevant taxpayers, including their name, date and place of birth (in the case of an individual), residence for tax purposes, TIN and, where appropriate, the persons that are associated enterprises to the relevant taxpayer;

2 - details of the hallmarks that make the cross-border arrangement reportable;

3 - a summary of the content of the reportable cross-border arrangement, including a reference to the name by which it is commonly known, if any, and a description in abstract terms of the relevant business activities or arrangements, without leading to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information about the disclosure of which would be contrary to public policy;

4 - the date on which the first step in implementing the reportable cross-border arrangement has been made or will be made;

5 - details of the national provisions that form the basis of the reportable cross-border arrangement;

6 - the value of the reportable cross-border arrangement;

7 - the identification of the Member State of the relevant taxpayer(s) and any other Member States which are likely to be concerned by the reportable cross-border arrangement;

8 - the identification of any other person in a Member State likely to be affected by the reportable cross-border arrangement, indicating to which Member States such person is linked.

The Directive says that the Commission will not have access to the information in items 1, 3 and 8. These are personal information about the intermediaries / users or could lead to commercial, industrial or professional secret and, in these cases, they are not under the macro controller´s interest of the effectiveness of the measure.

Some of this information is difficult to relate to the defined scope of identifying weaknesses and loopholes in the tax law, which would allow the tax administration to react to the arrangement. Intermediaries/users can wonder, for instance, when asked to inform "*date and place of birth*", if the primary intention is to identify the scheme or to identify promoters and users to apply sanctions. Moreover, some information is very detailed and much of it requires a "self-assessment" by the intermediaries / users[788].

3.6.4.1 Reference number

On 28 March 2019, the Commission Implementing Regulation[789], amending a previous regulation, was published having regard to the Directive 2011/16/EU as amended by Directive 2018/822/EU, "*in order to ensure that the mandatory automatic exchange of information on reportable cross-border arrangements is effective, especially where more than one intermediary or relevant taxpayer is liable to file information*". The Regulation considered the inclusion of an additional information containing the reference number of the reportable cross-border arrangement as crucial to the

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[788] See Chapter II, topic 2.4.5 – What information is required to be reported.

[789] EUROPEAN UNION. Commission Implementing Regulation (EU) 2019/532 of 28 March 2019 amending Implementing Regulation (EU) 2015/2378 as regards the standard forms, including linguistic arrangements, for the mandatory automatic exchange of information on reportable cross-border arrangements. OJ L 88, 29.3.2019, p. 25–27.

Directive´s proposals. Thus, if more than one intermediary or relevant taxpayer is obliged to file information, the reference number should be useful to identify the same arrangement being reported, on the central directory.

It seems clear that there are three underlying objectives, in this procedure: first, identifying the intermediary; second, identifying the scheme and, third, identifying the Member State in which the loophole or weakness of the law allows the development of the arrangement.

3.6.5 Appropriate penalties or other mechanisms to address non-compliance.

The Directive does not establish a set of rules or guidance. As it was said, in its intention to create the minimum necessary common framework, the Commission says penalties for non-compliance will remain under the sovereign control of Member States. The Directive´s wording is: "*Member States shall lay down the rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and concerning Articles 8aa and 8ab, and shall take all measures necessary to ensure that they are implemented. The penalties provided for shall be effective, proportionate and dissuasive*".

Some studies in Europe consider monetary penalties, like the German draft discussion, which classifies that a breach of the obligation to report in due time constitutes an administrative offense (*Ordnungswidrigkeit*) and is subject to a fine of up to €25,000 per breach[790]. An administrative fine can be fixed per each offense (specific), as the German draft, or as a percentage of the non-disclosed transaction (*ad valorem*), as in the Brazilian case[791], in 2015, when the fine was set at the value of 150% of the tax assessment amount. In the UK and Ireland, the law sets the maximum and minimum of fees and the Courts, considering the circumstances, case by case, and establishing the amount due[792].

A further discussion about the nature of the offenses arises, regarding tax planning non-disclosure: whether the non-compliance is administrative or criminal, in nature. Where in Germany it would constitute an administrative offense, in the Polish proposal, failure to correctly observe the rules will constitute a criminal offense based on the Polish Fiscal Penal Code and will be subject to a fine[793]. However, assigning criminal nature requires careful analysis within domestic legislation and can lead to the issue of prohibition of self-incrimination.

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[790] EY Tax News Update: Global Edition. Germany publishes draft Mandatory Disclosure Rules. Global Tax Alert. 20 March 2019. "*On 30 January 2019, the German Federal Ministry of Finance (BMF) sent a draft bill to all other federal ministries to introduce a "law on the introduction of a mandatory disclosure regime for tax arrangements*" (the bill). *The bill is intended to transpose the European Union (EU) Directive 2018/822/EU of 25 May 2018 into German national law and to create a reporting obligation for certain cross-border tax arrangements*". Available at: https://www.ey.com/gl/en/services/tax/international-tax/tax-alert-library. Accessed on: 10 Apr 2019.
[791] See Chapter III, topic 3.5 – The Brazilian proposal.
[792] See Chapter III, topic 3.4.4 – Appropriate penalties or other mechanisms to address non-compliance.
[793] KPMG International Cooperative. Poland: Mandatory disclosure rules, cross-border tax planning arrangements. Available at: https://home.kpmg/xx/en/home/insights/2018/11/tnf-poland-mandatory-disclosure-rules-cross-border-tax-planning.html. Accessed on: 17 Jan. 2019.

Therefore, concepts of "proportionate and dissuasive" are very broad and particular. In Brazil[794], for instance, Oliveira[795] defends that the reasoning behind the fine was that if someone submits the tax return but does not inform that he/she has practiced an act or transaction intending to minimize its tax burden (in this context, targeting a "*tax advantage*"), he/she would be committing tax fraud. However, the lawmakers considered that attributing presumption of fraud and criminal liability in the case of non-disclosed abusive planning was disproportionate.

On the other hand, it is important to consider not only the proportionality and the dissuasive effect of the penalties but also the importance of using positive rewards as an incentive to tax compliance and MDR observation. One of the most challenging points being discussed here is why being mandatory is not enough.

Specifically in the EU context, a possible problem arises if imposing penalties of different weights in different Member States, which could influence the quantity and the quality of the reported information, when considering one State against another. Furthermore, a tax planning market 'shopping' can arise, because the risk of being submitted to a penalty will take into consideration the gravity of the sanction.

3.6.6 DAC (6) Dates, Terms and Assessment.

According to Directive Article 3º, it should enter into force on the twentieth day following its publication in the Official Journal of the European Union. The publication occurred on 5th June, 2018[796], therefore, it entered into force on 25th June, 2018.

Article 2º (1) determines Member States should adopt and publish, by 31 December 2019 at the latest, the laws, regulations and administrative provisions necessary to comply with the Directive and they shall immediately inform the Commission. Beginning January 2020, fifteen EU Member States (Austria, Belgium, Bulgaria, Croatia, Estonia, France, Germany, Hungary, Ireland, Lithuania, Malta, the Netherlands, Poland, Slovakia and Slovenia) had finalized their respective legislative processes to implement DAC6. Therefore, the remaining thirteen Member States did not meet the implementation deadline[797]. Nevertheless, almost all were undergoing measures to comply with the implementation process.

According to article 8º ab (12), each Member State shall take the necessary measures to require intermediaries and relevant taxpayers to file information on reportable cross-border arrangements the first step of which was implemented between the date of entry into force and the date of application of the Directive. The date of application was defined in Article 2º (1) as 1st

[794] See Chapter III, topic - 3.5.4 - Appropriate penalties or other mechanisms to address non-compliance.
[795] OLIVEIRA (2018). Op. Cit., p. 343 – 348.
[796] EUROPEAN UNION (2018). Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU. Cit.
[797] KPMG. Euro Tax Flash from KPMG's EU Tax Centre. *EU Mandatory Disclosure Requirements – Update*. This seventh Special Edition Euro Tax Flash summarizes the most recent status of the implementation of the new rules into Member States' domestic legislation, as at January 8, 2020. Cit.

July, 2020. Therefore, the first reporting shall cover the information between 25 June 2018 and 30 June 2020 and intermediaries and relevant taxpayers, as appropriate, shall file information on those reportable cross-border arrangements by 31 August 2020.

The competent authority of a Member State where the information was filed shall, by means of an automatic exchange, communicate the specific information to the competent authorities of all other Member States, according to Article 8º ab (13).

The Directive states that the Commission shall adopt standard forms, including the linguistic arrangements, develop and provide with technical and logistical support and all the necessary practical arrangements for a secure Member State administrative cooperation in the field of taxation, including satisfying automatic exchange of information requirements. Specifically, the Commission should, by 31 December 2019, develop and provide with technical and logistical support a secure Member State central directory on administrative cooperation in the field of taxation where information to be communicated shall be recorded and the competent authorities of all Member States shall have access to the information recorded in that directory (Article 21 (5)). The Commission shall also have access to the information recorded in that directory, however within some limitations above specified.

In order to fulfill this technical and logistical support, a working group on administrative cooperation in the field of direct taxation (WGACDT) - sub-group on the automatic exchange of information (SGAEOI) was instituted. They promoted a series of meetings and during the 19th meeting, on 20 November 2019[798] it was stated that the Commission outlined the state of play for the first version of the central directory of DAC6. The 'demo' environment had been available since October 2019 and was deployed in a test environment with functional testing ongoing. Installation for conformance/production environment should take place by the end of December. The Commission predicted installation/production by the end of 2019 and training for users in the 1st quarter of 2020. Member States requested that their technical staff should also participate in the training.

Article 8º AB (18) predicts when the first exchange of that information should occur: 31 October 2020. After that, regularly, within one month of the end of the quarter which the information was filed.

The DAC has already been evaluated. According to Article 27, the Commission must submit a report on the application of the DAC to the European Parliament and to the Council every five years after 1 January 2013. For this purpose, Member States have undertaken to communicate the necessary information to the Commission for the evaluation of the effectiveness of administrative cooperation as well as statistical data. The first report was published in December 2017,

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[798] EUROPEAN UNION. European Commission. Working group on administrative cooperation in the field of direct taxation (WGACDT). Sub-group on the automatic exchange of information (SGAEOI). 19th Meeting–Brussels, 20 Nov 2019. Published on 10 December 2019. Available at: https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeetingDoc&docid=37236. Accessed on 21 Feb 2020.

accompanied by a Staff Working Document (SWD)[799], which contains qualitative and quantitative information on the application of the Directive 2011/16/EU. One of the main findings in the report states that "*DAC exchange of information has resulted in a great increase in the amount of data tax administrations have to handle – but their capacity to do so has not increased at the same rate*", and it is one of the crucial points in discussion here, i.e. the balance between the amount of information required under MDR and the tax administration´s capacity, to grant the effectiveness and proportionality of the measure.

That report, however, does not cover the more recent provisions on automatic exchange of information introduced via amending Directives to the original. A report on overview and assessment of the statistics and information on the automatic exchanges in the field of direct taxation[800] was provided on December 2018, based on the Directive´s Article 8b (2), and it describes the key findings on the implementation of AEOI, its costs and benefits, as well as actions taken by Member States to make use of the information received. This report´s conclusions are very important to MDR, especially the findings about the relationship between the countries' size and the amount of information exchanged. The report says that: *"large EU countries such as France, Germany, Italy, and the UK are among both the top senders and the top receivers"*. However, MDR introduction could change this scenario, especially because the imposition of sanctions and, maybe, the criminal implications, are under each Member State´s discretionary decision. Furthermore, tax administrations have different levels of equipment and domestic systems of law have different levels of enforcement. Depending on those factors, large countries could receive less information than small countries, causing an imbalance and administrative incapacities to deal with the information.

For example, the report points that in terms of number of taxpayers, France and Germany are the main sending countries, but the situation is different when the amounts (Euro) informed are considered. In the last case, the three largest flows, accounting for more than EUR 9 billion, originate from Luxembourg towards Belgium, France and Germany. When thinking about cross-border tax planning, the amount involved most likely represents a more significant parameter than the number of intermediaries/taxpayers acting/using the arrangement. Therefore, "small countries", like Luxembourg, will generate larger information flows than Germany or France.

Moreover, the report realizes the existence of a time gap between the income´s taxable year and the information´s sending date, stating that tax information was sent on average twelve months after the end of the tax period they refer to, even though there are significant differences between Member States. Additionally, according to the report, Member States tend to open the files within one year of receiving them. Finally, despite the fact that Member States have recognized that the tax information received via AEOI can be used in different ways, several of

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[799] EUROPEAN COMMISSION. Report from the Commission to the European Parliament and the Council on the application of Council Directive (EU) 2011/16/EU on administrative cooperation in the field of direct taxation. COM/2017/0781 final. Brussels, 2017. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017DC0781. Accessed on: 12 Apr 2019.

[800] EUROPEAN COMMISSION. Report from the Commission to the European Parliament and the Council on overview and assessment of the statistics and information on the automatic exchanges in the field of direct taxation. COM/2018/844 final. Brussels, 2018. Available at: https://ec.europa.eu/taxation_customs/sites/taxation/files/report-automatic-exchanges-taxation-dac-844_en.pdf. Accessed on: 15 Apr 2019.

them still make very limited, if any, use of the information they receive. In this case, the quarterly exchange of information required under MDR is a challenging objective, as well as the objective to react quickly to cross-border arrangements, keeping them from being effectively used, by promoting changes in the legislation.

Specifically to MDR and its hallmarks, after Amendment 2018/822 (DAC 6), every two years starting on 1 July 2020, Member States and the Commission shall evaluate the relevance of Annex IV and the Commission shall present a report to the Council. That report shall, where appropriate, be accompanied by a legislative proposal. It is very important for the efficiency and proportionality of MDR to continuously evaluate and adjust the hallmarks and the effectiveness of the AEOI.

3.6.7 Initial national concerns about Directive´s transposition. Spain and the Netherlands.

MDR has received a lot of attention from tax law practitioners, especially because it is focusing on the tax planning intermediaries, creating ancillary tax obligations and providing for specific sanctions for non-compliance. In addition, arguments about the effects of disclosing information and possible legislative changes as a source of legal uncertainties are raised. After the publication of the DAC 6, tax law practitioners are very interested in exactly how EU-Members will react to the new Directive[801], considering BEPS Action 12 does not present a minimum standard and the Directive only focuses on the identification and not on the solutions and consequences of the use and disclosure of tax planning. Questions were immediately raised, in regard to applying MDR regulations in practice, such as to who has the status of promoter, which arrangements should be reported or whether intermediaries should investigate arrangements other than those given to a specific taxpayer.

3.6.7.1 Spain.

Notwithstanding, several EU Member States started, already in 2018, public consultations and have drafted bills for the implementation of DAC 6, for example Spain[802]. The Spanish Association of Tax Consultants (*Asociación Española de Asesores Fiscales - AEDAF*) presented its analysis on the Directive and the expected transposition to the Spanish national legislation[803]. In their opinion, the Directive establishes a framework that goes beyond that designed by BEPS Action n. 12.

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801 KPMG. Euro Tax Flash from KPMG's EU Tax Centre. EU Mandatory Disclosure Requirements – Update. Available at: https://home.kpmg/xx/en/home/insights/2019/02/etf-394-eu-mandatory-disclosure-requirements-update.html. Accessed on: 16 Apr 2019.

802 SPAIN (2018). Secretaría de Estado de Hacienda - Dirección General de Tributos. Documento sometido al trámite de consulta pública previa con fecha 11/12/2018. Consulta pública previa sobre la trasposición al derecho español de la directiva 2018/22 del consejo de 25 de mayo de 2018 que modifica la directiva 2011/16/UE. Available at: http://www.hacienda.gob.es/documentacion/publico/normativadoctrina/proyectos/cpp_dac6.pdf. Accessed at: 19 jun 2019.

803 SPAIN. Asociación Española de Asesores Fiscales – AEDAF. José Ignacio Alemany, presidente de AEDAF: “Con la transposición de la DAC6 es necesario proteger el derecho a la intimidad, que es un derecho inalienable del cliente”.

They stated that the publication of the Directive being "*achieved in record time*" has given rise to widespread concern among professional sectors "*given the vagueness of many aspects of the disclosure obligation*", which must still be specified by the Member States. The Association, therefore, understands that the Directive opens a wide margin of appreciation to the Member States, which can produce significant asymmetries resulting in high compliance costs, reduced effectiveness and distortions in the functioning of the tax consultancy market (an "intermediary shopping"). On the other hand, they recognize that the Directive´s implementation could be associated with several aspects of cooperative compliance, offering new possibilities to foster cooperation between tax administrations and intermediaries[804].

Calling for a coordinated implementation between Member States, in order to avoid asymmetries and non-uniform application, they defend not altering or extending the Directive´s scope, and suggest that the Spanish implementation should limit itself to incorporating the obligation to provide information on those cross-border schemes that are required under the Directive[805]. Therefore, a *contrario sensu* from what this work indicates, *i. e.*, to also take domestic planning into consideration, when introducing the system.

The issue is that, as I see it, the broadness of the Directive must be defined or specified during a constant assessment process, based on its real results, and the Spanish experts understand that all the "*technical and interpretative issues should have been resolved prior to final approval and not in the implementation process*".

On the other hand, in line with what this work has already stressed, in terms of the supranational and possible political implications, the Spanish Association recognizes MDR implementation leads to a subsequent surveillance by the rest of the States, potentially affected by correct or incorrect transposition[806].

The Spanish Association of Tax Consultants´ analysis contains another important consideration, which is entirely connected with this work´s reasoning. They state that the Spanish version of the Directive opts for the expression "*mechanism*" to specify the objective element of the obligation to disclose[807], explaining that the Spanish Tax Code (*Ley General Tributaria – LGT*) uses the expression "mechanisms" to refer to different Administration´s actions, from the fight against fraud to compensation of debits. Therefore, the Spanish translation adopts a neutral wording, which cannot be connected to a "*behavior that deserves criticism for denoting an underlying illicit behavior*". Beyond all the legal implications, especially in countries that adopt a

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Madrid, 21 May 2019. Available at: https://www.aedaf.es/es/documentos/descarga/43467/los-asesores-fiscales-preocupados-por-la-aplicacion-de-la-directiva-europea-de-intermediarios-fiscales-dac6-prevista-para-finales-de-este-ano. Assessed at: 19 Jun 2019.

[804] SPAIN. Asociación Española de Asesores Fiscales – AEDAF. Paper n. 14 - La transposición en España de la Directiva sobre Intermediarios Tributarios (DAC6). Madrid, 21 May 2019, p. 92.

[805] Ibid, p. 97/98.

[806] Ibid, p. 88.

[807] Ibid. The Spanish version: "*Ya hemos indicado anteriormente que la versión española de la Directiva opta por la expresión "mecanismo" para concretar el presupuesto de hecho a partir del cual se genera la obligación de revelación*", p.29. The English version: "*We have already indicated that the Spanish version of the Directive opts for the expression 'mechanism' to specify the objective element of the obligation to disclose*", p. 100.

general tax code[808], when labeling what kind of tax undesirable behaviors should be object of MDR, there is, yet, the language mismatches, which could cause uncertainties. That is why, this work expresses criticism and recommends precaution in the use of terms such as "avoidance", "aggressive" or "abusive".

Moreover, they demonstrate other worries as: (i) the consequences of extending the scope of the duty of disclosure to the "supporting intermediary"[809], referring to the relocation of the principal tax intermediaries, the decomposition or partial subcontracting of the service, whose requirements will be difficult to assess and control by the tax administration. (ii) the predictability that tax intermediaries will preventively choose to present the declaration even if it is redundant and/or not fully coincident with other information obtained from other tax intermediaries or from other Member State, claiming for a big coordination when transposing the Directive to the national legislations[810]. (iii) the interpretation and protection given to professional secrecy and confidentiality and the application in Spain of the waiver based on professional privilege.

Analyzing the Directive, this work has raised these issues and they are really controversial. What the Spanish Consultants call "supporting intermediary", I named the "intermediary of the intermediary"[811], or people who only "know about the scheme" and my expectation, in this regard, is exactly the possible over-reporting. Moreover, about the legal professional privilege and the different levels of protection and interpretation conferred by each Member State, I agree that this can lead to undesirable competition in the professional market.

3.6.7.2 The Netherlands.

The Dutch Association of Tax Advisers (NOB)[812] also promoted discussion on the Directive raising several questions and providing their interpretation[813]. Initially, issues like the definition of "*potentially aggressive cross border tax planning arrangements*" and "*arrangements*" are discussed. The Association concluded, in those cases, DAC6 does not contain a definition of 'arrangement' itself, only the conditions to make it a cross-border arrangement and hallmarks to make it reportable.

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808 See Chapter III, topic 3.3 - The Portuguese experience.
809 SPAIN. Asociación Española de Asesores Fiscales – AEDAF. Paper n. 14, Cit., p. 112.
810 Ibid, p. 115.
811 See Chapter III, topic 3.6.2 – A description of the persons required to disclose such arrangements and topic 3.6.2.3 – Over-reporting.
812 THE NETHERLANDS. Dutch Association of Tax Advisers (NOB) is the professional association of the university educated tax advisers in the Netherlands. Available at: https://www.nob.net/dutch-association-tax-advisers. Accessed at: 23 Jun 2019.
813 THE NETHERLANDS. Dutch Association of Tax Advisers (NOB). Mandatory Disclosure – NOB questions and interpretation of the EU Directive, discussion paper, p. 1.
Available at: https://www.nob.net/sites/default/files/content/article/uploads/mandatory_disclosure_-_nob_questions_and_interpretation_of_the_eu_directive_-_discussion_paper_september_2018_0.pdf. Accessed at: 23 Jun 2019.

In its opinion, EU-Members have no room to include any more situations within the scope of the reportable arrangement and, similarly, are not allowed to exclude any situation from the scope of the concept because they are not deemed "aggressive". Conversely, as I see it and try to demonstrate throughout this text, Member States can expand on the situations covered by the Directive, although they cannot exclude any situations included on it. These examples can demonstrate how the issue can be controversial and why it is so important not to provide a closed concept of "aggressive tax planning".

Continuing, the Dutch Association raises several questions involving the concept of "arrangement" and whether a cross-border transaction could be considered as a cross-border reportable arrangement or not, such as involving two non-EU subsidiaries of an EU parent and the opening of a business establishment abroad by an individual entrepreneur or by a limited company. In the former situation, the Association answered that this should not be regarded as an arrangement unless the EU parent company is actively involved in the arrangement; in the last situation, differently, the answer was that where an entrepreneur opens a business establishment abroad, this constitutes an "arrangement".

This kind of question (and different interpretation) will occur often, the same way every year people obliged to submit their annual tax return have doubts about whether and where to include a given category of income. Therefore, MDR is not an inviable system, despite the fact that it is new and seems challenging. That is, among several others, an argument why MDR should be accompanied by a co-operative compliance program and tax administration must be prepared to provide a response to the information received, although the Directive states that a lack of manifestation does not represent an acceptance of the tax planning by the tax administration.

The definition of "intermediaries" dealing with "service providers" may lead to unintended outcomes, according to the Dutch Association. They raise the same point I have discussed above related to the problematic involving the competent procedure to provide proof that an arrangement has already been reported, and therefore an intermediary should not provide the information again. Their suggestion is *"it would be good to allow service providers to provide proof within a period of 30 days following the aid/assistance that the advice is part of a cross-border reportable arrangement which may be reported at a later stage by the relevant taxpayer or another intermediary (under their respective reporting requirements) and allow the service provider to report on its aid/assistance at the time the overall cross border arrangement becomes reportable"[814].*

Many other suggestions can come up and mismatches, over-reporting, and practical difficulties certainty will emerge. Considering that the Directive really does not deal with the solution for that, this is a point on which Member States should try a coordinated approach when implementing the Directive, as proposed by the Spanish Association.

[814] Ibid, p. 6.

Furthermore, the definition and the role of the intermediaries is broadly discussed, in the Dutch paper. For instance, the role and involvement of in-house intermediaries[815] which, in my opinion, was not included in the Directive´s initial scope, but is presented as a future possible initiative. This possibility, however, as I have explained above, raises ethical issues for the in-house professionals.

According to their paper[816], Directive has dual purpose: (i) to enable Member States to attack actual transactions and (ii) to enable them to make future changes in legislation and administrative practice. From this dual perspective, their conclusion is that an intermediary must separately report about any arrangement in which he is involved, if the same arrangement is implemented by several companies or taxpayers.

However, if the reference number is applied, an arrangement does not need to be disclosed more than once. As this work supports, MDR focus is objective, to take the necessary measures to keep an undesirable scheme from working continuously. Having the promoter fulfilled his/her obligation; the tax administration can react suitably. In case of marketable schemes, "implemented by several companies or taxpayers", the users have the obligation to inform the reference number in their tax returns, in such a way to make the tax administration aware of the risk posed by the scheme, based on the quantity of users.

This conclusion reinforces the focus on the intermediaries and the importance of knowing exactly how an arrangement is working in the market. For instance, if a given intermediary sells the same arrangement to a dozens of taxpayers, this situation requires a different approach from another arrangement, which is composed by several parts or steps, being reported for different intermediaries. In the first situation, there is one intermediary offering/implementing one arrangement to several taxpayers. It is probably a simple arrangement, which could be attacked by administrative controls or counteractions. In the second situation, we have a complex arrangement, involving several steps and different intermediaries, which may denote changes in the national's legislations or even in the tax treaties between the involved States.

3.6.8 The Polish proposal – the first country to implement the rules, after the Directive.

The Polish Government was the first to introduce a draft bill of corporate tax reforms including legislation to implement the European Union (EU) Mandatory Disclosure Rules (MDR), on 25 September 2018[817]. The requirements of the Polish MDR regulations are significantly broader than the requirements of the Directive.

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[815] Ibid, p. 8. *"Is an in-house entity an intermediary? The definition of intermediary in art. 3.21, appears to include "in-house" tax teams who advise on or manage the implementation of a reportable arrangement".*

[816] Ibid, p. 18. "*If the same arrangement is implemented for two group companies, does this mean that there are then two 'relevant taxpayers'?"*

[817] EY - Ernst & Young. Poland to implement Mandatory Disclosure Rules as of 1 January 2019. Global Tax Alert, 9 Oct. 2018. Available at: https://www.ey.com/gl/en/services/tax/international-tax/alert--poland-to-implement-mandatory-disclosure-rules-as-of-1-january-2019. Accessed on: 17 Jan. 2019.

3.6.8.1 A description of arrangements that are required to be disclosed.

The Polish legislation extends the Directive´s scope, because it does not regard only cross-border arrangements, including VAT with respect to the domestic tax arrangements[818]. Moreover, the rules in Poland are not limited to "aggressive" tax planning or tax avoidance elements, but they apply broadly to all tax arrangements that satisfy the hallmarks established by the Polish legislation, which contains an extended catalogue, introducing specific hallmarks in addition to those listed in the EU-Directive.

Two kinds of reportable arrangements are identified[819]: cross-border arrangements within the meaning of DAC6 and other arrangements, including domestic arrangements, as well as other cross-border arrangements. The criteria to classify an arrangement as reportable include generic and specific hallmarks (defined in Tax Ordinance), the main benefit test and some thresholds related to the value of assets, revenues and deductible costs involved. Therefore, the Polish legislation applies the main benefit and specific thresholds as “filters”[820].

Poland, therefore, made a sovereign decision, introducing the obligation also to domestic arrangements. This is, in theory, the best decision; however, it depends, in practice, on the relationship between taxpayers and tax administration and on the administrative capacity. While on the one hand over-reporting is a crucial question in the proportionality of MDR; on the other hand I recommend including also domestic arrangements, in terms of cost-benefit, as a measure of efficiency. Thus, the use of filters to limit or control the quantity of information is a reasonable solution.

3.6.8.2 A description of the persons required to disclose such arrangements.

In principle, the primary reporting obligation lies on the promoter[821], defined as any person who designs, markets, makes available, implements or manages the implementation of an arrangement. In general, the user (taxpayer) is obliged to report only if the promoter relies on the professional privilege exemption or there is no promoter involved in the arrangement, exactly as defined in the DAC 6.

The legal professional privilege (LPP) is taken into consideration in the Polish legislation, which will be applicable to tax or legal advisors and attorneys. However, professional privilege exemption does not apply to standardized arrangements, which means those arrangements easily

[818] PWC in Poland. Mandatory Disclosure Rules (MDR) enter into force in Poland as of 1 January 2019. Available at: https://www.pwc.pl/en/articles/tax-news/2018/2018-12-14-mdr-from-1-january.html. Accessed on: 17 Jan. 2019.
[819] KPMG in Poland. Reporting obligation under Polish mandatory disclosure rules. Tax Alert, 11 Nov. 2018. Available at: https://assets.kpmg/content/dam/kpmg/pl/pdf/2018/11/pl-en-tax-alert-KPMG-2018-11-30-reporting-obligation-under-Polish-mandatory-disclosure-rules.pdf. Accessed on: 17 Jan. 2019.
[820] See Chapter II, topic 2.5.3.1 - A description of arrangements that are required to be disclosed.
[821] KPMG in Poland. Reporting obligation under Polish mandatory disclosure rules. Tax Alert, Nov. 2018. Available at: https://assets.kpmg/content/dam/kpmg/pl/pdf/2018/11/pl-en-tax-alert-KPMG-2018-11-30-reporting-obligation-under-Polish-mandatory-disclosure-rules.pdf. Accessed on: 17 Jan. 2019.

applicable to a large number of taxpayers, without substantial or particular adjustments (marketable arrangements), where the intermediaries will be expected to report MDR information on a no-name-basis. Where the planning is 'bespoken' to the client, the intermediary covered by LPP must inform the client that it is a reportable arrangement. In this instance, the clients can either withdraw the confidentiality requirement to allow the intermediary to report or make the disclosure themselves.

In this regard, professional privilege does not keep the scheme from being disclosed. Anyway, whether marketable or bespoke, it will be taken to the Tax Authorities knowledge. The difference is how it affects the relationship between intermediaries and their clients, but not the scope of the obligation before the tax administration.

This is also a good solution, in terms of "putting pressure" in the tax planning market, if the confidentiality regards to the object, which means, the planning or advice. In this case, even though the professional claims LPP´s exemption, the client must do the disclosure. The problem of adopting the same solution in other countries concerns the interpretation and extension of the LPP, under each domestic legislation. As stated in this work, in some countries it would be impossible for the client to "waive" confidentiality, which regards the professional and his/her activity, which means, it is subjective, rather than objective.

When the promoter (primarily or in special circumstances regarding the promoter, the user or supporting entity) has to report the arrangement, there is the MDR-1 form. The supporter (the person providing with support/help in disclosure or implementation of the scheme) reports the tax scheme only when neither the promoter nor the user had to do so. The supporter informs the promoter/user about this fact (MDR-2 form – submitted in electronic form, the same way as other forms). If these persons do not report a given scheme, then the supporter should report it within 30 days (MDR-1 form). Additionally, the user of a tax scheme, on the same due date to present their annual tax return, regarding implementation of an arrangement or obtaining a tax advantage as result of that implementation, submits a MDR-3 form[822]. Finally, a promoter or a supporting entity must submit quarterly Information on the provision of a standardized tax schemes, using MDR-4 form[823].

3.6.8.3 A trigger for the imposition of a disclosure obligation.

In Poland, the obligation to report came earlier, comparing to the deadlines required by the EU Directive[824]. Thus, on 1st January 2019, regulations related to MDR came into force. Polish

[822] MAZARS in Poland. Mandatory Disclosure Rules (MDR). Available at: https://www.mazars.pl/Home/News/Our-publications/Newsletters/Tax-News/Mandatory-Disclosure-Rules-MDR. Accessed on: 22 Feb 2020.
[823] TCA ADVISERS. Hanna Szarpak. Tax Advisory Company TCA Advisers Ltd. Mandatory Disclosure Rules. Available at: http://www.tca.com.pl/index.php/en/news. Accessed on 20 Jan 2020.
[824] PWC in Poland. Mandatory Disclosure Rules (MDR) enter into force in Poland as of 1 January 2019. Available at: https://www.pwc.pl/en/articles/tax-news/2018/2018-12-14-mdr-from-1-january.html. Accessed on: 17 Jan. 2019.

legislation requires that the obligation be fulfilled within 30 days from the availability or the implementation of the arrangement, whichever occurs first.

However, due to difficulties related to the fulfillment of new regulations, the Ministry of Finance postponed the deadline for reporting till the end of February 2019 (and in practice till the end of April, as such delays will be considered as minor cases). This first report should consider schemes from the 1st November 2018, concerning to those not included in the DAC6 scope. If involving cross-border schemes, as defined in the DAC6, from 25th June 2018, the first report was postponed till mid-2019[825].

3.6.8.4. A description of what information is required to be reported.

The Polish tax administration should be provided with information containing the company's data, tax identification number (NIP), name, surname, date and place of birth of the Promoter/intermediary. Additional attachments include a description of the tax scheme, applied tax law regulations and the expected amount of tax benefit[826]. Therefore, the same information prescribed in DAC6[827]. However, for standardized schemes, which are expected to be the majority, the promoter does not include data concerning the user in the information, because of professional secrecy[828]. Each member of the Management Board of the reporting entity, in case of schemes promoted/implemented by firms or companies, must sign MDR information provided to tax authorities.

This information is transmitted electronically by means of special logical structures made available by the Ministry of Finance. Upon application, an individual scheme reference number will be given.

3.6.8.5 Appropriate penalties or other mechanisms to address non-compliance.

As required by the EU Directive, penalties shall be imposed if the MDR information is not provided, is incomplete or reported late. No observation of the rules in the correct manner will constitute a criminal offense based on Polish Fiscal Penal Code and will be subject to fine. It is important to note, moreover, if the disclosure requires the managers´ signature and predicts to criminal liability,

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[825] MAZARS in Poland. Mandatory Disclosure Rules (MDR). Available at: https://www.mazars.pl/Home/News/Our-publications/Newsletters/Tax-News/Mandatory-Disclosure-Rules-MDR. Accessed on 22 Feb 2020.
[826] BDO TAX NEWS. Poland. Mandatory Disclosure Rules. May 2019. Available at: https://www.bdo.global/en-gb/microsites/tax-newsletters/world-wide-tax-news/issue-51-may-2019/poland-mandatory-disclosure-rules. Accessed on 14 Sep. 2019.
[827] See Chapter III, topic 3.6.4 - A description of what information is required to be reported.
[828] MAZARS in Poland. Mandatory Disclosure Rules (MDR). Available at: https://www.mazars.pl/Home/News/Our-publications/Newsletters/Tax-News/Mandatory-Disclosure-Rules-MDR. Accessed on 22 Feb 2020.

as it has been drafted, there is a probable personal liability of the persons involved in the facts, including managers, intermediaries, supporters and taxpayers.

The gradation of the penalty most often happens during a tax inspection or a combined tax/customs inspection or a preliminary tax inquiry, or during an investigation. The Tax Administration may impose the higher penalty if a Court confirms that a crime against the mandatory disclosure rules (e.g. late disclosure or no disclosure, or no disclosure of benefits from arrangements) has been committed in a final and non-appealable judgment[829].

3.6.8.6 The impact of the regime on compliance.

In Poland, the National Revenue Administration (NRA) is a merger of tax administration, fiscal control and Customs Service. Among its key tasks are handling large taxpayers; providing uniform, individual interpretations of tax law and tax and customs information and crime prevention (including VAT fraud)[830].

As I see it, MDR can be very useful as a tool to establish risk assessment and focus on the really important taxpayers (handling large taxpayers), as an instrument to provide uniform interpretations and uniform application of the tax law, knowing the taxpayers´ activities better. However, it is not an efficient tool for helping crime and fraud prevention.

Analyzing the changes in Corporate Tax Law in Poland, in 2018, Kozaczuk and Kacymirow[831] published an article in which they say the environment is constantly evolving and register that work on corporate tax requires a continuous adaptation, considering the changes in the legal framework and "*the more restrictive approach of tax authorities, in the interpretation and application of tax law*". According to them, trying to increase the budget without raising its relatively low 19% Corporate Income Tax regular rate, the government eliminated loopholes and reduced the scope of allowances and deductions. Moreover, they register more audits and "*many tax schemes have ceased*" due to the new and tightened Tax Authorities´ behavior.

On the other hand, among several changes in the income tax regulations, "*aimed at reducing bureaucracy*", they also register the continued work on an entirely new Tax Code, which "*will put emphasis on cooperation between the Tax Authorities and taxpayers*", promoting instruments such as consultation procedures and co-operative compliance, "*all of which are*

[829] MUCHOWSKI, Marcin. Sanctions for non-compliance with mandatory disclosure rules. Roedl and Partner website, 12 Sep. 2019. Available at: http://www.roedl.net/pl/en/hot_news/mandatory_disclosure_rules_mdr/sanctions_for_non_compliance_with_mandatory_disclosure_rules.html. Accessed on 22 Feb 2020.

[830] POLAND. Ministry of Finance. National Revenue Administration. Polish government website. Available at: https://www.gov.pl/web/national-revenue-administration. Accessed at: 16 Apr 2019.

[831] KOZACZUK, Marek and Maciej, KACYMIROW. Corporate Tax/2018, Poland. Global Legal Insights. 6th Edition. Available at: https://www.globallegalinsights.com/practice-areas/corporate-tax-laws-and-regulations/poland. Accessed on: 31 May 2019.

currently unavailable in Poland". The new Tax Code, they estimated at the time, could come into force at the beginning of 2020.

My point is that MDR cannot work efficiently without co-operative compliance programs, in an environment of a growing number of audits. For it to work, it is necessary to migrate to a new relationship in which the trust between Tax Authorities and taxpayers is fundamental.

This is the number of disclosures, received in 2019.

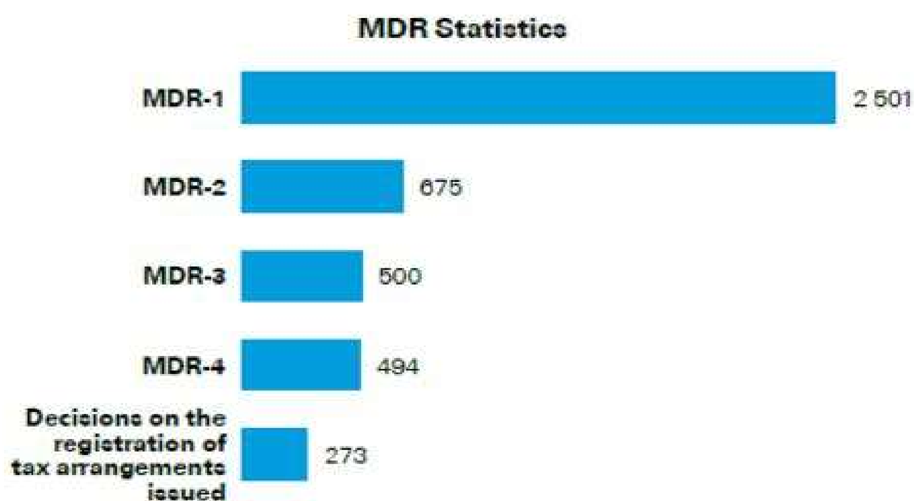

Figure 7 [832]

If this number is compared to the DOTAS and Irish system[833], one can perceive they are extremely high. Alternatively, either the Polish regime is applying MDR in a disproportional scope or in an apparently non-cooperative and untruthful environment, many users, promoters and intermediaries have reported activities they deemed potentially problematic under MDR scope. The purpose of such reporting demonstrated an intention to avoid the risk of being charged. Experts argue that there are still many doubts about the correct MDR application and "*the threat of fines (including their maximum amounts) is an additional rationale*"[834]. The point is how much this can compromise the efficiency of the measure, checking the effective response given by the tax administration.

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[832] KPMG. Mandatory Disclosure Rules (MDR): new obligations and many doubts. Published on 16 Sep. 19. Available at: https://home.kpmg/pl/en/home/insights/2019/09/mandatory-disclosure-rules-mdr-new-obligations-and-many-doubts.html. Accessed on: 22 Feb 2020.
[833] See Chapter III, topics 3.2.6 and 3.4.6.
[834] DELOITTE. Poland. Tax & Legal Highlights October 2019. MDR-3 form: tax scheme reporting by users. Doubts regarding the fulfilment of regulations regarding MDR-3. Available at: https://www2.deloitte.com/content/dam/Deloitte/ce/Documents/tax-legal-highlights/October2019/ce-tax-legal-highlights-poland-october-2019.pdf. Accessed on: 22 Feb 2020.

Interim Conclusion.

The proposed legislation amends the DAC to provide for the mandatory disclosure of potentially aggressive tax planning arrangements, moreover extending the scope of the automatic exchange of information between tax authorities to include such arrangements. The initiative of introducing MDR is a European response to the G-20/OECD BEPS Project. Clearly, it is part of a political initiative, requiring more than legal and administrative measures taken by Member States, individually, trying to promote fair competition in the internal market and protect the EU market in relation to third countries.

One of the strongest points when justifying the measure is the existence of a single market and, in parallel, the fundamental freedoms to the movement of persons, capital, goods and services. Although the problematics involving aggressive tax planning is not a European exclusivity, these factors can increase the possibilities for designing and using cross-border tax planning. A harmonized international system can work better than domestic and individualized initiatives. As is designed in the Directive, especially in relation to the review and control rules, MDR has two effects: controlling relevant taxpayers/intermediaries and countries "*inspecting*" other countries weaknesses, gaps and tax benefits/policies, which will result in political pressure. As a conclusion, MDR might work as an instrument to promote harmonization in international tax law.

On the other hand, in practical perspective, within the EU-system and after the automatic exchange of information, a less equipped tax administration can receive a large amount of information, because several intermediaries are acting in its jurisdiction, and it does not have the capacity to deal with all the information received. That is why the discussion involving the tax administration capacity and the quantity of the information collected is very important. If a given tax administration is demanding/receiving more information than it is able to deal with and effectively provide an answer about, the level of uncertainty generated can result in disproportional disadvantages.

When placing MDR as an instrument for transparency, the Commission is in line with the BEPS pillars. The European initiative expressly mentions its inspiration in BEPS Action 12, and argues its legitimacy using the argument of the presence of several EU-Members in the OECD. However, it is controversial at the extent of their real role and effective participation in the BEPS project development. Another argument supporting the measure is based on some previous experiences in other European countries like the UK, Portugal and Ireland, which, however, have nuances that were not expressed in the Directive.

What is specifically considered "aggressive" or "abusive" is not defined, in the Directive. The use of "hallmarks" is highly recommended. Furthermore, the Directive is adding new ones, which were not predicted in the BEPS Final Report, such as possible ways to address arrangements designed to circumvent reporting under the CRS or aimed at providing beneficial owners with the shelter of non-transparent structures.

Although the exclusively domestic arrangements eventually disclosed are not included in the automatic exchange of information within the EU-Members, when introducing MDR countries should not miss the opportunity to receive information about them. It seems inefficient to exclude possible domestic arrangements with the same effects aimed in the Directive and in the BEPS Action 12. However, it is necessary to establish filters or administrative policies in order to control the amount of arrangements disclosed, preserving the effectiveness and the proportionality of the measure.

The time of disclosing follows OECD´s guidelines. Its effectiveness, however, depends on each domestic legislation and the terms to fulfill tax obligations (*dies ad quem*) and finds limitations taking into consideration the quarterly exchange of information.

Some information to be disclosed requires a "self-assessment" by the intermediaries/ users. This is, for example, an argument to support why MDR should be accompanied by a co-operative compliance program or other administrative policies improving certainty to taxpayers and promoters, when providing information.

The Directive is “flexible” by the use of hallmarks, when only indicating “*appropriate penalties*” to be defined in each Member State and by not disposing of any consequences or specific measures to be taken after obtaining the information and automatically exchanging it. Thus, Member States have a wide range of maneuver, but this flexibility has two sides to it. If on the one hand this allows each one to adjust MDR to its needs and capabilities, in order to make the measure more efficient and proportional, on the other hand this can cause regional imbalances in the European Union, especially for the professional market, *i. e.*, the promoters/intermediaries. The solution will only be routed as the results are constantly being evaluated and possible and desirable adjustments come. After the publication of the DAC6, tax law practitioners are very interested in how exactly EU-Members will react to the new Directive, considering BEPS Action 12 does not present a minimum standard and the Directive only focuses on the identification and not on the solutions and consequences of the use and disclosure of tax planning.

IV. MDR FROM A CONSTITUTIONAL POINT OF VIEW

Introduction to Chapter 4.

The intention of this work is to analyze a proposed measure (MDR) in a way it could be applied more efficiently. As stated in the introduction[835], as this work sees it, the efficient MDR is that which is effective, proportional, reasonable and able to achieve its goals demanding the minimum cost from both the tax administration and the taxpayers. Therefore, limits for the duty of disclosure and its justifications need to be set. If the previous Chapter concentrated on administrative efficiency, this Chapter has as its objective legal efficiency, which means avoiding excessive judicial process, disputes, demands and failures.

When analyzing the issue, this work is limited to licit tax planning, which might be seen as a "*subjective right of the taxable person and a necessary condition for legal certainty in tax relations*"[836]. Moreover, it might be regarded as a legitimate activity, defined as "*a procedure of interpretation of the system of norms used as a technique of preventive business organization*"[837]. Thus, illicit acts are not considered, but only those acts developed within the system of laws borders. Furthermore, this work considers tax planning in which the taxpayer takes advantage of disparities between national tax systems or exploits the inadequacy of existing tax rules in the cross-border environment and/or in the domestic law.

MDR in tax matters does not mean paying more tax, directly, but it does impose an extra obligation with the purpose to provide knowledge, control and the possibility to react when any undesirable result, from the point of view of the objectives and purposes of taxation, caused by the application of a tax planning, structure or scheme is detected. As the tax administration´s inspection power increases, from the taxpayer´s perspective this raises issues such as arbitrariness, legal uncertainty, confidentiality and excessive burden.

The question that arises is whether an apparently legal and legitimate proceeding (tax planning) could be controlled or limited by any kind of administrative action. Moreover, whether this administrative action, despite the fact of being legally supported, might work without needing to have precise definitions in the law. For instance, (i) if the law does not define “tax advantage” or “aggressive tax planning”, but uses general descriptions as hallmarks, which shall be updated over time, and (ii) if the law stablishes penalties that can vary depending on the circumstances and on a case-by-case assessment. Therefore, how to admit this kind of action in order to achieve its ends and, at the same time, avoiding administrative excesses?

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[835] See Introduction, topic 1.5 – The efficient, the effective, the proportional and the reasonable.

[836] SALDANHA SANCHES, José Luís. *Os limites do planeamento fiscal. Substância e Forma no direito fiscal português, comunitário e internacional.* Coimbra: Coimbra Editora, 2006, p. 27.

[837] TORRES, Heleno. *Direito Tributario Internacional: Planejamento Tributario e operacoes transnacionais*. São Paulo: Editora Revista dos Tribunais, 2001, p. 37.

Specifically, there is, concerning MDR, a demand for a more precise description of arrangements that are required to be disclosed, especially in the case of using hypothetical or generic tests; on the more precise description of the persons required to disclose such arrangements and the legal consequences of non-disclosure[838]. However, providing these definitions could make the system ineffective. Because the majority of the tax planning to be considered relies, exactly, on the existence of weaknesses in tax systems, which were built based on hard rules and formalist views, both by exploring the mismatches between domestic systems acting internationally and by exploring loopholes caused by their inadequacy to cover the new economic reality[839].

Notwithstanding, vagueness is acceptable, and in some cases even desirable, in the law. In other cases, there is a tradeoff and the excess of precision, paradoxically, can generate arbitrariness. In my view, a concept can admit vagueness if it allows borderline cases. Even more difficult is the case of tax planning and avoidance, because there is no precise border. The possibilities to achieve a tax advantage are in a "grey" area, because tax advantage is a vague concept: some tax planning are regarded as avoidance, others are not. Some of them can be regarded as evasion or contain some element of fraud. Good people may disagree on whether to call a tax planning aggressive, avoidance or evasion[840]. In *Vagueness in Law,* Endicott[841] argues that the rule of law is an unattainable ideal because no legal system can avoid arbitrariness and unreasonableness in decision-making. Moreover, the author argues that the ideal of the rule of law contains maxims apart from the rule of non-arbitrariness. These maxims are not simultaneously realizable. Nevertheless, they can accommodate the effects of vagueness in a coherent way, for example, accommodating constitutional principles that cannot be realized simultaneously in full, but instead need to be interpreted coherently in each case.

In contemporary states, the power to tax is one of the favorite constitutional legislators' fields of work. Both because the exercise of taxation is fundamental to the interests of the state, to produce enough revenue to cover the always increasing social needs, and to use taxes as an instrument of extra fiscal policies, a technique in which the interventionist state is lavish[842]. Therefore, being extremely robust, taxation power must be disciplined and contained for the sake of citizens' security[843]. Constitutional limits, therefore, are at stake.

Summarizing, this Chapter aims, in order to achieve its ends, to analyze two important pillars that are considered in almost all modern constitutions: the right of the state to create and demand taxes and the right of taxpayers to freely develop their economic activities[844]. Thus, the

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[838] See Chapter II, topic 2.5.2 – Comments received on Public Discussion draft. BEPS Action 12.
[839] See Chapter II, topic 2.1.1 – Influences of globalization and the new economic and business reality.
[840] VAN DEEMTER, Kees. *Not Exactly. In praise of vagueness.* Oxford: Oxford University Press, 2010, p. 8.
[841] ENDICOTT. Timothy A. O. *Vagueness in Law.* Oxford: Oxford University Press, 2000, p. 31 and 58.
[842] LEROY, Marc. *Taxation, the State and Society: the fiscal sociology of interventionist democracy*. Brussels: P.I.E Peter Lang SA, 2011, p. 55.
[843] COELHO, Sacha Calmon Navarro. *Curso de Direito Tributário Brasileiro.* 6. ed. Rio de Janeiro: Forense, 2001, p. 37.
[844] See, for instance, BRAZIL (1988). Constituição da República Federativa do Brasil. Brasília, 5 Oct 1988. Art. 145. *A União, os Estados, o Distrito Federal e os Municípios poderão instituir os seguintes tributos: ... § 1º Sempre que*

state can tax as long as it does not create obstacles for the taxpayers to practice their activities and even organize themselves to pay the lowest possible burden, within the boundaries of the law. Analogously, the right of the state to impose ancillary obligations in the interests of collecting and inspecting taxes´ payment and the right of taxpayers to apply strategies that lead to a reduction in the tax burden, to refer specifically to the MDR issue.

Therefore, it is necessary to discuss:

First, the right of the taxpayer to freedom of economic enterprise and the MDR introduction with focus on the action's legitimacy, analyzing equity, justice, certainty and fundamental rights within a constitutional perspective in the current economic, social and legal reality[845].

It is possible to think about the taxation´s neutrality, on the idea that a tax should not distort economic behavior[846]. Specifically, concerning MDR, a given taxpayer should not avoid applying a tax planning because this scheme must be disclosed nor should he avoid seeking professional advice because the advisers must inform on arrangements, which they eventually offer or suggest to the taxpayer. On the other hand, for certain tax advisors who specialize in designing tax planning schemes, the introduction of MDR might lead to a situation where they can no longer exercise their activity, as tax planning schemes will lose their attraction. For them, MDR might constitute a restriction of their fundamental right, if the regime is not proportional in offering collective advantages, as it will be analyzed[847].

The term *"neutrality"* seldom appears in taxation literature. Groves[848] says that most textbooks on public finance devote a chapter to the canons of good taxation and neutrality is referred to "equity"[849], generally recognizing it as an important qualification of a tax. There is also the mention to "justice", as mainly synonymous with "equity". Adam Smith includes "certainty" among his list of canons, embracing in that term the idea that taxes should not be arbitrary, thus not according to the whim of some monarch or his agent. In conclusion, Groves[850] states that taxes should be equitable and they should deviate from neutrality only for an adequate public purpose.

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possível, os impostos terão caráter pessoal e serão graduados segundo a capacidade econômica do contribuinte, facultado à administração tributária, especialmente para conferir efetividade a esses objetivos, identificar, respeitados os direitos individuais e nos termos da lei, o patrimônio, os rendimentos e as atividades econômicas do contribuinte. Vs. Art. 170. *A ordem econômica, fundada na valorização do trabalho humano e na livre iniciativa, tem por fim assegurar a todos existência digna, conforme os ditames da justiça social, observados os seguintes princípios: ... Parágrafo único. É assegurado a todos o livre exercício de qualquer atividade econômica, independentemente de autorização de órgãos públicos, salvo nos casos previstos em lei.*

[845] See Chapter IV, topic 4.3 – What is a fair taxation?

[846] KAHN, Douglas A. *The Two Faces of Tax Neutrality: Do They Interactor Are They Mutually Exclusive?* University of Michigan Law School Scholarship Repository, Public law and legal theory research paper series, paper n. 18, 1990, p. 1-19. Available at: https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1318&context=articles. Accessed on 03 Mar 2020.

[847] See Chapter IV, topic 4.2.2 – Proportionality.

[848] GROVES. Harold M. *Neutrality in Taxation*. National Tax Journal, v. 1, n. 1, Mar. 1948, p. 18-24. Published by: National Tax Association. Available at: https://www.jstor.org/stable/41789749. Accessed on: 03 Mar 2020.

[849] NOTE. Most economists would argue that taxation is inevitably distortionary to some degree, although they might have very different views about the effects of that distortion. Thus, the neutrality I am concerned with is more closely related to equity, as I go on to discuss.

[850] GROVES (1948). Op. Cit., p. 18.

Second, one of the problems always raised in the application of mandatory disclosure rules on tax planning is that the regime could increase the level of uncertainty for taxpayers, when closing gaps and adjusting mismatches to avoid certain planning that are exploiting these deficiencies in the law. This means that, when analyzing MDR, it is controversial if the effects they would produce by predicting as one of its outcomes changes in tax laws creates "uncertainty" in the tax system, because such adjustments would affect (legitimate) expectations of the taxpayers and their business[851].

Third, when talking about transparency, this work is seeking a justification for the action in terms of social cost-benefit, respecting constitutional values, i.e., considering fair taxation and protection to taxpayers' privacy[852]. Thus, transparency is analyzed as a means to achieve greater values of justice and equity, even if it will bring certain limitations in terms of individual rights.

Although there will be some interference in the taxpayer´s right to privacy and confidentiality, Čičin-Šain[853], for instance, focusing on more controversial aspects of DAC6 and studying the impact that the new European MDR could have on the fundamental rights of the taxpayers and tax intermediaries concerned, concluded that the transparency rules for reportable cross-border arrangements violate the right to privacy and data protection, but that a limitation of this kind is acceptable. According to the Author, in her article "*it has been demonstrated that such interferences with these rights are within the legal exceptions and restrictions provided for by various primary and secondary legal sources, as well as relevant case law*"[854].

However, for discussing the problems above mentioned, the analysis deals with constitutional principles and social values from three standpoints, searching for a practical agreement: taxpayer's fundamental rights, fair taxation and justice (social interest). The balance between then, nevertheless, will be found in the proportionality and reasonableness of MDR[855].

The measure of proportionality, in turn, must be taken in two levels. (i) In the legislative level (making the law), the law must be clear and its effects must be predictable to the taxpayers. At this level, this Chapter discusses, especially, the MDR application and legal certainty. (ii) In the administrative level (applying the law) the law must both produce social advantages (equality, fair taxation, fair economic competition), which justify certain individual limitations that it eventually imposes to the taxpayer and to the tax intermediary obliged to disclose tax planning[856].

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[851] See Chapter IV, topic 4.4 – The answer to legal certainty.
[852] See Chapter IV, topic 4.5.1 – Confidentiality, privacy and MDR.
[853] ČIČIN-ŠAIN (2019). Cit., p. 116-117.
[854] Ibid, p. 119.
[855] See the considerations in Chapter IV, topic 4.2
[856] NOTE. Throughout this study, especially by the questions raised by taxpayers in the Comments received on public discussion draft of BEPS Action 12, my perception is that taxpayers are much more concerned with the role of the Tax Administration than with the role of the legislator, given the introduction of MDR. This refers to building trust, which will be discussed in the next chapter V.

4.1 Fundamental rights.

This work is not dedicated to a specific constitution or country´s system of laws nor is it limited to the European law. Nevertheless, when analyzing MDR introduction, the analysis is based on principles and values normally considered in constitutional law, at least in the western democracies. The next paragraphs serve to put in evidence the constitutional principles and fundamental rights related to taxation that I believe should be discussed in this case.

For instance, the DAC6[857], Recital 18, mentions its respect to fundamental rights and the principles recognized in particular by the Charter of Fundamental Rights of the European Union, according to which:

> *"Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice"*[858].

In Brazil, the Federal Constitution contains a specific Chapter dedicated to the National Tax System. In its article 150[859], legality for creating or modifying a tax; equality in the treatment of those taxpayers who are in similar situation (any discrimination due to professional occupation is prohibited); non-retroactivity and non-surprise in the introduction or modification of a tax are expressed principles.

According to Devereux, Freedman and Vela[860], in the UK the principle that a taxpayer is entitled to arrange his tax affairs in any way that complies with the law was set out in *IRC v. The Duke of Westminster [1936] A.C. 1, at pp. 19-20*. They state, moreover, this principle has never been overruled although its application has been modified by later case law, and is subject to the GAAR, since that was introduced[861]. A similar underlying principle to that in the Duke of Westminster's case can be found in most jurisdictions, although almost always modified by a GAAR or similar.

Also exemplifying, the Irish Constitution[862] recognizes and declares that people living in Ireland have certain fundamental personal rights. Article 40 set out these rights, in short, to

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[857] EUROPEAN UNION (2018). *Council Directive (EU) 2018/822 of 25 May 2018 amending Directive 2011/16/EU*. Cit.

[858] EUROPEAN UNION. *Charter of Fundamental Rights of the European Union*. OJ C 326, 26.10.2012, p. 391–407. Available at: *https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT*. Accessed on: 19 Feb. 2019.

[859] BRAZIL. Federal Constitution. Art. 150

[860]DEVEREUX, FREEDMAN and VELLA (2012), Paper 2, Op. Cit., p. 15.

[861] THE UNITED KINGDOM. Legislation. *Finance Act 2013*. NOTE. The GAAR was introduced in Finance Act 2013 as part of the government's wider efforts to tackle tax avoidance. The draft rules for the GAAR and the draft HMRC guidance relating to it were subject to public consultation before final enactment in FA 2013, Part 5. The GAAR applies to arrangements entered into on or after 17 July 2013. Available at: http://www.legislation.gov.uk/ukpga/2013/29/part/5/enacted. Accessed on 30 May 2020.

[862]IRELAND. Citizens Information. *Fundamental rights under the Irish Constitution*. Available at: https://www.citizensinformation.ie/en/government_in_ireland/irish_constitution_1/constitution_fundamental_rights.html. Accessed on 12 Mar 2021.

equality before the law, to freedom, to privacy, to work and to earn a livelihood. The rights that are set out in that article have been interpreted by the courts, some rights have been found to be protected by the article, even though they are not explicitly referred to. Fundamental rights are not absolute - they can be limited or restricted by the Oireachtas[863] for certain reasons, for example, for the common good or public order. If there is a conflict between two or more constitutional rights in a case, the courts will look at all the circumstances and weigh all of the factors to decide how that particular conflict is to be dealt with.

As pointed out by Hey[864], analyzing MDR introduction in the light of the German Constitution (Basic Law), the mandatory disclosure regime interferes with the professional freedom, and at least for some tax advisors, MDR represents a regulation on the choice of profession, that would be disproportionate and cannot find justification. Hey also lists that depending on the design, MDR would be incompatible with the confidentiality protecting the lawyer-client relationship, established by Article 12 (1) of the Basic Law[865]. Moreover, there would be an encroachment on the right to data protection of advisors and taxpayers and tax secrecy would be violated when used outside of the cases permitted[866]. Finally, the Author states that "*an obligation to notify, subject to sanctions, which is intended to cover unknown and particularly innovative designs and therefore inevitably has to be formulated very openly, cannot be reconciled with the requirement of certainty*"[867].

However, the State (political, legislative and administrative branches) has its own fiscal planning. There is a fiscal state, a tax constitution, principles of equality and ability to pay and the fundamental duty to pay taxes, which would restrict other rights such as entrepreneurial freedom and, consequently, to the free business management, including tax planning[868]. If on the one hand, saving tax is a taxpayers' right, which is based on the principle of economic freedom[869]; tax planning can, on the other hand, be subject to restrictions by applying other constitutional principles, since

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[863] See Chapter III, topic 3.4 – The Irish system.

[864] HEY, Johanna. *Assessment on the constitutionality of the introduction of a general obligation to notify for tax arrangements on behalf of the Federal Chamber of Tax Advisors*. (*Gutachen zur Verfassungsmäßigkeit der Einführung einer allgemeinen Anzeigepflicht für Steuergestaltungen im Auftrag der Bundessteuerberaterkammer*). Institute for Tax Law, University of Cologne, Feb. 2018. Available at: https://www.bstbk.de/downloads/bstbk/presse-und-kommunikation/pressemitteilungen/BStBK_PM_2018-005_Gutachten-Prof.Hey-Anzeigepflichten.pdf. Accessed on 11 Mar 2021.

[865] GERMANY. The Federal Government. *German Basic Law*. Article 12 - Occupational freedom; prohibition of forced labor. (1) All Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law. Available at: https://www.bundesregierung.de/breg-en/chancellor/basic-law-470510#:~:text=Basic%20Rights,-Article%201%20%5BHuman&text=(1)%20Human%20dignity%20shall%20be,of%20justice%20in%20the%20world. Accessed on 15 Mar 2021.

[866] HEY (2018). Cit., p. 5. *Bei einer Nutzung außerhalb der in § 30 AO zugelassenen Fälle wird zudem das Steuergeheimnis verletzt.*

[867] Ibid. p. 17.

[868] SANTOS, Antonio Carlos dos. *Planeamento Fiscal, Evasão Fiscal, Elisão Fiscal: o Fiscalista no seu labirinto.* Fiscalidade. Revista de Direito e Gestão Fiscal. Edição do Instituto Superior de Gestão, n. 38. Apr-Jun, 2009, p. 78.

[869] PORTUGAL (1976). Constituição da República Portuguesa. Diário da República n. 86/1976, Série I of 10 Apr 1976, p. 738 – 775. Art. 61 (1) - *A iniciativa económica privada exerce-se livremente nos quadros definidos pela Constituição e pela lei e tendo em conta o interesse geral.*

"*the tax system aims to satisfy the financial needs of the State and the fair distribution of income and wealth*"[870].

Thus, liberty, equality, solidarity, certainty and justice, freedom to conduct a business (freedom of enterprise), legality and proportionality of tax and penalties must be considered. In addition, privacy and protection of personal data, which must be processed fairly for specified purposes or some other legitimate basis laid down by law[871], are in focus. These principles are the starting point for this Chapter.

Madison, following in the Lockean natural rights tradition, placed property and equality of rights at the core of his constitutional system, a system in which both economic and noneconomic liberties should be given equal protection under the law of the Constitution and enforced by a vigilant judiciary, stated Dorn[872]. He, moreover, quotes that Madison "*saw the judiciary as the final guardian of the Constitution as an essential element in protecting individual rights and to establish a sound constitutional order based on a classical concept of commutative justice*". Thus, it is worth starting with some concerns that the competent Courts have or might take into consideration.

Differently from some other works, my analysis here is not dialectical. Thus, the reader should not expect that the text will be stressing negative and positive points, alternately. The methodology is pointing out the issues and problems first[873] and, in the following topics, analyzing[874] and proposing suggestions and solutions.

4.1.1 The European Union framework and its Fundamental Freedoms.

This topic has three basic objectives. *First*, specifically addressing the development of the exchange of information in the European framework, because it is important to take into consideration the particularities related to the fundamental freedoms and how they can impact a broad exchange of information. *Second,* because some "Court cases" are analyzed and it is possible to extract some comparisons and knowledge, in the event of the introduction of MDR and the subsequent exchange of information, based on it. *Third,* it is also important to pay particular attention to the implications involving administrative mutual assistance in tax matters and that they shall observe the proportionality of the measure and public interest, because this work supports both are very important when introducing MDR.

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[870] PORTUGAL (1976). Constituição da República Portuguesa. Cit. Art. 103 (1) - *O sistema fiscal visa a satisfação das necessidades financeiras do Estado e outras entidades públicas e uma repartição justa dos rendimentos e da riqueza*.

[871] EUROPEAN UNION. *Charter of Fundamental Rights of the European Union*. Cit., Article 8 and Article 42.

[872] DORN, James A. *Equality, Justice and Freedom: A Constitutional Perspective*. Cato Institute, Cato Journal, v. 34, issue 3, 2014, p. 491-517.

[873] NOTE. See topics 4.1.1 and 4.1.2.

[874] NOTE. See topics 4.2, 4.3, 4.4 and 4.5.

In the framework of the European Union (EU) there is the free movement of people, goods, services and capital, and reduced border controls. However, it is necessary to establish a balance between these fundamental freedoms and the national power for implementation and collection of taxes. Therefore, it was imperative to exchange tax information between Member States, which began in the field of direct taxes and subsequently extended to the VAT[875]. The first Directive 77/779/EEC[876] provided a base for exchange of information *on request* only, and it was revised several times.

Relatively to cross-border interest payments, in 2003 the Council adopted the *Savings Directive* and except for this specific area of interest payments to individuals, there was no legal basis within EU law providing for *mandatory automatic exchange* until the year 2011[877].

In 2009, a completely new Directive on Administrative Cooperation in the field of taxation was proposed, because in the Commission´s view the old Directive was not efficient enough to ensure an appropriate administrative cooperation between the Member States and no longer met the OECD international cooperation standard.

Thus, the Council formally adopted the Directive on Administrative Cooperation (DAC) 2011/16/EU[878], on 15 February 2011 and the Member States should have implemented its provisions by 1 January 2013, except for those regarding automatic exchange of information. It is important to note, however, that mandatory automatic exchange of information was introduced in areas other than interest payments and adoption of bank secrecy no longer justified refusal of information requests.

Furthermore, in the *Convention on Mutual Administrative Assistance in Tax Matters* (*The Convention*), Article 6, which entered into force on 1 June 2011[879], the Member States of the Council of Europe and the OECD Members provided for the automatic exchange of information for certain categories of taxes. Moreover, in accordance with the procedures they mutually agree on, two or more States shall automatically exchange information considered foreseeably relevant to

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[875] EUROPEAN UNION (2002). Official Journal of the European Communities, C 80/76. 3 Apr. 2002. Opinion of the Economic and Social Committee on: the ‘Proposal for a Regulation of the European Parliament and of the Council on administrative cooperation in the field of value added tax’, and the ‘Proposal for a Directive of the European Parliament and of the Council amending Council Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation’ (2002/C 80/16). On 9 July 2001, the Council decided to consult the Economic and Social Committee, under Article 95 of the Treaty establishing the European Community, on the above-mentioned proposals.

[876] EUROPEAN UNION (1977). Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums. OJ L 336 of 27.12.1977.

[877] SCHILCHER, Michael; SPIES, Karoline and ZIRNGAST, Sabine. *Introduction to European Tax Law on Direct Taxation - Mutual Assistance in Direct Tax Matters*, 4 ed., Austria: Linde, 2016, p. 207.

[878] EUROPEAN UNION (2011). Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC. OJ L 64 of 11.3.2011, p. 1–12.

[879] OECD and COUNCIL OF EUROPE (2011). Convention on Mutual Administrative Assistance in Tax Matters Text amended by the provisions of the Protocol amending the Convention on Mutual Administrative Assistance in Tax Matters, which entered into force on 1st June 2011. Available at: https://www.oecd.org/ctp/exchange-of-tax-information/ENG-Amended-Convention.pdf. Accessed on: 31 Oct. 2019.

the tax administration and enforcement of domestic legislation, relating to the taxes covered by the Convention[880].

As pointed out by Schilcher, Spies and Zirngast[881], the provisions on automatic information (Art. 8), were to be implemented by 1 January 2015. However, starting in 2014, the Directive 2011/16/EU was amended bringing about stronger focus on mandatory automatic exchange. After the implementation of these amendments, mandatory automatic exchange covers a large amount of tax information ranging for employment income, income from real estate to capital income.

From the European Commission´s[882] viewpoint, the Directive 2011/16/EU established useful tools, specifically: exchanges of information on request; spontaneous exchanges; automatic exchanges on an exhaustive list of items; the participation in administrative enquiries; simultaneous controls; and notifications of tax decisions to other tax authorities.

4.1.1.1 CJEU cases.

The MDR focusing on international tax planning only makes sense if after obtaining the information, it is shared between the States involved. As discussed in the previous topic, the automatic exchange of tax information, especially in the EU, is already a reality that has been developed and expanded for several years. As mentioned in the introduction and was specified in Chapter III of this work, the first exchange of information received as a result of the implementation of MDR in the EU will not take place before October 2020. Therefore, it is important to analyze some positions taken by the Court of Justice of the European Union (CJEU) in relation to previous cases involving sharing of tax information between Member States and possibly drawing some conclusions.

The CJEU, when examining the *Sabou Case*[883], approached the situation in an interesting manner and discussed the application of Directive 77/799/EEC, considered in the light of fundamental rights. Although that Directive had been repealed by Council Directive 2011/16/EU, it should still rule the case, taking into account the date of the facts in the main proceedings.

In summary, the request has been made in proceedings between Mr. Sabou, a professional footballer, and Tax Directorate for the City of Prague, concerning the amount of his taxable income for 2004. In his income tax return for 2004 in the Czech Republic, Mr. Sabou claimed to have incurred expenditure in several Member States with a view to a possible transfer to one of the football clubs in those Member States. That expenditure would have reduced his taxable income by the corresponding amount. The Czech tax authorities raising doubts on the expenditure sought

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[880] Ibid.

[881] SCHILCHER, SPIES, ZIRNGAST (2016). Op. Cit., p. 208.

[882] EUROPEAN UNION. European Commission. Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. Brussels, 21.6.2017, COM (2017) 335 final, 2017/0138 (CNS), p. 4.

[883] EUROPEAN UNION. Court of Justice. *Sabou Case*. Case C-276/12. Judgment of the Court (Grand Chamber), 22 Oct. 2013.

assistance from the Spanish, French and the UK tax authorities. It followed from the replies that none of the clubs knew either Mr. Sabou or his agent[884].

Before the Court, Mr. Sabou claimed that the Czech tax authorities had obtained information about him illegally. First, they had not informed him of their request for assistance to other authorities, so that he had not been able to take part in formulating the questions addressed to those authorities. Secondly, he had not been invited to take part in the examination of witnesses in other Member States, in contrast to the rights he enjoys under Czech law in similar domestic proceedings.

The Court pointed out that the preamble to Directive 77/799/EEC is clear in the aim of the Directive to combat international tax evasion and avoidance and that it was, therefore, adopted in order to govern cooperation between the tax authorities of the Member States. The Directive coordinates the exchange of information between competent authorities by imposing certain obligations on the Member States. However, it does not confer specific rights on the taxpayer and, in particular, it does not lay down any obligation for the competent authorities of the Member States to consult the taxpayer.

Another interesting point in that ruling is the question concerning whether the decision of a competent authority of a Member State to request assistance from a competent authority of another Member State, because of their consequences for the taxpayer, makes it necessary for him to be heard. The Court agreed that a request for information does not constitute an act giving rise to such an obligation and a request for assistance made by the tax authorities under Directive 77/799 is part of the process of collecting information. It happens that in tax inspection procedures, the investigation stage, during which information is collected and which includes the request for information by one tax authority to another, must be distinguished from the contentious stage, between the tax authorities and the taxpayer, which begins when the proposed adjustment is sent to the taxpayer.

Analyzing the case, Oberson[885] concludes that the Court of Justice took a "*rather restrictive approach on the potential application of taxpayer´s rights to exchange of information under EU law".*

The Directive 77/779/EEC, Article 2, "*Exchange on Request*", establishes that the competent authority of a Member State may request the competent authority of another Member State to communicate the information referred to it. However, the competent authority of the requesting State needs to exhaust its own usual sources of information, in accordance with the circumstances, to obtain the requested information without harming the attainment of the result sought. Moreover, Article 8, "*Limits to Exchange of Information*", establishes, in paragraph 1, the Directive shall not impose any obligation on a requested Member State to promote investigations or to transmit information if the fact or the information intended infringes its legislation or

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[884] OBERSON, Xavier. *International Exchange of Information in Tax Matters. Towards Global Transparency*. 2 ed., Cheltenham: Edward Elgar Publishing, 2018, p. 263.
[885] Ibid, p. 265.

administrative practices. Therefore, a large dose of coordination and similarity between domestic legislations and administrative practices is necessary.

MDR is not an ongoing specific investigation proceeding, but the competent authority is just gathering information defined in objective terms. On the other hand, there is no proof that the competent authorities were unable to obtain all the necessary information in view of a special situation of the taxpayer, who moved freely from country to country, receiving taxable income and having alleged expenses in different places. They will receive the exchanged information based on an automatic proceeding. Besides there is no necessary investigation or requested information, the information exchanged may be useful or not, depending on each domestic environment and tax administration capacity.

The conclusion is that, in a legal environment governed by Directive 77/779 / EEC, an MDR-based exchange of information would be limited not by taxpayer rights but by limitations imposed on the tax administrations of each State so that they could request and obtain such information. As the Court stated in the *Sabou Case*, the Directive regulates limitations for States and does not establish rights for taxpayers.

Nevertheless, the scenario changed and the Directive 2011/16/EU has a wide scope, because the wording in Article 1 (1) permits exchange of information to the broadest possible extent, state Schilcher, Spies and Zirngast[886]. Thus, as a matter of principle, any information that is "*foreseeably relevant*" to the administration and enforcement of the domestic laws can be exchanged[887].

As informed by Oberson, later on, in the *Berlioz Case*[888], *"the CJEU was again confronted with the issue of the existence of procedural rights within the context of exchange of information, but this time at the level of the requested State"*[889]. The ruling was based on the Directive 2011/16/EU.

Berlioz is a joint stock company governed by Luxembourg law, which received the dividends paid to it by its subsidiary, Cofima, a simplified joint stock company governed by French law, in application of an exemption from withholding tax. To make sure that the conditions of the exemption were met, the French Tax Administration sent a request for information to Luxembourg. Berlioz received an information order and responded partially, except as regards the names and addresses of its members, the amount of capital held by each member and the corresponding percentage of share capital, on the ground that such information was not foreseeably relevant.

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[886] SCHILCHER, SPIES, ZIRNGAST (2016). *Op. Cit.*, p. 207.

[887] EUROPEAN UNION (2011). Council Directive 2011/16/EU. *Cit.* Article 1 (1) - "*This Directive lays down the rules and procedures under which the Member States shall cooperate with each other with a view to exchanging information that is foreseeably relevant to the administration and enforcement of the domestic laws of the Member States concerning the taxes referred to in Article 2*".

[888] EUROPEAN UNION. Court of Justice. *Berlioz Case*. Case C-682/15, Judgment of the Court (Grand Chamber), 16 May 2017.

[889] OBERSON (2018). *Op. Cit.,* p. 266.

In that context, the Court said that:

Member States should exchange information concerning particular cases when requested by another Member State and should make the necessary enquiries to obtain such information. The standard of "foreseeable relevance" is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Member States are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.

Moreover, the Court stated that the "*foreseeable relevance*" of the information requested is a condition of the legality of the information order addressed by a Member State to a relevant person and of the penalty imposed on that person for failure to comply with that information order[890].

Then, the concept of *foreseeably relevant* is established by the competent authority that requests the taxpayer to provide the information, because in that State the taxpayer may question the lawfulness of the request and not by the competent authority of the other State, which made the request for information.

In the case of MDR, once established by the law of a given State to disclose certain tax planning, it can be inferred that those authorities understood that such information is foreseeably relevant. Subsequently shared information that contains planning whose effects have repercussions on other States, which may eventually take action against that taxpayer, could not be argued in the State that received the information, but only the law that required it in the State of origin could be argued in these terms.

The issue regarding exchange of information and mutual assistance in tax matters involves, also, checking principles as transparency, free movement of capital, non-discrimination, and collective interests. All of these points are sensible in the MDR introduction, balancing them with the proportionality and the effectiveness of the disclosure obligation.

In *Haribo*[891] *Case*, Haribo and Salinen AG, both governed by Austrian law, raised actions against Tax Office - Linz, concerning the taxation in Austria of dividends received from companies established in other EU-Member States and in non-Member States. The Court summarized:

the referring tribunal seeks, in essence, to ascertain whether Article 63 TFEU precludes national legislation under which portfolio dividends received from companies established in States party to the EEA Agreement are exempt from tax only if a comprehensive agreement for mutual assistance with regard to administrative matters and enforcement exists, when no similar condition is imposed for international holdings. (item 39)

Article 63(1) TFEU gives effect to the liberalization of capital between Member States and between Member States and non-Member States. To that end, it provides that all restrictions on

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[890] EUROPEAN UNION. Court of Justice. *Berlioz Case.* Cit.

[891] EUROPEAN UNION. Court of Justice. *Haribo Lakritzen Hans Riegel BetriebsgmbH (C-436/08), Österreichische Salinen AG (C-437/08)*. Cases C-436/08 and C-437/08, Judgment on 10 February 2011.

the movement of capital between Member States and between them and non-Member States are prohibited.

Despite the fact that a difference in treatment existent in the Austrian domestic law is liable to discourage companies established in Austria from acquiring shares in companies established in non-Member States, the Court interpreted that it was necessary to analyze the proportionality of the provision, in order to achieve its objectives and, in this sense, put limits on the answer. Whether that restriction on the free movement of capital can be justified in light of the provisions of the Treaty must be examined.

Moreover, in the Court´s view, it should be observed that the framework established by Directives on Mutual Assistance and Exchange Information for cooperation between the competent authorities of the Member States does not exist between those authorities and the competent authorities of a non-Member State (Third Countries) where that State has not entered into any undertaking of mutual assistance. Therefore, the taxpayers´ rights to be exempt or receive some tax benefits in specific circumstances in which exemption/benefit is conditional depending on exchange of information or mutual cooperation, must be analyzed bearing in mind proportionality and the effectiveness of administrative supervision in combating tax evasion. These domestic legislations, conditioning tax beneficial treatments to international administrative cooperation not precluding, necessarily, the fundamental freedoms safeguarded by the TFEU.

A remarkable decision involving legislation to avoid abusive planning aimed at obtaining a tax advantage, the business purpose test and economic freedom in the European Union was provided in *Cadbury Schweppes and Cadbury Schweppes Overseas Case*[892]. In this case, *Cadbury Schweppes*, a resident company in the UK, is the parent company of the Cadbury Schweppes group, which consists of companies established in the United Kingdom, in other Member-States and in third States. The group includes two subsidiaries in Ireland, Cadbury Schweppes Treasury Services (CSTS) and Cadbury Schweppes Treasury International (CSTI).

According to the decision making the reference to the CJEU[893], it is common ground that CSTS and CSTI were established in Dublin solely in order that the profits from the internal financing activities of the Cadbury Schweppes group could benefit from the advantageous tax regime. The main question was: in establishing and capitalizing companies in another Member State solely to take advantage of a tax regime that is more favorable than that applicable in the UK, is the company abusing the freedoms introduced by the TFEU?

The CJEU ruled that the fact that a EU national sought to profit from tax advantages in another Member State could not in itself deprive him of the right to rely on the provisions of the TFEU. It is necessary to investigate if it presupposes actual establishment of the company concerned in the host Member State and the pursuit of genuine economic activity there. It follows

[892] EUROPEAN UNION. Court of Justice. *Cadbury Schweppes and Cadbury Schweppes Overseas Case*. Case C-196/04, Judgment of the Court (Grand Chamber), 12 September 2006.
[893] See Chapter II, topic 2.2.4.1 – CJEU cases, other cases and references to the Court of Justice of the European Union (CJEU).

that, in order for a restriction on the freedom of establishment to be justified on the grounds of prevention of abusive practices, the specific objective of such a restriction must be to prevent the creation of wholly artificial arrangements, which do not reflect economic reality, aimed at circumventing the application of the legislation of the Member State.

The question involving the application of legislation that aims to directly deter or prevent the operation of tax planning in which the sole or main objective is obtaining a tax advantage is not the main purpose of MDR. Disclosure rules would only oblige to inform a planning like this in advance, so that the authorities could react with the application of CFC rules, GAAR[894], or even, when applicable, a proposal for legislative change that would avoid the specific scheme. This is the point that this work has been emphasizing, that the measures of reaction and its evaluation within constitutional principles or meta-principles or, in the case of the EU, supranational rules, cannot be confused with MDR.

The crucial point in the *Cadbury Schweppes Case* for analyzing what this Chapter proposes is established when the CJEU defined some marks to the restricting measures. It ruled that the separate tax treatment under the legislation on controlled foreign companies (CFCs) and the resulting disadvantage, dissuading companies from establishing in another Member State, with a lower level of taxation, constitutes a restriction on freedom of establishment within the meaning of Articles 43 EC and 48 EC. According to the CJEU, such a restriction is permissible only if it *is "justified by overriding reasons of public interest"*. The Court says that is further necessary, in such a case, that its application be "*appropriate to ensuring the attainment of the objective"* thus pursued and "*not go beyond what is necessary to attain it"*.

Soon after the European Commission published the proposal of implementing MDR in the European Union, in 2017[895], the practitioners of tax law raised some issues and worries about the new measure. PwC published a Bulletin[896] highlighting that EU Member States might argue some elements that potentially contravene EU law, creating restriction on the free movement of capital or being deemed to disproportionately burden intermediaries or taxpayers in relation to the objective. They also argue for further clarity regarding alignment with the EU's general principle of legal certainty.

According to that Bulletin, the Court of Justice of the European Union (CJEU) interprets the principle of legal certainty as requiring that national measures be sufficiently clear and precise and, while the proposed MDR will form part of a Directive, in their view, the analysis should not be any

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[894] See Chapter II, topic 2.2.4 – Why disclosure rules, some points differentiating the MDR application and GAAR.

[895] EUROPEAN UNION (2017). European Commission. Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. COM/2017/0335 final - 2017/0138 (CNS). Brussels, 21 Jun. 2017.

[896] PwC. Tax Policy Bulletin. Tax Insights from International Tax Services. *EU proposes mandatory disclosure of tax information for reportable cross- border arrangements.* 31 August 2017. Available At: https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-eu-proposes-mandatory-disclosure-of-tax-information.pdf. Accessed on 30 May 2018.

different. Tax certainty could be improved by making it possible to consult a tax administration in advance on the question of whether an arrangement is reportable.

Interim conclusion.

The Directive on administrative cooperation in the field of taxation (DAC) has a broad scope and the introduction of mandatory automatic exchange of information is a major development in the EU, even though it came gradually and only for specific items of income[897].

The wording "foreseeably relevant" is present in both the EU-Directive and in Article 26 OECD Model Convention[898]. The commentary on Article 26[899], which was expanded to develop the interpretation of the standard of "foreseeable relevance" and of "fishing expeditions", has already pointed out that Contracting States may agree to an alternative wording for "foreseeably relevant" that is consistent with the scope of the Article and that is, therefore, understood to require an effective exchange of information (e.g. by replacing "is foreseeably relevant" with "is necessary", "is relevant" or "may be relevant").

The commentary also states that the scope of exchange of information covers all tax matters without jeopardizing the general rules and legal provisions governing the rights of defendants and witnesses in judicial proceedings. The *Sabou Case* analyzed above dealt exactly with this issue, however the Court established limitations between the right to defense in the investigation stage, when the information is collected and exchanged, and the right to defense in the controversial stage, after the assessment´s notification. Moreover, in the *Berlioz Case*, the Court establishes differences whether the information holder is in the requested State and this person will not participate in the second stage in the requesting State and should be granted the possibility to argue the legality of the information order.

Finally, the commentary on Article 26 states a limitation to the exchange of information so that it should be given only insofar as the taxation under the domestic tax laws concerned is not contrary to the Convention. However, it expresses that the competent authorities may also exchange other sensitive information related to tax administration and compliance improvement, for example risk analysis techniques or tax avoidance or evasion schemes[900]. This final part is perfectly connected with MDR and schemes defined as "relevant" to tax administration enforcement from risk analysis methodologies.

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[897] OBERSON (2018). Op. Cit., p. 117.

[898] OECD (2017). Articles of the Model Convention with Respect to Taxes on Income and on Capital as they read on 21 November 2017. Article 26 - *The competent authorities of the Contracting States shall exchange such information as is foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind…*

[899] OECD (2017). *Model Tax Convention on Income and on Capital: Condensed Version 2017.* Paris: OECD Publishing, 21 Nov 2017, p. 490.

[900] Ibid.

One of the questions this work addressed at the beginning was whether an administrative measure, MDR, could impose limits on the taxpayer freedom to tax planning, which should be controlled or limited by any kind of administrative action. From this Court´s decision in *Haribo Case*, it is possible to extract the importance of principle of proportionality and of effectiveness of administrative action, when deriving the conclusion[901].

MDR produces a deterrent or dissuasive effect. The conclusion is that, concerning MDR, any alleged restriction on economic freedom (deterrence to use tax planning) could be applied if it is justified by "*overriding reasons of public interest*" and is limited to the intended objective and to the means necessary to achieve it. These are, therefore, important limits when introducing the measure.

4.1.2 Discussing Fundamental rights and MDR – France, Germany and Brazil.

In France, the disclosure of aggressive tax planning implementation under BEPS Action 12 was considered and analyzed. Majed[902] mentions that the French Constitutional Court rejected a proposal of disclosure of tax schemes included in the finance bill for 2014, considering the project unclear and ambiguous, creating excessive legal uncertainty for taxpayers and that there was a risk of arbitrary application of the law by tax administration. In the same decision, that Court also discussed the legality and necessity of a precise description of crimes and penalties, when analyzing the possible imposition of penalties on tax intermediaries, how it could harm ample defense and an extensive definition of abuse [903].

In Germany, taking the OECD recommendations into consideration, since 2014 German Authorities started to analyze the possibility of introducing mandatory disclosure rules to tackle tax avoidance. A study conducted by researchers at Max Planck Institute for Tax Law and Public Finance[904], presented a document examining whether a disclosure requirement for tax structuring could be implemented in an admissible and expedient manner in German tax law.

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[901] See Chapter IV, topic 4.2 – Reasonableness, proportionality and MDR and topic 4.3.2 – MDR application and the tension between a theory of equality and the freedom to pay the minimum tax and.

[902] MAJED. Leila. *Implementation in France of the disclosure of aggressive tax planning arrangements under action 12 of BEPS*. ABDF – Brazilian association of finance law. Available at: http://www.abdf.com.br/index.php?option=com_content&view=article&id=2175. Accessed on: 9 May 2018.

[903] FRANCE (2014). Conseil Constitutionnel. *Decision 2014-707 DC du 29 Decembre 2014*. Available at: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2014707dc/2014707dc_ccc.pdf. Accessed on 16 Ma 2020.

[904] OSTERLOH-KONRAD, Christine, HEBER, Caroline, BEUCHERT, Tobias. Abschließende Bewertung: Die Anzeigepflicht als Bestandteil eines fairen Steuersystems. In: Anzeigepflichten für Steuergestaltungen in Deutschland. MPI Studies in Tax Law and Public Finance, v. 7, Berlin: Springer, 2017, p. 145-155. *Notification obligations for tax planning in Germany.* Max Planck Institute for Tax Law and Public Finance, Munich, Germany. Online: 26 January 2017. Available at: https://link.springer.com/chapter/10.1007/978-3-662-53761-9_5. Accessed on: 26 Jul 2018.

They first state that "*the goal of closing illegal loopholes in tax law and ensuring the most coherent and effective application of existing anti-misuse rules and thus counteracting tax avoidance is in principle both constitutionally legitimate and economically sensible".* Second, they find a justification in *"if individual taxpayers succeed in minimizing their tax burden by exploiting unpopular gaps in the tax system in contradiction to the legislator's basic burden decision, then the establishment of equal taxation fails in this respect".* Third, they understand it may be possible to implement a duty of disclosure for tax arrangements in German law, which "*meets both constitutional and European requirements*".

However, the German study establishes some limits, advising that "*from a constitutional point of view*", MDR "*must be taken to ensure the proportionality of the administrative burden on the tax-consulting professionals and taxpayers*". Then, it explains that the system might not cover all undesirable arrangements, from an administrative point of view, because this would cause an overburden, both to taxpayers and to tax administration[905]. In conclusion, constitutionally speaking, "*a disclosure system that heavily burdens administration and privates, in a way that their disadvantages would clearly outweigh the benefits*" is highly discouraged.

Furthermore, the analysis mentions that, regarding to tax law, the German Federal Constitutional Court has clarified the principle of certainty by stating that "*the standard giving rise to tax must be sufficiently well defined and limited in content, object, purpose and extent, so that the tax burden is measurable and, to a certain extent, for the taxpayer Citizen becomes predictable*". In addition, "*the right to legal protection under Article 19 (4) of the Basic Law also plays a role, in particular in the right of intervention, since the fullest possible judicial protection against state measures is only guaranteed if the conditions for intervention are sufficiently certain*"[906].

Therefore, besides the measurement of proportionality, it is possible to identify some points in agreement with the French Court's decision, calling for certainty in the meaning to allow predictability to the taxpayer, when applying the measure, in order to make the ample defense and the protection against administrative excesses or arbitrariness possible.

Xavier[907], studying the positions of the German Constitutional Court, stated that the concept of "*protecting certainty*" assumed large relevance. He mentions that the Court has proclaimed what was called "*the principle of trust in tax law*" (*Vertrauengrundsatz bei Steuergesetzen*; *Verlässichkeit des Gesetzes*). According to this principle, the tax law must be elaborated in such a way to guarantee to the taxpayers the trust that the law will pose at their disposal a complete understanding of the consequences of their actions or behaviors giving rise to tax obligations. Moreover, the principle of trust in tax law, as an imposition of the constitutional principle of legal certainty, translates practically into the possibility given to the taxpayer to know and compute his tax charges based directly and exclusively on the law.

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905 See in Chapter II, topic 2.4.1.2.2 - Specific Hallmarks, my considerations on tax planning from different points of view, such as constitutional, international, policy and administrative.

906 OSTERLOH-KONRAD, HEBER and BEUCHERT (2017). Op. Cit., p. 20.

907 XAVIER, Alberto. *Os Princípios da Legalidade e da Tipicidade da tributação*. São Paulo: Revista dos Tribunais, 1978. p. 45-46.

Nevertheless, as was mentioned in this work, in the reference to the vagueness in law, the German study finally understands that:

> *[…] indefinite legal concepts tend to be accepted precisely where it is impossible for the legislature, given the diversity of economic life and its continuous development, to make the facts more precise. Finally, from the point of view of the Federal Constitutional Court, it also speaks in favor of the admissibility of an indeterminate concept of law, if it is intended to serve to realize tax equality*[908].

Thus, the limits that allow for the use of indefinite concepts are met if the measure is justified by overriding reasons of public interest, if it *is intended to serve to realize tax equality,* and if it is limited to the intended objective and to the means necessary to achieve it.

This work discussed the Brazilian proposal for introducing MDR, in 2015[909]. The Provisional Measure (MP)[910], in its part regarding MDR introduction (Articles 7 to 12), was not converted into law, as analyzed. Notwithstanding, it is interesting to mention a Direct Action of Unconstitutionality (ADI) n. 5366 / DF[911] arguing against the provisions in that proposal, despite the fact that the Federal Supreme Court decided the case was solved and the ADI extinct, without judgment on the merits (main issues). The interest is on some of the points presented in the ADI Initial Petition, stating against the provisions and the regular manifestation of the Republic Federal Prosecution Office[912], supporting them, because their arguments were based on constitutional principles.

Among other issues referring to formalities in the constitutional procedure, which are, therefore, out of the scope of this work, the ADI was proposed considering the following vices of unconstitutionality in the MP: violation of fundamental rights to legal certainty, to freedom of enterprise, to the presumption of innocence and to right of defense, and due process of law. Moreover, the ADI argued that the proposal represented an offense to the principle of strict legality in tax matters.

The main arguments rely on the use of "*subjective and generic terms*", such as "*relevant non-tax reasons", "unusual form"* and "*essential data to understand the business transaction*". Furthermore, the possibility to presume the intention of committing evasion or fraud, in case of non-compliance with the disclosure, allowing the application of a heaviest sanction (150%) plus criminal law consequences.

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[908] OSTERLOH-KONRAD, HEBER and BEUCHERT (2017). Op. Cit., p. 22-23.

[909] See Chapter III, topic 3.5 – The Brazilian proposal.

[910] BRAZIL (2015). Presidency of the Republic. *Provisional Measure n. 685/2015.* In force from 22.07.2015 to 18.11.2015, converted into Law n. 13.202, of 08 Dec. 2015, partially rejected. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13202.htm. Accessed on 12 Feb 2020.

[911] BRAZIL (2015). *Ação Direta de Inconstitucionalidade n. 5.366 - Distrito Federal*. Cit.

[912] BRAZIL (2015). Federal Supreme Court. *ADI n. 5.366/DF, arguing the unconstitutionality of MP n. 685/2015*. The Initial Petition (*Petição inicial*) and the respective information provided in the Action by the Republic Federal Prosecution Office (*Manifestação da PGR*). Available at: http://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=4827786. Accessed on: 13 Mar 2020.

The Initial Petition quotes several experts´ opinions[913] against the proposal. Those opinions mention that the MP was introducing transparency in a one-way route, i.e., the taxpayer must be transparent to the tax administration; however, the other direction was not being improved. Moreover, it was understood that the measure was "*criminalizing tax planning*", which no way could be taken as tax evasion. In the ADI Authors´ words: "*It is understood, therefore, that the attribution of responsibility to the practice of illegal conduct (especially in its willful modality) can only occur through proof. In order to characterize the intention to evade or defraud, it is up to the State to demonstrate its existence, given that 'dolus' makes up the subjective element of the conduct, not being objectively appreciated*".[914]

The ADI Authors also state that the MP conferred on the tax authorities a large margin of discretion, when issuing the competent regulations to define the parameters for disclosure (time, form, conditions and proceedings). Another point raised was on whether the Public Administration has the power to do so, the law must establish clear and objective margins to avoid excessive or illegitimate discretion, keeping the Administration from creating new and autonomous obligations outside of the limits of the law[915]. This point is related to the principle of strict legality in tax matters, which would be offended in that case.

Based on a Supreme Court´s decision[916], the ADI Authors observe that "*the principle of legal certainty is a fundamental right and in its subjective perspective, it translates into the protection of trust legitimately built from previous State action*"[917]. Then, the conclusion was that the MP n. 685/2015 does not build a relationship of legitimate trust between the State and taxpayers. On the contrary, it makes private individuals more and more suspicious of the tax authorities´ performance. Therefore, in a clear violation of the fundamental right to legal certainty.

Finally, it is argued that practicing tax planning is a clear expression of the fundamental right to freedom of enterprise, provided for in the Federal Constitution. Therefore, the possibility of State intervention in the economy is recognized, as long as it respects the core of economic

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[913] See, for instance: LEITE, Guilherme Cardoso. *MP 685 deve respeitar limites da atividade empresarial e ordenamento normativo*. Available at: http://www.conjur.com.br/2015-ago-04/guilherme-leitemp-685-respeitar-limites-atividade-empresarial; SANTIAGO, Igor Mauler. *Governo criminaliza planejamento tributário*. Available at: http://www1.folha.uol.com.br/opiniao/2015/08/1666101-governo-criminalizaplanejamento-tributario.shtml; SCAFF, Fernando Facury. *Querer pagar menos imposto virou crime no Brasil*. Available at: http://www.conjur.com.br/2015-ago-11/contas-vista-querer-pagar-imposto-virou-crime-brasil; LODI, Ricardo. *Planejamento tributário, mesmo mal feito, não é o mesmo que sonegar imposto*. Available at: http://www.conjur.com.br/2015-jul-23/ricardo-lodi-planejamento-tributario-mal-feito-nao-sonegar; BASTOS, Frederico Silva, SATO, Katherine Borges. *MP 685 prevê transparência de mão única, sem diálogo com o Fisco*. Available at: http://www.conjur.com.br/2015-jul-31/frederico-bastos-katherine-sato-mp-685-preve transparencia-mao-unica-dialogo-fisco; ANDRADE, Leonardo. *Transparência fiscal à força.* Available at: http://jota.info/transparencia-fiscal-a-forca, Accessed on: 18 Ago 2015.

[914] BRAZIL (2015). *Ação Direta de Inconstitucionalidade n. 5.366 - Distrito Federal*. Cit. *Initial Petition*, p. 24.

[915] Ibid, p. 18.

[916] BRAZIL (2015). Federal Supreme Court. *Extraordinary Appeal (RE) n. 608.482/RN*. Rel. Min. Teori Zavaski. Brasilia, 07 Aug. 2014. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=7088200. Accessed on: 13 Mar 2020.

[917] BRAZIL (2015). *Ação Direta de Inconstitucionalidade n. 5.366 - Distrito Federal*. Cit. Initial Petition, p. 19.

agents´ free performance. Thus, according to the Initial Petition, the State is not allowed to take charge of the companies´ activities in an arbitrary, subjective and largely discretionary manner[918].

In this kind of judicial procedure, the Federal Republic Prosecution Office (PGR) is asked to issue its opinion[919]. The PGR defended the constitutionality of the discussed provisions, concluding that they were consistent with constitutional principles.

First, the PGR stated that the provisions do not deal with Criminal Law or Criminal Procedure Law, but with ancillary tax obligation. In particular, Article 12 provided for non-compliance with the disclosure´s obligation that characterizes willful taxpayer´s noncompliance and entails imposition of fines and the correspondent taxes. This all occurs in the tax law sphere[920]. The prevalence of the objective character of illegality within the scope of taxes does not mean that there is no possibility of defining subjective infractions. Tax Law validly employs presumptions in many cases (in favor of both the tax administration and the taxpayer) and does not require a final judicial decision before allowing the tax authorities to act. On the other hand, the taxpayer is always guaranteed the right to ample defense, under the terms of the law, both in the fiscal administrative and in the judicial procedures.

Second, regarding the principle of legal certainty, the PGR says that it is a multidimensional right, which is divided into subprinciples grouped into three categories: stability, predictability and risk reduction. In particular, predictability is related to the possibility for the citizens to foresee the State´s action and its consequences, in order to guide their conduct, which is ensured especially by legality[921].

The non-exhaustive character of the expressions used in the MP is not sufficient to configure incompatibility with legal certainty and the use of indeterminate legal concepts does not authorize the discretion of the public administration. The administration is required to interpret the rules in order to make them operational, so that infra-legal (administrative) acts can "*detail the ancillary obligations created by law, complementing their standardization, as they are subject to relative legality*"[922]. Undefined normative terms are not enough to recognize automatic unconstitutionality, as indetermination is inherent in certain terms. Incompatibility with the Constitution will depend on how the normative rule will be interpreted and applied by the Administration. The contested rule, however, does not violate the constitutional precept of strict legality because the objective is to allow the identification and inspection of certain transactions

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[918] Ibid, p. 21.

[919] BRAZIL. Federal Republic Prosecution Office. *Manifestação na Ação direta de inconstitucionalidade n. 5.366/DF*. Available at: http://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=4827786. Accessed on: 13 Mar 2020.

[920] Ibid, p. 8-9.

[921] Ibid, p. 13, quoting SOUZA NETO, Cláudio Pereira de. *Comentário ao art. 5º, caput*. In: CANOTILHO, J. J. Gomes; MENDES, Gilmar F.; SARLET, Ingo W.; STRECK, Lenio L. (coords.). *Comentários à Constituição do Brasil.* São Paulo: Saraiva/Almedina, 2013. p. 229.

[922] Ibid, p. 14, quoting PAULSEN, Leandro. *Curso de Direito Tributário completo*. 4. ed. Porto Alegre: Livraria do Advogado, 2012, p. 134.

carried out by taxpayers. Taxes would only be charged if a taxable event defined by law is identified[923].

Third, freedom of enterprise and economic freedom are fundamentals provided for in the Constitution, but these constitutional guarantees cannot be assessed in isolation. They must be interpreted in a manner compatible with other fundamentals and principles. It is necessary to note that, since its origin, freedom of enterprise has not been seen as absolute freedom, "*the vision of a state entirely silent, in liberalism, in relation to private economic initiative, is pure and exclusive expression of an ideal type*"[924]. If, on the one hand, the Constitution guarantees freedom of enterprise, on the other hand it determines the State to adopt all measures to guarantee the effective exercise of social rights. Thus, in the composition between these principles and rules, the interest of the community must be preserved, that is, the primary public interest[925]. MP n. 685/2015 conforms the freedom of enterprise to the constitutional rules related to the principles of equality in tax matters and ability to pay[926].

Finally, notwithstanding a certain setback individual economic interests, the requirements of the contested rules are compatible with the benefit accruing to the State and for society itself, since, with reduced tax evasion[927], there is a tendency to achieve a fairer tax system. Anyway, the contested rules meet the criteria of adequacy and necessity, therefore compatible with the constitutional principle of proportionality[928]. Moreover, the instruments provided for by the MP are in line with the principle of efficiency. Guaranteeing timely access to information necessary for tax administration related to tax events that have occurred, they contribute to reducing expenses with litigation and other measures and ensure a legitimate increase in federal revenue, which is necessary to achieve the purposes set out in the Constitution[929].

Interim Conclusion.

[923] Ibid, p. 26.
[924] Ibid, p. 16, quoting GRAU, Eros Roberto. *A ordem econômica na Constituição de 1988*. 8. ed. São Paulo: Malheiros, 2003, p. 183.
[925] BRAZIL (2005). Federal Supreme Court. *Ação direta de inconstitucionalidade* ADI n. 1.950/SP. Rel. Min. Eros Grau. Judgment on 3 Nov. 2005. DJU, 2 Jun. 2006.
[926] BRAZIL. Republic Federal Prosecution Office. *Manifestação na Ação direta de inconstitucionalidade n. 5.366/DF.* Cit., p. 19.
[927] NOTE. In this excerpt, the PGR (p. 10) used the Portuguese word "*sonegação*", which can be translated to "evasion" and not to licit tax avoidance or licit and preventive tax planning. This demonstrates the inaccuracy of the wording and ideas, when dealing with MDR. Article 1 of Federal Law n. 4.729 / 65 describes several conducts that are considered as a crime of "sonegação", such as: providing a false declaration or omitting necessary information to the Tax Authorities; alter or defraud books required by tax laws; alter invoices or documents related to commercial transactions; increase artificially expenses to get tax reliefs. See BRASIL. Tribunal de Justiça do Distrito Federal e dos Territórios. Sonegação de imposto. Available at: https://www.tjdft.jus.br/institucional/imprensa/campanhas-e-produtos/direito-facil/edicao-semanal/sonegacao-de-imposto. Accessed on 30 May 2020.
[928] BRAZIL. Republic Federal Prosecution Office. *Manifestação na Ação direta de inconstitucionalidade n. 5.366/DF.* Cit., p. 12.
[929] Ibid, p. 20.

These recent experiences, described here, demonstrate the existence of worries involving legal certainty, legality, privacy and confidentiality, right of ample defense and proportionality when fighting against undesirable tax practices that, at the end, can harm the achievement of other basic principles such as equality, ability to pay and the support for social rights. Therefore, some tensions between constitutional principles can be identified.

Thus, it is necessary to discuss justice, fairness and "good" taxation. Legality is regarded in order to avoid arbitrariness and thus increasing legal certainty. Furthermore, legal certainty is regarded as stability, predictability and risk reduction, connected to the protection of trust legitimately built from previous State action.

Moreover, freedom of enterprise on the one hand and permissible restrictions "*justified by overriding reasons of public interest*" on the other hand are on the scale. However, how to strike the right balance between the necessity of using undetermined concepts, to make MDR efficient, and the need to control arbitrariness?

The implications of legal principles applicable to MDR can even go as far as questioning the validity of constitutional principles and their interpretation. Even if not universally codified, the silent presence of the Rule of Law and the right to legal protection permeates legal interpretation. These dynamics are gaining momentum in the era of global tax law, which shows a growing attitude of the national judiciaries to look beyond the positive boundaries of legal principles and to apply a purposive interpretation[930].

In this scenario, in order to restore order in tax matters, it would be highly desirable in practice not to privilege one principle, but to make it possible to defend several, simultaneously, as Gustavo Zagrebelsky[931] teaches. Thus, he argues for the "*practical agreement*" of the diversities (contradictions presented in theory) perhaps existent, in the search for prudent cumulative, combinatory, compensatory solutions to conduct constitutional principles to a joint development and not to a joint decline. Legal science cannot, therefore, be attached to old formalisms when the complexity of the systems and the speed of the changes require moderation, adaptation, and flexibility that are not supported by legal models epistemologically based on dogmatic-authoritarian assertions[932].

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[930] See Chapter III, topic 3.2.6 – The impact of DOTAS regime on compliance. A "purposive interpretation" means interpreting the law according to the "spirit" of the law and to the Parliamentary intention, consequently, making legislative changes, which really need Parliament intervention, as a result of the disclosure regime, less frequent and less necessary. The role of the Courts was demonstrated to be very important in the British disclosure regime (DOTAS) functioning, for instance when stablishing the severity of the penalty for non-compliance and even in defining the main concept in the regime, the "tax advantage".

[931] ZAGREBELSKY, Gustavo. *El Derecho Dúctil: Ley, derechos, justicia.* Translated by Marina Gascón. 3 ed, Madrid: Editora Trotta S.A, 1999, p. 16.

[932] CRUZ FERREIRA, Luis Alexandre e Alexandre Mendes. *Consenso e resistência como horizontes hermenêuticos da participação-cidadã no direito*. Hermenêutica, Cidadania e Direito, Campinas/SP: Millenium Editora, 2005, p. 86-87.

4.2 Reasonableness, proportionality and MDR.

This work has as one of its bases to understand, explain, and justify the proposal for MDR in the functioning of tax systems, considering the complexity and the myriad of unpredictable tax choices that globalization has brought. I have explained that there are aspects of both economic competition and of a technical-factual nature that make new instruments in tax matters necessary, in order to keep the tax systems' effectiveness. Moreover, it is necessary, in order to achieve their objectives, to consider that these untold choices on which paths to take are not limited to taxpayer planning but also include the government tax policies, which causes a great deal of mutual distrust in the relationship between taxpayers and tax administration.

Within the BEPS Project, one of the most challenging actions is Action n. 1 - *Addressing the Tax Challenges of the Digital Economy*[933]. Although the proposals in that Action are not directly linked to MDR, the principles that the OECD highlights are the same that must be taken into account here, in order to restructure the power of taxation. Therefore, the OECD states: *"Assuming a certain level of revenue that needs to be raised, which depends on the broader economic and fiscal policies of the country concerned, there are a number of broad tax policy considerations that have traditionally guided the development of taxation systems. These include neutrality, efficiency, certainty and simplicity, effectiveness and fairness, as well as flexibility"*[934]. The OECD, moreover, says: "*equity is also an important consideration within a tax policy framework. Equity has two main elements: horizontal equity and vertical equity."*[935] These are, at the end, the principles with which this Chapter deals, in a finalistic approach, which must mandatorily go through issues and traditional principles such as freedom, equality and justice. At this point, it is necessary, however, to discuss *reasonableness and proportionality*.

Reasonableness is a principle that emerged as a parameter for the judicial review of administrative acts, that is, how to control administrative discretion. As discussed here, one of the great fears voiced in relation to MDR is that the dose of discretion that needs to be conferred on the Administration, within the regime's idea, being used in an abusive and arbitrary manner, to generate the incidence of taxes where, otherwise, they would not exist. This topic demonstrates the relevance of reasonableness as a principle for controlling the administrative discretion and that "freedom *and equality are no longer the icons of the season. The law itself has fallen into disrepute. (...) The abstract formulas of law and judicial discretion no longer bring all the answers"*[936]. Therefore, in modernity, the paradigm is transferred to the concrete case, for the best solution,

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[933] OECD (2015). Addressing the Tax Challenges of the Digital Economy, Action 1 - 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project. Paris: OECD Publishing, 2015. "*Addressing base erosion and profit shifting (BEPS) is a key priority of governments. In 2013, OECD and G20 countries, working together on an equal footing, adopted a 15-point Action Plan to address BEPS. This publication is the final report for Action 1*".

[934] OECD (2014). *Addressing the Tax Challenges of the Digital Economy.* OECD/G20 Base Erosion and Profit Shifting Project, Paris: OECD Publishing, 2014, p. 30.

[935] OECD (2014). *Addressing the Tax Challenges of the Digital Economy. Cit*., p. 31.

[936] BARROSO Luís Roberto. *Fundamentos teóricos e filosóficos do novo direito constitucional brasileiro* (Pós-modernidade, teoria crítica e pós-positivismo). Revista Diálogo Jurídico, Salvador, CAJ - Centro de Atualização Jurídica, v. I, n. 6, Set, 2001. See also Chapter IV, topic 4.3.1 – MDR application, Freedom and Equality.

unique to the problem to be solved, especially with the development of administrative and tax systems that purport to be transnational. The development of the principle, as will be demonstrated, from different parameters of judicial review of administrative acts[937], resulted in a need of the proportionality test, for its application.

For instance, together with the principles of equality and legal certainty, proportionality as a general principle of EU law lies at the heart of the CJEU's judicial review[938]. At the end, defining whether proportionality is only a test to apply reasonableness and vice-versa, or an autonomous principle became difficult. Wouters and Duquet, analyzing the application of the principle by the CJEU, noted that, interestingly, reasonableness is part of the proportionality test in two distinct ways: as a benchmark to justify limitations of proportionality and as a specification on how the proportionality test itself should be applied[939].

What this topic defends is that, specifically, when the hallmarks, or the characteristics that cause a certain tax planning to be informed, are established, the analysis that can be carried out, in constitutional terms, is whether those characteristics justify the requirement of the disclosure or not. Additionally, if other planning that offer equal potential risk are being left out of the requirement, without reasonable justification, that is, "*the different treatments of equal situations are unreasonable*". The questions to keep in mind in this analysis are as follows.

Exemplifying, the EU-Directive (DAC6) has a specific hallmark, which determines the disclosure of arrangements that involves '*unilateral safe harbor rules'*[940]. In summary, a safe harbor represents simpler obligations than the general transfer pricing regime. The availability of safe harbors for a given category of taxpayers or transactions, the OCED warns, may have adverse consequences, such as causing taxable income to be reported not in accordance to the arm's length principle (ALP); increasing the risk of double taxation or double non-taxation when adopted unilaterally; potentially opening avenues for inappropriate tax planning or raising issues of equity and uniformity. Are these motives reasonable or not? Are they producing unreasonable discrimination for those who use *unilateral safe harbor rules,* since other kinds of planning, producing the same results, do not have to be disclosed? Is the risk indicated by the OECD reasonable or not?

On the other hand, in Austria[941] expenses incurred in "*acquiring, securing, and maintaining"* income are deductible from the taxable income of the particular source of income concerned. All employees are entitled to a standard allowance of EUR 132. Expenses in excess of

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[937] WOUTERS, Jan and DUQUET, Sanderijn. *The Principle of Reasonableness in Global Administrative Law*. New York University, School of Law. Jean Monnet Working Paper n. 12, 2013, p. 17. "*Manifest unreasonableness" relates to the very rare cases in which an administration has acted arbitrarily. "Soft look reasonableness" scrutinizes disconnections between the facts and the administrative decision or general norm. Finally, "hard look reasonableness" reviews the administration's thought-process that has resulted in the decision or general norm.*

[938] HARBO, Tor-Inge. *The Function of the Proportionality Principle in EU Law*. European Law Journal, v. 16, n. 2, Mar. 2010, p. 158–185.

[939] WOUTERS and DUQUET (2013). Op. Cit., p. 30.

[940] See Chapter III, topic 3.6.1.4.1 – Unilateral safe harbor rules.

[941] PwC. Worldwide Tax Summaries. *Austria – Individual deductions*. Available at: https://taxsummaries.pwc.com/austria/individual/deductions. Accessed on: 15 Apr. 2020.

this amount will be allowed if supported by receipts (e.g. office in home, continuing education). Would it be reasonable for all those who deducted more than the standard limit to be required to submit mandatory disclosure information, considering that tax administration already has the necessary information through the annual tax return and this type of deduction is not new, complex, nor does it involve professional knowledge of intermediaries, that is, there is no reasonable connection between the hypothetical requirement and the purposes described for an MDR[942]? Furthermore, if the proportionality test is applied, do the advantages that this obligation could produce justify the additional cost that it imposes on taxpayers in disclosing and on tax administration in processing the information?

In order to develop the reasoning and arrive at the principles that are in this topic, this work starts with a basic principle of any tax system, the ability to pay principle. Providing that the tax relationship should not be seen as a relation between the individual and the State, but between the individual and the society, Tesauro[943] states that paying taxes means to contribute to public expenditures in accordance with the individual ability to pay. Thus, the taxpayer pays because he is a member of the community and not because of what he receives from the State. The duty to pay taxes is, therefore, based on the duty of solidarity. However, he concludes that a constitutional provision dealing with the ability to pay, in its literal meaning alone, may appear devoid of practical effects.

Analyzing the Italian Constitution, the Author[944] points out that the '*Corte Costituzionale*' played a very important role in the realization of the constitutional precept, to give it substance. Since the 1980s, the Court has changed from a "guarantor" orientation, which adopts a subjective notion of ability to pay, as a guarantee for the taxpayer, to a less rigorous, more objective and "elastic" concept.

Tesauro[945] then deals with some requirements and consequences of ability to pay and arrives at equality and reasonableness. He says that constitutional issues, for the most part, do not arise because a rule points to a fact that is not an expression of ability to pay, but because there is no equal treatment between facts that express it in the same way. Then, he concludes: "*it is up to the legislator, in his discretion, to establish whether two situations are the same or different, but the Court can find out if the legislator's discretionary choices are unreasonable, that is, when either differentiated treatments of equal situations or equal treatment for different situations are unreasonable*".

Analogously, it is in this line of reasoning, but focusing on the discretionary choices of the administration and seeking substance and concretization, that this work argues that the constitutional evaluation of MDR should be made, since the regime has as one of its objectives to indirectly promote the ability to pay principle, as a corollary of equality. Indirectly because its objective is not to point out or define facts of economic nature that are liable to taxation, but to

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942 See Chapter II, topic 2.4 - Describing the System – Mandatory Disclosure Rules.
943 TESAURO, Francesco. *Instituições de Direito Tributário*. Translated by Fernando Aurelio and Laura Fiore Ferreira. São Paulo: IBDT, 2017, p. 75-76.
944 Ibid, p. 77-78.
945 Ibid, p. 86.

identify planning or schemes that produce results that deviate from the principle's application, which furthermore has already evolved from a subjective conception to a more objective conception, as explained by Tesauro, when analyzing the decisions of the Italian Court.

As already highlighted in this work, MDR does not mean paying more taxes, it is an ancillary tax obligation in order to allow inspection and control of the activities that give rise to interest in the collection of statutory taxes. In this sense, mandatory disclosure regime is similar to the obligation to present annual tax returns or respond to tax administration notifications, when requested. Nevertheless, MDR goes further, as it has dissuasive effects and interferes with the taxpayers' and intermediaries' behavior, acting in the tax planning market. Also, it must produce behavioral changes in tax administration and even in those who formulate tax policies. In the context of these effects, MDR can be identified as an obligation characterized by its "*extrafiscal nature*" or "*extrafiscal effects*".

In terms of tax obligations, Paulsen[946] devoted himself to exploring the "*duty of collaboration*", which he points out as being different from the duty to pay taxes. The author seeks to establish that this duty to collaborate with the State finds its limits in what he calls "*collaborative capacity*". Thus, he explains that a great challenge for those who deal with tax law is to find a balance between the protective values of individual freedom and the taxing activity of the State. Finally, he arrives at reasonableness and proportionality as parameters for the imposition of tax obligations, referring specifically to those existing to control or promote fair collection and inspection.

Casalta Nabais[947] says that within the tax legislation it is necessary to separate those rules whose main purpose is to serve as a source of revenue from those driven by other purposes. In the classification he outlines, the first stream constitutes the "*classic tax law*" and the second stream the "*economic-tax law*". He attributes this second segment to the "*extrafiscal nature*" and adds that taking into consideration that this economic-tax law "*deals with taxes and tax law as an instrument of economic and social policies, and not just as economic law*", its instrumentalization cannot be outside the legal-constitutional umbrella, formed by what he calls "*fiscal Constitution*".

Concerning MDR, what is expected is that a possible increase in Governmental revenue will be the consequence of a change in behavior (behavior inducing character) that the regime has as primary intention to cause. Thus, the rule that introduces MDR is not instituting a tax, but integrating tax law and it has the eminent and immediate purpose of achieving certain economic (for example, fair competition) or social (compliant behavior) results. Therefore, it has a hybrid nature of being an "*ancillary*" and "*extrafiscal*" rule. When analyzing the reasonableness, proportionality and practicality of the measure, it is necessary to consider these natures.

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[946] PAULSEN, Leandro. *Capacidade Colaborativa. Princípio de Direito Tributário para obrigações acessórias e de terceiros*. Porto Alegre: Livraria do Advogado, 2014, *passim.*

[947] NABAIS, Jose Casalta. *O Dever Fundamental de Pagar Impostos*. Coimbra: Almedina, 2009, p. 629.

After drawing a brief outline on the identification of "*extrafiscality*", Casalta Nabais[948] proposes to "*give an idea of its limits, (...) which do not coincide with those of classic tax law, getting closer to those of economic law, which materially the phenomenon integrates* ". Thus, norms of this nature cannot avoid being influenced by the characteristics of economic law. As a result, it is necessary to take into account the requirements of malleability and flexibility, which are translated into a significant framework of generality, which "*necessarily leave a wide margin of discretion to their applicators, allowing them to dominate the economic reality, which is in permanent and accelerated mobility and mutability*".

Analyzing the framework imposed by the Portuguese Constitution, Casalta Nabais explains why norms that have an economic law nature are subject to what he calls a "*soft legality*". He warns, however, that as those norms are interventionist norms that can affect or restrict fundamental rights, freedoms and guarantees, "*they cannot fail to obey the material link resulting from the principles of proportionality, lato sensu, and equality*". For him, the constitutional test of tax rules that contain a strong dosage of economic and social measures is limited to checking whether they prove to be arbitrary or without rational foundation, which he considers unlikely to happen, or if they present themselves as excessive and disproportional, in relation to their objectives. He says this would be a less demanding test than the one implemented in the prohibitions on arbitrariness and excess applicable to aggressive tax measures.

Torres[949] has worked reasonableness as a "*principle of legitimation*" and, analyzing proportionality and the anti-avoidance rules in the German Tax Code, states that fundamental rights, which are expressed by principles, are linked to the principle of proportionality, so there is a close and necessary relationship between fundamental rights and proportionality. By his turn, Ávila points out that reasonableness constitutes a "*guideline that requires a linkage of legal norms with the world to which they refer, either it is demanding the existence of an empirical and adequate support to any legal act, or to demand a congruent relation between the measure adopted and the purpose it intends to achieve*."[950] Moreover, according to Ávila[951], the measure of proportionality to achieve the goals of both the Legislative Branch and the Executive Branch must be verified by measuring the adequacy and necessity of the means. He explains that a suitable means is that which is capable of promoting its end, and the necessary means is the least restrictive, among all those equally adequate, with respect to fundamental rights. In other words, a legal or

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[948] Idem, p. 654-658. NOTE: The term "*extrafiscal*" refers to a tax or to an ancillary obligation, which has as its main function or purpose to induce a positive or negative behavior. It is broadly used in Portuguese language, in order to distinguish it from a measure or tax, which has as its primary purpose to be a source of State revenue. I am using the term as posed in the original, in this meaning. See also SCHOUERI, Luís Eduardo. Direito tributário. 9. ed. São Paulo: Saraiva Educação, 2019, p. 165. *"Há quem classifique os tributos a partir da extrafiscalidade, havendo os arrecadatórios e os regulatórios. A classificação merece crítica porque todos os tributos têm efeito arrecadatório e regulatório, em maior oumenor grau. Por isso mesmo, normas tributárias indutoras podem ser veiculadas em qualquer tributo".* (Emphasis added).

[949] TORRES, Ricardo Lobo. *O princípio da proporcionalidade e as normas antielisivas no Código Tributário da Alemanha.* Revista de Direito da Procuradoria Geral do Estado do Rio de Janeiro, v. 65, 2010, p. 219-230.

[950] ÁVILA (2018). Op. Cit. p. 48.

[951] Ibid, p. 103.

administrative measure is proportional if the advantages it promotes outweigh the disadvantages it causes.

Therefore, in the use of *extrafiscal* measures, the principle of legality is attenuated, while the principle of equality is not rigorous in its application. As they are behavior-inducing measures not focusing on tax burden, it is understood that in relation to them, the approach for formal legality in law is not required in the same way as that required in tax law, especially when one has to take into account its application in relation to the economic or social situation. The principle of legality is required in the sense that the provisions shall be instituted by law (Parliament's action) but the law is no longer required to determine its aspects entirely, and such aspects may remain for the discretionary decision of the administration. Thus, the approach in relation to legality is different, for example, from that given to the principle of legal certainty, which does not suffer any attenuation, but must be analyzed as this work will put in the next topic.

For obligations such as MDR, by its nature, it is not the precise description in law that must be required in order to control administrative arbitrariness or excess. What needs to be observed, as parameters to avoid arbitrary discrimination and to respect for fundamental rights, guarantees and freedoms, is the existence of a rational basis. Furthermore, whether the use of the instrument is, in each concrete situation, appropriate, suitable and according to the purpose pursued, necessary, required or indispensable when compared to other instruments or alternatives available to the State. In addition, there must be proportionality *stricto sensu* between the 'quantity' of the means and the 'quantity' of the objective pursued (ends). When checking suitability and necessity of that instrument, one cannot forget to consider the exceptional circumstances that led to its use. In addition, regarding the principles of social status and the coherence of the system, it is necessary to remember that the first is demanded, above all, to support the *extrafiscal* instrumentalization of taxes; while the second addresses the articulation and harmonization of these measures, through the tax system, with other indirect or direct measures of intervention in the economic and social order[952].

Finally, it is not possible to avoid the interaction between Administrative law and Constitutional law, nowadays. Grimm[953] explains that within legal scholarship, constitutional law, administrative law, and the other branches of public law have progressively lost their unity. He points out, moreover, that constitutional law is increasingly dominated by the institution and practice of judicial review, adding that there should be an approximation between the concept of "*balancing*" in American jurisprudence, increasing its centrality to constitutional discourse, and European constitutional law.

As this thesis stresses, the tax systems' fragmentation and the possibility of individuals and companies freely move through them requires that the legal interpretation consider the administrative practice, governed by Administrative law. Therefore, breaking with a purely theoretical application of the Constitutional law, in order to achieve a comprehensive approach, building a unitary and systematic perspective on public law in general. Such an approach,

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[952] NABAIS (2009). Op. Cit., p. 660-661.

[953] GRIMM, Dieter. *Proportionality in Canadian and German Constitutional Law Jurisprudence*. University of Toronto Law Journal, n. 57, 2007, p. 383.

moreover, should not be purely legal, and "*in the global legal space, the rules and institutions of public law must face competition from private actors and must also be evaluated from an economic and a political point of view*" [954].

4.2.1 Reasonableness.

Regimbald[955], analyzing *Correctness, Reasonableness and Proportionality,* as a parameters to be applied in Judicial review of administrative acts in Canada, states that "*as a result of the complexity of modern society and the establishment of the welfare state, the legislature often delegates the responsibility of implementing statutory programs to specialized administrative bodies*". This analysis, therefore, is suitable to MDR, from this work´s viewpoint, both in the premise "*as a result of a modern and complex society*", and in the consequence "*it is necessary to delegate the implementation to a specialized administrative bodies*". The more legal systems have become interdependent, the more an economic and political analyses of public administration actions has increased, which requires the adoption of multi-disciplinary approaches in examining the field. From the last quarter of the 20th century, Administrative institutions have undergone significant changes, due to several factors such as globalization, privatization, citizens' participation, and new global fiscal responsibilities[956].

The point this work highlights is that MDR cannot be rejected because the law that institutes it leaves certain concepts or definitions to be fixed in a discretionary manner by the Administration. This dose of discretion is necessary, given the character of the norm, and adequate, considering the ends, that is, the intended results. Although it is true that many scholars argue that politics play an important role in understanding how administrative law decisions are made, "*as the record of reasonableness in other areas of the law suggests, a reasonable agency standard would not mean that administrative law is just a matter of politics*"[957]. As a conclusion, MDR is absolutely subject to judicial review, however it must observe concrete and objective cases of abuse, and it must consider the open-endedness of the norm, taking into consideration tests of reasonableness and proportionality.

Regimbald[958] shows the evolution of "*Wednesbury unreasonableness's*" doctrine in the United Kingdom, the famous standard for judicial review, which has been regarded as a general doctrine of unreasonableness applicable to discretionary decisions, the introduction of a proportionality type test - first in human rights cases - and the successful approach of the proportionality type test in the European Union. According to Wouters and Duquet, "*Wednesbury*

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[954] WOUTERS and DUQUET (2013). Op. Cit., Prologue.

[955] REGIMBALD, Guy. *Correctness, Reasonableness and Proportionality: A New Standard of Judicial Review*. Manitoba Law Journal, v. 31, n. 2, 2005, p. 239-240. Available at: http://themanitobalawjournal.com/volumes/. Accessed on: 21 Sep 2019.

[956] ZARING, David. *Rule by Reasonableness.* Administrative Law Review, v. 63, n. 3, 2011, p. 551. Available at: http://www.administrativelawreview.org/wp-content/uploads/2014/04/Rule-by-Reasonableness.pdf. Accessed on 20 Apr 2020.

[957] Ibid, p. 552.

[958] REGIMBALD (2005). Op. Cit., p. 239-240.

unreasonableness" standard in the original meaning given to it by Lord Greene refers to "*manifest unreasonableness*":

> *The test recognises the non-interference of courts with the discretion assigned to public authorities, provided that (i) the authority took into account all the things it ought to have taken into account, (ii) the authority did not take into account things they should not have taken into account and (iii) the decision is not unreasonable, i.e. it is not a decision that a reasonable authority could ever have come to. To successfully apply the Wednesbury test, a decision has to be so outrageously deficient of logic or moral standards that no reasonable administration would ever have even considered taking it. This standard is high in order to avoid the substitution of judicial discretion for administrative discretion.*[959]

The Authors then investigate which standards the principle of reasonableness shall observe in order to be fully adapted to the realities of multipolar global administrative law, explaining that the Administration *"has been increasingly given rights in administrative procedures that allow it to be informed, to be heard, and to have decisions reviewed. This applies both to individuals functioning within the administration (civil servants) and those who are merely affected by decisions taken by it*".

Thus, a multipolar administrative law derives from these tendencies and clashes between principles are unavoidable. Rawls[960] says that a suitable conceptual framework has to be established to help reasonable people dealing with pluralism, and this as the preferred way for people with different traditions to reasonably agree on certain fundamental aspects of international order. Reasonableness serves as an important guiding principle in order to find agreement between the views of a multitude of actors, whether formally participating or not, in global arenas[961].

The main difficulty with the review of administrative decisions, Regimbald[962] states, is that there is a basic tension between the doctrine of Parliamentary sovereignty, which permits legislation to delegate very broad decision making authority, and the rule of law, requiring that even governmental action must be done according to the enabling statute and other fundamental principles.

Reasonableness emerged and functions, then, as a shaper coupling to accommodate this tension. The evolution of the principle brought about standards of review of administrative acts by the Judiciary, which take into account different levels of discretion and how much they could and should be corrected.

First, any administrative act in which the decision maker asked himself the wrong question, took into account irrelevant factors, or failed to take into account important factors would be subject to review. This standard of review is identified as "*standard of correctness*" or "*hard Look*

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[959]WOUTERS and DUQUET (2013). Op. Cit., p. 11.
[960] RWALS, John. *The Law of Peoples.* Cambridge: Harvard University Press, 2001, p. 199.
[961] GARRETT, Brandon L. *Constitutional Reasonableness*. University of Minesota Law School. Minnesota Law Review, v. 61, n. 102, 2017, p. 61.
[962] REGIMBALD (2005). Op. Cit., p. 256.

Reasonableness"[963]. This is where reasonableness is given its strongest meaning and the review aims to control the decision making process. A reasonableness standard that can be used to review matters beyond the facts at issue, including whether adequate consideration was given to the interests of the recipients of administrative action. Therefore, reasonableness can be used with conceptions that are objective, subjective, utility-based, or custom-based, says Garret[964]. As to the objects of reasonableness standards, they may be institutional or individualized and assessed from the perspective of judges, officials, legislators, or citizens.

Thus, in material scope, *standard of correctness* can be applied to MDR, verifying the relevance of the facts and planning considered in the hallmarks definition, as well as the reasons that led the Administration to consider them. The question, as I will discuss in the analysis of the personal scope in the principle of legal certainty[965] is who are the "recipients" and whose are the primary interests, in the MDR outcomes, whether the individual taxpayer, the society or the State. After defining it, then, the proportionality test shall be applied.

Second, the Court could intervene where the administrative interpretation is "*so-patently unreasonable that its construction cannot rationally be supported by the relevant legislation and demands judicial intervention upon review*"[966]. This standard of review may be identified as "*patent or manifest unreasonableness*". In this case, as a result of the general character of tax law, which is not a legal act focusing on a specific individual, a high burden is placed on the taxpayer to prove that the decision made by the Administration was so extremely erroneous. Regarding MDR, it would be necessary to demonstrate why such business or transactions, in particular, are so special, that for them the obligation of disclosing tax planning, which is based on general characteristics, is unreasonable. Importantly, the manifest unreasonableness standard does not offer a structured test.

However, if characteristics such as: bad faith; arbitrary decisions or decisions undertaken for improper purposes or ulterior motives; consideration of irrelevant factors or failure to consider relevant factors, this review is not for patent unreasonableness, but the review of a discretion conferring jurisdiction[967].

Third, an intermediate standard of review, identified on a "*spectrum*" ranging from correctness to patent unreasonableness, is the standard of "*reasonableness simpliciter*" or "*soft look unreasonableness*". This is the more lenient version of *Wednesbury unreasonableness* permitting reasonableness to be used in not only cases where there is a complete disconnection between the facts and the outcome, but also when the facts disproportionally differ from the decision taken or the rule made. This classification of reasonableness is clearly linked to the proportionality standard.

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[963] WOUTERS and DUQUET (2013). Op. Cit., p. 12-14.
[964] GARRETT (2017). Op. Cit., p. 124.
[965] See Chapter IV, topic 4.4.3 - Personal scope.
[966] REGIMBALD (2005). Op. Cit., p. 260.
[967] DALY, Paul. *Struggling Towards Coherence in Canadian Administrative Law? Recent Cases on Standard of Review and Reasonableness*. McGill Law Journal, v. 62, n. 2, 2016, p. 527–564.

The rationale for *the standard of reasonableness simpliciter*, however, is the same as for the standard of patent unreasonableness. Regimbald states that: "*The standards of reasonableness simpliciter and of patent unreasonableness should never have been interpreted as permitting a decision maker to make erroneous findings, whether on facts or on law. The premise of both standards is to recognize that decision makers are often better placed than courts to make administrative decisions*" [968]. The main difference is that following the *pragmatic and functional approach*, some decision makers must be afforded more leeway than others[969].

The use of the pragmatic and functional analysis, in my view, is quite relevant in relation to MDR context. In essence, prior to determining which of the three standards apply to the judicial review of the administrative decision, three factors must be considered: (i) expertise of the decision maker; (ii) purpose of the Act as a whole, and the provision in particular; and (iii) the "nature of the problem": a question of law or fact.

First, it is necessary to take into consideration the empirical and technical knowledge of the tax administration, which establishes the hallmarks by itself or suggests them to the legislator. Next, which kind of data, information or studies were considered when establishing or suggesting them. Therefore, in order to demonstrate unreasonableness, it is relevant to explain, technically, why those choices are wrong or inappropriate.

Second, it is necessary to take the tax system as a whole into consideration and the role of each one of those hallmarks in MDR objectives and results. For instance, the DAC6[970] makes reference to "*arrangement with a possible impact on the automatic exchange of information or the identification of beneficial ownership*". In practice, the Directive is proposing a specific hallmark to address arrangements designed to circumvent reporting obligations involving an automatic exchange of Financial Account information. The Directive´s introduction explains the intention to cover financial account information, mentioning the CRS introduced by Directive 2014/107/EU, which is a significant step forward in establishing a framework for tax transparency. The Directive also mentions "*for the purposes of that hallmark, agreements on the automatic exchange of financial account information under the CRS should be treated as equivalent to the reporting obligations laid down in Directive 2014/107/EU*". Thus, if analyzing the reasonableness of such hallmark, it is essential to take into consideration the whole objective of MDR towards transparency and how it relates to other initiatives.

Wouters and Duquet[971], furthermore, state that "*the picture that emerges from our review of international and regional cases shows a great deal of flexibility and pragmatism, whereby courts and tribunals develop close linkages between reasonableness and other standards of review, in particular proportionality, due diligence and fairness".* Garret[972] adds that the flexibility and

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[968] REGIMBALD (2005), p. 241-242 and p. 252-254.
[969] DALY (2016). Op Cit., p. 532.
[970] See Chapter III, topic 3.6.1.3 - Specific hallmarks related to AEOI and beneficial ownership.
[971] WOUTERS and DUQUET (2013). Op. Cit., p. 42.
[972] GARRETT (2017). Op. Cit., p. 62.

malleability of reasonableness standards accounts for their ubiquity and utility. Finally, Zaring[973], defending reasonableness, explains that if reasonableness review is the right way to think about administrative review, it might make for a "*flatter, simpler base*" of administrative law (flatter and simpler is what tax experts think might be the right way to write a tax code).

4.2.2 Proportionality.

The principle of proportionality originates and is fully developed in German law. When making discretionary decisions, the authority is required by the principle of proportionality to choose the measure which least restricts the citizen's rights. In German constitutional and administrative law, it has developed into a threefold test that will allow the Courts to diligently scrutinize administrative action. Such actions have to be suitable to achieve the aim they are used for; be necessary to achieve the objective in the sense that there is no other measure which would be less restrictive of freedom; and outweigh the individual's interest, in the sense that the measure is not disproportionate. Matthews[974] says that this multistep proportionality framework is an innovation of Germany's Federal Constitutional Court, which adapted the concept from German administrative law, where proportionality has played a role in judicial control of administrative action since the late nineteenth century, and has used it to adjudicate constitutional rights claims for more than half a century. Influenced by German and French law, the proportionality principle has been transformed into a widely used test for the CJEU to review administrative decisions[975].

Legal theorists have developed the principle of proportionality or *balancing,* as strict proportionality is also known, according to Sauter[976], "*as the gold standard of constitutional adjudication which allows all different rights and principles to be weighed against each other in the same dimension*". Despite differences in the historical origins of these conceptualizations (proportionality or balancing), proportionality, actually, can be used to protect individual rights both when there is little textual support in the law and "*to check the overzealous (libertarian) protection of rights based on an excessively literal reading of the constitutional text*"[977]. Regarding MDR, as this work pointed out, the issue involves the first case, because some definitions must be transferred from the text of the law to administrative discretion. However, it also involves the second case, because, as I explained, some complaints which create tension between MDR and freedom, have origins in an excessive libertarian doctrine.

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[973] ZARING (2011). Op. Cit., p. 555.

[974] MATHEWS, Jud. *Proportionality Review in Administrative Law*. Penn State University, Faculty of Law. Contributions to Books. 9, 2017, p. 5.

[975] COHEN-ELIYA, Moshe and PORAT, Iddo. *American balancing and German proportionality: The historical origins.* Oxford University Press and New York University School of Law, v. 8, n. 2, 2010, p. 263–286. See also REGIMBALD (2005), Op. Cit., p. 269; WOUTERS and DUQUET (2013). Op. Cit., p. 19 and Chapter III, topic 3.6.0.2.2 – Proportionality.

[976] SAUTER. Wolf. *Proportionality in EU Law: A Balancing Act?* TILEC Discussion Paper, n.3, 2013, p. 441. Available at: SSRN: https://ssrn.com/abstract=2208467. Accessed on: 23 Apr 2020.

[977] COHEN-ELIYA and PORAT (2010). Op. Cit., p. 266.

Considering that the proportionality test involves a balancing of the suitability of the measure, its necessity, and its proportionality *strictu sensu*, that is, weighing the necessary objective and the means used to achieve them, as a consequence, the proportionality test will often be applied at the same time that a reasonableness test. In case of the invocation of an alleged breach of a fundamental right by an individual, nevertheless, the proportionality will effectuate a more intense and structured review, which a reasonableness test cannot offer[978].

Therefore, proportionality provides a structural framework for substantive review, which has been applied to assess administrative decisions. Similar to when applying the reasonableness standard, it is necessary to fully recognize and respect the administration's discretion. Additionally, proportionality and reasonableness will often yield the same result, as it is unlikely that a decision that is found reasonable will be judged disproportionate or the other way around. Consequently, lack of proportionality is a strong indicator for unreasonableness[979].

The proportionality inquiry can be confined to a particular aspect of MDR, for example to a specific hallmark (material scope) or a specific person required to make a disclosure (personal scope) or a specific information required to be disclosed (that would lead to the disclosure of trade or industrial secrets, without a specific counterpart). The point is the identification of the problem, regarding the law or the facts. This way, a less intensive review can be utilized in these cases. When reviewing this type of case, nevertheless, Courts would be well advised not to challenge and balance all the issues considered by the regime, especially when political and economic reasons have been considered[980].

Notwithstanding, the proportionality test can be applied to the entire regime. For example, as this work has sometimes highlighted, if the information is being requested and the tax administration, due to technical incapacity, does not process it and does not offer adequate responses, either individual responses, promoting certainty for those who make a disclosure; or collective responses, modifying or improving the legislation. It will also be disproportionate, a regime that requires information already available by other means or that is not used to improve the administrative performance.

Interim Conclusion.

When introducing MDR, the law must be clear, its effects predictable and it must be at the same time as "open" as possible to counteract unpredictable tax planning structures or schemes, and as "certain" as possible to more appropriately cover different types and degrees of "administrative mistakes" or misuses of the indispensable administrative discretion.

Although it is impossible to disregard that the rule that introduces MDR is not instituting a tax, but integrating tax law and has the dominant and immediate purpose of achieving certain

[978] LENAERTS, Koen and GUTIÉRREZ-FONS, J.A. *The Constitutional Allocation of Powers and General Principles of EU law*. Common Market Law Review, v. 47, n. 6, 2010, p. 1629-1669.
[979] WOUTERS and DUQUET (2013). Op. Cit., p. 28.
[980] REGIMBALD (2005). Op. Cit., p. 277.

economic (for example, fair competition) or social (compliant behavior) results and, moreover, it has a hybrid nature of being an "*ancillary*" and "*extrafiscal*" rule, the joint evaluation of reasonableness and proportionality is necessary. In this process, reasonableness and proportionality have mixed to the point that it is difficult to distinguish whether they are autonomous principles or the second is actually a test of the first and vice versa.

Reasonableness clearly is a contextual standard and MDR application, submitted to "reasonableness review", might be useful for simplification, coherence, and consistency in tax law. Those are some advantages that could, *prima facie*, be seen in the balance with the limitations or "*particular disadvantages*" that some taxpayers point out, which means MDR is able to attend the proportionality test, *stricto senso*. Furthermore, it is important, when applying the principles or tests, to bear in mind the material scope but also the addressees and recipients of the norm (personal scope).

Reasonableness and proportionality are now accepted as a standard of judicial review for Administrative acts, both in civil and common law systems, although in different grades. Also international courts[981] have used reasonableness as a standard to review administrative action. Although current international legal practice does not offer a single formula or test, reasonableness and proportionality can be defined in such a way that makes them fit for use as a standard of review in global public law.

The conclusion is that MDR can be assessed in terms of objective and subjective reasonableness. For example, if the hallmarks are used to promote equality among taxpayers. Furthermore, due to proportionality, if they are suitable to achieve their ends and if the limitations they impose can be overweighed by the advantages they produce. Moreover, these advantages must be considered both collectively and individually. This work has already presented several points in which the MDR can bring individual benefits to the taxpayers. Finally, if the measure serves as a practical instrument to make the tax law, in a systemic approach, able to achieve its objectives.

4.3 What is a fair taxation? The limits that allow for restrictions within freedom of enterprise.

Considering the examples provided in topics 4.1.1 and 4.1.2, relating cases, studies and experiences in the EU, Germany, France and Brazil, the first question for investigation involves the limits that allow for restrictions within freedom of enterprise. Because it was stated that a measure imposing limits might be justified by overriding reasons of public interest and it must intend to achieve tax equality. The second question is concerning the extension and application of legality,

[981] WOUTERS and DUQUET (2013). Op. Cit., Section VI.

in a formalist approach, as a guarantee to avoid excesses on the part of the Administration and the balance between this role, equality and the achievement of the purpose of the norm.

Therefore, how and when is taxation really promoting equality[982]? When does equality bring justice and when it is a simple domination argument? Moreover, is it possible to make an abstract assessment, based on the Constitution, whether a given tax measure is promoting equality or not?

The very concept of constitution and its values are contextual, from Ferdinand Lassalle's sociology to Hans Kelsen's positivism. In a sociological approach, Lassalle, in his book *What is a Constitution?* says that Constitution is the "*sum of factors of the real power*" that predominate in a community. Thus, these factors of real power are collected and registered on a sheet of paper, which represents only their written expression. Then, from that moment on, embodied onto a paper, they are no longer simple real factors of power, but they are transmuted into law, in legal institutions[983]. According to Lassalle, there are two Constitutions in a society: one real, which corresponds to "*the sum of the real factors of power*"; and one written, which will only be valid if it fits the real Constitution. Therefore, there is a need for the Constitution to be "*the reflection of the social forces that structure and determine power*", that is, the people´s behavior and needs. Otherwise, the Constitution would be just a sheet of paper[984].

Although "*lawyers often use 'positivist' abusively, to condemn a formalistic doctrine according to which law is always clear and, however pointless or wrong, is to be rigorously applied by officials and obeyed by subjects*"[985], a real positivist study is that which refuses to consider the objectives of the rule of law. Sometimes it is associated with the homonymic but independent doctrines of logical positivism (the meaning of a sentence is its mode of verification) or sociological positivism (social phenomena can be studied only through the methods of natural science). To a logical positivist, for instance, fair or unfair would be adjectives for what is in conformity or not with the rule of law, the only possible scientific investigation. Hart admits that, as other forms of positivism, his theory "*does not present any intention of identifying the core or the objective of the law or of the juridical practices by themselves*"[986].

Goldscheit and Schumpeter created fiscal sociology as a result of their interest in the State crisis[987]. One of the fields in which fiscal sociology has been most important is the issue of taxation, and notably income taxation[988]. The discipline offers a series of truly helpful approaches for

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[982] NOTE. See the theory on the meaning of "equality" in Chapter IV, topic 4.3.2.1 – Applying Avila's theory.
[983] LASSALLE, Ferdinand. *O que é uma Constituição.* Translated by Hiltomar Martins Oliveira. Belo Horizonte: Ed. Líder, 2002, p. 48.
[984] Ibid, p. 68.
[985] STANFORD Encyclopedia of Philosophy. *Legal positivism*. First published 3 Jan. 2003; substantive revision 17 Dec. 2019. Available at: *https://plato.stanford.edu/entries/legal-positivism/*. Accessed on: 20 Mar 2020.
[986] HART, Herbert L. A. *O Conceito de Direito*. Translated by A. Ribeiro Mendes. 3 ed. Lisboa: Calouste Gulbenkian, 2001, p. 310.
[987] CAMPBELL, John L. *The State and Fiscal Sociology*. Annual Review of Sociology, v. 19, 1993, p. 163-185.
[988] BACKHAUS, Jürgen G. *Fiscal Sociology: What For?* In: Backhaus J.G., Wagner R.E. (eds). Handbook of Public Finance. Boston/MA: Springer, 2005, p. 521-541.

researching and thinking about reducing the adverse effects of administrative tax activity and thereby enhancing its efficiency. Campbell[989] states that:

> *Schumpeter observed that the extraction of tax revenue by the State has an enormous influence on economic organization, social structure, culture and the fate of the Nations. For this reason, he argued that the study of the social processes behind taxation and public finances, that is, fiscal sociology, is one of the best starting points for an investigation of society and its political life.*

What this topic demonstrates is that whether taxation interferes with economic organization, social structure and political decisions, these circumstances also affect, commutatively, the way taxation should be conducted and the extent to which it should be accepted. Therefore, '*valid taxation*' is not that resulting from a strictly legal interpretation, but one that arises from a legal interpretation that takes into account other systems, such as the economic, social and political.

After its creation, fiscal sociology experiences uneven development over different periods and in different countries. The economic crisis of the 1970's gives rise to a radical criticism of the interventionist State. During the 1990´s, the context of economic globalization fuels the debate on the retrenchment of the State[990] and fiscal sociology is renewed. After the most recent economic crisis, in 2008, the loss of revenue, coupled with a reduction in global economic growth compared to the previous decade, led countries to seek broad coordination and standardization of tax rules and agreements, trying to restore their political power over the economy, which goes through the power to tax. Thus, it is necessary to rethink the relationship between State, the society and taxation.

We now know, for example, that globalization did not only cause a *race to the bottom* in capital tax rates, but it indeed has also led to some convergence in tax structures[991]. The great evolution of this international coordination occurred around the G-20, developing both the international fiscal transparency and the attempt to ostensibly fight against the called aggressive tax planning. The political, social and territorial functions of tax policies complete the economic and financial approach[992] and might be taken into consideration to subsidize them.

The issue of defining a Tax Constitution has re-emerged on the political agenda with the European Union beginning to take shape and with elements of an emerging European Constitution becoming visible. If the intention is to think about constitutional principles able to govern a worldwide taxation, as Backhaus[993] states, it is necessary to meet on the one hand the classical criteria developed in political doctrine and on the other hand to be in line with the requirements of a modern global economy. It is necessary, therefore, to accommodate different legal principles

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[989] CAMPBELL (1993). Op. Cit., p. 163.
[990] MARTIN, Isaac William and PRASAD, Monica. *Taxes and Fiscal Sociology*. Annual Review of Sociology, v. 40, 2014, p. 331-345.
[991] MARTIN and PRASAD (2014). Op. Cit., p. 340. See also Chapter II, topic 2.1.1 – Influences of globalization and the new economic and business reality.
[992] LEROY, Marc. *Taxation, the State and Society: the fiscal sociology of interventionist democracy*. Brussels: P.I.E Peter Lang SA, 2011, p. 11.
[993] BACKHAUS (2005). Op. Cit., p. 527.

and economic and political systems, including different systems of taxation and political decision making. In order to meet this challenge, the different disciplines of public finance, law, public administration, political science and sociology would have to join forces.

When trying to understand how these functions interact and are balanced depending on the context, history is one of the best approaches to be used by fiscal sociology[994]. For instance, in the context of mid-seventeenth century, taxation in England was limited in scope and designed to address exceptional contingencies, always of a military nature. The fiscal system established after the Glorious Revolution provided funds to protect not only Britain, but also her "*hegemony over the international economic order*". John Locke did not diverge from this and his contribution to tax thinking can only be more clearly understood if it is contextualized. Locke was not interested in the redistribution of wealth but in raising funds for war against a possible Stuart restoration, after 1689[995].

Locke's is one of the most famous of all property theories. In that context, he related taxation to the *benefit principle* and, according to him, a fair amount to pay depends on the level of protection received by the taxpayer from the state. On the other hand, implementation of the ability to pay principle would mark an illegitimate incursion of the legislative competence of the state into the private sphere.

Therefore, in Locke´s theory, it is neither redistribution nor the ability to pay, but the benefit received by the taxpayer that makes taxes fair. Those with the most to lose in an Absolutist Catholic invasion, and post-1690 Stuart restoration, were those who held the great estates. Thus, they should pay more. The tax system had this limited redistributive role consistently with the fact that, in the seventeenth century, the overwhelming purpose of taxation was national defense.

To provide another historical illustration and demonstrate how the historic context intervenes to categorize tax justice, in the context of feudalism, it may appear fair to give tax privilege to those who defend the country. In the context of Western democracies, an evolutionary relation was established between tax justice and tax equality, prior to the appearance of the idea, consubstantially with the Welfare State, of the redistribution of taxes[996].

Showing how Samuel Johnson used Locke's theory to defend keeping the American colonies as part of Great Britain, Frecknall-Hughes[997] examines how events of the past and the vying for dominance between the political theories have a continuing resonance in a modern context in respect of establishing a sound theoretical underpinning for a tax system. In her work, she identifies that "*for the characteristics of a 'good' tax, it is usual to refer to the concepts (or canons) of equity/proportionality, certainty, convenience and efficiency put forward by Adam Smith*

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[994] MUSGRAVE, R.A. *Schumpeter's crisis of the tax state: An essay in fiscal sociology*. Journal of Evolutionary Economics, v. 2, 1992, p. 89-113.

[995] SNAPE, John; FRECKNALL-HUGHES, Jane and NOTTINGHAM, J. *John Locke: property, tax and the private sphere.* In: Harris, Peter and De Cogan, Dominic, (eds.) Studies in the History of Tax Law. Oxford: Hart Publishing, 2017, p. 1-35.

[996] LEROY (2011). Op. Cit., p. 86-100.

[997] FRECKNALL-HUGHES, Jane. *Locke, Hume, Johnson and the continuing relevance of tax history*. eJournal of Tax Research, v. 12, n..1, 2014, p. 87 – 103.

in Book 5 of his work, An Inquiry into the Nature and Causes of the Wealth of Nations, published in 1776".

Before defining what is fair in terms of taxation, it is necessary to understand what justice is. Because according to Plato, "*since I do not know what justice is, even less will I know if it is a virtue or not, and if the person who possesses it is happy or not*". For this very reason, Plato, through a wide discussion about what "justice" would be, brings, in the words of Thrasymachus, that:

> *Justice is nothing more than the convenience of the strongest man. Certainly, each government establishes laws according to its convenience: the democracy, democratic laws; the monarchy, monarchical laws; and the others, in the same way ... Here is what I want to say, by stating that there is only one model of justice in all States, which suits the instituted powers, because these are the ones that hold the strength. Whence it follows, for those who think correctly, that justice is the same everywhere: the convenience of the strongest.*[998]

In his aim to present a conception of justice, which generalizes and carries the theory of the social contract as found in Locke, Rousseau and Kant to a higher level of abstraction, Rawls states that in justice as fairness the original position of equality corresponds to the state of nature in that traditional theory. This original position is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice. This explains the propriety of the name "justice as fairness": it conveys the idea that the principles of justice are agreed to in an initial situation that is fair, because the principles of justice are chosen behind a veil of ignorance. Then, having chosen a conception of justice, "*we can suppose that they are to choose a constitution and a legislature to enact laws, and so on, all in accordance with the principles of justice initially agreed upon*" [999].

Therefore, Rawls[1000] deals with justice as fairness, in a theoretical context in which people are originally on an equal footing and in this *status* they agree upon the principles of justice to be adopted. He says that "*each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason, justice denies that the loss of freedom for some is made right by a greater good shared by others. It does not allow that the sacrifices imposed on a few are overweighed by a larger sum of advantages enjoyed by many*". He concludes, thus, that we are to imagine that those who engage in social cooperation choose together, in one joint act, the principles that are to assign basic rights and duties and to determine the division of social benefits.

Next, he establishes "*in a provisional form*" the two principles of justice that he believes would be chosen in the original position. First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: social and economic inequalities are to be arranged so that they are both (i) reasonably expected to be to everyone's advantage, and (ii) attached to positions and offices open to all. However, Rawls recognizes that there are two ambiguous phrases in the second principle, namely "*everyone's advantage*" and

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[998] PLATO. *A República*. Translated by Pietro Nasseti. São Paulo: Martin Claret, 2006, p. 25.
[999] RAWLS, John. *A Theory of Justice. The Main Idea of the Theory of Justice.* Oxford: Oxford University Press, 1972, p. 10.
[1000] Ibid, p. 4 and 11.

"*open to all*." The second principle applies, in the first approximation, to the distribution of income and wealth and while that distribution need not be equal, it must be to everyone's advantage; additionally, at the same time, positions of authority and offices of command must be accessible to all. One applies the second principle by holding positions open, and then, subject to this constraint, arranges social and economic inequalities so that everyone benefits.

Therefore, it is possible to see a proposal for a cyclical application. Despite the understanding that "*keeping positions and offices open to all*" would represent a constraint, this is at the same time an instrument for carrying out the second principle of justice, seeking to rearrange inequalities.

What I intend to make clear is that reason (and truth) was, throughout history, based on views that sought to privilege some interests. As Hegel stated "*reason is historical*" and at every moment interests and the socio-political-economic contexts have made principles such as fairness, freedom or equality called for by different motivations and used as instrument of either domination or liberation. In fact, '*reason*', in Hegel's view, "*is the knowledge of the harmony between things and ideas, between the outer world and the consciousness, between the object and the subject, between objective truth and subjective truth.*"[1001]

As a conclusion, when talking about taxation, there are many examples and arguments to be mentioned in order to support the possible relativization of legal principles and fundaments, depending on the context, seeking to find a justification for what is a "fair taxation". Thus, there are no standards to find what is right or wrong in tax matters. Each society can choose the means to reach the ends. What is not an optimal solution is maintaining objectives in the constitutional law which cannot be reached or which are easily circumvented, generating distortions, because the rigid interpretation of the rule of law is disconnected from the real facts. Analyzing laws and history of nations philosophically, Cesare Beccaria[1002] prophesied that their values change according to time and circumstances, mostly as a result "*of the errors and fortuitous interests of the various legislators".*

4.3.1 MDR application, Freedom and Equality.

This topic aims to pose an apparent conflict between freedom and equality in the form of ´*freedom at the extent of equality*´. This is because absolute freedom for some would mean absolute subjection for other members of the society. Thus, the analysis starts from what I would call a tension between positivist liberty, because it interprets the law from itself, without a cyclical interaction with the way individuals are following it, on the real plane; and sociological equality, because the law is observed from the results that it is actually producing at the real level and these results would serve to change it, in order to bring the abstract norm closer to the concrete cases.

[1001] CHAUÍ. Marilena, *Convite à Flosofia*. 12 ed. São Paulo: Editora Ática, 2002, p. 82.
[1002] BECCARIA, Cesare. *Dos Delitos e das Penas*. Traslated by Torrieri Guimarães. São Paulo: Martin Claret, 2003, p. 73.

The interpretation according to the norm, regardless of the ends, in positivism, and a sociological concept of constitution that is concerned with social reality.

What this work defends is that in the search for equality, then going through a "fair taxation", it is necessary to identify the purpose of the norm. In this case, the judgment of the validity of instruments involved in achieving these objectives depends on this conception. However, how to make the Rule of Law be developed in a way that it corresponds to the assumption ideal or natural, being thus more widely recognized by those who are disciplined by it and, in this way, adopted more efficiently?

Analyzing the balance between equality and freedom, Silva[1003] states that the former has not deserved as much defense as the latter. According to him, the debates and even the *'fight'* for freedom overcome equality, and equality, in fact, constitutes the fundamental signal of democracy, precluding privileges and discriminations that an absolutely liberal regime consecrates.

However, what the liberal state repeatedly evokes, in current times, is the certainty of rights, the preservation of privacy, due process of law, ample defense and everything to preserve a greater objective, that would be the freedom, or rather, the right to freedom. Freedom to come and go, to freely exercise a business or profession, to exercise an economic activity, a manifestation of will. Finally, searching for a precious interpretation of law that guarantees a minimal intervention of the state. Anyway, taxation is an intervention of the State in the citizens' liberties.

The role of the principle of equality, in a constitutional view, is not limited to equality before the law, but in guaranteeing equal opportunities for the achievement of each citizen's goals. The Social State, which followed the liberal-bourgeois, sought to reduce inequalities embedded in society. Globalization, as this work analyzed in Chapter II, by liberating capital and extolling freedoms, ended up creating a movement in the opposite direction, when the economic order dominates the political order and, in consequence, increasing inequality, unfair competition and distortions on the ability to pay principle.

The current democratic state is theoretically based on the ideological legacy of the French revolution; however, the concept of equality no longer goes back to that of bourgeois individualism, which has taken on a more Aristotelian[1004] style, when considering the element of justice, bearing in mind natural, social and economic inequalities. Plato, in turn, conceived justice as a political concern resting on the idea of equality, a geometric equality, insofar as it guarantees to each one what is due according to their aptitudes. His concept of justice also assumes the character of universality as it is linked to the idea of representing the harmony of the cosmos. Justice is a commitment of the citizen to the 'city', read society; dedication to the proper functioning of collective life based on the natural aptitudes of each one. Thus, he wisely unveiled two aspects of the concept of justice: as a guiding idea of law, and as guiding virtue determined by the law[1005].

[1003] SILVA, José Afonso da. *Curso de direito constitucional positivo*. São Paulo: Malheiros, 1998, p. 217-218.
[1004] TABORDA. Maren Guimarães. *O princípio da igualdade em perspectiva histórica: conteúdo, alcance e direções*. Revista de Direito Administrativo, Rio de janeiro, n. 211, jan./mar. 1998. p. 244.
[1005] PLATO. *A República*. Translated by Pietro Nasseti. São Paulo: Martin Claret, 2006, *passim*.

Concerning the complex economic and social organization in which we live, Roberto Barroso[1006] teaches that in consonance with the ideas of justice, would be the idea that:

> *In law, the issue is no longer individual liberty and its limits, as in the liberal state; or state intervention and its limits, as in the welfare state. Liberty and equality are no longer the icons of the season. The law itself has fallen into disrepute. (...) The abstract formulas of law and judicial discretion no longer bring all the answers. The legal paradigm, which had already passed, in modernity, from the law to the judge, is now transferred to the concrete case, for the best solution, unique to the problem to be solved.*

This connection implies delimiting the concept of what justice is and what its criteria are. The association between equality and justice (at least in the so-called Western tradition) goes back to classical Greek thinking. Nevertheless, equality can have many meanings. In a formal sense of all before the law without any distinction, that is, an equal treatment of all who are in the same situation; or as material equality, which can be understood as the prerogative of all to equal access to the rights, goods and services considered essential and basic in a given society.

Analyzing pluralistic societies, which means those marked by the existence of groups with different projects and interests, without any of them having enough force to become dominant and influence a state sovereignty in their favor, it is possible to infer that '*conformity with the law*' refers to the relation that the sense of individual justice maintains to the idea of equality, which in itself points to the fact that correctness surpasses the simple dimension of the written law, goes beyond its reason and is directly linked to the sense of natural law, insofar as it can be understood as a criterion for the appraisal of equality dictated by reason according to natural law. In this sense, '*reason*' signifies a higher form of human nature.

The circumstances admit, therefore, the differentiated application of the law to address inequalities. In this context, the limits are expressed by "*reasonableness*" as a standard in judicial review[1007]. In a short explanation, this possible differentiated application can only be assumed within a constitutional order, without representing discrimination, if there are objective and reasonable justifications, according to generally accepted valuable criteria, whose existence must represent a proportional relationship with the means used and the ends to be reached.

Reasonableness is a principle that stands out[1008]. For an expressive number of judges, experts, and legislators, everything must be "reasonable and proportional" in law enforcement. In this scenario, the Constitution, however clear, needs to be relativized, because legality has not

[1006] BARROSO, Luís Roberto. *Fundamentos teóricos e filosóficos do novo direito constitucional brasileiro* (Pós-modernidade, teoria crítica e pós-positivismo). Revista Diálogo Jurídico, Salvador, CAJ - Centro de Atualização Jurídica, v. I, n. 6, Set, 2001.

[1007] WOUTERS, Jan and DUQUET, Sanderijn. *The Principle of Reasonableness in Global Administrative Law*. New York University, School of Law. Jean Monnet Working Paper n. 12, 2013, p. 5. Available at: http://jeanmonnetprogram.org/wp-content/uploads/2014/12/WoutersDuquet.pdf. Accessed on 23 Mar. 2020.

[1008] See Chapter IV, topic - 4.4.1 Reasonableness, proportionality and MDR.

fulfilled its function of guaranteeing freedom with equality. Therefore, in order to restore equality, reasonableness clearly is a contextual standard[1009].

Thus, another issue to take into consideration when applying MDR, that is, the acceptance of the national Courts in applying reasonableness, because it is necessary to carry out an individual analysis of each case, when the taxpayer argues in general that the system is limiting his freedom.

On the other hand, a change in the meaning of equality, from equality of rights to equality of outcome, transforms the function of government from one of protection to one of redistribution. The concept of economic equality also takes on new meaning, instead of that open competition and the protection of individual rights to private property and economic freedom, it is necessary to take it in terms of distributive justice[1010].

When talking about freedom, the focus of this work is economic freedom, especially freedom of enterprise. The fact that the freedom of economic transactions tends to be a typically great engine of economic growth has been widely acknowledged. Amartya Sen[1011] says that the freedom to participate in economic interchange has a basic role in social living. He recognizes the importance of judging the market mechanism comprehensively in terms of all its roles and effects, including those in generating economic growth, adding that it does not preclude the role of social support, public regulation, or statecraft when they can enrich – rather than impoverish - human lives. On the other hand, he adverts, it is also necessary to pay attention to the persistence of deprivations among segments of the community that happen to remain excluded from the benefits of the market-oriented society, and the general judgments, including criticisms, that people may have of life-styles and values associated with the culture of markets. "*In seeing development as freedom, the arguments on different sides have to be appropriately considered and assessed*"[1012].

Amartya Sen[1013], moreover, says that "*there is a difference between supporting an individual's choices and creating more choice opportunities and substantive decisions for people, who then can act responsibly on that basis*". Finally, the preservation of equality aims to guarantee the exercise of freedom for all and cannot result in the suppression of responsibility for the choices freely made by each individual. The law in general aims exactly to place limits and define consequences for these choices, establishing general parameters. However, these parameters do not reach everyone and do not reach their ends, if they are absolutely generalized. On the other hand, if they are too specific, due to extension and detail, they generate complexity and do not reach their ends in the same way. The more the economy, the companies and the resulting relationships become broad and complex, the more this process can be observed.

Notwithstanding, focusing on taxation, Dworkin talks about individual responsibility:

> *The principle of personal responsibility requires a mainly free-market economic organization so that people one by one, rather than their governments, fix the main structural elements of the economic culture in which they live, including the prices of the different kinds of goods they choose to*

[1009] WOUTERS and DUQUET (2013). Op. Cit., p. 41.
[1010] DORN, James A. *Equality, Justice and Freedom: A Constitutional Perspective*. Cato Institute, Cato Journal, v. 34, issue 3, 2014, p. 491-517.
[1011] SEN, Amartya. *Development as Freedom*. Oxford: Oxford University Press, 1999, Introduction.
[1012] Ibid.
[1013] Ibid, p. 52.

buy and the rent of the labor they choose to offer. Only in that way can people exercise their responsibility to identify and realize value in their own lives, because only then does the price of what one person buys or produces reflect the value it has for others. Only a wide-ranging economic market respects that imperative of personal responsibility[1014].

Concerning the supposed tension between freedom (individualism) and equality (social solidarity) [1015], Dworkin defends that the radical egalitarian economic policy would have as a result, at least financially, that people would be insulated from the economic consequences of their acts and therefore unable to take any responsibility for the economic dimension of their own lives[1016]. Rethinking Rawls, he says that Rawls's scheme cuts the connection between personal choice and personal fate that the principle of personal responsibility requires.

Therefore, Dworkin[1017] argues that equality, freedom, and individual responsibility are not in conflict, but flow from and into one another as different sides of the same humanist conception of life and politics. Since no abstract political theory can be understood except in the context of actual and complex political issues, he develops his thesis by applying it to heated contemporary controversies about the distribution of almost all social benefits and conflicts.

The problem is that both Rawls and Dworkin establish their theories of equality based on theoretical situations that do not exist in practice, especially because men do not put themselves in *equal footing*, do not make decisions under *a veil of ignorance* and the economic competition precludes the establishment of self-regulation of markets and prices, which would lead to a *natural* individual responsibility.

However, Dworkin continues and, exemplifying, he quotes that the distribution of wealth and income in the United States is striking. During Bush's government, tax cuts have made the great gap between rich and poor even greater[1018]. According to him, "*Taxes are the principal mechanism through which government plays this redistributive role*". In the US political scenario, Conservatives believe that this role of government should be reduced and that tax reductions are an appropriate means to that goal because taxation at even its present level is unfair to those who work hard for their income and who make a vibrant economy that benefits everyone possible. They do not think it unfair that the rich have received the lion's share of Bush's tax cuts. Liberals believe, on the contrary, that reducing the taxes paid by the rich, is deeply unfair. Thus, the main arguments on both sides are arguments of fairness[1019].

[1014] DWORKIN, Ronald. *Is Democracy Possible Here? Principles for a New Political Debate*. Princeton and Oxford: Princeton University Press, 2006, p. 107.

[1015] Ibid, p. 111-112. *Two great images have dominated theories of economic justice: the metaphor of an imaginary social contract that provides for redistribution from rich to poor and the metaphor of an insurance pool to which all members of the society contribute and from which the needy draw. Describing a redistributive social program as insurance suggests social solidarity; it suggests that the citizens of a political community have reaffirmed their collective identity by pooling the risks they face. It lends the programs an aura of individual prudence and responsibility, because responsible people buy insurance to protect themselves and their families against un-foreseen danger.*

[1016] Ibid, p. 104.

[1017] DWORKIN, Ronald. *Sovereign Virtue: The Theory and Practice of Equality.* Cambridge/MA: Harvard University Press, 2000, *passim*.

[1018] DWORKIN (2006). Op. Cit., p. 91.

[1019] Ibid, p. 92-93.

Dworkin, to deepen and to shape the disagreement, proposes a connection between tax levels and not just the fairness, but the legitimacy of the government. At a certain point, he argues that a lightly regulated free market causes the government to fail in redistributing wealth, which weakens the government's claim to the respect and allegiance of all its citizens. Thus, since he is concerned with the question of legitimacy as well as of fairness, he tries to construct a structure that allows us to ask not only what level and kind of taxation would be optimal but also what level would seem too low to defend as even a good-faith attempt to treat the poor with equal concern[1020].

Concerning MDR, agreeing with Dworkin that the key point is not to find "fairness" in the measure, I meanwhile point out the question of trust in the Administration, instead of "government legitimacy", as an answer to the argument that the measure would be contrary to the Constitution because it violates strict legality, when all its elements are not precisely described in the law. I understand that it is a vindication for a legal positivism that would give validity only to an instrument that was specifically described in the law, not allowing scrutiny of its purpose, what is changeable and contextual. Therefore, the proposal is that the parameter of constitutional validity focuses not on the previous description, but on the ability to promote the ends that justified its introduction.

According to Backhaus[1021], the difficulty when studying the burden of taxation consists in its elusiveness. As citizens try to minimize the impact of the burden of taxation (and regulation), they invent ever-new forms of legal avoidance. Once this interaction is properly understood, the anticipation of such avoidance behavior can be the cornerstone of public policy itself. *"Surprises are the focus of much work in fiscal sociology, as we try to detect and predict the unanticipated consequences of regulation in taxation*"[1022]. Thus, time is an important element in determining the intended and unintended effects of taxation and regulation in the society.

However, even the best designed and drafted tax laws are not capable of anticipating every new product, service or business model and every taxpayer´s transaction and structure, particularly those of a risky nature or those that are otherwise undertaken for tax advantage purposes. The IMF/OECD registers "*the difficulties of the tax system in adapting to rapid changes in business models have been particularly apparent in the international tax arena, where the interaction between different systems adds an extra layer of complexity*"[1023]. It is in the international context that tax legislation not in line with the evolution of new business models has produced uncertainties and complains for both business and tax authorities. The OECD/IMF adds that "*against this background, lack of understanding of international business and lack of expertise in the tax administration on aspects of international taxation*" make the scenario more challenging.

The fact is that the current reality exposes the weaknesses of old tax systems, built based on principles established a hundred years ago, for instance the arm's length principle or principles

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[1020] Ibid, p. 106.
[1021] BACKHAUS (2005). Op. Cit., p. 535.
[1022] Ibid, p. 537.
[1023] IMF/OECD (2017). *Tax Certainty*. Report for the G20 Finance Ministers, March 2017, p.20 and 23. Available at: https://www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf. Accessed on: 31 Mar 2020.

governing the income taxation. Moreover, there are sets of rules enacted under the strong influence of economic interests and harmful competition, representing systems of law designated to benefit particular situations.

It was mentioned that the limits that allow for the use of indefinite concepts are met if the measure is justified by overriding reasons of public interest, if it *is intended to serve to realize tax equality,* and if it is limited to the intended objective and to the means necessary to achieve it. These limits were discussed in the previous topic, after the German study. What this topic intended to demonstrate, then, is that they are absolutely relative and could not be established in an abstract control of the constitutional rules, as the judicial action presented in Brazil intended[1024]. Only a specific case that showed a misuse of purpose or excess by the Public Administration, for reasons other than just the general provision that a tax planning should be disclosed. It cannot be abstracted from the purpose of the norm and from the achievement of the objectives of taxation, to conclude that the use of indefinite concepts would be limited by the achievement of equality, if the proper equality and fairness are relative, as I have tried to demonstrate here. Equality between whom and for whom?

Furthermore, regarding freedom, when applying or assessing an MDR, it cannot be understood that the system is preventing each individual from making his own choices, but that he must make them in a manner consistent with the objectives and purposes of taxation and be responsible, even within a liberal society that values economic and market liberalism, for its choices. In a cyclical application, this would be guaranteeing economic freedom, since freedom is also guaranteed by the creation of opportunities for choices to be made.

MDR, if applied as proposed in my analysis in Chapter III, allows an approximation between what people subject to tax rules consider them to be and how they follow them, and what these rules really are. In other words, MDR provides for an increase in the approximation between the norm set and the norm assumed by those whose conduct is disciplined by it. This would therefore be within the concept of proportional application, that is, the limitations that it imposes are overcome by the benefits that it can bring.

Regarding equality, the same requirement is present. It is essential that the content of the law is as close as possible to what the subjects disciplined by it consider it should be. Such correspondence is indispensable and necessary for the legal system to be considered fair, and to the extent of its development, be endowed with greater stability and effectiveness.

MDR provides this, by making it possible to verify how, effectively, taxpayers are applying the abstract rule. By knowing tax planning developed for specific cases, it is possible to adjust the rule so that it brings the abstract general command closer to the concrete particular application. It is a fact that those who benefit individually from the general abstract rule, because they have found a way to reduce their tax burden, according to what it establishes, or because they find themselves in a special situation in relation to the others, will be dissatisfied. However, undoubtedly the

[1024] See Chapter IV, topic 4.1.2 – Discussing Fundamental rights and MDR: France, Germany and Brazil.

adjustment process generates a better standard, without having to resort to an extreme and, often, useless and ineffective, detailing.

4.3.2 MDR application and the tension between a theory of equality and the freedom to pay the minimum tax.

Before beginning a debate on the right to apply tax planning in order to pay the least tax possible, "*it is necessary to ask the political ideology of those who are talking*", says Greco[1025]. According to him, supporters of classical liberal ideology will, almost certainly, defend the taxpayer's conception of a broad - if not unlimited - freedom[1026]. On the other hand, if the ideology is eminently social, they will certainly argue that tax planning is always unacceptable behavior because it frustrates the achievement of the ability to pay principle, breaks equality and harms social solidarity, that is why the interpretation of the tax rule should give prominence to the business's economic substance and not to its legal dimension.

This work, however, has a technical-scientific nature and tries to derive a practical result from the analysis, keeping at a maximum possible distance, any political or economic ideology.

4.3.2.1 Applying Avila's theory.

The duty to treat taxpayers as equals stems from the duty to treat each one with respect to the exercise, socially legitimate, of their autonomy. Each individual, based on the fundamental rights of dignity and freedom, has the prerogative to develop autonomously as a person. This autonomy begins after the dignity and freedom of others are respected. On the one hand, this means, for example, that the taxpayer cannot have differentiated commercial practices disregarded and unjustifiably restricted, by the application of a general rule. To treat as equals means to rule without annihilating or excessively restricting the autonomous exercise of his freedom, with respect for others freedom. In other words, the freedom of one cannot restrict the freedom of others, as is the case of someone who systematically, unjustified and substantially fails to fulfill his tax obligations. Ultimately, being treated as "equal" means that you can validly exercise your autonomy without preventing others from doing so as well[1027].

Returning to those issues that intrigued Rawls, when applying his principles of justice, namely "*everyone's advantage*" and "*open to all*", the questions are: does a tax advantage for someone mean a disadvantage to others? If the 'ideal' tax system is designed in order to preserve the social welfare, when someone is achieving a tax advantage, does it mean that the society is

[1025] GRECO, Marco Aurélio. *Planejamento Tributário*. 3 ed. São Paulo: Dialética, 2011. p. 22.
[1026] See advances in this conceptualization in BECK, Ulrich and BECK-GERNSHEIM, Elisabeth. *Individualization: Institutionalized Individualism and Its Social and Political Consequences*, v. 13, University of Michigan: SAGE Publications, 2002.
[1027] AVILA, Humberto. *Teoria Geral da Igualdade Tributária*. 3 ed., São Paulo: Malheiros Editores, 2015, p. 108.

suffering a disadvantage? What does "advantage" mean if I think collectively? Another interesting point is whether all taxpayers are in a position to enjoy the freedom to organize their business in order to achieve a tax advantage or only some of them, who are at the same position to pay the statutory tax, can apply tax planning in order to achieve a tax advantage reducing that burden. What is the meaning of "*freedom to achieve a tax advantage*" within the theory of justice as fairness?

There is an apparent conflict between fair taxation and tax equality, which refers to a doubt between individualization and standardization. If fair application of the tax law would give rise to a norm that predicted each particular situation, equality demands a standardized application. If fair application calls for a standardized application, in order to reduce or suppress special or privileged treatments, equality indicates that '*the differences*' must be treated differently by the tax administration.

Ávila[1028] applies this reasoning to tax planning, when the taxpayer, analyzing a general rule, practices or intends to practice a particular, a '*different*', transaction, so as not to be reached by that standard or, if he is reached, that it be done as smoothly as possible. Thus, the taxpayer seeks to block the individualized performance of the tax administration, claiming that the general rule does not apply, individually, to his case. On the other hand, the tax administration can either change the rule, so that it specifically applies to that case, keeping that planning from achieving its goals, or understand that the rule, being general, requires only a particular analysis of that planning for its application.

In short, tax planning creates inequalities not sought by the legislator. If these inequalities were intended, they would be expressed in the law, for example, granting exemptions or benefits. In the case of international tax planning, domestic law may intend to grant the advantage to attract capital, in which case inequality would be verified with taxpayers operating in other countries. Knowing this law would lead to the search for standardization or harmonization, in order to correct inequality.

In order to react to individual exploitations of general rules, the legislator and the tax administration try to create laws, norms and regulations as specific and detailed as possible, in an attempt to make taxation fairer, by looking at each case individually. The undesired effect, however, is that the legislation becomes more extensive and complex. Ávila[1029] explains that the rule becomes unfair because it takes into account the particularities of each case and each taxpayer, with the intention of treating '*each one*' differently, which, at the same time, creates an enormous difficulty in applying the rule '*to all*'. So, that taxpayer who claimed the legitimacy of his tax planning based on the particularity of his case, which should not be subject to a generalized or standardized rule, because it is '*different*', demands "*a tax legislation that is above to these particularities*", simpler and, consequently, based on a general fairness.

[1028] Ibid, p. 21.
[1029] Ibid, p. 22-23.

The question is whether the administration and the legislator knew one by one the planning and the rules on which they are based, would more or less specifications in the law be needed? The concern with the individual use of gaps and mismatches of general norms, which promotes an unfairness based on the inequality or on the particularity of each case, if these cases were individually known, would that lead to a greater or lesser need for particular treatments, and consequently complexity, in the law, which must be general?

The answer, in my view, is that the specifications could be made only for concrete cases, really existing, in the search for equality, without the need to abstractly '*predict*' what could happen and try to close gaps or abstractly describe situations that would never be verified concretely. The law would be simpler and less extensive, even though it would have to undergo (several) modifications even after its publication. However, these situations would experience an adjustment over time, until they reached (almost) perfection.

Another question is whether a tax rule should always be neutral or if true equality would only be achieved by non-neutral rules, that is, rules that would ultimately have an effect in the sense of treating differently different people? Thus, as was mentioned above "*Groves concludes that taxes should be equitable and they should deviate from neutrality only for an adequate public purpose*"[1030]. The next step is, therefore, to define what is this public purpose or what is its measure?

In conclusion, here it is possible to point out a relationship between tax fairness, equality and neutrality. It seems that fairness is only achieved by treating the different people unequally, but the rule must be neutral, as an expression of equity, justice and certainty. These characteristics, which in principle aim at the individual expression of the norm, that is, it would be even fairer as it could be applied individually to reach each individual in a precise and fairer manner, can be used as a justification for not being applied to all if the public, or collective, interest overrides personal interest. Ávila[1031] adds that to be neutral is to not influence in an unjustified, arbitrary or excessive way in the taxpayers' economic activities, but that would never mean, "*not to exert any influence*".

MDR, as suggested in the question and answer launched above can be applied as an instrument in this process and its application is not incompatible because the State could not limit the freedom for tax planning; however, its functioning must be governed by trust and predictability between taxpayers and tax administration.

4.3.2.2 Applying Greco´s theory.

Accordingly, Greco[1032], when analyzing the debate on the limits of tax planning in Brazilian tax law, pointed out that this came through three phases: (i) absolute freedom, except for simulation in transactions; (ii) freedom, except for pathologies such as abuse of law, fraud in the law and other

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[1030] GROVES (1948). Op. Cit., p. 18.
[1031] AVILA (2015). Op. Cit., p. 102.
[1032] GRECO (2011). Op. Cit., *Passim*.

similar figures; and (iii) freedom according to the ability to pay. Although the first reading gives the impression that "*phases*" indicate a period, a place in time, Greco has already clarified that his classification is not chronological, but rather theoretical[1033]. Therefore, it is not an evolution in the timeline, but different points of view, which can exist concomitantly and allows for mid-term positions or combination.

In "*absolute freedom, except for simulation*", the first consequence is that it leads to an idea of legality taken to the last degree, hence the term *strict legality*. Another consequence of this theory is the perception that there would be a practically absolute right to self-organization for the taxpayer. According to the Author, "*if the Tax Authorities can only demand taxes through rigid definitions and strict legality, then everything that is not submitted to them will be an area not covered by the tax law, therefore a gap. Thus, when the taxpayer behaves within a gap area, he can act calmly, because the Tax Authorities cannot object*"[1034].

This theory, in its narrow view, indicates that the legislator should identify and regulate each factual situation found in reality, which should be considered abusive tax planning. Thus, the legislator must create laws regulating each act or transaction which promote tax consequences not predicted and not desired by the rule of law[1035]. The result of this, as this work has already indicated, are very extensive and complex laws, which are hard to comply with, by the tax community, and hard to enforce, by the tax administration.

However, Greco expands his thinking towards a broad perspective, explaining that the principle of legality does not only require conformity with a law in particular, but conformity with the legal system, in general[1036]. Rocha says that it is what Greco calls "*Legality-Emancipation*", to represent a substantive legality, justified by the aims pursued, which must be aligned not only with the constitutionally envisaged form, but also with the constitutional values and purposes[1037]. Finally, Greco proposes a functional legality, based on the purposes of the law. A legality of ends and not of means, combined with a functional role.

When analyzing this theory, Rocha raises questions and presents his answers. He asks himself whether Greco has a more flexible view of the principle of legality? And he says: yes. Then, he asks: is this more flexible view related to the limits of tax planning? And he says: no, because the limits of tax planning are found in the facts, not in the hypothetical description of the taxable event, in the law[1038].

Considering this so-called '*first phase'* and its conceptual consequences, my position is that the MDR application should follow, and needs to follow, this "*more flexible view on the principle of legality*". However, as I have argued several times, MDR does not need to be limited, or defined,

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[1033] ROCHA, Sérgio André. *Planejamento Tributário na Obra de Marco Aurélio Greco*. Rio de Janeiro: Editora Lumen Juris, 2019, p. 46.
[1034] GRECO (2011). Op. Cit., p. 138.
[1035] ROCHA (2019). Op. Cit., p. 56.
[1036] Ibid, p. 60.
[1037] GRECO (2011). Op. Cit., p. 150.
[1038] ROCHA (2019). Op. Cit., p. 74.

by the same theoretical efforts that are made to classify and define “abusive” or “aggressive” or “lawful” tax planning, etc. Because MDR is a means of knowing a planning that contains characteristics that potentially indicate abuses, and not an end to classify a taxable transaction and demand taxes.

That is why in the ‘*next phase*’, “*freedom, except for pathologies*”, this work only punctuates that the idea is that the interpretation and application of the legal order supposes the conjugation and compatibility between the values proper to the Liberal State, such as negative freedom, formal legality and protection of property; with the values inherent to the Social State, such as equality, positive freedom and solidarity, and this legal environment requires a certain standard of behavior from the taxpayer, a certain type of morality. Tax planning, says Greco, must be analyzed “*not only from the perspective of permissible legal forms, but also from the perspective of its concrete use, its functioning and the results that it generates in the light of the basic values of equality, social solidarity and justice*” [1039].

Greco, then, develops his theory of “abuse of rights” and justifies the possibility of disregarding transactions performed with abuse of rights in principle of solidarity, which is one of the fundaments of the State, and in the ability to pay. He also bases his position on the principle of equality, arguing that if “*the law qualified a certain manifestation of ability to pay as a presumption of the imposition of a tax, there will only be tax equality if all those who are in the same condition have to bear the same tax burden*"[1040]. Therefore, there is no longer a predominance of freedom and there is a balance between it and the value of social solidarity. In other words, it is no longer a freedom “*except for...*”, but a freedom “*with...*"[1041].

In “*freedom according to the ability to pay*”, the core is that “*there are situations in which, even if all acts are legitimate, there is no pathology, the result of the legal transaction or business will be contrary to the purpose of the tax law*"[1042]. Greco says “*even if the acts practiced by the taxpayer are lawful, do not suffer from any pathology; even if they are absolutely correct in all their aspects (lawfulness, validity), the taxpayer cannot act in any way he wishes, as his action must be seen from the perspective of the ability to pay”* [1043].

Part of the doctrine criticizes his thesis arguing that it would be ineffective every tax planning that, although without any pathology (abuse, fraud, dissimulation, etc...), has as sole purpose to achieve a tax advantage, because it violates the ability to pay principle, in its positive bias. In other words, the lack of an economic or commercial purpose, other than an exclusive tax advantage, would make the tax planning ineffective for tax purposes. Much criticism was based on

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[1039] Ibid, p. 75.
[1040] GRECO (2011). Op. Cit., p. 200-202 and 210.
[1041] GRECO, Marco Aurélio. *Planejamento Tributário Revisitado*. In: OLIVEIRA, Francisco Marconi de. et. al. (Coords.). *Estudos Tributários do II Seminário CARF.* Brasília: CNI, 2017, p. 28. See also GRECO, Marco Aurélio. *Reorganização Societária e Planejamento Tributário*. In: CASTRO, Rodrigo R. Monteiro de; ARAGÃO, Leandro Santos de. R*eorganização Societária*. São Paulo: Quartier Latin, 2005. p. 45.
[1042] ROCHA (2019). Op. Cit., p. 111.
[1043] GRECO (2011). Op. Cit., p. 319.

the assumption that, similarly, when used with *extrafiscal* effects[1044], a tax exploits exactly that idea, I mean, the tax rate is increased or decreased not to collect more or less, but to induce taxpayers' behavior in order to pay less, as a consequence of other behavior (import/export less, smoking less, pollute less, settle in more remote or poor regions of the territory, etc.).

This position is expressed, for instance, by Machado Segundo, who explains:

> *Even if it is considered that the practice of tax planning contradicts or diminishes the ability to pay, and even if one takes into account that legality is a 'ponderable' principle, it would not be proportional to give the interpreter the power to disregard the acts performed by the taxpayer, when any pathologies are absent. Such a disregard could even be adequate, in the sense that it would really give prestige to the ability to pay, however it would certainly be unnecessary: the enactment of a law foreseeing the fact as taxable would also be adequate and incomparably less burdensome, that would not hurt the requirement of tax legality.* [1045]

It is at this point that Greco defends himself by saying that in the case of *extrafiscality* there is "*desirable*" planning. He states that *"the exercise of this right [of self-organization] is dependent on an extrafiscal reason: economic, business, family, etc. that is the fundamental cause of the business and that justifies it*". At this point, moreover, he makes a distinction between his understanding for "non-tax reasons" and the business purpose test theory[1046].

The distinction Greco made is in line with the fact that, in his theory, the *extrafiscal* justification does not need to be of an economic background, and can be a '*de facto*' reason, if the transaction performed is lawful and legitimate, reasonably justified and practiced in accordance with its legal cause. Rocha[1047] observes, therefore, that the "*third phase*" requires the presence of a reasonable and congruent *extrafiscal* reason for the practice of the transaction or carrying out the legal transaction.

It is along the same lines that this work argues that MDR has its justification for demanding that a planning be revealed in the *'fact'* that it presents an "*undesirable*" result. Thus, I reaffirm that the classification of "aggressive", besides being unnecessary, is inefficient, to define arrangements that are in the focus of a disclosure regime.

Notwithstanding, Greco justifies that the ability to pay, due to its structuring function in the tax system, would be more important than legality and equality, which are only instruments for

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[1044] NOTE: The term "*extrafiscal*" ("*extrafiscality*") refers to a tax or to an ancillary obligation, which has as its main function or purpose to induce a positive or negative behavior. It is broadly used in Portuguese language, in order to distinguish it from a measure or tax, which has as its primary purpose to be a source of State revenue. I am using the term as posed in the original, in this meaning. See SCHOUERI, Luís Eduardo. Direito tributário. 9. ed. São Paulo: Saraiva Educação, 2019, p. 165. *"Há quem classifique os tributos a partir da extrafiscalidade, havendo os arrecadatórios e os regulatórios. A classificação merece crítica porque todos os tributos têm efeito arrecadatório e regulatório, em maior ou menor grau. Por isso mesmo, normas tributárias indutoras podem ser veiculadas em qualquer tributo".* (Emphasis added). See more in Chapter IV, topic 4.2 - Reasonableness, proportionality and MDR.

[1045] MACHADO SEGUNDO, Hugo de Brito. *Breves Notas Sobre o Planejamento Tributário*. In: PEIXOTO, Marcelo Magalhães; ANDRADE, José Maria Arruda de (Coords.). Planejamento Tributário. São Paulo: MP Editora, 2007. p. 370.

[1046] GRECO (2011). Op. Cit., p. 216.

[1047] ROCHA (2019). Op. Cit., p. 122.

the application of that, in order to build a free, fair and solidary society. An apparent conflict between the principles of ability to pay on the one hand and legality and private autonomy on the other hand is drawn from his thesis. However, principles of generality and universality in tax matter can be added to the ability to pay principle, all of them arising from the *meta* principle of legal certainty.

This is another pillar of traditional tax doctrine challenged by Greco's theories, that is the true obsession with safety and certainty, materialized in bivalent logic and *"the statement that an object has a certain essence is opposed to the statement that it does not have that same essence. Either the law to apply is law A or it is not; either the conduct is X or it is not X; or the conduct is lawful or unlawful, etc."* [1048] The Author, however, takes uncertainty as an essential part of the world, which has gained relevance in these times, as a result of the complexity, high-speed and instability of the social relations and their interactivity with worldwide environment. It is "post-modernity" or "the uncertainty era"[1049].

Interim conclusion.

The fact is that taxation, as an element to assure real freedom, through the financing of the State activity, has been lost, especially in the context of a "risk society", in which the (tax) advantages for some imply in disadvantages for the others[1050].

When applying MDR, one should not search for a dichotomy between licit and illicit tax planning, even because this search is irrelevant to the results envisaged by the regime. What should be in focus is that a given tax planning must be known and another not, based on what the tax system understands as "desirable" or "undesirable". Moreover, the fact that they do not need to be disclosed at a certain moment or circumstance does not mean they are acceptable or considered valid. Conversely, they are not being included in the disclosure obligation because there is no reasonableness and proportionality in demand to do so.

Within this logic, what needs to be assured to the taxpayers is a relation based on trust, in the sense that the disclosure will be applied to the ends predicted in the law and that the process of change in the legislation will occur in the way the law prescribes it. It is this kind of "certainty" the taxpayers need to have.

As a conclusion, neither legality, as a form of taxpayer protection, nor equality, as justice and fairness or in its ability to pay corollary, is the answer to investigate in MDR application. Whether "strict legality" does not find an answer nor to properly classify tax planning, much less

[1048] GRECO (2011). Op. Cit., p. 493.
[1049] GRECO, Marco Aurélio. *A Prova no Planejamento Tributário*. In: NEDER, Marcos Vinicius et. al. (Coords.). *A Prova no Processo Tributário*. São Paulo: Dialética, 2010. p. 191-192.
[1050] BECK, Ulrich. *Risk Society: Towards a New Modernity.* Translated by Mark Ritter. London, Newbury Park, New Delhi: SAGE Publications, 1992. *Passim*.

to limit the application of MDR. As for equality, there would be criticism that planning can be legitimate when its only or main purpose is to achieve the tax advantage.

That is why this work argues that MDR aims at *tax planning* that are *at risk* of producing results that were *not desired* by the legislator. The discussion, then, about the future disqualification or requalification of a planning and the balance between legality, freedom and equality, or ability to pay, does not need to be resolved in order to apply MDR. What we have to preserve, in short, in the institution of MDR, is the legal certainty. The answer that is necessary, in this work's viewpoint, is about legal certainty and trust.

However, legal certainty does not mean certainty that the law will not be changed, neither for the past nor for the future. Legal certainty means, as I am going to analyze in the next topic, that the administration will only act in accordance with the objective and purpose set in the law, which implements the measure. As Rocha points out, the relevance of this fact is in the recognition that legal certainty cannot be guaranteed by law, but only in the interpretation and application of the law.[1051]

4.4 The answer to Legal Certainty.

The previous topic 4.3 sought to develop some ideas of justice and fairness to see what would be a "fair" measure in terms of taxation and whether the search for justice could impose limitations for other widely accepted principles in tax matters. It is important to remember that *"justice"* is indeed a term susceptible to many meanings, and for this reason, it has come to be regarded as part of the essence of law. Wade[1052] states that *"in so far as it means 'equality', 'impartiality' or 'uniformity', it has more in common with the political idea of order than with the moral idea which is also implied in the word".* In his work, he dedicated himself to exploring the problem, which is also discussed here, of making legal certainty and legal justice conform, without abandoning the one for the other.

Moreover, if sub-topic 4.3.2 ended with the indication that tax planning would be guided, in its acceptance or not, by the principle of ability to pay, the caveats that have been made connect the limits of its application to the principle of legal certainty. Thus, this topic begins with Avila[1053] pointing out that the problematic involving legal certainty is existent because: (i) the provisions are not oriented to the user, since they fail to predict the information relevant to the behavior that he must adopt. (ii) the rules lack reliability (the citizen does not know for how long the rule will still be valid). (iii) the right is not predictable nor calculable, which results in a lack of reliability for the

[1051] ROCHA, Sergio André. *Da Lei à Decisão: A Segurança Jurídica Possível na Pós-Modernidade*. Rio de Janeiro: Lumen Juris, 2017. p. 77-80.

[1052] WADE, H. W. R. *The Concept of Legal Certainty a Preliminary Skirmish*. Modern Law Review, v. 4, n. 3, Jan. 1941, p. 187.

[1053] AVILA, Humberto. *Teoria da Segurança Jurídica*. 4. ed. São Paulo: Malheiros, 2016, p. 76-77.

future. Therefore, he concludes: "*the absence or the low intensity of these elements installs uncertainty, disrepute, indecision in the social environment, casting doubt on even traditional principles, such as legal certainty, ability to pay, equality and legality*".

Then, this topic is dedicated to studying the principle of legal certainty and the application of MDR in a practical and objective way, verifying the '*elements*' listed above, which would connect and affect not only legal certainty but the other principles cited (ability to pay, legality and equality). First, it is necessary to separate the principle of legal certainty in several perspectives, which will give the topic structure. As a result of this point, this work concludes that the question regarding MDR does not rely essentially on non-retroactivity, specifically in the temporal perspective, as it is sometimes answered when asked about the application of the measure[1054]. Second, it is necessary to emphasize that uncertainty exists both for the tax administration and for the taxpayer, in the application of the tax law, and, in the view of this work, it is necessary to evaluate the application of MDR, in its effectiveness, proportionality and reasonableness, considering both sides of the relationship.

Legal certainty is superficially associated with the ideal of predictability. In tax law, this conception corresponds directly or indirectly to the understanding that the principle of legality requires absolute determinacy of the essential elements of a tax obligation, also known as the principle of perfect typicality. It means that the taxpayer is able to recognize normative meaning in advance by interpreting the tax rule, and the lawmaker´s duty is to materialize it comprehensively in the hypothesis of tax incidence. However, analyzing MDR, the point is who are the addressed and the beneficiaries of the principle?

In fact, through the analysis conducted here in Chapter III and by the positions expressed by the institutions that submitted comments in the public discussion draft on BEPS Action 12[1055], it can be seen that the main point in relation to MDR and (un)certainty is not in the temporal dimension. Although there are problems, for example, the case reported in Poland[1056], where I believe that there was a fallout that could be questioned, since the scope of DAC6 was extended in a possible affront to non-retroactivity, the MDR proposal in discussion does not exactly breach the temporal dimension, linked to retroactivity. The main question, however, falls on the legitimate expectation, for the future. In this perspective, legal certainty is closer to clarity, in the meaning that those subject to the law must know their rights and obligations and to trust between those who have a duty to enforce the law and those who have a duty to comply with it. Therefore, there are two issues to take into consideration: first, publishing, which is not a problem to MDR, and second, the measure should be clear and its application and effects should be foreseeable.

Once the point regarding MDR is not retroactivity in the law, the next step is to define how much the tax advantage produced by tax planning is a "*legitimate expectation*" or not and for whom, that is, a subjective perspective. It should be noted that this work already acknowledges

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[1054] LUDOVICI, Paolo. *DAC 6: challenges and opportunities of the new EU tax disclosure rules*. Colloquium: Current Developments in European and International Tax Law. Institute for Austrian and International Tax Law, Vienna, 25 Nov. 2019.

[1055] See Chapter II, topic 2.5.2 – Comments received on Public Discussion draft. BEPS Action 12.

[1056] See Chapter III, topic 3.6.8 – The Polish Proposal.

that the tax planning arrangements in focus here are "licit", not referring to fraud or criminal acts. However, thinking about the tax system as a whole, and the objectives and purposes of taxation and social and collective interests, when would a tax advantage be legitimate?

In Brazil, the Supreme Court has ruled that[1057]:

> *The principle of legal certainty, in an objective perspective, prohibits retroactivity of the law, protecting vested rights, the perfect legal act and res judicata. In its subjective perspective, legal certainty protects legitimate expectations, seeking to preserve past facts from possible changes in legal interpretation, as well as safeguarding the legal effects of acts considered invalid for any reason. Ultimately, the principle of legitimate expectation is primarily intended to protect expectations legitimately created in individuals by state acts.*

Analyzing the CJEU role in the construction of the legal certainty principle within the European Union, Ahmetaj[1058] says that:

> *Although mentioned together, in substance the legal certainty and the legitimate expectation are two separate principles. While legal certainty require that individuals must be able to ascertain what their rights and obligations are, and is strongly based upon the temporal dimension and retroactivity, the legitimate expectation is rooted in the concept of the good faith meaning that an operator induced to take an action the administration should not withdraw from, so the operator suffers loss.*

According to the CJEU, legal certainty requires that "*there be no doubt about the law applicable at a given time in a given area and, consequently, as to the lawful or unlawful nature of certain acts or conduct*"[1059]. Ahmetaj´s article, quoted above, additionally provides that the most comprehensive definition of the legitimate expectation in the EU law was given by the CJEU in *Branco Case*[1060].

In short, Branco was a Portuguese national who developed a contract in training activities with the Portuguese authorities under the European Social Fund program for training young adults. Under the regulation ruling such fund, the national authorities were supposed to certify the trainers who should be awarded and the Commission would make the payment. Branco was certified by the Portuguese authorities to award the funding and submitted the request for the payment to the Commission. Later on, after an investigation procedure, the Portuguese authorities found that Branco had not fulfilled the duties foreseen in the contracts. Based on these findings, the Commission refused to make the final payment and asked Branco to reimburse the sums already paid. Branco appealed claiming among other things such a request that was contrary to

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[1057] BRAZIL (2014). Federal Supreme Court. *Extraordinary Appeal n. 608.482*. RE (Recurso Extraordinário) 608.482/RN. Rel. Min. Teori Zavaski. Judgment on 07/08/2014. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=7088200.

[1058] AHMETAJ, Hysni. *Legal Certainty and Legitimate Expectation in the EU Law*. Interdisplinary Journal of Research and Development 'Alexander Moisiu' University, Durrës, Albania, v. I, n.2, 2014, p. 20-25.

[1059] EUROPEAN UNION (1990). Court of Justice. *Case C-331/88 - The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others*. Judgment of the Court (Fifth Chamber) of 13 November 1990.

[1060] EUROPEAN UNION (2005). Court of Justice. *Case T-347/03 - Branco v Commission*. Judgment of the Court of First Instance (Fifth Chamber) of 30 June 2005.

the principle of the legitimate expectation due to the fact that his work had been certified by the Portuguese ministry once and he was entitled to such payment. Among other things, the Court of Justice observed:

> *Three conditions must be satisfied in order to claim entitlement of the protection of the legitimate expectation. First, precise, unconditional and consistent assurances originating from authorized and reliable sources must have been given to the person concerned by the community authorities. Secondly, those assurances must be such give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules.*[1061]

The Court found that Branco was not entitled to such protection due to failing to satisfy the first condition. It observed that it was for the Commission to decide whether to authorize or not the payment and not for the Portuguese ministry, and further, the Commission had given no assurances in the case.

Therefore, legal certainty has several approaches. The analysis follows the structure: (i) time aspect; (ii) material scope; (iii) personal scope; (iv) international and domestic perspective, and (v) static and dynamic certainty. The topic, moreover, analyzes legal certainty searching for a balance among principles, standards and rules, in order to achieve an efficient result when applying MDR, without denying the application of the principle.

4.4.1 Time aspect.

Notwithstanding I highlighted that retroactivity is not the main problem in the application of MDR, both the verification of justice and the realization of certainty in law must be done with a reference to time. "*Justice in law is a quality which cannot be explained except by reference to some further value, and that value is set by whatever general opinions happen to be current in the society of the moment*", says Wade[1062].

In 2016, the OECD and IMF prepared a report (hereinafter *2017 Report*) on legal certainty based on "*extensive global surveys*" conducted in more than 700 businesses and 25 predominantly G20 / OECD Tax Administrations. They state that while "*retroactivity*" is frequently cited as very harmful as it relates to uncertainty, it is critical to distinguish between retroactivity and "*tax stabilization"*, in such a way as changes in tax rules should only be implemented prospectively, in respect of the next tax period (for instance, for a change in tax rates) or of transactions taking place after the change is announced (for instance, where existing rules are modified), as opposed to applying to tax years before the announced change (true retroactivity)[1063].

[1061] Ibid, *Case T-347/03 Branco v Commission (2005)*, paragraph 102.
[1062] WADE (1941). Op. Cit., p. 185.
[1063] IMF/OECD (2017). *Tax Certainty*. Report for the G20 Finance Ministers, March 2017, p.17. Available at: https://www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf. Accessed on: 31 Mar 2020.

It is important to highlight that thinking about stability, temporary measures generate much more apprehension and uncertainty than stable measures that foresee changes. Tax changes could differ regarding the expectation of their reversal during time. In some cases, the uncertainty is such that firms know with certainty that a tax change will be followed in the near future by another change, with a certain probability. There are also tax changes - like a far-reaching reform - which are not expected to be reversed soon after their implementation[1064]. The problem then is not to change, but that the changes, their possibilities, their causes and their effects are clear, precise and certain and the consequences are predictable.

According to Ávila[1065], an examination of the temporal aspect can operate as a criterion for testing the extent to which the principle of legal certainty is effectively realized. Application of the law requires an analysis of the temporal dimension from a single perspective encompassing all three periods: certainty today, yesterday and tomorrow. Trust and reliability involve the past as well as the present and the future: the fact of trust situated in the past; the trust that lives in the present and the trust that is projected into the future.

Over time, a country can mitigate time consistency problems by establishing a reputation for credibility in tax matters. This requires minimizing unanticipated policy changes and refraining from opportunistic tax increases once the investor has incurred sunk costs[1066], for instance. Thus, it is possible to think in other two elements: consistency and credibility.

Concerning MDR, credibility is desirable in the meaning to really analyze all disclosed arrangements, providing answers and comments and changing what must be changed in a consistent way with the objectives of the measure. Thus, credibility leads to increasing trust. In this case, considering that the taxable events will only occur in the future and the tax law will not be "retroactive", in my view, what protects the taxpayer then is a certainty based on future expectations and the awareness of an (in)existence of risk when he implements the planning.

Thus, MDR and its hallmarks can and must be constantly updated; however, the inclusion of new characteristics that cause tax arrangements to be included in the disclosure obligation should cover only planning that are implemented or offered as of the date the legislation is modified. If the law is changed to include certain planning, an expectation that the tax administration will meet or seek to know who is using that kind of scheme emerges. Then, there is a "future expectation" that the substantive law or the regulation can be changed. In this case, the legitimate expectation is of risk to the planning and the taxpayer has the option of closing it, modifying it or maintaining it, if he is sure of its legitimacy. He can also make a consultation or wait for the tax administration to manifest itself.

[1064] ZANGARI, Ernesto; CAIUMI, Antonella and HEMMELGARN, Thomas. Tax Uncertainty: Economic Evidence and Policy Responses. European Commission. Taxation and Customs Union. Taxation Papers, Working paper n. 67, 2017, p. 18.

[1065] ÁVILA, Humberto. *Certainty in Law*. Switzerland: Springer International Publishing, 2016, p. 97-98.

[1066] IMF/OECD (2017). *Cit.* p. 59.

After the 2017 Report, the G20 has asked for an update, which was delivered in 2018[1067]. That update elaborates first on developments in the OECD and G20 countries and discusses what has happened since the 2017 Report. Analyzing a series of measures which have been taken in light of the previous report, an important conclusion in line with what this work indicates is that:

> *the toolkit on BEPS risk assessment will provide assistance to tax administrations in developing risk flags and risk assessment tools. It will discuss the merits of publishing certain risk flags to enable taxpayers to adjust their behavior in order to ensure they are compliant, and provide examples of self-assessment risk tools, which help to give compliant taxpayers greater certainty that they are unlikely to be audited on a particular issue if they accurately self-assess themselves as low-risk*.

As businesses inevitably operate with many uncertainties, their decisions do not need absolute certainty in tax matters but an environment where they are able to manage the risk associated with tax uncertainty[1068]. This is one of the reasons why I propose MDR "*on potentially risky tax planning*", focusing on "*risky arrangements*". Why are they risky? Because tax administration defines them based on those characteristics that "might" represent abuse, but that are not abuse, there is only "risk". On the taxpayer's side, when adopting a tax planning that involves those characteristics, he knows that there is a greater risk of being challenged by the tax administration, because if it involves those characteristics, the planning must be disclosed. He can then adopt a different strategy, which does not involve those characteristics and does not need to be disclosed. Thus, arguments that the MDR "criminalizes" the use of planning or that legality and freedom are being threatened have no substance[1069].

Therefore, when implementing a planning that is previously defined as risky by the tax administration, the taxpayer knows that the chance of being challenged or that in the future the gap he is exploring in the law been closed is greater, exactly because the tax administration has already warned him. He is free to implement it or not, taking the tax risk into consideration, as in any other part of his business. The important thing in terms of certainty is that hallmarks should be defined only for planning that have been implemented until their setting (of hallmarks). There can be no retroactive hallmarks, for instance implemented in 2021 saying that all planning that used certain definitions between 2018 and 2020 should be informed.

In this reasoning, Muchmore[1070] says that "*the manner in which legal uncertainty operates depends in part on the temporal relationship between the legal uncertainty and the time at which a primary actor is making a decision. Legal uncertainty can operate with respect to past, present, or future law*". The author goes on to state that uncertainty with respect to future law involves uncertainty about what changes in the law some future lawmaker will (or will not) make; however,

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[1067] IMF/OECD (2018). *OECD/IMF Report on Tax Certainty - 2018 Update* - IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors. Paris, July 2018, p. 31. Available at: *www.oecd.org/tax/tax-policy/g20-report-on-tax-certainty.htm).*

[1068] IMF/OECD (2017). Cit. p.11.

[1069] See Chapter IV, topic 4.1.2 – Discussing Fundamental rights and MDR - France, Germany and Brazil.

[1070] MUCHMORE, Adam I. *Uncertainty, Complexity, and Regulatory Design*. Faculty Works at Penn State Law e-Library, Houston Law Review, v. 53, n. 5, 2016, p. 1321. Available at: http://elibrary.law.psu.edu/fac_works. Accessed on: 01 Apr 2020.

this is a huge source of uncertainty that is always present when contemplating an action beyond the very near future. He punctuates that particularly salient examples involve tax law (where long-term investment decisions may involve tax advantages that could be repealed by a future lawmaker)[1071].

In other words, the problem of uncertainty is neither in MDR nor in the tax administration, if the laws are not made by them. The point is that laws that are wrong or circumstantially made can generate uncertainties regarding their stability over time, because they can be modified. By applying MDR, it can serve as an instrument to make the tax system more stable, by providing early information on the weaknesses of the law.

The conclusion is that it is not changes which cause uncertainty, but unpredictable changes. Furthermore, changes that do not serve to simplify and rationalize the tax system. The solution in the process of changing, in such a context, is proactive consultation announcing changes in advance and with timely issuance of guidance and information would ideally give enough lead-time to business to adapt to the new environment and, consequently, reduce uncertainty[1072].

A final point I want to discuss is related to transition periods and the amount of changes implemented. The 2017 Report[1073] states that a central purpose of the G20-OECD BEPS Project is to avoid the uncertainty arising from fragmented or unilateral action by achieving greater cooperation and coordination in international tax matters. The phase during which proposals to do so were developed is naturally one of some uncertainty. As with the implementation of any new legislation or regulation, MDR implementation inevitably involves a transition period.

However, this work´s expectation, as explained, is that the number of changes decrease and the time between them increases, in an efficient MDR, despite the fact that these factors will vary widely from country to country, depending on the technical capacity and legislation of each one. For instance, the OECD/IMF point out that "*the narrative analysis suggests there is considerable variation across advanced countries in both the frequency of corporate tax changes and the lag before implementation*".

Thus, intentions to "quickly" react in a disclosure regime are, in many cases, impractical because the usual legislative procedure takes considerable time and it can increase uncertainty. The conclusion is that in MDR efficiency is important to have the early information in a way tax administration can prepare itself to react, but it is not certain that the reaction will really be implemented in a short period of time (i) because of practical issues (ii) because this possibility can increase uncertainty and so is undesirable.

Actually, the OECD/IMF[1074] registers that there is systematic and wide cross-country variation in the length of implementation periods, which means the average number of days necessary to implement new tax measures announced in any particular year. For instance, on

[1071] Ibid, p. 1342.
[1072] IMF/OECD (2017). *Cit.,* p.16.
[1073] Ibid, p. 10.
[1074] IMF/OECD (2017). *Cit*., p. 39-40. Source: Data constructed by IMF staff.

average, the implementation period of measures announced in 1997 was 184 days. Implementation periods have increased in recent years, it is highest in Germany (379 days), followed by Canada and France (232 and 225 days, respectively). For the corporate income tax changes examined, most were implemented at least 150 days after announcement.

Further, the process for implementing the relevant changes is also critical to managing the level of uncertainty produced by the change. For example, taxpayers experience considerable uncertainty when proposed changes to the law are announced but are not legislated in a timely manner[1075]. That is why I stress the proposal in the sense that the taxpayer has (relative) "certainty", or a reasonable expectation, that the change as an answer to a disclosure will come, once the characteristics involved in such a tax scheme were previously defined by the tax administration as "risky" and, therefore, subject to disclosure and change.

4.4.2 Material Scope.

In terms of its material aspect[1076], legal certainty requires the realization of a state of affairs whose gradual promotion depends on certain types of behavior, such as publishing an act or setting transitional rules, which creates the necessary means to realize a state of legal certainty. These behaviors or conditions form the structure of the legal certainty principle. Legal certainty is, under this perspective, a norm that determines the realization of a state of affairs characterized by the individual´s capacity to plan actions strategically in a juridically informed and respected manner. In the case of legal certainty principle, the question is what types of behavior contribute to the promotion of the factual conditions that constitute the ideal states of knowability, reliability and calculability of the law.

Jurisprudential views of legal uncertainty range over a broad spectrum. At one extreme is Ronald Dworkin's[1077] view that legal uncertainty does not exist, as there is a single right answer even in hard cases. At the other extreme is Anthony D'Amato's[1078] view that legal certainty does not exist, as there is no such thing as an easy case with a single right answer.

Analyzing the role of uncertainty in regulatory design, Muchmore[1079] identifies three different components: legal uncertainty, factual uncertainty and uncertainty about the application of law to fact. Legal uncertainty is uncertainty about the content of the law. Factual uncertainty is uncertainty about facts in the world. According to him, "*It may well dwarf legal uncertainty in the calculations of primary actors*" and "*in sum, factual certainty is tied to three related concepts: time;*

[1075] Ibid.

[1076] ÁVILA (2016). Op. Cit., p. 112.

[1077] DWORKIN, Ronald. *Taking Rights Seriously*. Massachusetts: Harvard University Press, 1977, p. 563.

[1078] D'ÁMATO, Anthony. *Pragmatic Indeterminacy*. Northwestern University School of Law, Faculty Working Papers, Paper n. 78, 1990, p. 167-168.
Available at: http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/7885.

[1079] MUCHMORE (2016). Op. Cit., p. 1338.

scientific knowledge and human observational capacity and resources"[1080]. Law-fact uncertainty is uncertainty not about the content of the law itself or the facts that exist in the world. It is, instead, uncertainty about how a decision-maker—a judge, jury or agency—will apply law to fact. Even with the law and facts at a given constant, different decision-makers will reach different conclusions on how the law applies to some sets of facts.

This framework highlights the pervasiveness of factual uncertainty and law-fact uncertainty and viewed through this angle, legal uncertainty is less problematic than it is typically thought to be. Muchmore´s article suggests that there are fundamental limits to how much legal certainty can be achieved, that legal uncertainty is unavoidable in functioning regulatory systems, but that the amount of legal uncertainty is not constant and that all types of legal uncertainty are not equally good or bad. Furthermore, these limits apply both to legal systems generally and to specific areas within a legal system. It then considers the degree to which making a requirement either more rule-like or more complex can increase legal certainty[1081]. In some situations, uncertain legal requirements make it easier for predicting the legal consequences of their application than a more certain requirement.

This is one of the points this work discusses, I mean, whether making MDR more specific, defined and precise will increase the system´s "certainty". Moreover, it is necessary to think about the measure as a component of the whole tax system. Finally, which are the sources of uncertainty in this tax system and which are those in the whole legal system? In conclusion, there is a strong indication that the problem with MDR is not "legal uncertainty", but it refers to the "application of law to fact" and it is a result of the mistrust existent in the relationship between State and society or, precisely, between tax authorities and taxpayers.

There is another aspect to take into consideration, separating rules and standards. Overall, says Muchmore[1082], a legal requirement tends to be more certain to the extent it is expressed as a rule rather than a standard. Additionally, whether it is associated with a body of jurisprudence treating it as a rule; has in the recent past led to similar outcomes over a wide range of fact situations; and it is not closely associated with other rules that would lead to a different outcome.

Adding descriptions and specifications and consequently complexity to rules can increase legal certainty by specifying predetermined outcomes in a greater range of fact situations. For standards, the type of complexity that is likely to decrease their certainty is the presence of a large number of distinct factors that must be considered in the analysis. The more factors must be considered, the more often they will decrease legal certainty.

MDR is established from patterns of behavior or facts. Thus, schemes that involve the use of low-tax jurisdiction are a pattern that indicates abusive tax planning, but not a rule that establishes that those schemes are abusive or illicit. Contracts that contain confidentiality clauses for non-disclosure of a planning are a pattern that indicates that the planning is innovative and has

[1080] Ibid, p. 1347.
[1081] Ibid, p. 1327-1328.
[1082] Ibid, p. 1341.

unknown elements, but not a rule that establishes that this type of clause violates the tax law. Moreover, it is undeniable, as this work mentions several times, the connection of MDR with GAAR, in order to obtain a more effective result. The measures are different, but if they work together, they produce a better result. Thus, MDR needs to deal with a wide range of situations associated with another type of rule that must, by its nature, be general, defined only in terms of a result, focusing on undue tax advantage, regardless of the means that were used to achieve it.

For these reasons, one cannot desire that MDR have the same level of detail as other tax rules or to compare the definitions that are used in it with rules that, after the knowledge of the schemes, by the Administration, should be used or modified to establish tax liability. Moderate levels of legal uncertainty, placed appropriately, can perhaps contribute to overall stability and predictability.

Muchmore[1083] concludes that factual uncertainty and law-fact uncertainty play a major role in the decision-making of primary actors. Accordingly, even complete legal certainty cannot come close to eliminating the uncertainty faced by primary actors in their interactions with the law. Uncertainty about the content of future legal requirements is qualitatively different from uncertainty about the application of existing legal requirements.

In the OECD/IMF *2017 Report*[1084], the OECD conducted a business survey on tax certainty in late 2016. A large number of businesses participated in the exercise: 724 companies headquartered in 62 different countries/jurisdictions submitted a response. Additionally, in conjunction with the Forum on Tax Administration (FTA), the OECD also conducted a survey of FTA member tax administrations on tax certainty in January 2017. Tax administrations from 25 of the 47 FTA administrations responded. *2017 Report* first reviews theory and evidence on the nature and impact of tax uncertainty, and then identifies and discusses its main drivers. Then, narrative evidence bearing on key aspects of tax uncertainty are presented, before a range of practical measures and tools to enhance tax certainty are outlined. The report concludes with thoughts on taking forward this agenda.

In its *2017 Report*, the OECD says it "*explores the nature of tax uncertainty and the importance of providing greater tax certainty to taxpayers to support trade, investment and economic growth has become a shared priority of governments and businesses*"[1085]. Several general aspects of tax uncertainty involving tax law, administrative and legislative actions and taxpayers' behaviors are common to different areas of law and bring important information for the application of MDR. Specifically, the report deals with MDR very briefly, saying only:

> *Mandatory Disclosure Regimes can help to reduce the uncertainties, for both taxpayers and tax administrations, associated with aggressive tax planning. By requiring taxpayers to disclose aggressive tax schemes and by enabling tax authorities to quickly access information on such aggressive tax planning strategies (e.g. Action 12 of the BEPS Package), it is likely that some*

[1083] Ibid, p. 1367.
[1084] IMF/OECD (2017). *Cit.*, p. 25.
[1085] Ibid, p. 5.

taxpayers will become more averse to taking an aggressive stance. Committing to the spontaneous exchange between tax administrations of certain tax rulings can reduce potential harmful tax practices that often facilitate tax avoidance (e.g., Action 5 of the BEPS Package)[1086].

Notwithstanding, the interesting thing about the *2017 Report* is that it heard businesses and tax administrations and tried to cross the problems pointed out by one with the solutions and actions that the other party can take, including "cross" issues. Thus, it is stated that there was strong agreement between businesses and tax administrations on the most effective tools to help reduce tax uncertainty. Both assigned high importance to addressing perceived weaknesses in tax policy design and legislation. The highest scores were given to detailed guidance in tax regulations; announcement of changes to tax legislation in advance; reduced frequency of changes to tax legislation; bringing domestic tax legislation into line with international tax standards; and effective withholding tax relief and reclaim systems[1087].

Therefore, certainty, in the respondents' view, does not mean immutability and perfect stability, which would be unattainable in tax matters, because no tax law can specify tax outcomes without ambiguity in all possible circumstances, no administration can enforce the law without error and no tax policy can be defined irrespective of the circumstances. Therefore, changes both on the part of taxpayers, who change their business models, and on the part of tax administrations, which, as branches of the government, have people and policies modified, are expected and inevitable. However, what is the limit of these changes? How will they be done in a way that does not create uncertainty?

The *2017 Report* outlines the following practical tools to enhance tax certainty: Reducing complexity and improving the clarity; Increasing predictability and consistency by tax administrations. Therefore, this does not mean an immutable system, regarding to MDR, but a system that changes steadily, as announced and planned, from the information collected. The certainty that "risky" planning could be known and assessed by tax administration would lead to greater transparency among taxpayers when doing business. For example, the price of a transaction that is adjusted based on costs, including tax costs, would be presented transparently to the other party, since it involves the risk of future change. And the contractors would accept or not the risk that the price could change due to the tax cost, since this involves risk planning.

Having a methodical and consultative tax design process can help to improve the clarity of tax laws. This raises two related but distinct issues, both of which are critical to improving tax certainty: the transparency of the tax law and the ease of taxpayer compliance with the law.

The behavior of taxpayers in terms of aggressive tax planning and taking risky positions can also play a critical role in reducing tax uncertainties. As this work has supported, *2017 Report*[1088] confirms that a desire for greater certainty can, if not properly managed, lead to more detailed and complex laws that are ultimately less simple to apply and comply with. A desire for simplicity

[1086] Ibid, p. 52.
[1087] Ibid, p. 37.
[1088] Ibid, p. 45.

may lead to laws that are incomplete or vague, which would ultimately make the law harder to comply with and administer, and increase uncertainty. In finding the balance, detailed provisions in support of the core legal provisions should then be left to subsidiary legislation (such as regulations) or taxpayer guidelines, as appropriate. However, it is also necessary to be careful about discretionary powers, which cannot be inappropriately expanded by including key rules in regulations rather than the law itself.

The main issue, thus, is not the existence of vagueness in law; but where it is exactly. In the MDR under analysis here, the intention of the law, the consequences and the relations resulting from it seem clear. Thus, what is claimed is a formal uncertainty, whether or not a special situation fits into the situation provided for in the hallmark and if a particular person who participated in a tax planning process fits as an intermediary with a disclosure obligation. My opinion is that these uncertainties are raised only as a way of creating difficulties for the system to work. Tax Administration must maintain an open channel to answer this type of "doubt". The point is that the person, when submitting her question, is already, in a way, disclosing the arrangement. Two principles that are mentioned in the *2017 Report* and that I agree that should be applied here as a solution are transparency and effectiveness, to circumvent this alleged "uncertainty".

Therefore, the successful application of MDR ultimately depends on: (i) the design and drafting of the particular hallmarks, which is often less rules-based and therefore more discretionary in its application; and (ii) the capacity of the tax authority to appropriately apply MDR in a measured, even-handed and predictable way. Both aspects are critical to achieving greater tax certainty.

In the previous topic, when presenting some cases that were submitted to judicial or technical analysis, the issue regarding the claiming for "bright-line rules" and the refusal of "vague standards" was highlighted. The general assumption is that the first are framed in clear and determinate language, therefore producing certainty and avoiding arbitrariness, and the second, which employs indeterminate terms like *relevant non-tax reasons, unusual form, essential data to understand the business transaction*, or based on principles full of subjectivity such as reasonableness and fairness, should be rejected. Raban[1089], analyzing the issue under different points of view, first points out some advantages in both positions: "*It is generally believed that legal rules provide the virtues of certainty and predictability, while legal standards afford flexibility, accommodate equitable solutions, and allow for a more informed development of the law*". His arguments start with a series of quotations, defending the preference for using the Rule of Law, as clear and definite rules, in order to allow predictability, instead Standards that allows flexibility, for regulating human behavior, because the former are "more certain". I will mention Cass Sunstein[1090], who identified different characteristics in "untrammeled discretion", "rules," "rules with excuses," "presumptions," "factors," "standards," "guidelines," "principles," and "analogies"[1091]:

[1089] RABAN, Ofer. *The Fallacy of Legal Certainty: Why Vague Legal Standards May Be Better for Capitalism and Liberalism*. Boston University Public interest Law Journal, v. 19, n. 2, 2010, p. 175-192.
[1090] SUNSTEIN, Cass R. *Problems with Rules.* California Law Review, v. 84, n. 4, 1995, p. 956.
[1091] Ibid, p. 959–68.

> *A system committed to the rule of law is ... not committed to the unrealistic goal of making every decision according to judgments fully specified in advance. Nonetheless, ... frequently a lawmaker adopts rules because rules narrow or even eliminate the ... uncertainty faced by people attempting to follow ... the law. This step has enormous virtues in terms of promoting predictability and planning ...*

Then, Raban[1092] states the intention to "*refute the idea that bright-line rules are superior to vague standards in regard to certainty and predictability*". According to him, in fact, clear rules are bound to produce less certainty and predictability than vague standards in many areas of the law, and "*the fallacy"* in contrary *"consists in identifying people's ability to predict the consequences of their actions with lawyers' ability to predict the consequences of applying the law*". This is in line with what Ávila says about "predictability" for whom, which I will address in the next topic (personal scope).

In Max Weber´s[1093] view, "*An economy where private parties freely own, produce, exchange, and consume articles of value must provide private actors with clear and certain delimitations of their economic rights and duties; and these delimitations necessitate clear and determinate legal rules".* Friedrich Hayek[1094] also "*strongly condemned the use of vague legal standards like reasonableness or fairness"*.

"The claims that strictly construed clear and determinate legal rules are essential for capitalism and liberalism are intuitive and widespread", says Raban. He explains that, however, they are based on a confusion between the predictability of applying a legal rule and the predictability that a rule generates for those that it governs. Indeed, capitalism and liberalism require the latter, not the former: "*what we want is a certain and predictable regulative environment (a predictable economic sphere, a predictable social sphere), not merely clear and determinate rules generating certain and predictable outcomes*"[1095]. His text divides the analysis about legal certainty showing examples and considerations in three topics: "capitalism", "liberalism" - and their contractual relations among privates – and "legal interpretation", what is really interesting for this work.

As an example[1096], he quotes statutes that penalize "unfair competition", understood as commercial practices that deceive consumers, in California. In 1962, criminal defendants challenged the statute as unconstitutional because of its "uncertainty and vagueness", but a Californian Court rejected the challenge by maintaining that California simply could not draft a more determinate statute. In fact, any alternative statute would substantially reduce the certainty and predictability that facilitate economic transactions. Allowing consumer deception to go unpunished would make for a far more uncertain economic environment for sellers and consumers

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[1092] RABAN (2010). Op. Cit., p. 176-177.
[1093] WEBER, Max. *Economy and Society: An Outline of Interpretive Sociology*. Berkeley and Los Angeles: University of California Press, 1978, p. 847.
[1094] HAYEK, Friedrich A. *The Road to Selfdom with the Intellectuals and Socialism*. Combined edition first published in Great Britain, London: The Institute of Economic Affairs, 2005, p. 78.
[1095] RABAN (2010). Op. Cit., p. 179.
[1096] Ibid, p. 184-185.

alike. Therefore, the level of uncertainty was compared to the intended outcome of the measure and not to its literalness.

If one of MDR's intentions is to avoid unfair competition, providing precise legal definitions leads to an unnecessary extension of the law, complexity and inefficiency, which will be used to circumvent the effects of the rule, by those required to comply with it. In addition, of course, to various administrative and judicial disputes. Since it is not necessary to define what "fairness" would be in terms of the application of the measure, the solution is to seek "certainty" in the result and not in the premises. On the other hand, vagueness is preventing the need to make an extremely long law, which will foresee each case, and consequently so complex to comply with. Therefore, allowing, due to its precision and in the paradox that I have already explained, that it is not, exactly because of its details, effectively observed.

The point is that MDR cannot work, because the changing behaviors of the taxpayers in a dynamic social and economic environment and because of the constant need for adaptation, with precise definitions. It needs a certain dose of "vagueness". As this work demonstrates, vagueness is not incompatible with or contrary to certainty. Coexistence within the interpretation and application of the law is possible. The dose of vagueness existent in MDR must be controlled based on the objective application one tax administration is making of the regime and the taxpayer can (and must) argue it before the competent Courts, in order to have some excess corrected.

4.4.3 Personal scope.

The lawmaker must be aware of the significance of legal certainty, says Popelier[1097]. She stresses it is an important element of a citizen's personal freedom, as a clear legal framework that enables personal choices and action. Additionally, it is important for economic reasons, as legal certainty is one of the elements on which enterprises base their decision to invest in a certain country. Finally, it is important for public confidence in a legal system and thus for the system's legitimacy. The creation of objective certainty is the lawmaker's primary concern, as according to the paradox that "*objective uncertainty (accessibility) leads to justified subjective uncertainty (respect for legitimate expectations)*"[1098]. This is decisive for maintaining subjective certainty. Therefore, the lawmaker must, moreover, be well aware of the fact that accessibility of laws is not merely a question of legal terminology and publication in the official gazette.

In terms of personal aspect, a law may be obvious to an expert but not to an ordinary citizen[1099]. This seems especially true in the field of taxation where experts on both sides, tax administration and tax law professionals, debate the state's right to demand taxes and the duty of

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[1097] POPELIER, Patricia. *Five Paradoxes on Legal Certainty and the Lawmaker*. Legisprudence, v.2, n.1, 2008, p. 47-66. Published online: 01 May 2015. Available at: https://doi.org/10.1080/17521467.2008.11424673. Accessed on: 31 Mar 2020.

[1098] Ibid, p. 49. *The fourth paradox.*

[1099] ÁVILA (2016). Op. Cit., p. 90, quoting Frederico Arcos Ramirez, *L'aseguridad jurídica: una teoria formal.* Madrid: Dykinson, 2000, p. 260.

the citizen to pay them, at a level apparently above the ordinary understanding of that taxpayer. After demonstrating why tax law becomes so complex, not just because of technicality, but because it involves large doses of political and economic interest, could it also include professional interest?

In other words, should tax legislation, which is "naturally imperfect" since it is extensive and complex, guarantee the legitimate expectative (*lato sensu* right of certainty) for exploring these imperfections? However, the point is that not only the "ordinary" taxpayer is doing so, but essentially experts, whose expertise is exactly to find and explore imperfections in the law, as it is possible to see in the OECD 2008 Study[1100].

Ávila[1101] analyses who will benefit from legal certainty, presenting a citizen (legal certainty can take on a strictly individual dimension when its use aims to protect an individual´s private interest); the entire collectivity and the State. Moreover, he points out the perspective of who serves as a criterion for measuring legal certainty.

In legal certainty for a collective dimension, he identifies the powers of judicial review and constitutional control, for instance in "*diffuse control of constitutionality, when a general consequence is acknowledged at the appeal level*". In this thesis´ point of view, regarding MDR, this kind of control should not work to refuse the measure, under the justification of general threat to certainty, exactly because it is necessary to take into consideration the subjective aspect. On the other hand, MDR should presumably be admitted in general to protect the collective right to fair taxation and to fair competition in the economy.

Furthermore, Avila[1102] raises the question of whether the State can benefit from legal certainty. In his view, if legal certainty is taken as an objective principle, its elements (*knowability, reliability and calculability*) are indispensable to the State. However, in a subjective sense, "*as the reflexive application of the principle of legal certainty relative to some subject, there are serious normative obstacles to its consideration in favor of the State*". Specifically concerning to tax law, he understands that the principle becomes protective of citizens, because "*its foundations relating to taxation (legality, non-retroactivity, protection of trust, equality) are designed not to further but to limit State action*".

This topic will present a different point of view, demonstrating that uncertainty has origins from both the tax administration (as a branch of the State power) and taxpayers' behavior, and how MDR could be applicable in favor of both parties. Consequently, if the relationship between taxpayers and tax administration searching for fairness in taxation in a given contextual social environment increase in certainty, all of society benefits.

The IMF/OECD *2017 Report*[1103] registers that according to *the businesses*, the main sources of uncertainty are related to tax administration and include bureaucracy to comply with the tax

[1100] See Chapter II, topic 2.3.2 - The 2008 Study.
[1101] ÁVILA (2016). Op. Cit., p. 91.
[1102] Ibid, p. 92.
[1103] IMF/OECD (2017). *Cit.,* p. 31-33.

legislation, although this may also reflect concern over compliance costs, and inconsistent treatment. Unpredictable or inconsistent treatment by the tax authority was ranked as one of the two most important sources of tax uncertainty. According to respondents, the most effective tools or measures that could enhance certainty include: reducing the frequency of changes in the tax legislation and the bureaucracy to comply with it; providing detailed guidance in tax regulations; announcing changes in statutory tax system in advance; reducing the length and complexity of the tax legislation; keeping domestic legislation in line with international standards and offering timely consultation with taxpayers when changes are introduced. Moreover, "*increased transparency from tax administrations in relation to their risk assessment protocols*" was rated very important by close to half of respondents.

On the other hand, *tax administrations* identified taxpayer´s behavior as an important source of uncertainty, in particular as a result of aggressive tax planning and of lack of cooperation. A key area of agreement in both surveys was that legislative and tax policy design issues are a major source of tax uncertainty, mainly through complex and poorly drafted tax legislation and the frequency of legislative changes[1104].

It is possible to note that uncertainty is generated by some friction in the relationship between tax authorities and taxpayers, concerning to the lack of trust on the expected behavior from both sides. However, a stable and simple legislation is a key point. From the businesses survey, while uncertainty is perceived as coming from interaction with the tax administration, some solutions could be primarily found in measures in the tax law.

The solution, then, calls for clearer, consistent, simpler legislation and, above all, that allows the predictability of behavior of those who are obliged to comply with it, both the taxpayer and the Administration. Complex laws and inconsistent tax policies lead to a reduced ability to predict the behavior of the other party. Thus, beyond seeking clarity and simplicity in tax legislation, and consistency in implementation, it is necessary to adopt a variety of measures serving to limit the discretion not only of the administration but also of the taxpayers.

What I mean is that the more freedom the taxpayer has to adopt varied and unpredictable methods of reducing the tax burden, exploring complex and circumstantial legislation, the more the tax administration feels insecure and refrains from adopting a transparent and helpful behavior. Governments set the tax rules, but the outcome is determined by the hard-to-predict behavioral responses of businesses, including, perhaps, in identifying unanticipated opportunities for avoidance.

Thus, Governments may face a trade-off between maintaining flexibility in designing and implementing tax policy in order to achieve their economic and social policy objectives, providing full clarity and certainty to guide investors and taxpayers and restricting its own discretion and constraining the taxpayers' freedom to adopt a large set of tax schemes in order to obtain particular advantages.

[1104] Ibid, p. 6.

This "*restriction of freedom*" reduces the possibilities of seeking equality, not allowing each particular case to find or build a structure, within the law, to pay taxes according to its particular business and transactions. On the other hand, as explained, the degree of certainty increases.

Thus, taxpayers demand more freedom to organize their businesses in order to pay lower taxes, and base their arguments on the search for equality, in order to treat each case according to their particularities. The point is that at the same time they complain of uncertainty, because of the treatment they receive from tax administration. Nevertheless, what is shown here is that the more particular cases and freedom, the less certainty there can be in the taxation relationship, if we think about both sides. Replacing a system in which tax payments are uncertain by one in which they are certain, may then be mutually beneficial.

The *2017 Report* does not explore the possibility of using MDR as an instrument in this process. They present only the suggestion for improving the relationship between taxpayers and tax authority, consequently promoting tax certainty, with the co-operative compliance framework, as a "*voluntary relationship between a tax administration and business taxpayers based upon mutual increased transparency, cooperation and collaboration*". In their view, taxpayers can pro-actively notify the administration of any issues with a possible or significant tax risk and disclose all facts and circumstances to speed up the audit process and resolve uncertain positions quicker.

However, in this process, taxpayers' participation is voluntary. Therefore, they disclose only what, from their point of view, represents risk, searching for some advantages associated to the participation in the co-operative compliance regime, such as "*a shortened ruling procedure, reduced need for large reserves for tax risks in the financial statement, reduced compliance cost by reducing the need for revenue bodies to conduct frequent audits, reduced administrative fines if the taxpayer did not follow the solution as agreed with the tax administration*" [1105].

Zangari, Caiumi and Hemmelgarn[1106] state that the tax administration also gains from increased compliance and reduced auditing costs, as regards tax uncertainty. Since the idea behind the co-operative compliance regime is moving from an *ex-post* to an *ex-ante* assessment, this regime is expected to eliminate *de facto* the uncertainty regarding the tax treatment of specific transactions before the submission of the tax return.

This idea, however, is incomplete. Since the taxpayers' behavior is a source of uncertainty that reaches both sides, a mandatory regime with all the advantages cited here can put both sides in equal footing when including the risks, which produce concerns and, consequently, uncertainty, from the tax administration´s point of view. That is why this work defends that a co-operative compliance program is important, nevertheless, some mandatory rules are essential in the search for transparency and certainty.

[1105] IMF/OECD (2017). *Cit.,* p. 14.
[1106] ZANGARI; CAIUMI and HEMMELGARN (2017). Op. Cit., p. 25-26.

4.4.4 The spatial aspect. International and domestic perspective.

Observing the results of the IMF/OECD *2017 Report*, Zangari, Caiumi and Hemmelgarn register that the analysis is separated by certainty in domestic level and international level, which means that there are different expectations for each context. Moreover, it is important to bear in mind that companies in different sizes - small, medium and big - operate and have their main interests from an exclusively domestic context to a mainly international one. For instance, simplicity is an important factor of certainty to small companies: "d*esigning a simpler tax system, in terms of tax rules and tax compliance, may improve substantially tax certainty. This is especially the case for smaller businesses that have fewer resources to deal with increased tax uncertainty*". On the other hand, for big companies operating in an international environment, "*the best policy answer is boosting broadly the cooperation on tax matters, which means not only more exchange of information, but also common approaches in fighting aggressive tax planning, agreement on a fair distribution of the tax revenues for cross-border investment, as well as agreeing on a transparent and fair tax competition game*". [1107]

They point out, then, that "*at the domestic level*", simplification and rationalization might increase as a result of improving the drafting of the legislation, making and monitoring processes of compliance, increasing the predictability and consistency of tax administration´s actions, and, consequently, enhancing the relationship between taxpayers and tax authority[1108]. Therefore, the sources of and solutions for uncertainty at the domestic level involve rather the role of tax administration and less the role of macro tax policies.

In this scenario, MDR serves especially as a monitoring tool and to control the dissemination of marketable tax schemes for tax administration. The level of certainty and trust in the tax law system increases if it receives a large number of disclosures with repeated schemes. If tax administration responds quickly by closing specific gaps, considerable results shall be observed mainly in the reduction / elimination of tax boutiques[1109]. On the other hand, it is necessary to increase the quality and access to its services, so that the small taxpayer feels more confident and becomes more compliant, because for this type of taxpayer it will be important to verify that the disclosure observes the proportionality between the obligation to do and the advantages it promotes.

The "*macro level"* refers to the overall structure of the revenue system. At this macro level, tax uncertainty is related to overall taxation policy and the different tax rules applied internationally in cross-border situations. Note that the first source of tax uncertainty would exist even if the national tax systems were completely harmonized. While governments need to have enough scope and flexibility for adapting the tax system to achieve different policy objectives, such

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[1107] Ibid, p. 3.
[1108] Ibid, p. 29.
[1109] NOTE. According to DEVEREUX, Michael; FREEDMAN, Judith and VELLA, John, in practice, tax planning promoters are accountants, solicitors, banks and financial institutions and small firms of specialist promoters known as "*tax boutiques*". Review of DOTAS and the tax avoidance landscape (2012). Monograph. Oxford University Centre for Business Taxation. Deposited on 18 Mar 2013. *Paper 2 – The Disclosure of Tax Avoidance Schemes Regime*, p. 4. See Chapter III, topic 3.2.2 - A description of the persons required to disclose such arrangements.

as addressing redistributive issues or negative externalities, the process of change can increase uncertainty as a side effect[1110].

For these reasons, at the international context, the *2017 Report* concentrates the most significant proposals on "*cooperation and coordination on the development of coherent international standards and guidance*", on effective dispute resolution mechanisms and on a multilateral instrument which will allow for the amendment of treaties to be made rapidly and consistently, thereby enhancing certainty[1111]. The role of tax administration is quite limited in this scenario and proposals. It can act as a technical advisor but not as an implementer, which is in a political level.

The main purpose of BEPS Action 12 was to work at an international level, in cross-border situations, as described in this work[1112]. However, what one can see is that the application of MDR as a tool for building certainty at this level is much more complex and time-consuming than at the domestic level. That is why I sometimes stress that the results and observations that were made in the BEPS Action 12 Final Report[1113], based on the example and situations presented by the experience in the British DOTAS, will not be similarly reachable.

For big companies, operating at an international level and using tax schemes that simultaneously explore different tax law systems, MDR does not produce certainty in the foreground. A first step would be taken when, after the application of MDR, particular favorable domestic policies were revealed, making schemes like the one explored by Apple in Ireland not spend so much time out of the eyes of the international community[1114]. Thereafter, pressures on the international community make the scheme unfeasible and, as was the case mentioned, the avoided tax is collected. Certainty then comes from a process of standardization of international tax policies, which is very difficult to achieve due to the sovereignty and the particular needs of each country. Notwithstanding, sometimes, longer implementation periods are preferred, and Governments may wish to use the expectation of future changes to influence current behavior and a factor to bear in mind is that longer implementation periods increases taxpayers' certainty in the short and medium terms. Thus, the recommendation is that upon discovering an undesirable scheme, the tax administration announces that it is undesirable and creates the expectation that in the future changes will occur. Thus, the taxpayer can prepare and decide, himself, to stop using that scheme or, trusting in its legitimacy, to continue to use it. But the issue becomes more of a risk analysis than an uncertainty.

The IMF/OECD reports place several differences between developed and developing countries in terms of certainty/uncertainty. Thus, another point that needs to be addressed is about the promotion of certainty in different countries and the administrative capacity of each

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[1110] ZANGARI; CAIUMI and HEMMELGARN (2017). Op. Cit., p. 6.
[1111] IMF/OECD (2017). *Cit.,* p. 7.
[1112] See Chapter II, topic 2.5.3.1.1 - International Tax Schemes.
[1113] See Chapter II, topic 2.5.2 – The Final Report.
[1114] See Chapter III, topic 3.4 – The Irish system. *"The second reason was the broad repercussion on the case involving the US´s giant tech company Apple, Ireland and tax avoidance…"*

one. The *2017 Report* recognizes that developing countries can face particular challenges of capacity and in combining the need to maintain sustainable revenues to support budgetary expenses with ensuring the tax certainty necessary to create an attractive business environment[1115]. Therefore, this concern is yet another demonstration that uncertainty is not limited to the legal issue. This is their conclusion when they mention situations in African countries several times, where the uncertainty is caused by a reduced capacity of the tax administration to deal, for example, with complicated international planning. In an attempt to curb and in the difficulty of understanding them, there are excesses when considering the illegitimacy of this kind of schemes. MDR, with the early disclosure of the arrangements, can serve to increase the tax administration's understanding about them and then avoid or reduce the excesses in the counteraction.

4.4.5 Static and dynamic certainty.

Static dimension[1116] (certainty of law) concerns the problem of knowledge of law or the problem of communication in law and reveals what qualities it must have in order to be considered "certain" and hence serve as a guide to citizens in general and taxpayers in particular. In this sense, a law must be understandable and effective. The concept of '*understandable*' means as clarity and accessibility (publication). Effectiveness, as explained in this work´s Introduction, is an issue regarding the acceptance in practice of the norm by the people who must comply with it.

A model in which a State is ruled by laws that should be able to regulate every activity with the highest amount of precision and perfection springs from a nineteenth century concept, which describes the legal order as a transparent, predictable and static system, says Popelier[1117]. In this ideal, positive law is rational law, which contains the entire normative reality. In this model, legal certainty is a conservative principle, composed of transparency, predictability and stability and aimed at maintenance and accumulation of property and other "*vested rights*". Thus, there is a presumed rationality of the legislators, so that their Acts are assumed to be perfect, inviolable. Consequently, the principle of legal certainty, in this view, is focused on the execution and application of laws by the administration and the courts, based on methods of interpretation and the principle of legality.

Reading Hayek[1118], Popelier says that it was what "*Hayek has named taxis: a perfect order, which works according to a Cartesian rationality presupposing complete knowledge of all relevant facts*". The contemporary, complex and dynamic society, however, calls for a new, more dynamic

[1115] IMF/OECD (2017). *Cit.,* p. 5.
[1116] ÁVILA (2016). Op. Cit., p. 207.
[1117] POPELIER, Patricia. *Five Paradoxes on Legal Certainty and the Lawmaker*. Legisprudence, v.2, n.1, 2008, p. 47-66. Published online: 01 May 2015. Available at: https://doi.org/10.1080/17521467.2008.11424673.
[1118] HAYEK, Friedrich A. *Law, Legislation and Liberty. V.* I, *Rules and Order.* London: Routledge & Kegan Paul Ltd, 1973, p. 12 and 37.

concept of legal certainty and the transformation of the principle of legal certainty into a legal tool may lead to unrealistic expectations.

This work focuses on demonstrating that first, legal certainty cannot be placed as an instrument and second, the exigence for "legal certainty" in the sense of protecting an alleged economic freedom (freedom of enterprise) is mistaken. Therefore, it aims to deconstruct the arguments that place MDR as an "*instrument that compromises the instrument*" of legal certainty, because it is seen "*as a structural requirement law must have in order to serve as a guiding instrument*"[1119] if considering only its static dimension. Moreover, because such "*freedom*" specifically exploits those "uncertainties" caused by imperfections in the law, whether they are natural (involuntary) or due to circumstantial policies (voluntary).

Legal certainty, therefore, does not imply that persons have a right to absolute security. Instead, it helps people to deal with inevitable uncertainty. This indicates the relativity of the principle of legal certainty and the balance of interests, which are central in the process of judicial review to this principle. As a legal principle and not as legal rule, legal certainty does not contain definitive deontological propositions and is not intended to yield definitive answers, it only points to a direction and, ultimately, requires a weighing of interests. In this sense, the principle of legal certainty serves merely as an argument in legal reasoning, along with a plethora of other principles, rules, facts and values[1120].

That is why this work defends that it is not possible to abstractly control MDR's constitutionality under the argument of causing uncertainty, and a concrete framework can be drawn up from an analysis of specific facts. This framework provides for arguments to direct legal reasoning towards a certain outcome and to predict to a certain degree, whether the decision to push the limits of a law (in the tax system) is a legitimate option. The legitimacy of individual expectations depends a great deal on the existence of some objective certainty of the law. In other words, individual expectations are less protected in the absence of objective certainty.

However, whichever perspective (objective or subjective) is adopted, the static (or structural or systemic) dimension cannot be separated from the dynamic (or functional or operative) dimension of legal certainty. Dynamic dimension[1121] (certainty through the law), concerns the problem of action over time and prescribes which ideals must be assured if the law is to "guarantee" citizens´ rights and thus serve them as an instrument of protection. In this sense, the law must be reliable and calculable. Reliable in the sense of enabling citizens to know which changes can be made and which cannot, thus preventing frustration of their rights. This reliability exists only if citizens see that the effects guaranteed by law yesterday are assured today. Calculable, in the sense of enabling citizens to know how changes can be made and when they will be affected, so they are not surprised. Thus, legal certainty principle aims in its dynamic dimension to guarantee a respectful transition from the past to present and from the present to future, through knowledge of law. In this perspective, the main point is how the process of change will happen (transition) and not whether a change will take place or not.

[1119] ÁVILA (2016). Op. Cit., p. 207.
[1120] POPELIER (2015). Op. Cit., p. 53 and 61.
[1121] ÁVILA (2016), Op. Cit., p. 241.

This dynamic approach introduces the ideas of "risk" and "confidence" in the concept of legal certainty. According to Luhmann[1122], it is possible to understand law and risk in terms of dealing with time. Legal rules project certain expectations in the future. However, legal rules incorporate political decisions, which are taken without full knowledge of future events and consequences. Therefore, although legal rules diminish the risk of legal actions by anticipating future legal consequences, they are unable to fully eliminate the risk. What they do is orient collective decision making within a legal framework, which tries to deal with risk in a responsible way.

In Chapter II[1123], this work discusses the challenges posed by globalization and how it led to seeking new instruments in order to increase transparency and restore the power of the State in taxation. Here, this topic is about the principle of legal certainty and how it should or could be applied taking into account this new reality. Identifying the existence of transnational constitutional problems that States cannot face individually, Appignanesi[1124] says "*the factors of globalization challenge not only the constitutions but also their fundamental pillars*". Within a sociological approach, she starts from classical theories on pluralism and moves into funcionalism, by a systemic perspective. Based on Luhmann's theories, she concludes that the Constitution is a "*structural coupling*" between the legal system and the political system. At this point, she stresses that Luhmann emphasizes the seemingly paradoxical character of the coexistence of rigidity and adaptability, closure and openness.

The author[1125] goes on to clarify that Teubner applies the tools of Luhmann's general theory and tries to contribute to the sociology of law by combining the formal normative approach with that of reasoning (*cognition*). A more advanced model in Teubner's work is represented by the "policontextual" law, which is based on the relativization of the various criteria of rationality and its balance. Finally, Teubner arrived at the "*autopoetic*" model based on the paradox of the potentially open but fundamentally closed legal system. According to Teubner[1126], the more the legal system gains in operational closure and autonomy, the more it gains in openness toward social facts, political demands, social science theories and human needs.

Therefore, combining the static and dynamic perspectives of legal certainty with the need to have constitutional principles that cannot be interpreted and applied exclusively within a legal perspective, but that need to be relativized to other social realities, we arrive at a view of legal certainty built on the pillars of confidence (trust), coherence and consistency.

[1122] LUHMANN, Niklas. *Law as a Social System*. Northwestern University Law Review, v. 83, n. 1 and 2, 1989, p. 136.
[1123] See Chapter II, topic 2.1.1 – Influences of globalization and the new economic and business reality.
[1124] APPIGNANESI, Laura. *Il mercato globale del diritto costituzionale: dal diritto frammentato al diritto liquido*. Sociologia del Diritto, Issue 1, 2019, p. 7-21.
[1125] Ibid.
[1126] TEUBNER, Gunther. *Introduction to Autopoietic Law.* In Teubner, Gunther, Autopoietic Law: a New Approach to Law and Society, Berlin, New York: de Gruyter, v.1, 1987, p. 1-11.

Confidence, says Popellier[1127]:

> *Confidence, based on sufficient albeit incomplete information and on experiences in the past, thus orients human behavior. In terms of law, this means that legal rules do not hinder a person's autonomy but reduce options for human behavior and includes risk: the possibility that future events turn out differently in the end. Confidence implies the calculation of possible disappointment. For a system like the legal order what matters is that people are not disappointed on a regular basis so that public confidence in the system as such is undermined.*

Coherence, Ávila[1128] explains, from the static point of view, means the gradual relationship of support a given alternative receives from the legal order as a whole and, from the dynamic point of view, the requirement of uniform application of norms. The static dimension helps to reduce uncertainty as to which alternative interpretation is correct, indicating which of the alternatives compatible with the provision being interpreted is most strongly supported by the legal order, especially its fundamental principles. The dynamic dimension helps to reduce uncertainty as to which normative consequence is most likely to be imposed in the future, since the duty of uniform application allows citizens, knowing the normative consequences assigned to analogous acts or facts, to foresee the imposition of the same consequences to similar acts they may perform.

The duty of consistency has different approaches: constitutional, statutory and case law dimensions[1129]. In addition, within this work`s line of reasoning, there must be consistency both in the behavior of the tax administration and in the behavior of taxpayers, in order to improve the relationship and, as a result, promote certainty in tax law. Thus, it first needs non-contradiction in the systemic interpretation of constitutional principles, so that every principle can coexist and point in the same direction. Second, the legal rules cannot conflict with one another, because "*the application of these norms cannot contradict the solutions given previously ... Hence, the level of congruence and harmony among normative propositions is clearly part of the legal certainty principle*"[1130]. Third, consistency means the requirement of non-contradiction between norms in both stage of enactment by the legislative and stage of enforcement by the administrative branch[1131].

Regarding to MDR, what happens is that the regime does not prevent the taxpayer´s autonomy to apply tax planning; nevertheless, in fact, it reduces the possibilities to do so. It also includes or increases the risk of using tax planning. However, this increase in risk for the individual choice must represent a reduction in the risk of frustrating the taxation objectives, in the collective interest. In addition, by reducing the possibilities of exploiting loopholes and mismatches in the tax system, it makes it possible, both from the point of view of tax administration and from the collective point of view, to increase certainty. Therefore, "*the court must make a balance of*

[1127] POPELIER (2015). OP. Cit., p. 60.

[1128] ÁVILA (2016). Op. Cit., p. 235.

[1129] JOHNSON, Steve R. *An IRS Duty of Consistency: The Failure of Common Law Making and a Proposed Statutory Solution*. Florida State University College of Law, v. 77, 2010, p. 563.

[1130] CARVALHO, Paulo de Barros. *Segurança Jurídica e modulação dos efeitos*. Revista da Fundação Escola Superior de Direito Tributário, v. 1, 2008, p. 206.

[1131] VALEMBOIS, Anne-Laure. *La constitutionalisation de l'exigence de securite juridique en Droit Français*, Paris: LGDY, 2005, p. 198, *Apud* AVILA (2016), Op. Cit., p. 236.

interests. On one hand the interest of the individual in legal certainty, either as accessibility to laws or as respect of his legitimate expectations. On the other hand the public interest and the feasibility of government to keep its legislation accessible and reliable"[1132].

Interim conclusion

A legal principle that causes many concerns and discussions regarding the application of MDR is the principle of legal certainty. This work provides examples and considerations to demonstrate this. This topic addresses the principle of legal certainty from different perspectives, to investigate the issue, its truths and myths. It, moreover, analyzes legal certainty searching for a balance among principles, standards and rules, in order to achieve an efficient result when applying MDR, without denying the application of the principle.

The topic concludes, for instance, that the main question falls on the legitimate expectation, for the future, and not in the non-retroactivity issue, to the past. In this time perspective, legal certainty is closer to clarity, in the meaning that those subject to the law must know their rights and obligations and to trust between those who have a duty to enforce the law and those who have a duty to comply with it. A crucial point, therefore, is that the measure should be clear and its application and effects should be foreseeable. Furthermore, it is arguable how much the tax advantage produced by a tax planning is a "*legitimate expectation*" and for whom, that is, a subjective perspective. The conclusion is that changes do not cause uncertainty, but unpredictable changes do.

Moreover, there is a relativization to the environment analyzed, because tax uncertainty may derive from several sources, at the domestic and international level, and it is mainly related to weaknesses of the institutional framework of tax policy. At the domestic level, the lack of precision of the tax law, conflicting tax provisions and interpretations over time and frequent changes of the tax rules are the main sources of tax uncertainty. At the international level, the lack of tax coordination/cooperation between countries, as well as the globalization and the emergence of new business models, are the main reasons of increased tax uncertainty regarding the tax treatment of cross-border investment[1133].

MDR is established from patterns of behavior or facts. The behavior of taxpayers in terms of aggressive tax planning and taking risky positions can also play a critical role in reducing tax uncertainties. What I mean is that the more freedom the taxpayer has to adopt varied and unpredictable methods of reducing the tax burden, exploring complex and circumstantial legislation, the more the tax administration feels insecure and refrains from adopting a transparent and helpful behavior. Thus, MDR needs to deal with a wide range of situations associated with

[1132] POPELIER (2015). Cit., p. 60.
[1133] IMF/OECD (2017). Cit., p. 10

another type of rule (GAAR) that must, by its nature, be general, defined only in terms of a result, focusing on undue tax advantage, regardless of the means that were used to achieve it.

Three broad types of uncertainty affect regulation of conduct by the legal system: legal uncertainty; factual uncertainty and law-fact uncertainty. Examining the broad range of fact and law-fact uncertainty, however, it appears that the concern frequently focused on legal uncertainty may be overstated. Legal certainty is often desirable, but it is insufficient to give primary actors a solid background against which to plan[1134].

Thus, it is possible to think of other elements beyond the legal interpretation and legality. The solution, then, calls for clearer, consistent, simpler legislation and, above all, one that allows the predictability of behavior of those who are obliged to comply with it, both the taxpayer and the Administration, producing credibility and stability. Moreover, combining the static and dynamic perspectives of legal certainty with the need to have constitutional principles that cannot be interpreted and applied exclusively within a legal perspective, but that need to be relativized to other social sciences, we arrive at a view of legal certainty built on the pillars of confidence (trust), coherence and consistency.

The conclusion is that perfect legal certainty in law is unattainable. There are limits on how much certainty can be increased by moving from standards to rules, or from simple to complex legal requirements. After a given point is reached, further movement in these directions can decrease, rather than increase, legal certainty[1135]. Furthermore, attempts to reach or exceed these limits undermine the efficient use of the law, in a practical way, so that other objectives cannot be achieved and other principles cannot be valued, especially in matters of taxation. What should be sought, then, is a certainty / uncertainty that is reasonable and proportional, also guaranteeing the effective application of the tax law (practicality / effectiveness), the preservation of the collective interest and the objectives and purposes of taxation.

Analyzing MDR application and the complaints of a possible “uncertainty”, this work supports that the issue is closer to the principle of protection of trust[1136], which is distinguished from the principle of legal certainty by the following criteria: (i) it relates to a normative aspect of the legal order, focusing on a micro legal view. (ii) it protects the interest of a specific person and presupposes a concrete level of application. (iii) it serves as a means of protection of individual interests. (iv) it is used only to protect the interests of those who consider themselves harmed by the past exercise of legally oriented freedom. Therefore, there is no abstract or collective incompatibility between MDR and the principle of legal certainty.

[1134] MUCHMORE (2016). Op. Cit., p. 1351.
[1135] Ibid, p. 1352.
[1136] ÁVILA (2016). Op. Cit., p. 260.

4.5 Other principles to be considered. Future developments.

This topic only mentions, without intending to deepen or conclude the subject, other principles widely accepted and considered, in terms of constitutional law and public administration, relating their possible application and effects to MDR. Actually, this thesis foresees future questions and controversies regarding these themes. However, it was not possible to address them here and they remain as a suggestion or indication for future research work and developments. To discuss them properly, two more chapters would be needed. One concerning ethics and taxation, focusing on the issue involving the *intermediaries*, especially lawyers, practice in the tax planning market and the relationships between them, between them and other professionals, and between all these intermediaries and their clients, in a scenario in which MDR is in force. The other related to Public Administration and MDR, focusing on problems and solutions of an eminently practical order in the tax administration's work.

Regarding the DAC6[1137] and the European framework, Čičin-Šain[1138] pointed out, among others, two "*controversial points*" with respect for the impact MDR can have on the taxpayers' fundamental rights: (i) what is the interplay between the taxpayers' right to privacy and data protection and the reporting requirements? (ii) where is the limit between the obligation for transparency, on the one hand, and the respect of professional privileges, on the other hand (or, in a broader sense, how do these rules impact the taxpayers' right to legal advice and legal representation)?

The Author[1139] concluded that: *first*, if the new European transparency rules for reportable cross-border arrangements violate the right to privacy and data protection, it is important to note that the DAC6 offers internal mechanisms for protecting the data collected and exchanged. *Second,* it was shown that the mandatory disclosure rules clearly infringe on the taxpayers' right to legal advice, which is tightly linked to the professional privilege of the tax adviser, thus creating an unjustified difference in treatment between tax advice and other legal advice.

Therefore, these are the issues the next topics will deal with, remembering that my work is not limited to the EU-law.

4.5.1 Confidentiality, privacy and MDR.

In accordance with the 2008 Portuguese Decree-law[1140], for instance, the information provided within the disclosure regime does not constitute a breach of any confidentiality obligation, nor does it cause to anyone who provides it any kind of liability. *"The duty of secrecy to which the*

[1137] See Chapter III, topic 3.6 – The European Directive.
[1138] ČIČIN-ŠAIN (2019). Cit. p. 77.
[1139] Ibid. p. 117-118.
[1140] See Chapter III, topic 3.3.6 - The impact of the regime on compliance.

entities covered by the law are legally or contractually subject does not exempt them from the observation of the obligations provided by the disclosure rules".

After receiving the information provided under MDR, Portuguese tax authorities made the information public, through the *Website*, exposing their understanding that a certain tax scheme or planning, described in general and abstract terms, is considered abusive and it may be reclassified, corrected or trigger a legal procedure for the application of anti-abuse provisions. Without obstacle to these clauses, the information communicated is subject to the duty of tax confidentiality.

In this regard, it is important to stress the public administration's duty of confidentiality, concerning private data obtained during the legal exercise of its public role, especially the information received in the context of MDR. Nevertheless, it is also possible to predict some concerns involving taxpayers' privacy, when applying MDR, despite the fact that the recent developments related to bank secrecy around the world have demonstrated this is not a plausible justification to avoid providing the tax administration with the necessary information.

"The issue of tax secrecy and tax transparency plays a significant role not only in academics, but also in general practice. The collection and treatment of information by tax authorities has been a highly discussed issue in recent years, both in the ambit of national legal communities and supra-national organizations, such as the OECD and the EU". This statement introduces a book, which contains 37 analysis carried out by different countries on confidentiality arrangements in tax law, prepared for the Vienna University of Economics and Business, Conference on tax secrecy and transparency, in Rust, Austria, July, 2012. The Canadian National Report[1141] states that *"there seems to be little by way of historical account that explains the sensibility around taxpayer privacy, but scholars have suggested that confidentiality has always been seen as necessary, both as a matter of protecting personal rights as well as to ensure compliance with the tax laws".* Christians says, at a certain point of her report[1142], that it is the government's position that comprehensive information management and governance is "*key to reducing legal risks, cost and burden to the government*". However, this general statement is mitigated by the principle of proportionality, which, according to her, exists in some provinces and was recognized at the federal level in Canada. Therefore, the balance between transparency and secrecy points to the evaluation of other principles and, specially, proportionality.

Taxpayers should have the right to have their personal financial information accorded the greatest possible confidentiality within the taxation authority, states the IMF[1143]. The Organization suggests that this confidentiality should be breached only during criminal investigations, whether

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[1141] CHRISTIANS, Allison. *Tax Secrecy and Tax Transparency – The Relevance of Confidentiality in Tax Law Country Report: Canada,* 2012, p. 3. *in* Kristoffersson, Eleonor; Lang, Michael; Pistone, Pasquale; Schuch, Josef; Staringer, Claus, and Storck, Alfred (eds.), Tax Secrecy and Tax Transparency: The Relevance of Confidentiality in Tax Law, Part 1 and 2. Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien, 2013. Available at SSRN: https://ssrn.com/abstract=2148091. Accessed on 27 Apr 2020.

[1142] Ibid, p. 16-17.

[1143] IMF. International Monetary Fund. *Tax Law Design and Drafting*. Victor Thuronyi, ed., v. 1, chapter 4, 1996, p. 16.

criminal investigators outside the taxation authority must view the information; when so required during adjudication of a controversy, whether an adjudicator must view the information; and in certain other cases provided by law, for instance, disclosure of information pursuant to a treaty to the competent authority of a foreign government.

In my point of view, there is no general problem in providing information to tax administration, because all taxpayers are compelled to file annual returns and in doing so, disclose sensitive information. The disclosure system only focuses on other information, but in the same way, in the interest of taxation[1144]. Thus, the question regarding privacy, in MDR context, is diminished if the name/identification of the taxpayers is not disclosed by the Administration. As was stressed in this work[1145], tax planning strategies normally involve information about individuals and companies, which are not new in terms of economy or business. What is new, actually, is the way those elements have been arranged and the result that those arrangements are achieving, as a consequence of their application.

Moreover, it is important to reflect about the tax administration´s duty of transparency, which could demand the obligation to unveil tax planning used by third persons or other taxpayers, if a specific taxpayer requests it. The answer, *prima facie*, is negative and it is based on the concept of legitimate interest: *"the interest of a tax payer´s right to privacy, which concerns the right to confidentiality of personal information held by the tax administration, is generally recognized as outweighing the right to information and thus justifies confidentiality rules protecting privacy"*[1146].

Taxation is a State activity that has always been resisted by individuals, especially because of its interference with individual rights. The debate involves fundamental rights contained in the UN Declaration of Human Rights of 1948, and the fundamental obligation of graduating taxes according to the ability to pay principle.

However, it is necessary to understand and interpret the legal system as a whole, to know the boundaries of privacy and to find its limits. Revealing these borders is essential both for this right not to be transgressed and to prevent its exercise from becoming abusive, unduly encroaching on other rights, especially collective rights. Furthermore, it is necessary to discuss the social and individual cost of rights[1147].

Having an equal right to noninterference or freedom, however, is not the same as having an equal power to exercise that right. If the State needs some power of interference to promote equilibrium or equality, the right to exercise economic freedom, dispose of private property and preserve business privacy exists as long as social rights are not violated.

[1144] HAMBRE, Anna-Maria. *Tax Confidentiality – a comparative study and impact assessment of Global Interest*. Doctoral dissertation. Orebro University/Vienna University of Economics and Business. Orebro, 2015.

[1145] See Chapter II, topic 2.4.1.2 - Hallmarks. Key-characteristics.

[1146] Idem, p. 19.

[1147] HOLMES, Stephen and SUNSTEIN, Cass R. *The cost of rights. Why liberty depends on taxes*. New York, London: W. W. Norton & Company, 1999. *Passim.*

The fundamental element of the definition of tax is to be a revenue resulting from the *ius imperii*, or coercive, corollary of the authority of the State. Being compulsory distinguishes, then, taxes from the private payments. The relationship between the individual and the State that imposes taxation on him/her and, more precisely, the relation between that individual and the society to which he/she belongs and to which he/she finally contributes, in a more solidary and social view of taxation, are fundamental elements for justice and legitimacy of fiscal policies. Therefore, taxation cannot be assessed without an idea of the role of the State[1148].

The collection and inspection of tax (intervention in the private wealth) and the possibility that the State can use them for the implementation of public policies, as well as to using taxation to inhibit or encourage behavior (*extrafiscal character*), makes taxes the proper instrument to satisfy collective or *trans individual* rights, limited by the individual ones. However, if the absolute invocation of fundamental rights, such as privacy, jeopardizes the achievement of principles such as equality, moving away from social solidarity, the claim of economic interests promoted by multinational contexts on the domestic tax legislation requires a new view on the fundaments, which support taxation.

It is possible, nevertheless, to raise the question of trade secrets and confidentiality, in other words, whether tax planning is a commercial/intellectual property and the interest to keep it confidential. To protect their interests, "*accounting firms, insurance companies, investment banks and some law firms have asked clients and other advisers to sign confidentiality agreements*" because an innovative tax planning could be seen as "*something that amounts to a trade secret: confidential information that could give them a competitive advantage*". On the one hand, the law protects trade secrets even in the absence of such agreements. Peterson says that in the US, the Uniform Trade Secrets Act (UTSA), adopted in 34 States, defines "trade secret", providing the Act protects an idea which is able to produce an economic advantage to the proprietor by the virtue of its secrecy. Also requires "reasonable" efforts by the proprietor to protect the secret from public disclosure[1149]. On the other hand, MDR require "promoters and users" to reveal their strategies, which generally, promote tax advantage. Which is the formal status of the tax planning strategies and if they rise to the level of trade secrets, which law should/will protect them? Therefore, civil law and tax law can go in apparent conflict. Moreover, how to balance "economic advantage" and "tax advantage"? Finally, even where all the individual components of a trade secret (tax planning) are well known in the community, would the law still protect the particular combination of the elements?

Notwithstanding, in my view, if tax planning is regarded as an intellectual/commercial property, the tax liability of the intermediaries should be taken into consideration accordingly, and legal privileges should be reviewed[1150].

[1148] MURPHY, Liam and NAGEL, Thomas. *The Myth of Ownership: Taxes and Justice*. New York: Oxford University Press Inc., 2005. *Passim*.

[1149] PETERSON, Andrew Franklin. *Trade Secrets and Confidentiality: Attorney Ethics in the Silent World of Tax Planning*, Brigham Young University Journal of Public Law, v. 17, Issue 1, 2002, p. 164. Available at: https://digitalcommons.law.byu.edu/jpl/vol17/iss1/8. Accessed on: 31 May 2018.

[1150] NOTE. I am going to explain this idea in the next topics 4.5.2 and 5.1.2.

4.5.2 Ethics and MDR.

The DOTAS guidance defines as a *Promoter* a person who is to any extent responsible for the design of a scheme, who makes a firm approach to another person with the purpose of making a scheme available for implementation by that person or others, who makes a scheme available for implementation by others, or who organizes or manages the implementation of a scheme. The guidance included a new category of person for information power purposes, an '*introducer*', to describe persons who advertise notifiable schemes on behalf of a promoter but whose role does not extend to that of a promoter[1151].

Moreover, schemes promoted by *lawyers* are within the scope of the disclosure rules in the same way as for other promoters. However, where an adviser who would ordinarily be a promoter is prevented because of legal professional privilege from providing any of the information needed to make a full disclosure, that adviser has no obligation to make a disclosure. Unless there is another promoter who has an obligation to disclose the scheme, it must be disclosed by any person in the UK who enters into any transaction forming part of it. Nevertheless, the client of the lawyer has the option of waiving any right to legal privilege. If legal privilege is waived the lawyer is required to disclose.

Therefore, it is possible to foresee the problematic involving confidentiality, professional privileges and ethical issues between taxpayers and their tax advisors, largely defined as promoters or *intermediaries*, and such questions will certainly motivate ethical and moral discussions. Further studies in this field are necessary.

The problematic might involve, for instance, accounting firms and lawyers and make difficult to distinguish which part of a structured tax planning is a "legal advice" and which is an economic strategy producing tax consequences and/or tax advantages and vice-versa. The achievement of tax advantages, it important to remember, is one of the key characteristics making a scheme reportable under MDR.

MDR regimes has been introducing "*specific figures*" for establishing disclosure obligations, taking the tax planning market practice into consideration. Thus, it is possible to observe the "introducer", the "scheme designer" or the "scheme marketer", in DOTAS. Moreover, in the Portuguese 2008 regime, for instance, there was a different treatment for lawyers when acting as legal advisors in the course of judicial suits and those acting as tax planners.

The issue becomes even more complex considering the internationalization of MDR, after the BEPS. In the European context, for example, several countries adopting different domestic legislations conferring different approaches for lawyers and other professionals' legal privileges, such as accountants and accounting firms, must confer uniformity to the disclosure obligation. The point is that the personal aspect is distinct and the sanctions applied because of an eventual non-compliance are also under the decision of each Member-State.

[1151] See Chapter III, topic 3.2.2 – A description of the persons required to disclose such arrangements and topic 3.2.2.1 - Professional Privilege, scheme number and client lists.

In the past, Raby[1152] wrote "*the fundamental ethical rule in tax practice at the level of personal ethics is that the tax practitioner must allow the client to make the final decisions. The practitioner has no right to substitute his scale of values for that of the client. Beyond that, the practitioner must recognize a positive responsibility not to provide false or misleading information to the government*". He warns, however, that within the framework of the US legislation, at that time, it seemed clear that the practitioner was concerned with protecting and advancing the interests of his client and not that of the Internal Revenue Service. Nevertheless, the interest in having a legal advice in order to achieve a tax advantage can contrast with the duty to provide an independent audit. In case of conflict, the solution, in Raby´s opinion, would be to recommend that the client obtain either a new tax advisor or a new independent auditor.

Concerning the MDR proposal, much criticism is devoted to the use of confidentiality and premium or contingent-fee clauses as generic hallmarks, which are present in BEPS Action 12 - Final Report[1153]. In this scenario, the problematic can emerge from two different points. First, multidisciplinary practice has become increasingly acceptable and a range of ethical and legal problems has become increasingly common, involving different professions and their different levels of legal privileges. Moreover, different levels of participation and influence in a reportable arrangement, which can lead to some severe consequences, sometimes proportional to their activity, sometimes not. Second, the understanding that a practitioner acting ethically should follow not only the letter of the law, but also its spirit (underlying intention).

Regarding the strategies designed by accounting firms, for instance, they generally do not rely solely on the protection afforded by trade secrets law. Instead, they rely on confidentially agreements to bind their clients and client's attorneys to silence in order to protect the claimed proprietary interest. Moreover, confidentiality agreements are common, not only in the interest of the firm, but also in the interest of the client, because the use of the "secret" by other clients might cause him to lose the economic advantage, in the market. In a scenario where the economic advantages of the strategies have very short shelf lives, damage calculations may prove very speculative and uncertain[1154].

As Peterson[1155] explains, those confidentiality agreements potentially suffer from serious contract problems, lacking definitiveness and therefore enforceability. Furthermore, they put the attorney who signs them into very dangerous ethical territory, creating potential conflicts of interests between his clients, imposing unreasonable duties on potential clients and restricting the free flow of competent legal advice.

Moreover, the issue in the presence of MDR is mutability, as it was largely discussed in topic 4.3, connected to the obligations that justify those confidentiality agreements and the promise involving a "secret" tax-planning strategy that will "benefit" the client or yield "significant savings".

[1152] RABY, William L. *Ethics in Tax Practice*. American Accounting Association. The Accounting Review, v. 41, n. 4, Oct. 1966, p. 714-720.
[1153] See Chapter II, topic 2.5.3.1 – A description of arrangements that are required to be disclosed.
[1154] PETERSON (2002). Op. Cit., p. 163-190.
[1155] Ibid.

Even if an accounting firm succeeds in fashioning an enforceable confidentiality agreement, ethical rules may still prevent an attorney from binding himself to confidence before his other clients. Could an attorney sign one agreement if he presently represents other clients who could benefit from the proposed strategy?

In case one of those clients waives the legal privilege, and the tax planning must be disclosed, how should the attorney proceed? Such a transaction may impermissibly create a conflict of interests between the client for whom the attorney signs the agreement and the attorney's other clients. Even if the attorney does not represent other clients, agreements such as this could restrict the attorney's ability to practice law.

Is it possible to assume that secret strategies promoted by accounting firms necessarily have sufficient worth that prevent an attorney from advising it to his other clients? Not only do future clients' interests weigh against the present clients' interests, but so do the general public's interest in the free-flow of competent legal advice.

Second, if we are talking about tax planning and avoidance, Frecknall-Hughes *et al*.[1156] state that:

> [...] *in terms of tax practitioners and their decision-making processes, in an ideal world, a practitioner acting ethically should follow not only the letter of the law, but also its spirit (underlying intention). Also in an ideal world, the letter of the law and its underlying spirit would be aligned with one another, but this is not always the case in reality. The intention, or spirit, of the law may be unclear in terms of what it is trying to do or to what or whom it applies*.

Therefore, the ethical analysis must focus on both ethical duties of the attorney to his clients and the attorney owes to "the system" as a whole. If the lawyer's conduct does constitute assistance within the meaning of that rule, then may the lawyer not ethically engage in that transaction?

The introduction of MDR and the need to frankly discuss the implications of implementing a tax planning, which must be disclosed, in my view, will increase the discussion about the lawyers' and other professionals' ethics creating unethical conflicts of interest between their current clients. Such conflicts arise because the attorney no longer has the ability to bring all his knowledge and ability to bear on the problems of the clients for whom he did not enter into a confidentiality agreement; by restricting his ability, not in legal meaning, but in the ethical field, to practice law and creating conflicts of interest with future clients (despite the fact that the regime (MDR) may play an important role in securing the public interests beyond future client's interest) and putting pressure in the relation between attorneys and accounting firms, when deciding whether to sign a confidentially agreement or keep secret about a tax planning.

[1156] FRECKNALL-HUGHES, J., MOIZER, P., DOYLE, E. *et al. An Examination of Ethical Influences on the Work of Tax Practitioners. Journal of Business Ethics, n.* 146, 2017, p. 729–745. Published online: 17 February 2016Available at: https://doi.org/10.1007. Accessed on 28 Apr 2020.

It means that all tax-planning clients and potential clients must always inquire of their attorney what his position is involving a tax planning and his other clients' benefits, which means third-party liability.

4.5.3 Practicality.

What constitutes simplicity and consistency in tax law, at least with regard to tax avoidance opportunities, will depend on the policies behind the specific type of tax involved. In theory, the more the obligations can be designed to treat taxpayers and circumstances alike, the more consistent the law will be, and treating taxpayers and circumstances as similarly as possible, the opportunity to avoid tax obligations would be reduced[1157]. Unfortunately, it can be very difficult for these general principles to work in practice as it has been demonstrated. The search for consistency, trying to treat each case and each taxpayer in a particular way, leads to a complex and extensive law, which only increases its imperfections and, consequently, the opportunities for avoidance. Therefore, it would generally be wise for the drafters of substantive tax laws to consult with tax administration experts to ensure practicality of the law, in order to achieve its effective results. While there may be no rules of thumb to decide when this will be the case, this should be the explicit goal of the drafters of substantive tax laws. Therefore, this suggestion involves the Legislative branch.

Concerning the Judiciary, in the previous topic 4.2, when dealing with reasonableness, this work discusses the connection of the law with the facts and with the assessment of the facts, so that one can make an interpretation of the standard within the criteria of reasonableness. Legal reasoning is practical in the sense that its natural conclusion is an action rather than a state of knowledge, says Detmold[1158]. He adds that this is taking "practical" in a strong sense and "*by this definition thought is practical whose natural conclusion is an action (or decision against action): its strongest contrast is with theoretical thought whose natural conclusion is knowledge*". His approach is interesting because of its structure and I believe that the same could be applied to MDR studies. It means how the practicality of judging connects necessarily to the practical assessment of the particular citizens concerned and as a result of this connection, the practicality of legal reasoning becomes the whole practicality of law in society, offering a theory of the practicality of law.

It is necessary, however, regarding to tax rule that proposes to offer instruments to the tax administration so that the objectives of the law are achieved, to advance further in this interpretation. In other words, there are two issues involving practicality: the first is connected with the interpretation of the law that takes the facts into account, to assess whether administrative acts are reasonable or not. The second is based on admitting the application of instruments that promote the effectiveness of the law. Therefore, there are two different uses of

[1157] IMF. International Monetary Fund. *Tax Law Design and Drafting*. Victor Thuronyi, ed., v. 1, chapter 4, 1996, p. 16.

[1158] DETMOLD, M. J. *Law as Practical Reason*. Cambridge Law Journal, v. 48, n.3, Nov. 1989, p. 436-471.

the concept of practicality: one to arrive at reasonableness and the other to arrive at effectiveness. If the topic 4.2 analyzed the first, this topic suggests that an analysis of MDR should also be made on the second.

It is important to keep in mind that a provision which does not offer the tax administration instruments to promote effectiveness has no practical meaning. The debate of principles over practice has regained dominance in recent years in discussions about whether the UK should have a general anti-avoidance (or anti-abuse) rule and this is reflected in the calls to eschew avoidance schemes[1159]. However, one cannot ignore practical matters. If individuals adopt the principle that they should pay tax, they also need to know how much to pay. On the other hand, if the State introduces a new tax, it also needs to make the statutory revenue concrete. So, idealism needs to be tempered by practicality.

Furthermore, whether on one hand principle of good governance[1160] requires tax authorities to conduct tax procedures in a way that not only maximizes the effectiveness of their action in the interest of the community, but also the consistency with the requirements of the Rule of Law, which means concretely that tax authorities also have to act impartially and in a way that maximizes the protection of the rights of the affected persons. On the other hand, it is not possible to disregard the need for effectiveness in order to achieve the goals of the Rule of Law according to ability to pay principle, reflecting the real facts in its economic reality.

Analyzing the ability to pay principle as a corollary of equality, Costa discussed the principle of "practicality" in tax law. She explains:

> *The practicality can be translated, in its legal sense, in the set of techniques that aim at making the proper execution of the legal system feasible. (...) The principle of tax practicality is an objective limit for the achievement of several values, and it can be presented with the following formulation: tax laws must be enforceable, propitiating the attainment of the purposes of public interest that they aim at - the proper fulfillment of their commands by the citizen, in a simple and efficient manner, and the proper collection of taxes. Consequently, the state acts for enforcement of such laws - administrative and jurisdictional - abiding by the dictates of practicality, in order not to frustrate the public purpose stamped in the law.*[1161]

The final part of the quotation is especially relevant in the sense that the administrative and jurisdictional acts of enforcement of the laws cannot frustrate the public purpose stamped on them. In this sense, it is understood that the objective of MDR is to give the tax administration an instrument, which is capable of individualizing behaviors, making it possible to identify the actual economic activities, their conformity with the purposes of the tax law and its results in relation to the ability to pay principle. This way, MDR is not an eminently legal instrument, but a practical tool, to connecting the theoretical and general approach of tax law to the individualized and factual world.

[1159] FRECKNALL-HUGHES (2014). Op. Cit., p. 98.

[1160] See Chapter III, topic 3.6.0.2.3 – Good Governance.

[1161] COSTA, Regina Helena. *Praticabilidade e Justiça Tributária*. São Paulo: Malheiros, 2007, p. 388-390.

It should be noted, as is appropriate, that the tax administration already has instruments that help it to provide "practicability" to the principle of the ability to pay, which consist of access to taxpayer confidential data. An example to be quoted is the access to the data included in the annual tax return, such as income, bank balances, assets, debts and medical and educational expenses. When working with private information of personal interest, the tax administration must safeguard the confidentiality of such data.

Conclusion to Chapter 4.

Due to the complexity, density and wide reach of constitutional norms, several interpretations are possible to make the constitutional text fit the needs of the society. This work does not see problems regarding to limitation or suppression of freedom to organize a business (freedom of enterprise) in a way to pay the minimum possible tax burden and MDR application, if considered constitutional principles. The right to pay less taxes is not absolute; it finds obstacle in the balancing of objectives and purposes of principles and norms. MDR can and should be used as a supporting instrument in this balance, in a practical and efficient way.

Regarding freedom, when applying or assessing MDR, it cannot be understood that the system is preventing each individual from making his own choices, but that he must make them in a manner consistent with the objectives and purposes of taxation and be responsible, even within a liberal society that values economic and market liberalism, for his choices. In a cyclical application, this would be guaranteeing economic freedom, since freedom is also guaranteed by the creation of opportunities for choices to be made.

The Chapter, moreover, analyzes legal certainty searching for a balance among principles, standards and rules, in order to achieve an efficient result when applying MDR, without denying the application of the principle. The analysis concludes, for instance, that the main question falls on the legitimate expectation, for the future, and not in the non-retroactivity issue, for the past. In this time perspective, legal certainty is closer to clarity, in the meaning that those subject to the law must know their rights and obligations, and to trust between those who have a duty to enforce the law and those who have a duty to comply with it. Analyzing MDR application and the complaints of a possible “uncertainty”, this work supports that the issue is closer to the principle of protection of trust, which is distinguished from the principle of legal certainty, and that there is no abstract or collective incompatibility between MDR and the principle of legal certainty.

A good function that cannot be constitutionally argued is if the MDR serves to correct the fortuitous errors the legislator committed when making the law, due to occasional policies or motivated by reasons that do not find basis in the constitutional principles of taxation. This can justify the measure whether fears about possible uncertainty are raised. That is, initial uncertainties will be used to build a more coherent, consistent and confident legislation.

MDR was presented as a “*extrafiscal*” tool, or a behavior-inducing instrument, which goes beyond the tax law and integrates the economic law and the fiscal sociology. Notwithstanding, the simple application of the instrument by the economic law or fiscal sociology has consequences on the claim to principles of legality and equality, which cannot be totally disregarded, taking into consideration their specific validity and application to control arbitrariness and abuses, when applying taxations measures (or means) to achieve economic or social ends.

While the rule that introduces MDR is not instituting a tax, but integrating tax law and it has the eminent and immediate purpose of achieving certain economic (for example, fair competition) or social (compliant behavior) results, it has a hybrid nature of being an “*ancillary*” and “*extrafiscal*” rule. When analyzing the reasonableness, proportionality and practicality of the measure, it is necessary to consider these natures.

There is a basic tension between the doctrine of Parliamentary sovereignty, which permits legislation to delegate very broad decision-making authority, and the rule of law, requiring that even governmental action must be done according to the enabling statute and other fundamental principles. What this Chapter demonstrates is that if taxation interferes with economic organization, social structure and political decisions, these circumstances also affect, commutatively, the way taxation should be conducted and the extent to which it should be accepted.

The liberty to freely organize their economic affairs and, in this way, seek to pay the lowest tax burden, must be balanced with the duty to pay taxes according to the ability to pay principle, promoting equality. If in certain historical moments liberty supplanted equality, in this *post* globalization era it is necessary to reverse the process. Instruments such as MDR are tools that improve practicality so that the tax administration can effectively reinforce the tax system. The possible implementation of MDR finds limits not in restricting freedom, nor in the constraint of privacy, but in the proportionality and reasonableness of the measure.

Reasonableness emerged and functions, then, as a shaper coupling to accommodate this tension. The evolution of the principle brought about standards of review of administrative acts by the Judiciary, which take into account different levels of discretion and how much they could and should be corrected. The proportionality test will effectuate a more intense and structured review, which a reasonableness test cannot offer, and it has been applied to assess administrative decisions.

Thus, it would be the case for constitutional courts to evaluate some parameters. For instance, it can be pointed out that MDR should not require information that the tax administration already has on the income statements. Nor should they require all the information that may eventually contain some form of undesirable tax planning from the administrative point of view, but should focus on those that are undesirable from the legal point of view, i.e., obtaining advantages that were not envisaged by the tax law. In addition, tax administration must be able to deal with and respond to the taxpayer about all the information provided, and it is not proportional to require information with which it cannot effectively cope.

This work suggests further studies related to Public Administration and MDR, focusing on problems and solutions of an eminently practical order in the tax administration's work (practicality) and concerned ethics and taxation, focusing on the issue involving the *intermediaries'*, especially lawyers, practice in the tax planning market and the relationships between them, between them and other professionals, and between all these intermediaries and their clients, in a scenario in which MDR is in force.

V. REQUIREMENTS FOR EFFICIENT MDR.

This Chapter has two objectives. *First* (suggestions), to discuss and to present two more aspects and theories, which this work believes are valuable to make MDR more efficient. (i) the *Slippery-Slope* theorem, defending that depending on trust and the minimum use of power is the best application for mandatory regime. (ii) the issue to non-self-incrimination and the adviser's liability regarding to MDR and its effects, defending that criminal liability and joint and several tax liability are not the optimal solutions, but non-compliance should result in administrative penalties, if considering promoters-administration's link, and civil liability, if considering promoters-taxpayers' (clients) link, as will be explained. *Second* (concluding remarks), to conclude the work, summarizing and reinforcing the points, which I believe should be taken into consideration to answer the research questions posed at the beginning and to achieve more efficient results when applying MDR.

5.1 Suggestions.

5.1.1 The Slippery-Slope theorem and MDR. Depending on trust and the minimum use of power.

Integrating economic-psychological research on tax compliance, Erich Kirchler´s research presents findings into a model based on two dimensions, originated from the interaction climate between tax authorities and taxpayers. These interdependent dimensions are defined by citizen´s trust in authorities (voluntary compliance) and the power of authorities to control taxpayers effectively (enforced compliance). The author says that "*depending on trust and the use of power, either voluntary compliance, enforced compliance or no compliance are likely to result*"[1162].

In the topic *motivation to comply*[1163], Kirchler says that it depends on subjective constructs of tax phenomena and collective sense-making of subjective tax knowledge, on myths and legends about taxation and tax behavior. Moreover, he stresses that tax laws are difficult to understand and are of little interest to the ordinary taxpayer[1164].

In my view, MDR is related to these findings. The regime is difficult to understand, especially to the ordinary taxpayer, because it focuses on tax professionals, the so-called "intermediaries", to whom MDR may cause natural rejection because it interferes in their activities. Consequently, it is covered by several "myths", which this work dedicates itself to dealing with, for instance, that MDR is "criminalizing" tax planning, conferring an exceptional discretion to tax authorities, creating restriction on the free movement of capital or being deemed to disproportionately burden

[1162] KIRCHLER, Erich. *The Economic Psychology of Tax Behavior.* Cambridge: Cambridge University Press, 2007, preface, xiii.
[1163] Ibid, p. 96.
[1164] Ibid, p. 28.

intermediaries and taxpayers in relation to its objective[1165]. Throughout my text, I present several points in order to achieve an efficient system and I conclude that not all these allegations raised against MDR find a theoretical basis in the principles of law themselves. Nevertheless, many of these questions are based on a practical suspicion that the administration will not use MDR for the purposes that were devised and the regime will serve to increase coercion and tax collection. The lack of trust between taxpayers and tax authorities leads to allegations of non-observance of legality, legal uncertainty, arbitrariness, limitation of freedom, as demonstrated in Chapter IV. Thus, an important measure for those administrations intending to introduce MDR is studying and understanding the measure, in order to overcome these barriers.

That is why one of the questions posed at the beginning of this work was "*Why is it not enough to be mandatory?*" and, in this topic, Kirchler´s model and studies will be used to demonstrate in which extent a balance between those two dimensions abovementioned is necessary, when applying MDR.

MDR cannot only be a voluntary obligation, because the system implies State's intervention in the private sphere and needs to have a certain amount of coercion, typical of taxes, anyway; however, my prediction is that MDR does not work in a mistrustful environment. According to Allingham and Sandmo[1166], the tax declaration decision is taken under uncertainty. The reason for this is that failure to report one's full income to the tax authorities does not automatically provoke a reaction in the form of a penalty. Corroborating, Kirchler[1167] says that when comparing the taxpayers' choice between (i) declaring the actual income or (ii) declaring less than the actual income, and selecting the latter strategy, "*the payoff will depend on whether or not the taxpayer is investigated by the tax authorities*".

Next, Kirchler[1168] states that defection and cooperation in social dilemmas are studied in various disciplines and, for instance, in mathematics and economics, the optimal strategy for rational individuals is not to cooperate. Therefore, it is necessary to be forced to cooperate by control mechanisms and severe sanctions in case of non-compliance. Indeed, audit probability and fines play a role for compliance. That is why, in MDR, sanctions are necessary, despite the fact that, in my view, the most important attribute is not the value of the penalties; conversely to what many countries seem to believe, when they opt to impose "heavy" sanctions[1169].

The crucial point is that MDR is a measure that demands both collective participation and responses at a collective scope. As this work argued in topic 4.3.2.1, if the 'ideal' tax system is designed in order to preserve the social welfare, when someone is achieving a tax advantage, does it mean that society is suffering a disadvantage? What does "advantage" mean if I think

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[1165] See Chapter IV, topic 4.1 – Fundamental rights.
[1166] ALLINGHAM, Michael G. and SANDMO, Agnar. *Income Tax Evasion: A Theoretical Analysis*. Journal of Public Economics, v. 1, issue 3-4, North-Holland Publishing Company, 1972, p. 324.
[1167] KIRCHLER (2007). Op. Cit., p. 105.
[1168] Ibid, p. 104.
[1169] KPMG. *EU Mandatory disclosure regime: DAC6 state of play*, p. 10. Published online: 14 Nov 2019. Available at: https://assets.kpmg/content/dam/kpmg/xx/pdf/2019/11/EU-mandatory-disclosure-rules-webcast-deck.pdf. Accessed on 06 May 2020.

collectively? What is the meaning of "freedom to achieve a tax advantage" within the theory of justice as fairness? It is important, then, to mention Kirchler's[1170] conclusion that *"the tax system represents a social dilemma with individual interests being in conflict with collective interests: two or more people are interdependent on obtaining outcomes; if few people try to maximize their own outcomes, defection is the rational choice. However, if a large number or all people maximize their outcome, the effect is that, sooner or later, everyone gets less than if they had chosen to cooperate".*

In MDR, analogously, it means that the schemes disclosed need mostly to result in some action, such as changing the audit schedule, modifying the legislation, offering advantages for the compliant people. Thus, the payoff will depend on how tax authorities are able to react to the information provided. This ability to react, besides its behavioral influence, is also a measure of the proportionality of the regime, as was explained[1171]. Thus, my answer is that the regime needs to be mandatory, with sanctions, but *"something more"* is required. I mean transparency, trust, awards or advantages for compliance, clarity, simplicity, cost reduction and, especially, that a taxpayer can perceive the collective results the regime produces, increasing fairness in competition, reducing the tax gap[1172] and improving the quality of the legislation, for instance.

This means that if in a universe of taxpayers providing disclosure only a few of them perceive some kind of reaction, because most still use undesirables schemes[1173], since the legislation has not been changed, the gap was not closed, the mismatch was not adjusted or the administrative/legal interpretation was not clarified, the system will not achieve its efficiency.

Another point to be considered when developing MDR is that the hallmarks must focus on either schemes that are promoting undesirable tax advantages to a lot of people (marketable arrangements) or schemes in which a few people are taking undesirable advantage (bespoke schemes). However, in any case, the total undesirable advantage must be so big that it affects the legitimate expectative (fairness, justice, welfare) of so many individuals. This must be clear to justify the inclusion/choice of the hallmarks. Thus, hallmarks should not be included only because a situation is difficult to assess or control, or because that inclusion will increase the tax collection "automatically" or easily[1174]. Of course, in the end there will be an increase in revenue; however, it comes as a natural consequence of combating undesirable tax planning, which achieve results that unbalance the tax system and promote inequality within it.

In the topic *interaction between tax authorities and taxpayers[1175],* Kirchler says that traditional economic models[1176] assume that taxpayers make strategic decisions and the rational

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[1170] Ibid, p. 103.

[1171] See Chapter IV, topic 4.2 – Reasonableness, proportionality and MDR.

[1172] See Chapter III, topic. 3.2.6 – The impact of the DOTAS regime on compliance.

[1173] NOTE. "*Undesirables schemes*" means, in this sentence, "*schemes which produce tax advantages not desired by the tax law*" or "*schemes which produce tax advantages not in accordance with the spirit of the law*".

[1174] NOTE. See in Chapter II, topic - 2.4.1.2.2 Specific Hallmarks, my considerations to undesirable arrangements from different perspectives.

[1175] KIRCHLER (2007). Op. Cit., p. 167.

[1176] SOUR, Laura. *An Economic Model of Tax Compliance with Individual Morality and Group Conformity.* Economía Mexicana Nueva Época, v. XIII, n. 1, Jan. 2004, p. 43-61. "*Scholars in public finance traditionally have analyzed tax compliance using the Allighman-Sandmo model".* It is possible to include in this rational model both moral and social

model emphasizes the taxpayers´ predisposition to behave dishonestly and suggests control and punishment as educational measures. Kirchler, however, cast doubts on it, clarifying these models focus merely on improving revenue and does not at all consider the relationship between taxpayers, tax authorities and the state, and related fairness aspects. In MDR, it is quite necessary, as I see it, that the second aspect be more important than the first. Thus, the mentioned relationship trying to achieve fairness is the target and the possible increase in revenue only a collateral effect.

MDR is a regime that needs cooperation. Thus, it needs to be established and developed in a certain climate, which fosters taxpayers' trust in the tax system and perceived legitimacy of tax authorities. As opposed to what Kirchler calls "*cops and robbers'*" approach, in my viewpoint a "*service and client*" approach is the suitable environment for applying MDR. The author explains that if empirical studies sometimes confirm a strong deterrent effect of audits and fines, there are certain circumstances in which these effects are low or even opposite to the predictions[1177]. If the climate is friendly and taxpayers trust the authorities, compliance is likely to occur voluntarily, independent of the authorities' power to enforce it. As Kirchler[1178] states, *"a service and client approach is characterized by clear and understandable regulations, transparency of procedures, neutrality, respect and politeness with regard to taxpayer treatment as well as support. Procedural fairness perceptions are at the base of a climate of trust…"*

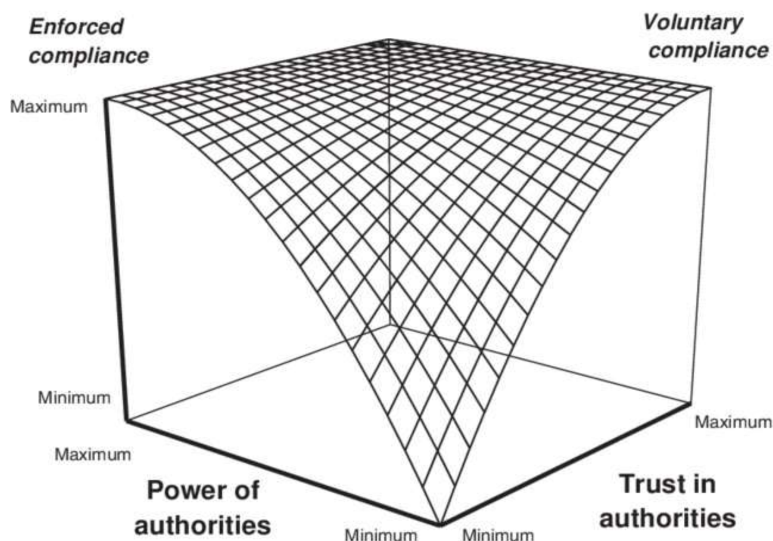
Kirchler, then, visualizes his "slippery-slope model"[1179], explaining that the term was chosen to illustrate the potential dynamics inherent in the interplay between trust and enforcement (*audits*). The curvature demonstrates that an increase in compliance can only be achieved by "*exceedingly high increases in power 'or' trust*".

payoffs for compliance. See ALLINGHAM, Michael G. and SANDMO, Agnar. *Income Tax Evasion: A Theoretical Analysis*. Journal of Public Economics, v. 1, issue 3-4, North-Holland Publishing Company, 1972, p. 323-338.

[1177] See BERGMAN, Marcelo. *Who Pays for Social Policy? A Study on Taxes and Trust.* Journal of Social Policy, v. 31, Issue 2, 2002, p. 289-305. Published online by Cambridge University Press: 25 April 2002. Based on surveys in Argentina and Chile, this research paper contrasts two similar countries that show remarkable differences in tax compliance and commitment to social policies. The analysis of the data supports the hypothesis that social variables associated with trust and legitimacy have an independent effect on social solidarity. See also FELD, Lars P. and FREY, Bruno S. *Trust breeds trust: How taxpayers are treated.* Economics of Governance, v. 3, issue 2, 2002, p. 87–99. Published online July 2002. Available at: https://doi.org/10.1007/s101010100032. Accessed on: 09 May 2020. In this paper, empirical evidence based on a survey of tax authorities of the 26 Swiss states (cantons) is presented, indicating that the differences in the treatment of taxpayers by tax authorities can be explained by differences in political participation rights as well.

[1178] KIRCHLER (2007). Op. Cit., p. 204.

[1179] Ibid, p. 205.



Kirchler, Hoelzl, and Wahl[1180] assume in their study that '*trust*' is "*a general opinion of individuals and social groups that the tax authorities are benevolent and work beneficially for the common good*". The Authors demonstrate that mutual trust between the authorities and taxpayers leads to a *synergistic tax climate*. In such climate, the authorities trust that taxpayers pay their taxes honestly, and therefore the authorities treat them with courtesy and respect. In turn, the taxpayers trust that authorities provide good services for them, and thus they observe the tax law.

Otherwise, '*power of authorities*' is defined as taxpayers' perception of tax authorities' capacity to detect and punish tax crimes[1181]. Following this assumption, Kirchler, Hoelzl, and Wahl concluded that the perception and execution of too much power leads to mutual distrust between the authorities and taxpayers, which represents an *antagonistic tax climate*. In other words, if the power of authorities increases and authorities are perceived as acting in an untrustworthy manner, taxpayers perceive the prevailing climate as antagonistic. In such climate, the authorities act on the assumption that taxpayers evade taxes whenever they have a chance to do so. The deterrent effects of these enforcing factors appear to be inconclusive in the literature analyzed by Wahl, Kastlunger and Kirchler[1182], with some studies confirming their positive effect, while others report contrary results. It means, whether the authorities use extensive audits and severe punishment to coerce taxpayers' honest tax payments, in response, taxpayers feel persecuted and, therefore, try to get away from them.

My assumption is that this kind of *antagonistic* environment is very inefficient to MDR, because the characteristics of the regime, which aims introducing coherence and consistency in the domestic rules, reinforcing coordination and harmonization in the existing international

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[1180] KIRCHLER, Erich; HOELZL, Erik and WAHL, Ingrid. *Enforced Versus Voluntary Tax Compliance: The 'Slippery Slope' Framework*. Journal of Economic Psychology, n. 29, 2008, p. 210-225.
[1181] Ibid.
[1182] WAHL, Ingrid; KASTLUNGER, Barbara, and KIRCHLER, Erich. *Trust in Authorities and Power to Enforce Tax Compliance: An Empirical Analysis of the "Slippery Slope Framework"*. The University of Denver/Colorado Seminary. Law & Policy, v. 32, n. 4, Oct. 2010, p. 385-386.

standards and improving transparency as well as certainty. Consequently, MDR needs a large emphasis on cooperation, commitment and understanding from the society.

A related empirical study suggests that depending on the case, *"the quality of tax compliance differs, and is either voluntary or enforced"*[1183]. The study conducted a laboratory and an online experiment to investigate whether trust in authorities increases voluntary tax compliance and whether power of authorities increases enforced tax compliance[1184]. However, considering that those experiments involve tax payments and samples that contain students and self-employed taxpayers, their object and the persons involved are very different from those who are expected to be involved in tax planning and MDR. Notwithstanding, despite the fact that their results, considering the methodology, are not directly applied to my thesis, the idea behind them is.

MDR is an excellent object to apply the slippery-slope theory. Therefore, this work suggests that similar studies could be conducted focusing on disclosure regimes to confirm or reject my assumptions that the more the "power of authorities" (enforced compliance) increases, trying to "force" intermediaries and taxpayers to provide the information needed, the more "trust in authorities" (voluntary compliance), concerning MDR, decreases, compromising the regime's efficiency. Therefore, when balancing these two dimensions, the arm must lean towards the side of trust, not of power.

This thesis mentions a survey conducted by Devereux, Freedman and Vella, analyzing DOTAS, in the UK, in 2012, which detected a kind of "competitive" behavior, from some tax advisers to tax authorities, in the presence of a disclosure regime[1185]. That is why it is necessary, moreover, to distinguish *power of authorities* between legitimate power and coercive power[1186]. While legitimate power can be seen as a positive evaluation of authorities' power that is connected with positive attitudes towards tax authorities, coercive power describes tax authorities' abilities to detect tax crimes and to carry out severe punishment. As long as power of authorities is perceived as *coercive*, it leads to resistance and taxpayers could consequently be motivated to compete against tax authorities and engage in exploiting loopholes in the surveillance system to minimize their taxes (i.e., strategic tax planning behavior)[1187].

Summarizing, concerning MDR, my assumption is that "trust in authorities" is the essential component to be observed, worked on and studied in relation to the efficiency of the regime and "power of authorities" is an intrinsic characteristic of the obligation, because of its nature as a behavior inducing and ancillary tax obligation. Moreover, the amount of "power" must concentrate

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[1183] WAHL; KASTLUNGER, and KIRCHLER (2010). Op. Cit., p. 384.
[1184] Ibid, p. 383-406.
[1185] DEVEREUX, FREEDMAN and VELLA (2012), Paper 2, Op. Cit., p. 19. *Moreover, the OUCBT study, after taking interviews with practitioners, promoters and taxpayers, realized that "whilst some react by greater compliance, others consider it a challenge to defeat the new rules. There are known advisers who work in this space". Therefore, if not correct and carefully applied, MDR can produce a spurring effect in the tax planning activity.* See Chapter III, topic 3.2.6 – The impact of the DOTAS regime on compliance.
[1186] TURNER, John C. *Explaining the Nature of Power: A Three-Process Theory.* European Journal of Social Psychology, v. 35, n. 1, 2005, p. 1–22.
[1187] WAHL; KASTLUNGER, and KIRCHLER (2010). Op. Cit., p. 388.

in legitimate power connected with positive attitudes towards tax authorities as a consequence of taxpayers' legitimate expectative when balancing the implementation of a tax planning and its economic and social consequences.

Next to other objectives, this work presents MDR as an instrument to strengthen trust between taxpayers and tax authorities. The regime can work to enable quick and targeted responses in order to promote the stability of the tax system. This does not mean immutability, but it comes as a result of technical improvement, which eliminates distortions arising from policies that could be linked to casuistic formulations of tax laws, associated with formal interpretations (interpretation literally restrictive), which finally generate unequal and, therefore, unfair treatments for similar cases[1188]. In this reasoning, the regime, in addition to protecting and promoting equality, also promotes legal certainty, by reducing the possibility of sanctions and litigations.

5.1.2 The issue of non-self-incrimination, the adviser's liability and MDR.

The privilege against self-incrimination first appeared during the Middle Ages in England. From there, it was introduced in the American colonies. Although never included in written English law, the privilege was incorporated in the fifth amendment to the United States Constitution. The privilege was originally limited to criminal cases and only later was it extended to civil cases by decisional law[1189].

In tax law, nevertheless, the right to not self-incriminate should protect the affected persons against any request to make statements that can go to their detriment, but not to the extent that it can undermine the actual reporting obligations, on which the tax system relies for its correct functioning. Accordingly, taxpayers may invoke it to remain silent during audits, but not to refrain from submitting documents that they are obliged to file and keep.

Notwithstanding, the privilege to not self-incriminate raises doubts in relation to MDR application. In the *Comments received on Public Discussion draft*, BEPS Action 12[1190], the Federal Chamber of Tax Advisers, referring to the German law, said:

> *Our Constitutional Law and the Human Rights Chart protect everyone from self-incrimination (Principle of Nemo tenetur se ipsum accusare). Every person has the right to claim privilege. Transferring the obligation to disclose to another person in order to circumvent the legal privilege doesn't make sense because it doesn't protect the constitutional rights effectively. In some cases, it may be difficult to draw the line between cases involving a risk of self-incrimination and*

[1188] See Chapter IV, topic 4.3.2 - MDR application and the tension between a theory of equality and the freedom to pay the minimum tax.

[1189] *Constitutionality of Administrative or Statutory Sanctions Upon the Exercise of the Privilege Against Self-Incrimination.* Fordham Law Review, v. 36, Issue 3, 1968. Available at: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1937&context=flr. Accessed on 13 May 2020.

[1190] See Chapter II, topic 2.5.2 - *Comments received on Public Discussion draft*, BEPS Action 12.

"ordinary" cases aiming at schemes being in a legal surrounding. We doubt if the fundamental rights will always be observed.[1191]

Another Institution, for instance, said:

For those jurisdictions that impose criminal sanctions for taxpayers that enter certain transactions, the privilege against self-incrimination should control, and such taxpayers should not be required to disclose those transactions that give rise to criminal liability. Moreover, civil penalties should not apply where a taxpayer does not disclose because of concerns of self-incrimination.[1192]

The OECD included an annex[1193] in the BEPS Action 12 Final Report to provide some answers to questions raised against MDR related to the right to not self-incriminate. The Organization says that: (i) the information to be provided under MDR is generally no different from that information provided during audits or into a tax return. (ii) Moreover, transactions targeted will not generally be the types of transactions that will give rise to criminal liabilities, because they present a different object and scope. (iii) Furthermore, MDR focuses on disclosures before the actual implementation of the planning, thus, it is unlikely that criminal proceedings are pending, involving the same information, at the moment of the disclosure. Thus, "*such early reporting can be considered as part of the ordinary information collection*". (iv) Finally, there should not be an issue of self-incrimination where a promoter is obliged to disclose instead of a taxpayer, except in the circumstances where the promoter could have criminal liability in relation to the promotion or facilitation of a scheme.

As this work stresses, MDR should not focus on crimes or actions that give rise to criminal liability[1194]. Possible criminal liability will be a result of a specific and subsequent action of the tax administration and not related to a previous pendency (audit or assessment). In addition, I understand that if in the course of an administrative action (audit), it is found that a scheme or arrangement gives rise to criminal liability, which was not disclosed under MDR, the fine (penalty) for non-disclosure would not be applicable. In that case, non-disclosure is justified and the penalty would be absorbed by the criminal sanction, which is much more grave. In other words, the fact that it is found that tax planning involves crime would be a reasonable justification to accept the disclosure was not done and then there would be no reason to apply a sanction for non-disclosure[1195].

The argument that someone could disclose a planning without being aware that crimes were involved there, of which he could be accused in the future, has no basis in the principles of law, since no one can excuse himself from complying with the law, claiming that he does not know

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[1191] OECD (2015). *Comments received on Public Discussion draft.* Cit. *Bundessteuerberaterkammer* (The Federal Chamber of Tax Advisers), p. 59.

[1192] Ibid, International Alliance for Principled Taxation, p. 168.

[1193] OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report*. Cit. Annex B.

[1194] See Chapter II, topic 2.4.1.1 - Aggressive or Abusive Tax Planning.

[1195] See Chapter III, topic 3.2.4 - Appropriate penalties or other mechanisms to address non-compliance. *The DOTAS guidance accepts several conditions as 'reasonable excuse', especially when related to non-compliance. HMRC tries to establish an objectiveness to "reasonable" by using examples and descriptions but in the end, cases-law, which indicate that what is reasonable in such circumstances depends upon the particular facts, provide the parameters.*

it[1196]. Thus, it is unreasonable to assume that, when disclosing a tax planning, which is defined by general characteristics that do not focus on criminal offenses, one could run the risk of incriminating himself by mistake or unfamiliarity, especially because most of the time advisers and professionals are providing the information. If it is a crime, it is defined in a previous law and no one can refuse to do something, claiming that he has doubts whether that is a crime or not.

Moreover, I assume that the following HMRC position is correct, which was already quoted in this work[1197]. After trying to delineate some characteristics of planning that should be disclosed, they conclude in the DOTAS Guidance: "*in our experience those who plan tax arrangements fully understand the tax advantage such schemes are intended to achieve. Therefore we expect it will be obvious (with or without detailed explanation) to any potential client what the relationship is between the tax advantage and any other financial benefits of the product they are buying*", in summary, transferring the decision about whether an arrangement represents a "tax advantage" or not to the intermediaries/users of the arrangements. Therefore, it is expected to be much more clear to a reasonable person if a given planning involves illicit actions or transactions and if it is passive of criminal sanctions or not. In an uncommon case of doubt, as the OECD clarify, it is possible to ask the Authorities, before the implementation.

Regarding the last point abovementioned, posed by the OECD, I mean, "*in the circumstances where the promoter could have criminal liability in relation to the promotion or facilitation of a scheme*", my assumption is that the joint criminal liability between the tax planning intermediary or promoter and the taxpayer only happens in very special circumstances. Although this analysis goes beyond the scope of this work, my answer in relation to the application of a criminal penalty and the non-compliance with MDR has already been dealt with, above. Notwithstanding, it is important to quote what the *Abogacía Española* stresses:

> *Legal professions are de iure, by definition, legal. As a consequence, Abogados are obliged to respect the law in all the areas of their professional activity, including tax advice. If their advice is within the terms of the law it constitutes a legal advice, which is also the very source of a citizen right. There can be no rights and no Rule of Law if the citizen is not entitled to know his own rights. If, on the contrary, an advice is illegal then the lawyer will be committing a tax offence or a crime and has no legal privilege or professional secrecy as he is not acting under his capacity as a lawyer but as coauthor or accomplice or any relevant figure under the respective national criminal law.* [1198]

On the other hand, an issue which is important to deal with in this work refers to the possibility of imposing tax liability on the promoter/intermediary for tax planning and the efficiency of considering this possibility in an environment where a mandatory disclosure regime is in place.

[1196] *Ignorantia juris non excusat* or *ignorantia legis neminem excusat* (Latin for "ignorance of the law excuses not" and "ignorance of law excuses no one", respectively) is a legal principle holding that a person who is unaware of a law may not escape liability for violating that law merely because one was unaware of its content. Available at: http://www.duhaime.org/LegalDictionary/I/IgnoranceoftheLaw.aspx. Accessed on: 12 May 2020.

[1197] See Chapter II, topic 2.4.1.1 Aggressive or Abusive Tax Planning. THE UNITED KINGDOM. HM Revenue and Customs. *Guidance Disclosure of Tax Avoidance Schemes – DOTAS. Cit., p*. 32.

[1198] OECD (2015). *Comments received on Public Discussion draft.* Cit. *Consejo General de la Abogacía Española*, p. 111.

It is important to remember, in addition to studies on the role of tax intermediaries[1199], that a key point in the regime's result is to put pressure on the taxpayer - promoter (the supply driven) relationship and not create excessive tension between promoter - tax administration. As was explained in the previous topic, in the Slippery-Slope model, the tax administration needs collaboration and trust so that the obligation to disclose tax planning is optimized. As this work states, MDR should focus on collective solutions, not individual relationships or solutions. This also weakens, in principle, the "thesis" of self-incrimination, because it needs to be, essentially, bi-directional.

In the Autumn Budget 2017 and Spring Statement 2018, the British government announced that it would explore ways to tackle taxpayers who deliberately abuse the insolvency regime in trying to avoid or evade their tax liabilities, including using *phoenixism*[1200]. In 2019, the Government published draft legislation for the Finance Bill 2020. This draft legislation would introduce a new regime giving HMRC the power to issue notices to make directors of companies, together with shadow directors and certain others connected to a company, jointly and severally liable for the company's tax liabilities. Explaining in other words, the provisions introduce a new regime permitting HMRC to serve joint liability notices on directors and other persons involved in tax avoidance or evasion, making them jointly and severally liable for a company's tax liabilities if there is a risk that the company may deliberately enter insolvency. Moreover, the initial purpose included the possibility that HMRC might authorize a notice in cases when penalties are established for facilitating tax avoidance or evasion and/or penalty proceedings have been commenced under the rules for disclosing tax avoidance schemes, promoters of tax avoidance, enablers of tax avoidance and offshore tax regimes[1201]. The Chartered Institute of Taxation (CIOT) pointed out that HMRC has noted concerns previously raised that the inclusion of 'participators' (as defined by Corporation Tax Act 2010 s 454[1202]) in the definition of individuals who have a '*relevant connection*' with the old and new companies in repeated insolvency and non-payment cases might be too broad[1203].

[1199] See Chapter II, topics 2.3.3 – The 2008 Study and 2.3.2.1 Supply and Demand.

[1200] THE UNITED KINGDOM. House of Commons Library. *Insolvency: joint and several liability notices for directors*. Published on 05 Feb. 2020. Available at: https://commonslibrary.parliament.uk/research-briefings/cbp-8802/. Accessed on 14 May 2020. In brief, "phoenixism" is the practice of carrying on the same business or trade successively through a series of limited liability entities where each becomes insolvent and transfers its business, but not its debts, to a new entity.

[1201] EUROPEAN RESTRUCTURING WATCH. *Finance Bill 2020: Key Insolvency Measures*. Available at: https://eurorestructuring.weil.com/reform-proposals-and-implementations/finance-bill-2020-key-insolvency-measures/. Accessed on 14 May 2020.

[1202] THE UNITED KINGDOM. *Corporation Tax Act 2010. 454* - "Participator" (1) For the purposes of this Part, "participator", in relation to a company, means a person having a share or interest in the capital or income of the company. (2) In particular, "participator" includes (a) a person who possesses, or is entitled to acquire, share capital or voting rights in the company. (b) a loan creditor of the company. (c) a person who possesses a right to receive or participate in distributions of the company or any amounts payable by the company (in cash or in kind) to loan creditors by way of premium on redemption. (d) a person who is entitled to acquire such a right as is mentioned in paragraph (c). (e) **a person who is entitled to secure that income or assets (whether present or future) of the company will be applied directly or indirectly for the person's benefit** (emphasis added). Available at: http://www.legislation.gov.uk/ukpga/2010/4/section/454. Accessed on 14 May 2020.

[1203] CHARTERED INSTITUTE OF TAXATION (CIOT). *Joint and several liability of company directors: draft Finance Bill*. Tax Adviser Magazine. Published on 1 October 2019. Available at: https://www.taxadvisermagazine.com/article/joint-and-several-liability-company-directors-draft-finance-bill. Accessed on 1 Apr 2020.

The points to be highlighted are, first, the intention to make directors of companies, together with shadow directors and certain others connected to a company, jointly and severally liable for the company's tax liabilities when the liability arises or is expected to arise from tax avoidance or tax evasion; repeated insolvency or penalty for facilitating avoidance or evasion[1204] (material circumstances). Moreover, the possibility of involving promoters and disclosure rules as a circumstance for such involvement (personal aspect). Finally, the doubts which might emerge because it is necessary to establish a "relevant connection" between the individuals - either directors (the main focus of the proposal), promoters or other persons - the circumstances and the results, such as insolvency, as in the UK proposal, or undesirable tax advantages, as in my study, in order to create joint and several tax liability. For instance, in the UK legislation, as emphasized in the reference note below, might "participator" be a person who is entitled to benefit directly or indirectly for income or assets of the company, originate from tax advantages or tax savings obtained by the application of a tax planning?

In Brazil, for instance, there is great resistance in relation to the joint and several tax liability of lawyers or other advisers involved or acting in tax planning and taxpayers. The topic has been subject of debates among law practitioners[1205], who begin their arguments in constitutional principles, especially in the recognition of the lawyer as "*indispensable to the administration of justice*", and hence inviolable "*due to his acts and manifestations in the exercise of his profession*" [1206]. Duque Estrada, analyzing some tax assessments that sought to impose joint and several liabilities on lawyers, noting that "*these assessments have found validity on a broad interpretation of the concept of 'common interest*'" between advisers and taxpayers (I see it as the same as "relevant connection" required in the UK). Then, the arguments are based on the definition of what the "*common interest*" would be in the situation that constitutes the taxable event, whether the common interest would be "factual", "economic", "legal" or a combination of all of them.

The line of reasoning presented by the article[1207] says that participation in the factual event (transaction) does not represent a satisfactory motive for the definition of joint and several liability and that such "common interest" needs to be legal and not merely economic[1208]. This thesis dealt with the existence of economic interest in topics 4.5.1 and 4.5.2[1209], placing tax planning, in some cases, not as legal advice but as a trade secret. In those situations, the existence of MDR and non-compliance with the disclosure, I assume, both the intermediary, who has an economic interest in

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[1204] EUROPEAN RESTRUCTURING WATCH. Cit.

[1205] DUQUE ESTRADA, Roberto. *Carf confirma a inexistência de responsabilidade solidária de advogados.* Revista Consultor Jurídico, 7 Jun 2017. Available at: https://www.conjur.com.br/2017-jun-07/consultor-tributario-carf-afirma-inexistir-responsabilidade-solidaria-advogados. Accessed on 1 Apr. 2020.

[1206] BRAZIL (1988). Constituição Federal de 1988, Artigo 133 - O advogado é indispensável à administração da justiça, sendo inviolável por seus atos e manifestações no exercício da profissão, nos limites da lei. Available at: https://www.senado.leg.br/atividade/const/con1988/con1988_15.12.2016/art_133_.asp. Accessed on 13 May 2020.

[1207] DUQUE ESTRADA (2017). Cit.

[1208] NOTE. See my comments in Chapter III, topic 3.3.2, about the Portuguese Decree-Law n. 29/2008. *It is interesting to note that the wording in Article 5 (1) refers to "economic activity" and not to "professional activity". The point is that the tax planning in this case is characterized in economic terms and not in legal terms, highlighting the existence of economic interest when providing or implementing a scheme, going beyond a limited "legal advice", which could be covered by legal professional privileges.*

[1209] See Chapter IV, topic 4.5.1 – Confidentiality, privacy and MDR and 4.5.2 - Ethics and MDR.

keeping it unknown to the authorities and other competitors; as well as the taxpayer, who obtain competitive advantages, are on the same side.

However, Duque Estrada mentions decisions by the Brazilian Administrative Council of Tax Appeals[1210] to refute the possibility of lawyers and tax consultancy firms being jointly and severally liable for tax credits, because the *common legal interest* is required and the fact that consultancy firms are executing tax planning does not mean that they have such an interest.

The Brazilian Federal Revenue (RFB) has expressed its opinion[1211] on the possibility of regarding the joint and several tax liability on the "*people who have a common interest in the situation*". As reported, the Brazilian National Tax Code has been applied to confer joint and several liability in situations such as economic groups; affiliated companies, abusive tax planning and cases of fraud/collusion. Despite the fact that the focus was on the "*possibility of conferring liability to the third party who committed unlawful acts together with the taxpayer*", more specifically, on the situation in which third parties are involved in the practice of illicit acts that cooperate to tax evasion, some aspects deserve to be mentioned.

The RFB's opinion states that when it characterizes the *common interest* as being related in some way to the tax legal fact, one can get the false impression that in its opinion it would be aligned with the thesis that the common interest would be what was called *common legal interest*, which is not true. It says that in many situations, especially in cases of committing illegal acts, the common interest is configured to the extent that the essence of the true taxable fact has been artificially hidden or manipulated by certain people. This would happen from the moment those parties come together to commit an unlawful act, when it becomes evident that they are no longer on opposite sides, but in cooperation to affect the tax authorities, establishing a new relationship or link between them, in parallel with that main relationship which integrates the business or transaction.

Notwithstanding, even though the elements necessary to characterize such *legal interest* could cause divergences, it is not in any case that third parties can be held liable for tax, since the mere common economic interest in the transaction cannot give rise to joint and several liability. There must also be a common legal interest, which must be direct and immediate in the realization of the taxable event, and which is present when people participate together in the practice of the acts described hypothetically in tax law, giving rise to tax.

It means that more than an economic interest ("*in the sense that an economic benefit would be sufficient to give rise to the application of the joint and several tax liability*"), it is necessary to have a common legal interest, which would be represented by the legal connection between the

[1210] BRAZIL. Conselho Administrativo de Recursos Fiscais – CARF. Acórdão (Decision) n. 2402-005.703 (position defended by the Counselor Bianca Felicia Rothschild), of 15/03/2017; Acórdão (Decision) n. 2301-004.800, of 17/08/2016 and Acórdão (Decision) n. 2402-005.697, of 14/03/2017. Available at: http://carf.fazenda.gov.br/sincon/public/pages/ConsultarJurisprudencia/consultarJurisprudenciaCarf.jsf. Accessed on: 14 May 2020.

[1211] BRAZIL. Brazilian Federal Revenue. *Parecer Normativo (Opinion) Cosit/RFB n. 04, of 2018*. Available at: http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?visao=anotado&idAto=97210. Accessed on: 12 Jul 2019.

parties in order to jointly materialize the law hypothesis, which describes the taxable event. For this purpose, the parties should be on the same side of the legal relationship, which produces the tax effects, and not on opposite sides[1212]. Thus, such a common interest would normally be verified in transactions involving economic groups, but hardly verified in licit tax planning market where the taxpayer and the intermediary/promoter enter into a contract with mutual and opposite obligations. In this conclusion, it is important to remember, once again, that this work focuses on lawful planning[1213] and not on simulations, frauds or manipulations that represent illegal activity, subject to criminal penalties.

Considering this, the solution would be the civil liability of the lawyer or consultant who proposed, under the guise of lawful tax planning, schemes that in the future give rise to reclassification and requirement of taxes, interest and penalties. Duque Estrada cites examples where a “product” (tax planning) was presented with the promise of generating VAT credits, in intermediation and exportation of commodities, which were not recognized by tax administration. Then, the taxpayer moved a civil action against the tax consulting firm. Although the right to compensation for loss or damage was not recognized, the taxpayer had the right to return the amounts paid by the consultancy.[1214]

Concerning lawyers’ civil liability in Italy, that liability is at the same time for the execution of the mandate and professional responsibility, specifying that doctrine and jurisprudence are consistent to qualify the obligation of the lawyer as an obligation of means and not of results[1215]. It means that the lawyer is not responsible if his client does not achieve the intended results, having the same right to receive payment for the case law or advice. In another perspective, then, it is possible to conclude that when the client achieves the result, for instance a tax advantage, the lawyer would not be responsible for the advantage or its consequences.

[1212] MATIAS FILHO, João Luís Nogueira. *A Imputação de Responsabilidade Tributária às Redes Contratuais: análise do parecer normativo COSIT Nº 04/2018*. 1. ed., Fortaleza: Mucuripe, 2019, p. 70.

[1213] See Chapter IV, Introduction to Chapter 4. *When analyzing the issue, this work is limited to licit tax planning, which might be seen as a "subjective right of the taxable person and a necessary condition for legal certainty in tax relations". Moreover, what might be regarded as a legitimate activity, defined as "a procedure of interpretation of the system of norms used as a technique of preventive business organization". Thus, illicit acts are not considered, but only those developed within the system of laws borders. Furthermore, this work considers tax planning in which the taxpayer takes advantage of disparities between national tax systems or exploits the inadequacy of existing tax rules in the cross-border environment and/or in the domestic law.*

[1214]BRAZIL (2013). Tribunal de Justiça do Estado de São Paulo/SP. *Processo n. 0188622-16.2007.8.26.0100*. Decision on 12 Dec 2012. Available at: https://www.conjur.com.br/2013-fev-27/justica-manda-deloitte-indenizar-tigre-operacao-tributaria-fraudulenta. Accessed on 13 May 2020. See also MALUF, Rafaela Rodrigues. *Responsabilidade solidária e a complexidade sobre o "interesse comum" estipulado pelo artigo 124 do Código Tributário Nacional*. Available at: https://www.migalhas.com.br/depeso/320132/responsabilidade-solidaria-e-a-complexidade-sobre-o-interesse-comum-estipulado-pelo-artigo-124-do-codigo-tributario-nacional. Accessed on 13 May 2020.

[1215] CONCAS, Alessandra. *La responsabilità civile degli avvocati*. Available at: https://www.diritto.it/la-responsabilita-civile-degli-avvocati/. Accessed on 10 May 2020. *La responsabilità dell'avvocato è allo stesso tempo responsabilità da esecuzione di mandato e responsabilità professionale, specificando che dottrina e giurisprudenza sono solite qualificare l'obbligazione dell'avvocato, come obbligazione di mezzi e non di risultato. L'avvocato non risponde se il suo cliente non raggiunge il risultato sperato, avendo lo stesso diritto al compenso della causa o dell'affare.*

Nevertheless, the *Corte di Cassazione*[1216] emphasized that the lawyer's "duty of care", in turn, includes the duties of information, solicitation and dissuasion, which the professional must fulfill, upon taking up the position. Moreover, the professional's performance must present to the client the factual and/or legal issues existent from the beginning of the case or subsequently arising, which may harm the achievement of the result and/or producing a risk of negative or harmful consequences, advising and providing to the client useful elements to the positive solution of the issues themselves. Additionally, the professional duty includes advising the client against taking or continuing the behavior/transaction, if a positive solution does not seem achievable and, consequently, an unfavorable and harmful outcome is possible.

The civil liability of the tax advisor in face of the provisions contained in the Civil Code, whether contractual or non-contractual, and the diligence that the professional has to develop in order not to incur civil liability in the performance of the profession is matter of discussion also in Spain[1217].

Since 2010, the Supreme Court in Madrid[1218] provided two important decisions, which are interesting to establish some parameters for the liability of lawyers and other tax advisors. First, the STS decision of May 19, 2010[1219], which condemned the tax advisor to pay a percentage of the tax contingency incurred by a client for not having "checked" the correction of the invoices that the latter sent him for his accounting and subsequent tax declaration. Second, the STS decision of March 11, 2016[1220], which solved a case in which a taxpayer contracted a tax planning agency for their business. However, the tax administration denied the tax benefits claimed by the taxpayer and imposed a high penalty due to the omission of an accounting entry, of which his advisor did not notify him. In said Judgment, the Supreme Court indicated that the advisers, by omitting the

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[1216] ITALY (2002). Corte di Cassazione. II Civile. *Decision n. 16023*, on 14 Nov 2002. Available at: https://www.ricercagiuridica.com/sentenze/sentenza.php?num=4018. Accessed on 11 May 2020. *Peraltro, il fatto che la realizzazione del risultato perseguito dal cliente non costituisca oggetto della prestazione cui si è obbligato il professionista non esime quest'ultimo dal dovere di prospettare al cliente tutte le circostanze contrarie, ch'egli sia in grado d'ipotizzare in virtù di quella preparazione tecnica e di quell'esperienza medie costituenti l'imprescindibile fondamento e la conditio sine qua non dell'esercizio dell'attività secondo quanto sopra evidenziato, per le quali, nonostante il corretto svolgimento dell'attività promessa, l'esito di questa possa risultare ostacolato, di tal che si conseguano effetti inferiori al previsto, o vanificato, non conseguendosene alcuno, o persino sfavorevole, determinandosi una situazione deteriore rispetto a quella antecedente; deve, infatti, il professionista porre il cliente in grado di decidere consapevolmente, sulla base di una valutazione ponderata di tutti gli elementi favorevoli e contrari della situazione dedotta in rapporto ragionevolmente prevedibili, se affrontare o meno i rischi, di varia natura a seconda dell'attività richiesta al professionista, ai quali questa lo esponga o possa eventualmente esporlo.*

[1217] SANCHEZ PEDROCHE, J. Andres. *Responsabilidad penal, civil y administrativa del asesor fiscal.* Madrid: CEF, 2016. *Passim.*

[1218] SPAIN. Judiciary Brach. *El Tribunal Supremo tiene su sede en Madrid y es un órgano jurisdiccional único en España con jurisdicción en todo el territorio nacional, constituyendo el tribunal superior en todos los órdenes (civil, penal, contencioso-administrativo y social), salvo lo dispuesto en materia de garantías y derechos constitucionales, cuya competencia corresponde al Tribunal Constitucional.* Available at: http://www.poderjudicial.es/cgpj/es/Poder-Judicial/Tribunal-Supremo/. Accessed on 20 May 2020.

[1219] SPAIN. Judiciary Brach. *El Tribunal Supremo.* STS 2412/2010. Sala de lo Civil, Madrid. Date: 19 May 2010, Appeal: 892/2006, Decision (Sentencia): 317/2010. Civil procedure. Available at: http://www.poderjudicial.es/search/index.jsp. Accessed on 20 May 2020.

[1220] SPAIN. Judiciary Brach. *El Tribunal Supremo.* STS 1319/2016. Sala de lo Civil, Madrid. Date: 11 March 2016, Appeal: 2209/2013, Decision (Sentencia): 153/2016. Civil procedure. Available at: http://www.poderjudicial.es/search/index.jsp. Accessed on 20 May 2020.

aforementioned accounting note, incurred “negligent advice”, clarifying that the responsibility of the external advisor does not decline even though the businessman's in-house advisers had “accounting knowledge”. In this line, the Provincial Court of Barcelona, judging a case in which the actor filed a lawsuit against the tax office, the law firm and the insurance company, requesting that the three be jointly sentenced to pay a certain amount as compensation for the damages caused to him, made a decision of March 21, 2019[1221], ruling on the contractual liability of the lawyer and the tax adviser derived from an alleged negligence in the service provided[1222].

My point is that in these situations described in Brazil, Italy and Spain, attributing civil liability to tax consultants for acting with a lack of care or negligence towards their clients when offering tax planning, MDR plays a role. The existence of the obligation to disclose tax planning makes the promoter's duty to inform the client that the arrangement contains characteristics that require it to be reported to the tax administration clearer and more robust. The lack of information clearly represents the lack of care and transparency towards the client. In short, MDR generates two responsibilities for the promoter. In his relationship with the tax administration, he must disclose the planning and non-compliance is subject to an administrative fine. In his contractual/commercial relationship with the client, he must inform that planning must be disclosed to tax administration and the non-information generates civil liability for future damages/demands that the client may suffer.

In other words, only in very special cases could the tax planning intermediary be jointly and severally liable for the tax credit. The professional (or the firm) should be classified as a “partner” in the tax planning and tax advantage, with a common economic and legal interest. For example, when their fees are fixed according to the amount of the tax saved and / or there are confidentiality agreements between the client and the promoter/advisor, protecting the planning of the knowledge of third parties, including tax administration, which would configure commercial interest, the common economic interest might be present. However, to configure the common legal interest, the tax advisor should also participate in the acts/transactions that are described in the law as taxable events, for example making a profit, moving goods, exporting / importing, purchasing / selling properties. Moreover, when he is entitled to benefit directly or indirectly for income or assets of the taxpayer (individual or company), originated from tax advantages or tax savings obtained by the application of a tax planning.

Considering the growing role of tax intermediaries[1223] and how they influence in the taxpayers’ decisions and behaviors in relation to tax obligations, there must be some kind of liability, there is no doubt. One proposal is to introduce MDR for tax planning defined by law, with intermediaries/promoters being the main subjects of the obligation. Non-disclosure would lead to administrative penalties/sanctions for them. The need for mandatory disclosure should be alerted to taxpayers who acquire and/or implement such tax planning, at risk of incurring the

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[1221] SPAIN. Judiciary Brach. *Audiencia Provincial de Barcelona*, Sección 17ª. Date: 21 March 2019, Appeal: 444/2018. Decision (Sentencia) 197/2019. Civil procedure. Available at: https://www.bufetealedo.com/wp-content/uploads/2019/05/Audiencia-Provincial-de-Barcelona.pdf. Accessed on 20 May 2020.

[1222] ANIDO, Miguel Caamaño. A propósito de la negligencia y consiguiente responsabilidad del asesor fiscal. Territorio Fiscal. Published online 02/01/2020. Available at: https://www.ccsabogados.com/a-proposito-de-la-negligencia-y-consiguiente-responsabilidad-del-asesor-fiscal/. Accessed on 20 May 2020.

[1223] See Chapter II, topic 2.3.2 – The 2008 Study.

intermediary/promoter in civil liability for any damages or liability caused to the client (which may include tax and criminal penalties).

After reading this statement, one could ask: what is new? The answer is that MDR, focusing on tax intermediaries, besides creating administrative sanctions for non-compliance to them, can serve as an instrument to make the civil responsibility of lawyers and other tax consultants, when offering, marketing, designing and implementing tax planning, robust and clear.

Moreover, there will be pressure on the tax planning market, without the promoter - tax administration link being marked by "self-incrimination". Working properly, MDR will already place enormous pressure and need for transparency on the taxpayer - promoter relationship for the use of schemes that are contrary to the law, even if the regime focuses only on schemes that are within the limits of the law. Thus, it is not self-incrimination to disclose what is within the legal limits, the same way that there is no self-incrimination in presenting invoices or receipts or proof of expenses, which support information contained in an annual statement.

Therefore, this work understands that non-compliance with MDR should not be regarded a *(i) criminal offense*[1224]. Furthermore, it should also not automatically generate joint and several liabilities for the taxes due, which may be determined in the future, because it is not enough to configure the common legal interest and this possibility may generate inefficient resistance to MDR of those who will be required to present the information. The best solution is the case of non-compliance with disclosure obligation to be used and recognized by the Courts of Justice as a strong element to support the fact that the adviser has neglected the relationship with the taxpayer, who is his client in the tax planning and this configures his *(ii) civil liability* for damages suffered by that client. Therefore, in the tax law field, non-disclosure does not generate joint and several liability for the intermediary obliged to provide the information, but only the *(iii) administrative fine* for non-compliance with the obligation.

5.2 Concluding remarks.

As stated, this topic aims to conclude this work, summarizing and reinforcing those points, which I believe should be taken into consideration to answer the research questions posed at the beginning and to achieve a more efficient result when applying MDR.

[1224] See Chapter III, topic 3.6.8.5, The Polish proposal - Appropriate penalties or other mechanisms to address non-compliance.

5.2.1 Why is there a need in the first place for mandatory disclosure rules and how can MDR be seen as a part and as an instrument in the international process towards coordination and transparency in tax matters?

1.1 The interplay between current international practices for the taxation of profits and increasing capital mobility over the last decades has created incentives for governments to engage in harmful tax competition, especially for accounting profits and for income related to intangible assets. This process of tax competition has traditionally shown itself with the reduction of the statutory tax rates and the broadening of the tax bases. For instance, the reform promoted in the US, in 1986. This "*tax-rate-cut-cum-base-broadening*" reform was praised worldwide and served as the model for similar tax reforms in many EU countries. Its effects, however, caused a large federal deficit and the continuous growing complexity of the income tax codes. Moreover, governments have also implemented specific regimes to attract highly mobile tax bases, opening up new tax planning opportunities for multinationals that generate opacity in the tax system. These reforms and favored treatment for increasingly volatile foreign capital are largely responsible for international profit shifting, which would be ineffective without countries offering preferential tax rules or low tax regimes to specific taxpayers and income categories.

1.2 At the same time, governments have been trying to protect domestic tax bases through anti-avoidance rules, measures for increasing transparency and exchange of information. While this may be a useful approach from a single country´s viewpoint and in the short-run, the lack of coordination of such measures complicates the international tax system and it might exacerbate the tax avoidance problem creating new tax mismatches and loopholes and it tends to increase tax uncertainty, with negative repercussions on compliance costs and investment.

1.3. Thus, tax competition between countries can increase tax uncertainty along an active and a passive channel. The active channel is that countries may try to attract capital, profits and corporations by introducing specific regimes mainly targeted at cross-border investments. These regimes create discontinuities in the tax treatment of investment and they may ultimately generate tax uncertainty. The passive channel describes countries trying to protect their domestic tax revenues in the process of tax competition, complicating the international tax environment further.

1.4. Whether, in theory, harmonizing (making equal) the tax laws of all countries, in a way that produces a similar effect on commercial and investment decisions, tax competition could be avoided; in practice, the harmonization in the domestic legislations is not viable because, first, it undermines countries sovereignty and second, it is not advantageous to all to make different realities adopt the same taxation standards. The great problem with *harmonization* '*stricto sensu'*, which in theory would eliminate competition for the impossibility of disparities, is that it would not bring equal benefit to all countries. This is because this alleged harmonization stops at the tax issue, without going further in search of economic and social harmonization, which would enable the reduction of regional inequalities and the distribution of world wealth. The point is that by respecting these inequalities, mismatches and loopholes will still exist. The solution then turns to *coordination* among countries, which could be applied at different levels. Therefore, from the point

of view both of efficiency and of fairness, the solution follows the path of redistribution or sharing of taxation power. At an international level, the expansion of a tax treaty network searching for increasing coordination (harmonization in a softer way) was verified.

1.5. Nevertheless, tax competition is not under government control. Indeed, the fundamental point is that globalization transformed the domestic options in taxation matters into a global problem and the States' traditional capabilities were being undermined by it. Although the OECD seeks convergence, adherence and standardization, which would lead to its increasing influence, incentivizing the expansion of the global tax treaty network, mostly based on its Model Convention, the fact is that the ease of capital movement and the concentration of value on services and intangibles made the international tax system, which was built on a residence-source paradigm at a different time and reality, inadequate.

1.6. Therefore, the current reality exposes the weaknesses of old tax systems, built based on principles established a hundred years ago, for instance the arm's length principle or principles governing the income taxation. Moreover, there are sets of rules enacted under the strong influence of economic interests and harmful competition, representing systems of law designated to benefit particular situations. As Avi-Yonah punctuates, the "*old international tax regime*", based on principles developed in the 1920´s-1930´s, worked reasonably well until the 1980´s, when globalization led to tax competition that undermined those principles.

1.7. The damage caused by harmful competition in the field of the law was disastrous, because during this process particular laws were enacted, focusing on special economic groups or sectors. In tax law, this phenomenon is verified due to the increasing number of fiscal benefits and exemptions granted, in order to adjust supposed regional differences or economic distortions or, essentially, to attract capital and investments. Moreover, it is important to stress the effects in the social and political fields, resulting in a reduction of the State's power over the economy. Thus, this tax competition also promoted a process of political competition and prevalence of the economy over the social field, which generates a complex tax system and a series of differentiated treatments that need to be addressed in a myriad of details.

1.8. As a result, an increasing number of weaknesses and mismatches emerged, which significantly created more and more options for tax planning. In principle, tax arrangements are within the limits of the law, in its literalness, but whether exploiting weaknesses and mismatches, they force those limits, preventing the objectives of the law from being met. In this case, this thesis refers to them as "*undesirable schemes*", which means *schemes that produce tax advantages not desired by the tax law* or *schemes that produce tax advantages not in accordance with the spirit of the law*.

1.9. In this scenario, the natural loss of revenue, coupled with a reduction in global economic growth after the financial crisis in 2008, led countries to seek broad harmonization '*lato sensu*' (coordination and standardization) in tax rules and agreements. The great evolution of this international effort occurred around the G-20, developing both the international fiscal transparency and the attempt to combat what was considered "aggressive" tax planning in its intention to achieve tax advantages. Thus, tax issues have gained so much importance that in all the G-20 statements over the last years, both are present.

1.10. For achieving a high level of coordination, in the sense of similar policies and regulations for dealing with specific situations, focusing on the elimination of disparities between national laws in order to achieve the same results, without limiting the exercise of the domestic legislator, would be necessary for providing a broad, reasonable and proportional level of information. However, simply broadening the exchange of information network presented some problems, because the actual coordination was not in the desired level (for instance, some countries used bank secrecy or other secrecies to protect the taxpayers´ identity and others not). Furthermore, only obtaining information was not a sufficient reason to engage in a “modeled” Tax Treaty that involved a series of mutual obligations. Therefore, some measures to standardize the information to be exchanged and its flow were necessary.

1.11. The concept of “transparency” emerged as a global flag and some unilateral solutions were sought, especially by the US, or multilateral examples by the OECD / G-20. These solutions essentially sought to expand the exchange of tax information between countries to reduce the possibilities of tax avoidance or evasion, money laundering and fraud. These exchanges of information initially focused on tracking the money, seeking information and sharing in bank account deposits. This would reduce the role of tax havens and, in addition to the tax issue, it targets crimes ranging from terrorism to international trafficking. Thus, besides the arguments involving the need to reinforce tax systems around the Globe, there arouse the fight against terrorism and international traffic, aiming at a control over the movement of money that funds those activities.

1.12. When a country, or a community like the European Union, is making the decision to introduce MDR, it is not focusing only on its problems with tax planning, but also on the possibility of requiring other countries to introduce MDR themselves and make an automatic exchange of information on tax planning strategies. That is, even if the problem is not real and immediate, having access to information represents a future possibility of reaction. Having access to information about what was happening in the tax planning market as soon as possible was one of the initial ideas in DOTAS. Internationally, one country, knowing the tax planning arrangements working in the other countries, can exert international political pressure to close existent gaps or to change favorable tax policies, which causes base erosion and profit shifting. It seems, however, that this finding - the use of MDR as a tool for harmonizing legislation by applying international political pressure, based on the sharing of information obtained - causes a certain discomfort and it is not expressed in the EU proposal or in the OECD/BEPS Action 12 Final Report.

1.13. Summarizing, as I see it, MDR is a measure focusing in obtaining standardized information on tax planning, which affects the international (globalized) tax system. Obtaining and exchanging this information would serve to expose and control the problems that have been described here. Even though a domestic system of law is good in terms of enforcement and if the degree of trust between tax administration and taxpayers is high, there is a reason for introducing MDR, that is, to take part in a larger project involving many countries, which allows that country to receive information about tax schemes working abroad. Thus, putting it in a political position to pressure other countries to change their legislation and to close “gaps” abroad. In conclusion, thinking in terms of MDR, there will be political pressure to prevent countries from offering beneficial tax treatments without drawing the attention of the international community.

1.14. In fact, a harmonized international system focusing in obtaining and sharing information on tax planning can work better than domestic and individualized initiatives. In this context, especially in relation to the review and control rules, MDR has two effects: controlling relevant taxpayers/intermediaries and countries "*inspecting*" other countries weaknesses, gaps and tax benefits/policies. As a conclusion, MDR might work as an instrument to promote harmonization in international tax law.

1.15. Therefore, once the system can make evident mismatches and favorable treatments in an international context, it is able to reinforce international standards and it is a measure to improve transparency. Notwithstanding, it is possible to see that closing gaps and loopholes in the legislation can lead to an increased coherence in the domestic tax system. MDR might be expected to reduce harmful tax competition, by reducing the options for unilateral measures to protect or increase the domestic tax bases, given the adoption of binding exchange of information. All in all, by promoting common and coordinated measures in taxation and by being more efficient in tackling harmful tax competition, the new framework should increase over time tax certainty stabilizing the tax environment.

1.16. The crucial point, however, is that MDR cannot work in a standardized way such as CRS and other transparency measures, bearing in mind, for example, who suffers the actual compliance burden in each regime and how each regime affects the relationship between tax authorities and taxpayers. Countries have a range of combinations to adopt MDR according to their needs. What is worrisome, and which ultimately becomes one of the motivations of this thesis, is whether indeed each administration will warrant sufficient study in introducing MDR or whether the "inclusive framework" based more on political propaganda than technical analysis will prevail and various administrative problems and legal issues may arise. These two points must be addressed when implementing MDR. That is why one must be alert to the next questions.

5.2.2 How can MDR be seen as a part and as an instrument in the construction of a new relationship between tax authorities and taxpayers?

2.1. Due to the complexity of the *undesirable arrangements*, often international, audits may not necessarily reveal their use, traditional auditing process takes significant time, sometimes several years, and it may be difficult to identify if a scheme is an isolated case or widespread phenomenon, in an audit context. Moreover, audits are normally more costly than compliance programs, for both tax authorities and taxpayers. Thus, while audits continue to be an important source of information, they are conditioned by various limitations and lack of relevant tools for early detection of tax planning activities. As a result, tax administrations would not have relevant information at their disposal on tax planning in a timely, comprehensive manner and new instruments for this information should be developed.

2.2. In comparison with the information normally provided in the annual tax returns, disclosure tax planning initiatives go beyond, because it should include any information necessary for the tax administration to undertake a fully informed risk assessment. This includes any transaction or position where there is a material degree of tax uncertainty or unpredictability, or where the tax administration has indicated publicly that the matter is of particular concern and will, therefore, be scrutinized.

2.3. In relation to some voluntary disclosure programs, since the idea behind the co-operative compliance regime is moving from an *ex-post* to an *ex-ante* assessment, this regime is expected to eliminate *de facto* the uncertainty regarding the tax treatment of specific transactions before the submission of the tax return. In fact, the tax administration also gains from increased compliance and reduced auditing costs, as regards tax uncertainty. However, this idea is incomplete for tackling undesirable tax planning, because in those processes taxpayers disclose only what, from their point of view, represents risk, searching for some advantages associated to a co-operative compliance regime.

2.4. Since the taxpayers' behavior is also a source of uncertainty for the tax administration, a mandatory regime can put both sides on equal footing when including the risks, which produce concerns and, consequently, uncertainty, from the tax administration´s point of view. That is why this work defends that a co-operative compliance program is important, nevertheless, some mandatory rules are essential in the search for transparency and certainty.

2.5. My solution is to focus on planning that represent a "risk" of not achieving the results intended by tax law. The solution, then, calls for clearer, more consistent, simpler legislation and which, above all, allows for the predictability of behavior of those who are obliged to comply with it, both the taxpayer and the tax administration. Complex laws and inconsistent tax policies lead to a reduced ability to predict the behavior of the other party. Thus, beyond seeking clarity and simplicity in tax legislation, and consistency in implementation, it is necessary to adopt a variety of measures to limit the discretion not only of the administration but also of the taxpayers. It is important to highlight that thinking about stability in legislation, temporary measures generate much more apprehension and uncertainty than stable measures that foresee changes. The problem then is not to change the law, but that the changes, their possibilities, their causes and their effects are clear, precise and certain and the consequences are predictable.

2.6. If the pragmatic idea about tax planning involves administrative and policy concerns in order to provide for solutions to prevent certain unintended or distortionary tax results, guaranteeing the achievement of the objectives of the law, the solutions must take the role of tax intermediaries into consideration. Tax intermediaries are broadly defined as the person who, in the course of a relevant transaction, is in some way responsible for the scheme´s design, acts as an intermediary between taxpayers or who, with the intention of implementing a planning, organizes or coordinates the action.

2.7. MDR can be used to establish risk analysis methodology, in a cyclical application. Risk factors are required to present disclosure. Thus, MDR creates a risk for certain conducts and arrangements

containing certain components. If the risk is confirmed, a fine-tuning is performed to improve the result. This risk analysis methodology allows tax administrations to implement taxpayers' ratings, sometimes offering administrative advantages in their relationship with low risk taxpayers. Normally, a concern with the creation of a rating, which uses objective criteria, is raised based on a possible confrontation between it and the principle of equality. However, there are special taxpayers, who require different treatment by the tax administration.

2.8. When classifying taxpayers by risk factors it is also better to understand the facts and circumstances of their activities, which are not normally presented in the annual tax returns. In this way, tax administrations may choose to conduct audits only in relation to taxpayers involved in similar events or circumstances and also to avoid some gaps that normally arise when collecting information on tax returns. It is an efficient approach based on risk analysis to deal with larger and more complex taxpayers, seeking to understand their particularities and how they respond to management. The management relationship model seeks to deal with tax issues based on clarity, security, proportionality and timeliness in the solution. The information provided in MDR can be efficiently applied to allow the tax administration to know taxpayers better and improve their relationship with them. Thus, it was believed that the role of intermediaries and the demand for "aggressive" tax planning, would naturally be reduced.

2.9. Furthermore, the complexity of the tax system, in addition to producing more gaps and mismatches, which could be exploited, causes more disputes. More planning in operation, more disputes for the tax administration. As a result of more disputes, promoters and intermediaries of the planning goes for acting as advocates of the client because of the scheme they created themselves. MDR can be used as an instrument to break this cycle of disputes, avoiding them in advance, if the authorities understand this as one of the objectives and do not intend to use the information only to optimize their audit performance, which will not work.

2.10. However, it is important to note the point that in a mistrustful environment, where there are several other sources of relevant information and several advanced technological instruments for risk analysis, MDR can be unnecessary and disproportional, in terms of cost-benefit. The only reason, if it is interesting, is to take part in the automatic exchange of information and if the international community has made MDR introduction a requirement.

2.11. Other crucial point is that the control to establish all the characteristics and consequences of the regime cannot be concentrated only in the hands of the tax administration. For example, either penalties are fixed in the law (legislative), which would be more advisable in civil-law, or by the Judiciary, in each case, which can be used in common-law. The more tax administration concentrates power on controlling the regime, two opposite consequences might be observed: on the one hand, it increases the ability to react; on the other hand, it increases the mistrust of the taxpayers/promoters, casting doubts if the regime could be used excessively, only imposing penalties without the proportional results in terms of efficiency.

2.12. As highlighted in this work, MDR does not mean paying more taxes. It is an ancillary tax obligation in order to allow inspection and control of the activities that give rise to interest in the collection of statutory taxes. In this sense, mandatory disclosure regime is similar to the obligation to present annual tax returns or respond to tax administration notifications, when requested.

Nevertheless, MDR goes further, as it has dissuasive effects and interferes with the taxpayers' and intermediaries' behavior, acting in the tax planning market. Also, it must produce behavioral changes in tax administration and even in those who formulate tax policies.

2.13. The question involving the application of legislation that aims to directly deter or prevent the operation of tax planning in which the sole or main objective is obtaining a tax advantage is not the main purpose of MDR. Disclosure rules would only oblige to inform a planning like this in advance, so that the authorities could react with the application of CFC rules, GAAR, or even, when applicable, a proposal for legislative change that would avoid the specific scheme. In relation to the existence of anti-avoidance rules, this work stresses that MDR and GAAR are complementary and the existence of one does not preclude the co-existence of the other and that MDR has further functions beyond the collection of information, which could be collected by other means/actions.

2.14. Therefore, MDR does not directly threaten the planning, but points out where the risk factors, which offer undesirable results for the purposes of taxation, are. MDR is established from patterns of behavior or facts. Thus, schemes that involve the use of low-tax jurisdiction are a pattern that indicates abusive tax planning, but not a rule that establishes that those schemes are abusive or illicit. Contracts that contain confidentiality clauses for non-disclosure of a planning are a pattern that indicates that the planning is innovative and has unknown elements, but not a rule that establishes that this type of clause violates the tax law. Seen in this way, the regime is a system of cooperation, cost reduction and avoids future litigation.

5.2.3 Why is it not enough to be mandatory?

3.1. The most important component of sanctions is their ability to deter unwanted behavior, so as to bring about greater compliance. Therefore, sanctions should be applied only if they are reasonably effective in deterring undesirable behavior. The point in MDR is that the system needs cooperation and trust, so that the desired information can flow as expected. The primary effect of deterrence in the system can be achieved by putting pressure on the relationship between taxpayers and promoters/intermediaries and not by punishing those who do not provide the information within the established deadlines, which should be an administrative fault. Indeed, MDR cannot only be a voluntary obligation, because the system implies State's intervention in the private sphere and needs to have a certain amount of coercion, which is typical of taxes, anyway. However, penalties are, in case, exclusively connected to the idea of deterrence because knowing that planning should be revealed, *supply and demand* in the tax planning market would decrease.

3.2. Regarding to MDR, what happens is that the regime does not prevent the taxpayer´s autonomy to apply tax planning; nevertheless, in fact, it reduces the possibilities to do so. It also includes or increases the risk of using tax planning. However, this increase in risk for the individual choice must represent a reduction in the risk of frustrating the taxation objectives, in the collective interest. In addition, by reducing the possibilities of exploiting loopholes and mismatches in the tax system, it makes it possible, both from the point of view of tax administration and from the collective point of view, to increase certainty. Thus, it is necessary to keep in mind that any individual limitations

can be justified by collective advantages, in terms of obtaining better legislation and fairer competition, in the market governed by that legislation.

3.3. Considering these characteristics, MDR does not work in a mistrustful environment. Thus, my answer is that the regime needs to be mandatory, with sanctions, but *"something more*" is required. I mean transparency, trust, awards or advantages for compliance, clarity, simplicity, cost reduction and, especially, that a taxpayer can perceive the collective results the regime produces, increasing fairness in competition, reducing the tax gap and improving the quality of the legislation, for instance.

3.4. When applying MDR, deterrence, the more traditional tax administration tool, is important but not sufficient to explain the level of tax compliance in society. Other factors are shown to be important, particularly the influence of social responses and the level of trust in the tax administration. Perceptions of the prevailing personal scope are also important determinants of compliance but appear to exert less influence on taxpayers than the social ones.

3.5. It is important, first, to create an environment based on trust and transparency; second, to present MDR as a benefit for both the taxpayer and the tax administration, comparing to the system based on audits and tax disputes. Solutions go through the development of risk analysis methodology, for which the information gathered is very important and leads to savings for both tax administration and taxpayers. For the first, because it increases the efficiency of their work and for the second because compliance costs are lower than the costs of concealment and the costs of facing an eventual and avoidable auditing.

3.6. When describing the advantages of using MDR, it is important to consider the issue of the taxpayers´ willingness to comply with the rules. Taxation is a State activity that has coerciveness as an essential characteristic. If it is not mandatory, we are not talking about taxes. Likewise, ancillary activities in order to verify the correct fulfillment of the payment, according to the law, are also compulsory and therefore there are always penalties for those who do not comply. The mere existence of penalties for non-compliance does not mean that after the enactment of the law creating the obligation there will be a high degree of adherence or observance. So, it is not enough to think about the advantages the regime might bring assuming that everyone will faithfully provide the information, but if it is considered that not everyone will provide it, even if there are penalties, the balance of benefits certainly decreases because other management efforts and costs are needed to increase the compliance rate.

3.7. Previous experiences, especially in the US and the UK, have a major influence on taxpayer/promoter behavior and perception of MDR. Thus, those already working under those systems demonstrate more confidence than others for whom MDR is really new. The conclusion is that MDR is a system that requires adaptability by taxpayers, intermediaries and tax administration. The best results will not come right after the measure is implemented, and it will certainly be necessary to adjust hallmarks to "balance" the amount of information received, the tax administration's work capacity and the trust of taxpayers / promoters in providing the information. All existing systems, such as the American, the British, Canadian, South African, have undergone major transformations a few years after the introduction.

5.2.4 What are the justifications and limits in order to make MDR not arguable in the face of fundamental rights?

4.1. In the search for prudent cumulative, combinatory, compensatory solutions to conduct constitutional principles to a joint development and not to a joint decline, legal science cannot be attached to old formalisms when the complexity of the systems and the speed of the changes require moderation, adaptation, and flexibility that are not supported by legal models epistemologically based on dogmatic-authoritarian assertions.

4.2. As a conclusion, when talking about taxation, there are many examples and arguments to be mentioned in order to support the possible relativization of legal principles and fundaments, depending on the context, seeking to find a justification for what is “fair taxation”. Thus, there are no standards to find what is right or wrong in tax matters. Each society can choose the means to reach the ends. What is not an optimal solution is maintaining objectives in the constitutional law which cannot be reached or which are easily circumvented, generating distortions, because the rigid interpretation of the rule of law is disconnected from the real facts.

4.3. When applying MDR, one should not search for a dichotomy between licit and illicit tax planning, even because this search is irrelevant to the results envisaged by the regime. What should be in focus is that a given tax planning must be known and another not, based on the tax system´s objectives. Moreover, the fact that they do not need to be disclosed at a certain moment or circumstance does not mean they are acceptable or considered valid. Conversely, they are not being included in the disclosure obligation because there is no reasonableness and proportionality in demand to do so.

4.4. This work states that neither legality, as a form of taxpayer protection, nor equality, as justice and fairness or in its ability to pay corollary, are the most important pillars to investigate in MDR application. *Strict legality* does not provide an answer to properly classify tax planning, nor does it limit the application of MDR. Moreover, regarding freedom, when applying or assessing an MDR, it cannot be understood that the system is preventing each individual from making his own choices, but that he must make them in a manner consistent with the objectives and purposes of taxation and be responsible for its choices. In a cyclical application, this would be guaranteeing economic freedom, since freedom is also guaranteed by the creation of opportunities for choices to be made and avoiding criticism that a planning can be legitimate when its only or main purpose is to achieve the tax advantage.

4.5. MDR is established from patterns of behavior or facts. The behavior of taxpayers in terms of taking risky positions in tax planning play a critical role in reducing tax uncertainties. What I mean is that the more freedom the taxpayer has to adopt varied and unpredictable methods of reducing the tax burden, exploring complex and circumstantial legislation, the more the tax administration feels insecure and refrains from adopting a transparent and helpful behavior. Thus, MDR needs to deal with a wide range of situations associated with another type of rule (GAAR) that must, by its

nature, be general, defined only in terms of a result, focusing on undue tax advantage, regardless of the means that were used to achieve it.

4.6. That is why this work argues that MDR aims at "undesirable" tax planning and, specifically, focuses on those that are at risk of producing results that were not desired by the legislator. The discussion, then, about the future disqualification or requalification of a planning and the balance between legality, freedom and equality, or ability to pay, does not need to be resolved in order to apply MDR. What we have to preserve, in short, in the institution of MDR, is legal certainty. The answer that is necessary, in this work's viewpoint, is about legal certainty and trust. The solution is to seek "certainty" in the result and not in the premises. Moreover, combining the static and dynamic perspectives of legal certainty with the need to have constitutional principles that cannot be interpreted and applied exclusively within a legal perspective, but that need to be relativized to economic and social realities, we arrive at a view of legal certainty built on the pillars of confidence (trust), coherence and consistency.

4.7. As businesses inevitably operate with many uncertainties, their decisions do not need absolute certainty in tax matters but an environment where they are able to manage the risk associated with tax uncertainty. That is why I propose MDR "*on potentially risky tax planning*", focusing on "*risky arrangements*". Why are they risky? Because tax administration defines them based on those characteristics that "might" represent abuse, but that are not abuse, there is only "risk". On the taxpayer's side, when adopting a tax planning that involves those characteristics, he knows that there is a greater risk of being challenged by the tax administration, because if it involves those characteristics, the planning must be disclosed. He can then adopt a different strategy, which does not involve those characteristics and does not need to be disclosed. Thus, arguments that the MDR criminalizes or constrains the use of planning or that legality and freedom are being threatened have no substance.

4.8. Moreover, my point is certainty as trust and credibility and certainty as acceptable risk (risk management). Therefore, when implementing a planning that is previously defined as risky by the tax administration, the taxpayer knows that the chance of being challenged or that in the future the gap he is exploring in the law been closed is greater, exactly because the tax administration has already warned him. He is free to implement it or not, taking the tax risk into consideration, as in any other part of his business. The important thing in terms of certainty is that hallmarks should be defined only for planning that have been implemented until their setting (of hallmarks). There can be no retroactive hallmarks.

4.9. This work concludes that the main question falls on the legitimate expectation, for the future. In this time perspective, legal certainty is closer to clarity, in the meaning that those subject to the law must know their rights and obligations and to trust between those who have a duty to enforce the law and those who have a duty to comply with it. A crucial point, therefore, is that the measure should be clear and its application and effects should be foreseeable. Furthermore, it is arguable how much the tax advantage produced by a tax planning is a "*legitimate expectation*" and for

whom, that is, a subjective perspective. The conclusion is that changes do not cause uncertainty, but unpredictable changes do.

4.10. Analyzing MDR application and the complaints of a possible uncertainty, this work supports that the issue is closer to the principle of protection of trust, which is distinguished from the principle of legal certainty principle by the following criteria: (i) it relates to a normative aspect of the legal order, focusing on a micro legal view. (ii) it protects the interest of a specific person and presupposes a concrete level of application. (iii) it serves as a means of protection of individual interests. (iv) it is used only to protect the interests of those who consider themselves harmed by the past exercise of legally oriented freedom. Therefore, there is no abstract or collective incompatibility between MDR and the principle of legal certainty.

4.11. The powers of judicial review and constitutional control, in diffuse control of constitutionality, when a general consequence is acknowledged at the appeal level, regarding MDR, should not work to refuse the measure, under the justification of general threat to certainty, exactly because it is necessary to take into consideration the subjective aspect. On the other hand, it should presumably be admitted in general to protect the collective right to fair taxation and to fair competition in the economy.

4.12. MDR produces a deterrent or dissuasive effect. The conclusion is that any alleged restriction on economic freedom (deterrence to use tax planning) could be applied if it is justified by "*overriding reasons of public interest*" and is limited to the intended objective and to the means necessary to achieve it. These are, therefore, important limits when introducing the measure. Concerning MDR, the joint evaluation of reasonableness and proportionality is necessary. However, when analyzing the reasonableness, proportionality and practicality it is impossible to disregard that the rule that introduces MDR is not instituting a tax, but integrating tax law and has the dominant and immediate purpose of achieving certain economic (for example, fair competition) or social (compliant behavior) results. Moreover, it has a hybrid nature of being an "*ancillary*" and "*extrafiscal*" rule.

4.13.Reasonableness clearly is a contextual standard and MDR application, submitted to reasonableness review, might be useful for simplification, coherence, and consistency in tax law. Those are some advantages that could, *prima facie*, be seen in the balance with the limitations or "*particular disadvantages*" that some taxpayers point out, which means MDR is able to attend the proportionality test, *stricto senso*. Furthermore, it is important, when applying the principles or tests, to bear in mind the material scope but also the addressees and recipients of the norm (personal scope).

4.14. MDR makes it possible to verify how, effectively, taxpayers are applying the abstract rule. By knowing tax planning developed for specific cases, it is possible to adjust the rule so that it brings the abstract general command closer to the concrete particular application. It is a fact that those who benefit individually from the general abstract rule, because they have found a way to reduce their tax burden, according to what it establishes, or because they find themselves in a special situation in relation to the others, will be dissatisfied. However, undoubtedly the adjustment

process generates a better standard, without having to resort to an extreme and, often, useless and ineffective, detailing.

4.15 When checking suitability and necessity of MDR, one cannot forget to consider the exceptional circumstances that led to its use. In addition, regarding the principles of social status and the coherence of the system, it is necessary to remember that the first is demanded, above all, to support the *extrafiscal* instrumentalization of taxes; while the second addresses the articulation and harmonization of these measures, through the tax system, with other indirect or direct measures of intervention in the economic and social order.

4.16. It is necessary to take the empirical and technical knowledge of the tax administration, which establishes the hallmarks by itself or suggests them to the legislator, into consideration. Next, which kind of data, information or studies were considered when establishing or suggesting them. Therefore, in order to demonstrate unreasonableness, it is relevant to explain, technically, why those choices are wrong or inappropriate.

4.17. Proportionality provides a structural framework for substantive review, which has been applied to assess administrative decisions. Similar to when applying the reasonableness standard, it is necessary to fully recognize and respect the administration's discretion. Additionally, proportionality and reasonableness will often yield the same result, as it is unlikely that a decision that is found reasonable will be judged disproportionate or the other way around. Consequently, lack of proportionality is a strong indicator for unreasonableness.

4.18. The proportionality inquiry can be confined to a particular aspect of MDR, for example to a specific hallmark (material scope) or a specific person required to make a disclosure (personal scope) or a specific information required to be disclosed (that would lead to the disclosure of trade or industrial secrets, without a specific counterpart). The point is the identification of the problem, regarding the law or the facts. This way, a less intensive review can be utilized in these cases. When reviewing this type of case, nevertheless, Courts would be well advised not to challenge and balance all the issues considered by the regime, especially when political and economic reasons have been considered.

4.19. The conclusion is that MDR can be assessed in terms of objective and subjective reasonableness. For example, if the hallmarks are used to promote equality among taxpayers. Furthermore, due to proportionality, if they are suitable to achieve their ends and if the limitations they impose can be overweighed by the advantages they produce. Moreover, these advantages must be considered both collectively and individually. This work has already presented several points in which the MDR can bring individual benefits to the taxpayers. Finally, if the measure serves as a practical instrument to make the tax law, in a systemic approach, able to achieve its objectives

4.20. A good function that cannot be constitutionally argued is if the MDR serves to correct the fortuitous errors the legislator committed when making the law, due to occasional policies or motivated by reasons that do not find basis in the constitutional principles of taxation. This can

justify the measure whether fears about possible uncertainty are raised. That is, initial uncertainties will be used to build a more coherent, consistent and confident legislation.

5.2.5 What is required for the system to function efficiently?

5.1. An important point that this work stresses many times is the early, specific and relevant information, which should be focused on MDR, is suitable to tackle tax planning forcing the limits of the law, but still limited by them. However, to clearly illicit practices, or in which the intention to break the boundaries of the law is evident, MDR is not the adequate instrument.

5.2. MDR is not primarily intended to identify persons who are committing crimes and to serve as a basis for criminal prosecution, therefore, determining whether the planning to be disclosed is considered avoidance or evasion is useless. The rules, as pointed out, have two main objectives: to increase transparency and to reduce uncertainty. The focus should never be identifying criminal or unlawful activities, which can occur eventually, during the development of the analysis by the tax administration, but not primarily, when designing the rules.

5.3. If the tax administration is primarily introducing MDR taking the existence of illicit behavior into consideration, beyond subverting its main functions, in many cases, it is creating an additional barrier against receiving the information. One of the main issues in this work is to demonstrate the need for a cooperative compliance program in parallel with MDR. Proposing or arguing the necessity of combating crimes as an argument to require the information using MDR goes in the opposite direction.

5.4. What makes a tax planning innovative is the way its structural elements are organized and arranged. Thus, they can be framed by the presence of certain general characteristics. These characteristics are named "hallmarks" and the legislation must promote descriptions of which arrangements it focuses on. Some of these hallmarks are designed to capture new and innovative arrangements. Others are designed to capture areas of specific concern and they may include schemes that are well known or commonly used. It is expected that the range of hallmarks will change over time, in function of perceived changes in the tax planning market or in the effectiveness of any counteraction. For instance, every time the tax planning market adapts its practices according to the new rules, provisions or opinions emitted by the tax administration or every time the potential risk of such planning changes and it is no longer considered to be relevant in MDR application. The periodic evaluation of MDR is remarkably important to adjust the hallmarks and maintain the proportionality and effectiveness of the system, considering that tax planning structures are changed very quickly. Placing the hallmarks in regulations allows them to be altered with greater ease than if they were found in primary legislation.

5.5. The success of a disclosure regime is contingent on its scope being set correctly. Suffice it to say that a disclosure regime needs to cover a wider range of transactions than those that could be successfully challenged under current law (i.e. transactions which could be challenged by GAAR).

It needs to catch transactions which could withstand a challenge under current law and which the tax authorities might thus wish to counter through a change in the law.

5.6. The obligation to disclose, in essence, should be early and at the time of availability or implementation of the planning. There is no reasonableness in a once-a-year MDR, together with the annual tax return, because the objectives of the information provided in the MDR differ from the objectives of the information provided in the annual tax return. In addition, in the case of marketable schemes, early information can prevent them from being spread to many taxpayers, keeping eventual damage to tax revenue under control.

5.7 Moreover, in the scope of MDR, identifying the schemes is more important than identifying the promoters and users. MDR should be designed as an important instrument for tax administration to use in the practical application of the tax law, in order to achieve the objectives and purposes of the law, obtaining the necessary and timely information. Deterrence is only a collateral effect, not under control of MDR scope. The deterrence effect will be greater to the extent that the system is efficient. If deterrence is posed among the objectives of the law, when introducing MDR, strong arguments can be presented about the State´s illegitimate intervention in business freedom and in the right to self-organization, in order to pay the minimum tax burden. It is efficient if MDR is applied as a deterrence tool, based on self-assessment and penalty system, which offers an increase in risk of avoiding tax and some reductions or benefits if the avoidance scheme has been disclosed before the tax administration assessment. Furthermore, it is efficient if the system is developed taking taxpayers´ behaviors and perceptions into consideration, in relation to tax administration and in relation to the tax system, as a whole.

5.8. Essentially, the direct objective of MDR is not exactly to punish the intermediary or even the taxpayer, but to adapt the legislation/administrative practice/tax policy to prevent loopholes or mismatches from being used to reduce the tax burden, promoting the effective achievement of tax law purposes. In this sense, the variable time for both information and the possibility of reaction by the tax administration, promoting the due adjustments, proves to be crucial.

5.9. MDR should have clarity, objectivity, flexibility, proportionality and effectiveness as its principles. Systems introducing MDR should clearly specify what information must be disclosed and the information provided within the scope of MDR shall be that which is strictly connected to the intended purpose of the system. It cannot be taken for granted that an MDR is in place to gather other financial information, which was eventually left out of an annual tax return or to prevent financial crimes. This element in the system is strictly connected with the concepts of proportionality and reasonableness.

5.10. The fact that a transaction is reportable does not necessarily mean that it involves tax avoidance and providing the information does not imply any acceptance of the validity, or tax treatment, of the transaction by the tax authority. In other words, the lack of tax authority response does not give rise to a legitimate expectation. However, this work stresses that making these aspects clear in the legislation is only a formal solution, which is not enough to guarantee the system´s well-functioning, because the absence of responses can lead to issues involving

uncertainty and (dis)proportionality. An efficient system must be designed in a way so that tax administration has the objective of providing responses covering all (or the maximum of) arrangements informed, in particular or in general, in a reasonable time.

5.11. No publication requirements of the tax administration opinion about the disclosures is not necessarily an advantage in the system. Where on one hand it reduces the tax administration costs, on the other hand, it decreases the system´s general efficiency. One arrangement informed and analyzed by the tax administration can be a good example/guidance for several other intermediaries/users. It means that by analyzing and publishing a general opinion, tax administration could reach a large number of taxpayers, furthermore increasing the level of certainty about the possible use or not of a given arrangement. It means that the schemes disclosed need mostly to result in some action, such as changing the audit schedule, modifying the legislation, offering advantages for the compliant people. Thus, the payoff will depend on how tax authorities are able to react to the information provided. This ability to react, besides its behavioral influence, is also a measure of the proportionality of the regime.

5.12. The Administrative body cannot be in charge of all the steps, from defining which kind of planning must be disclosed, by the hallmarks, to receiving and processing the information and at the same time for establishing the country´s tax policy and promoting legislative changes. It represents an excess of power and can compromise the transparency and trust of an MDR system. If on the one hand this compromises the speed with which changes in legislation can be made, on the other hand it increases the degree of taxpayers' confidence in the regime. A possible loss in reaction speed, for “demeaning” cases, is compensated in the certainty degree, for those cases that focus on stabilizing the legislation and controlling tax planning, over time.

5.13. In MDR, the role of policymakers is important, and it is necessary for them to be committed to the regime, for it to be successful. While in some countries tax administration takes a main role in the tax policies definitions or at least has great influence on that, in others these definitions are conducted in other branches of the government. Anyway, it is necessary that these double functions (administration and policy) be connected and working together.

5.14. An important characteristic, which this work suggests to all MDR: starting as small as possible and expanding gradually. This will bring certainty and trust in the application, both to tax administration and to promoters/users. If an MDR starts trying to encompass a great amount of information, taxes and situations, it leads to management difficulties and uncertainty in the application, which can, hence, lead to failure.

5.15. The reference to “potentially risky” tax planning, which could seem to be only textual at first glance, produces two significant effects, in this work’s point of view: first, a psychological effect on the promoters/users obliged to disclose, because the schemes are not defined as “aggressive” or “abusive”, but simply schemes that are “risky”. Thus, they can be risky because they involve complexity, international interests or policy concerns and not exactly because they push the limits of the law and by doing so, could be challenged by a GAAR or in an audit. Second, because by applying this idea tax administration can avoid litigations or challenges before the Courts,

especially in countries where the Courts look at the letter of the law to provide its interpretation. Therefore, if a regulation introducing MDR provides definitions to “tax advantage”, “scheme” and “avoidance” and subsequently sets the hallmarks as characteristics related to a scheme producing an advantage that represents abuse or avoidance, it is possible to raise a discussion on whether the hallmark really catches those schemes or not, *i.e.*, the “quality” of the hallmark. Thus, the idea is to make it clear that the nature of the mandatory disclosure regime is such that it may require the disclosure of some schemes that are not avoidance.

5.16. The administrative and jurisdictional acts of enforcement of the laws cannot frustrate the public purpose stamped on them. In this sense, it is understood that the objective of MDR is to give the tax administration an instrument, which is capable of individualizing behaviors, making it possible to identify the actual economic activities, their conformity with the purposes of the tax law and its results in relation to the ability to pay principle. This way, MDR is not an eminently legal instrument, but a practical tool, to connecting the theoretical and general approach of tax law to the individualized and factual world.

5.17. As this work stresses, MDR should not focus on crimes or actions that give rise to criminal liability. Possible criminal liability will be a result of a specific and subsequent action of the tax administration and not related to a previous pendency (audit or assessment). In addition, I understand that if in the course of an administrative action (audit), it is found that a scheme or arrangement gives rise to criminal liability, which was not disclosed under MDR, the fine (penalty) for non-disclosure would not be applicable. In that case, non-disclosure is justified and the penalty would be absorbed by the criminal sanction, which is much more grave. In other words, the fact that it is found that tax planning involves crime would be a reasonable justification to accept the disclosure was not carried out and then there would be no reason to apply a sanction for non-disclosure.

5.18. Concerning the taxpayer-promoter connection and tax liability in the presence of MDR, the mere common economic interest in the transaction cannot give rise to joint and several liability. There must also be a common legal interest, which must be direct and immediate in the realization of the taxable event, and which is present when people participate together in the practice of the acts described hypothetically in tax law, giving rise to tax. For this purpose, the parties should be on the same side of the legal relationship, which produces the tax effects, and not on opposite sides. Thus, such a common interest would normally be verified in transactions involving economic groups, but hardly verified in licit tax planning market where the taxpayer and the intermediary/promoter enter into a contract with mutual and opposite obligations. In this conclusion, it is important to remember, once again, that this work focuses on lawful planning and not on simulations, frauds or manipulations that represent illegal activity, subject to criminal penalties.

5.19. A suggestion is attributing civil liability to tax consultants for acting with a lack of care or negligence towards their clients when offering tax planning and on this MDR plays a role. The existence of the obligation to disclose tax planning makes the promoter's duty to inform the client that the arrangement contains characteristics that require it to be reported to the tax

administration clearer and more consistent. The lack of information clearly represents the lack of care and transparency towards the client. In short, MDR generates two responsibilities for the promoter. In his relationship with the tax administration, he must disclose the planning and non-compliance is subject to an administrative fine. In his contractual/commercial relationship with the client, he must inform that planning must be disclosed to tax administration and the non-information generates civil liability for future damages/demands that the client may suffer.

5.20. Therefore, this work understands that non-compliance with MDR should not be regarded a *(i) criminal offense*. Furthermore, it should also not automatically generate joint and several liabilities for the taxes due, which may be determined in the future, because it is not enough to configure the common legal interest and this possibility may generate inefficient resistance to MDR of those who will be required to present the information. The best solution is the case of non-compliance with disclosure obligation to be used and recognized by the Courts of Justice as a strong element to support the fact that the adviser has neglected the relationship with the taxpayer, who is his client in the tax planning and this configures his *(ii) civil liability* for damages suffered by that client. Therefore, in the tax law field, non-disclosure does not generate joint and several liability for the intermediary obliged to provide the information, but only the *(iii) administrative fine* in case of non-compliance with the obligation.

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