# BEPS: ACTION 12 – ANALYSIS OF COMPATIBILITY WITH BRAZILIAN AND EU FUNDAMENTAL FREEDOMS

## *AÇÃO 12 DO BEPS – ANÁLISE DE COMPATIBILIDADE COM AS LIBERDADES FUNDAMENTAIS BRASILEIRAS E DA UNIÃO EUROPEIA*

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## Resumo

Este estudo tem como objetivo analisar a compatibilidade da Ação 12 do BEPS com as liberdades fundamentais da União Europeia, fazendo, adicionalmente, uma comparação com a tentativa frustrada de implementação no Brasil em 2015, decorrente de sua incompatibilidade com as garantias constitucionais.

**PALAVRAS-CHAVE:** OCDE, BEPS, PLANEJAMENTO TRIBUTÁRIO, LIVRE INICIATIVA, SEGURANÇA JURÍDICA, GARANTIAS FUNDAMENTAIS, DIREITO TRIBUTÁRIO EUROPEU, DIREITO TRIBUTÁRIO BRASILEIRO

## ABSTRACT

This study aims to analyse whether Action 12 of BEPS could be compatible with the fundamental freedoms of the European Union, and in addition, making a comparison with the failed attempt of implementation in Brazil in 2015, due to its incompatibility with their fundamental rights.

**KEYWORDS:** OECD, BEPS, TAX PLANNING, FREEDOM OF ESTABLISHMENT, FREEDOM TO CONDUCT A BUSINESS, FORESEEABILITY, FUNDAMENTAL FREEDOMS, EUROPEAN TAX LAW, BRAZILIAN TAX LAW

## INTRODUCTION

In October 2015, the Organisation for Economic Co-operation and Development (OECD) published the final version of its report on the Base Erosion and Profit Shifting project (BEPS) with provisions aiming to mitigate or eliminate double non-taxation, in addition to new approaches on how to fix some issues in cross-border operations. This report is the result of a two-year long project, made by request of the G20[1] after the 2008 global economic crisis.

Action 12 requires taxpayers to disclose their aggressive tax planning arrangements, under the justification that this measure would enable an "early counteraction". The BEPS project tries to protect the countries' tax base as a reaction to earlier abuses by giant corporations.

Even though this is a commendable initiative and some limits to tax planning must be imposed, the provisions of the BEPS project in order to be serviceable must be in line with the country's constitution, or, in the case of most OECD member countries, European Union Law.

The fundamental freedoms are prescribed in four articles of the Treaty on the Functioning of the European Union (TFEU), which is a primary law[2], and can be summarized as the free movements of goods; freedom of movements for workers; right of establishment and freedom to provide services; and free movement of capital.

In addition, in 2009 by force of article 6(1) of the Treaty on the European Union (TEU), new rights were given primary law status, having "The Charter of Fundamental Rights of the European Union" (CFR) become legally binding. One of these "new" freedoms is the "Freedom to conduct a business".

Brazil is not a Member State of the European Union, but its Constitution has remarkably similar, or, at least, comparable provisions, stating that the freedom of enterprise, the right of free competition and private property are "fundamental". Until this day, Brazil is still not a member of the OECD, but its position in the G20 and the need to protect its tax base in a weak economy made the country choose to implement some of the provisions of the BEPS project.

Brazil's first attempt started (and ended) in the second semester of 2015, when the government tried to pass a Provisional Measure with articles resembling the provisions found in BEPS Action 12. After much debate within the law community and injunctions granted by Federal Courts, the articles regarding mandatory disclosure of tax planning were finally vetoed when converting the Provisional Measure into Law.

1 The "Group of Twenty" is an international forum for the governments and central bank governors from 20 major economies.
2 According to EUR-Lex, a primary law is "the supreme source of law of the European Union (EU), that is it prevails over all other sources of law." Cf.: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al14530>. Accessed: 14 February 2016.

The reason for the veto was allegedly that the provisions of the Brazilian law, even though in line with BEPS, were not in line with the fundamental freedoms. However, was it really the case? The whole discussion can be summarized in the following questions: to what extent is mandatory disclosure of tax planning in line with fundamental rights and freedoms?

## BEPS ACTION 12 – SCOPE AND DELIMITATIONS OF THE PROVISION

Action 12 is part of a 15-action plan issued by the OECD and the G20 aiming to tackle current issues on international taxation. The plan is based on three objectives: coherence in the domestic tax rules in relation to cross border activities; reinforcing existing international standards; and improving transparency[3].

The Actions prescribed by BEPS when implemented should reduce misunderstanding and disputes between governments and should be mutually beneficial to governments and businesses. Changes should be implemented via domestic law and treaties' provisions. It was expected by the OECD that by the end of 2016 a multilateral treaty would be signed by the participating countries. The first signature would only come in 2017, and the last one in March 2018, when Slovenia finally deposited the instrument of ratification of the Treaty.

Action 12 introduced the Mandatory Disclosure report on (aggressive) tax planning and was designed to "increase the information flow on tax risks to tax administrations and tax policy makers. [...] provid[ing] the necessary flexibility to balance a country's need for better and more timely information with the compliance burdens for taxpayers"[4]. With that objective, the OECD issued recommendations on how the mandatory disclosure rules should be to achieve that goal.

The first characteristic that a Mandatory Disclosure regime must have is to "be clear and easy to understand" and "should accurately identify the schemes to be disclosed"[5]. It also must inform who reports; What information to report, when to report and the consequences of not reporting.

The general provisions for mandatory disclosure rules are the following:

> a) Who has to report: taxpayers or planners? Taxpayer being the user of the scheme and the planners the promoters or advisors who planned the scheme.
> b) What has to be reported: counties can choose based on their domestic needs what should be on the report.
> c) When the information should be reported: the purpose of the report is to have an early access to information.

3 OECD/G20. Mandatory Disclosure Rules, Action 12 - 2015 Final Report. OECD Publishing, 2015. In: <http://dx.doi.org/10.1787/9789264241442-en>. Accessed: 14 February 2016.
4 Ibidem.
5 Ibidem.

d) Other obligations: disclosure rules can also require the client list of a scheme when the domestic law permits it.

e) Consequences of nondisclosure: countries should apply sanctions and penalties.

Concluding, a Mandatory Disclosure rule would apply to all taxpayers, creating the obligation on the taxpayer/planner to report on specific transactions as soon as possible. The failure to report the transaction can lead to sanctions and penalties.

Since the OECD report is only a guideline and countries are free to choose what kind of regime they think best suits their needs, a more profound study of each aspect of the general guideline will not be carried out.

## THE BRAZILIAN MODEL

Brazil has suffered an increasing economic crisis and the need to secure its tax base is a daily concern for the government and tax authorities. The country has been trying lately to catch up with international tax law recommendations and as part of the G20 compromised in implementing the BEPS actions on its domestic legislation.

On July 21, 2015, the Provisional Measure n. 685 was published in the Official Journal. By its nature a Provisional Measure can be issued by the president when there is relevance and urgency. A provisional measure cannot be called a law, because it was not made by the legislative branch, but by the executive - therefore its "provisional" status. This measure will be subject to legislative analysis by Congress but during this period it is already in force, affecting the whole population. The measure can be in force for 60 to 180 days and then it must be converted into Law to maintain its validity.

PM 685 concerns majorly tax matters and creates the "PRORELIT Program", a program aiming to reduce tax litigation cases, including the establishment of a mandatory disclosure rules program.

In Brazil all laws and provisional measures is accompanied by a justification. PM 685 had its justification written by Mr. Joaquim Levy, Finance Minister at the time. In his words, the mandatory disclosure rules proposed:

> "[...] aims to increase legal certainty in the country's business environment and generate savings of public funds on unnecessary and time-consuming litigation. The lack of complete and relevant information about the harmful tax planning strategies is one of the main challenges faced by tax administrations in the world. Access to timely information as such offers the opportunity to respond quickly to the risks of loss of tax revenue through supervisory or change in legislation. In this line, the BEPS Action Plan, [...] Thus, under the BEPS, there are recommendations related to the preparation of such rules as transactions, arrangements or aggressive or abusive structures. The main objective of this

> measure is to instruct the tax administration with timely information regarding tax planning, and provide legal certainty to the company that reveals the operation, including charging only the tax due and default interest if the transaction is not recognized for tax purposes. Moreover, it is emphasized that the measure encourages a more cautious stance by the jurisdictional office before making use of aggressive tax planning."[6]

His justification is exactly what Action 12 recommends and the result was six articles creating the Brazilian version of the Mandatory Disclosure rules suggested by the OECD. The provisions are:

> "Art. 7 The set of transactions in the preceding calendar year involving acts or legal transactions that entail elimination, reduction or tax deferral should be declared by the taxpayer to the Federal Revenue of Brazil, by 30 September each year, When:
> I – acts committed or legal businesses do not have relevant reasons other than tax reasons;
> II – the adopted form is unusual, if used indirect legal transaction or contains clause denature, even partially, the effects of a typical contract; or
> III – addresses specific acts or legal transactions provided for in Act of the Federal Revenue of Brazil.
> Single paragraph. The taxable person shall submit a statement for each set of operations performed in an interconnected manner, in accordance with the regulations.
> Art. 8 The statement of the taxpayer reporting acts or legal transactions yet to occur will be treated as consultation with tax legislation, pursuant to art. 46 to Art. 58 of Decree No. 70,235, of March 6, 1972.
> Art. 9. In the event that the Federal Revenue of Brazil does not recognize, for tax purposes, the operations under Article 7, the taxpayer will be asked to pay, within thirty days, the taxes owed plus only default interest.
> Single paragraph. The provisions of the caput does not apply to transactions which are under the surveillance procedure when submitting the return.
> Art. 10. The form, term and conditions of presentation of the declaration referred to in Art. 7, including dismissal of cases the obligation, shall be regulated by the Federal Revenue of Brazil.
> Art. 11. The statement referred to in Art. 7, including rectifying statement or supplement statement, will be ineffective when:
> I – presented by one who is not the taxpayer of tax liabilities which may be a result from operations for the acts or declared legal transactions;
> II – when silent on the essential data to understand the act or legal business;
> III – when the statement contains false information; or

6 Ministério da Fazenda. Exposição de Motivos 00080/2015. In: <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/Exm/Exm-MP%20685-15.pdf?>. Accessed: 20th April 2016 (free translation).

> IV – involve fraudulent filing of people
>
> Art. 12. Non-compliance with the provisions of Art. 7 or the occurrence of any of the situations provided for in Art. 11 features wilful omission of the taxpayer with tax evasion of order or fraud and tax liabilities will be charged plus the due fine and the interest provided for in § 1 of Art. 44 of Law No. 9.430, of December 27, 1996."[7]

As one can notice, the provisions of the Brazilian Mandatory Rules resembles the ones suggested by BEPS Action 12:

| | BEPS Action 12 | Brazilian Provision |
|---|---|---|
| Who? | Taxpayers or Planners | Taxpayer |
| What? | Country specific need | Unusual business; business without relevant purpose other than tax purposes; acts listed by the tax administration |
| When? | Early access to information | By 30 of September, yearly |
| Other obligations? | Client list if possible | |
| Penalties? | Sanctions and penalties according to national law | The non-disclosure will be considered omission with the intent of fraud. Payment of tax + penalties of § 1 of Art. 44 of Law No. 9.430/96 (150%) |

Even though at first sight one would say that there is no problem with either the BEPS provisions and with the Brazilian version of it, after a closer look the conclusion might be different. After much debate and outrage by the business and tax law community, these provisions didn't last long and were not converted into law (although all the other provisions on the Provisional Measure 685 were). To better understand what the issues were, we must look closely to something much bigger than tax law, we must analyse constitutional law and the treaties that rule the European Union.

## FUNDAMENTAL FREEDOMS IN THE EUROPEAN UNION LAW

7 Medida Provisória 685/2015. In: <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/mpv/mpv685.htm>. Accessed: 20th april 2016 (free translation).

European Union Law has its origins in The Treaty on the Functioning of the European Union, which is one of the two primary Treaties of the European Union, apace with the Treaty on European Union (TEU). In its Articles 2 and 19, the TFEU establishes the values of equality, rule of law and respect for human rights.

As explained by Ben J. M. Terra and Peter J. Wattel:

> "the recognition of 'the law' in general as a source of EU law provided the legal basis for the Court to develop general principles of EU law, such as, in the first place, the principle of protection of fundamental rights common to the legal traditions and constitutions of the Member States and as enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) [...]."[8]

It was only in 2009 that the ECHR came into force as primary law due to the Lisbon Treaty, finally gaining, the same status as the founding treaties of the Union. In reality what this means is that now European citizens, both persons and companies, can invoke those rights in a Court of Law and that the Member States have to design their laws in consonance not only with the TFEU and TEU but also with the ECHR provisions.

In addition, by force of Article 6(1) of the TEU, the Charter of Fundamental Rights became legally binding, providing that:

> "[t]he Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union [...], which shall have the same legal value as the Treaties. The Charter, therefore, constitutes primary EU law; as such, it serves as a parameter for examining the validity of secondary EU legislation and national measures."9

To our subject of study, only a few of the freedoms and principles laid down in the TFEU, the ECHR and the CFR applies, and therefore, only those will be subject to analysis.

As aforementioned, the TFEU is the starting point for every European Union Law. Moreover, it provides guidelines and principles that must be followed when organising and structuring the Union itself. It is in these guidelines that we find the fundamental freedoms. The fundamental freedoms were introduced in order to achieve an internal market inside the European Union, abnegating all kinds of discrimination based on nationality.

The fundamental freedoms are listed as freedom of movement of workers, freedom of establishment, free movement of goods and free movement of capital. Among many others, the ECHR describes as a human right the right to a fair trial, public hearings and

8 TERRA, Ben and WATTEL, Peter. European tax law. Boston: Kluwer Law International, 2012, p. 33.
9 The charter of fundamental rights | EU Fact Sheets | European Parliament (Europarl.europa.eu, 2016). In: <http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.1.6.html>. Accessed: 28 April 2016.

access to documents and freedom against self-incrimination. Additionally, the CFR ensures the right of property, freedom to conduct a business, the principle of legality and many more.

## FUNDAMENTAL FREEDOMS IN THE BRAZILIAN CONSTITUTION

Brazilian Constitutional Law "is a branch of Public Law, highlighted by being fundamental to the organisation and functioning of the State, the articulation of its primary elements and on the establishment of the base of the political structure"[10]. That means that as the TFEU, the Constitution, besides many other things, organises the functioning of the Federation.

Every subject or matter concerning the organisation, functioning and fundamental rights are in the scope of the Constitution. From basic human rights to division of power to tax, everything has its principles, origins or guidelines in the Constitution.

De Plácido e Silva defines it as being:

> "the basic rules or the primary requirements laid down as a basis, as the support of something. They reveal the set of rules or precepts, which are fixed in order to serve as a standard to all kinds of legal action, mapping thus the action to be taken in any legal transaction. Thus, they express more relevant sense than the rule itself or legal rule. They are the very fundamental reason to be of legal things, becoming perfect axioms. Undoubtedly, they mean the basic points that serve as a starting point or as of the vital elements of the Law itself."[11]

One could say that there is no Federation without the Constitution, although it was not always the case. To understand better the current scenario, we must look to the past and understand the motivations and causes that made Brazil opt for this model of structuring.

From 1964 to 1985 Brazil was under a dictatorship, Brazilians had their civil rights diminished and at one point even excluded in order to maintain the "national security", that is to say that people did not have their fundamental freedoms or even basic human rights under the dictatorship's constitution. The regime then dissolved the National Congress, limiting even more public access to the government.

However, after many years of fighting and with the promise of the "economic miracle" and justification for the Regime declined, people finally had the opportunity to re democratize the country. With the ghost of the dictatorship still haunting, Brazilian legislators decided to seek inspiration for the new constitution in Mexico and Germany. More precisely, the Mexican Constitution from 1917, and the Weimar Constitution from 1919.

10 MORAES, Alexandre de. Direito constitucional. São Paulo: Atlas, 2010, p. 33 (free translation).
11 SILVA, De Plácido e. Vocabulário jurídico. São Paulo: Forense, 2002, p. 639 (free translation).

After much resistance from the conservatives in the government, the 1988 Constitution was finally issued, with great influence from and resemblance to the social rights contained in the aforementioned constitutions. To our specific study, the influence of Weimar Constitution is undeniable - being the inspiration to add economic rights ("the economic and financial order") in the Brazilian constitutional text.

The freedom of enterprise can already be observed in the constitution's first article:

> "Article 1. The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state and is founded on:
> I – sovereignty;
> II – citizenship;
> III – the dignity of the human person;
> IV – the social values of labour and of the free enterprise;
> V – political pluralism.
> Sole paragraph. All power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution."

And then again, in article 170:

> "Article 170. The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles:
> I – national sovereignty;
> II – private property;
> III – the social function of property;
> IV – free competition;
> V – consumer protection;
> VI – environment protection, which may include differentiated treatment in accordance with the environmental impact of goods and services and of their respective production and delivery processes;
> VII – reduction of regional and social differences;
> VIII – pursuit of full employment;
> IX – preferential treatment for small enterprises organised under Brazilian laws and having their head office and management in Brazil.
> Sole paragraph. Free exercise of any economic activity is ensured to everyone, regardless of authorization from government agencies, except in the cases set forth by law."

Although the wording may vary between "free enterprise"[12], "freedom of initiative" and "freedom to conduct business", as used in the EU, it is correct to say that considering the aforementioned article, those principles are synonymous.

In Tércio Sampaio Ferraz Júnior's words, freedom of initiative consists in two types of freedom, a negative and a positive one. He explains: "[...] in terms of negative freedom, it is the absence of impediments and the expression of creativity itself. It is in the valuation of human labour. On the other hand, in terms of positive freedom, it is about the participation without alienation in the construction of economic wealth."[13]

Freedom of initiative grants companies and persons to conduct their business the way they judge fit, or in José Afonso da Silva words "Freedom of initiative involves freedom of industry and trade or freedom of enterprise and freedom of contract."[14]

When a law imposes new obstacles or requirements that might make taxpayers change their behaviour or how they manage their business, this law is in breach with the Constitution and should have no legal value.

## COMPATIBILITY OF ACTION 12 WITH FUNDAMENTAL FREEDOMS

The primary source of law in the EU are the Treaties and in Brazil, the Constitution. Therefore, every legislative work made by the Member States must follow the Treaties' guidelines and in the latter case the Constitution's guidelines and principles.

The concern with compatibility of tax matters with the rule of law is not new, but has been growing exponentially especially after the introduction of harder measures in order to tackle tax avoidance, evasion and fraud.

Ana Paula Dourado observed this and concluded that:

> "In recent decades, the struggle of companies of OECD Member states to remain competitive in the world economy combined with aggressive tax planning in the global context has given rise to a corresponding aggressive introduction of more cooperation and information duties. The boundaries of those cooperation and information duties as well as of their use by the tax administration through exchange of information between states have to be carefully assessed, in order to comply with the rule of law."[15]

## COMPARISON – BRAZILIAN CONSTITUTION AND EUROPEAN UNION TREATIES PROVISIONS: FREEDOM AGAINST SELF-INCRIMINATION

12 The portuguese term "livre iniciativa" has been translated in legal documents as both free enterprise and freedom of initiative.

13 FERRAZ JÚNIOR, Tércio Sampaio. A economia e o controle do Estado. Parecer publicado no jornal O Estado de S. Paulo, p. 50, em 04.06.1989, apud Eros Roberto Grau. A ordem econômica na Constituição de 1988. 5. ed. São Paulo: Malheiros, 2000, p. 232.

14 SILVA, José Afonso da. Curso de direito constitucional positivo. São Paulo: RT, 2000, p. 767 (free translation).

15 DOURADO, Ana Paula and DIAS, Augusto Silva. Information duties, aggressive tax planning and nemo tenetur se ipsum accusare in the light of art. 6(1) of ECHR. Human rights and taxation in Europe and the world. Amsterdam: IBFD, 2011, p. 133.

The European Union has signed the Council of Europe's European Convention on Human Rights, and Article 6 prescribes the freedom against self-incrimination. Although similar provision can be found in the Brazilian constitution, they differ because this freedom is also applicable regarding tax cases as pointed out by Marjaana Helminen:

> "The taxpayer, for example, has the right to see all the documents assembled by the tax authority. The taxpayer must be considered to be innocent until proven guilty of a tax crime, such as tax fraud, and the taxpayer does not need to help in finding him or her guilty to a crime (freedom against self-incrimination. The taxpayer has the right of silence in any tax investigation where there is a likelihood of a significant penalty and there is default on the taxpayer's part. In such a situation the taxpayer does not need to answer the relevant questions (oral or written) and he does not have to hand over relevant documents. The taxpayer should not have to prove a hypothetical assumption."[16]

If this principle is applicable during a "fair and public hearing", it is possible to understand that it is also applicable concerning the mandatory disclosure rules: the taxpayer already submitted their tax returns, the tax authorities already have all the information concerning profits and revenues and transactions made. If there is a problem or if the tax authority thinks that the transactions were not in accordance with the law, they would still have all the means necessary to levy the tax and penalties on the taxpayer.

The Public Discussion Draft of May 15, 2015[17] was quick to dismiss any problems between the compatibility from the disclosure rules with the freedom of self-incrimination. The justification for this would be that the information required by the disclosure rules would not necessarily be different from information obtained during a tax audit and if the country imposes penalties on certain behaviours, those behaviours should be excluded or adapted on the disclosure rules[18].

Initially, the text of the draft seems a bit contradictory – of course it depends on the treatment the Member State gives the taxpayer when it comes to tax evasion or fraud – but to dismiss the issue completely seems premature. The solution offered to the problem, which at first the report claims that does not exist, would be "to simply exclude those transactions from the scope of the disclosure regime without substantially curtailing the scope of the regime"[19]. However, if the Member State simply excludes that kind of transaction from the scope of the regime, which is built solely for the purpose to avoid those situations, then the regime itself is pointless.

16 HELMINEN, Marjaana. EU tax law – direct taxation. Amsterdam: IBFD, 2015, p. 18.
17 Public Discussion Draft BEPS Action 12: Mandatory Disclosure Rules (1st edn, OECD 2015). In: <https://www.oecd.org/tax/aggressive/discussion-draft-action-12-mandatory-disclosure-rules.pdf>. Accessed: 28 March 2016.
18 Ibidem.
19 Ibidem.

It is important to make a distinction between the applicability of the principle in filing a simple tax return and filing mandatory disclosure rules. The freedom from self-incrimination should apply in the latter case. The mandatory disclosure rules expect taxpayers to do the tax authority's work and beyond, putting the taxpayer in the position of qualifying their transaction, facing the consequences of the tax authority disagreement and further penalties that can go beyond the tax scope (criminal matter).

Even if one does not consider Art. 6 applicable in tax matters, it becomes applicable when a penalty and criminal charges are involved, as explains Ana Paula Dourado:

> "However, where a criminal charge is involved, the right to silence and *nemo tenetur* may apply, and the exact moment when the situation of a taxpayer becomes 'substantially affected' has to be determined, so that Art. 6 comes into play. That moment starts where the purposes of the tax investigation are no longer exclusively connected with tax purposes, but with punitive ones."[20]

It is as if in this fever of fighting tax evasion, all means, regardless of their actual effectiveness must be implemented at the expenses of the taxpayer.

## FORESEEABILITY

As it is in the Brazilian Constitution, tax law must be clear and, therefore, foreseeable. In the European Union legislation this is not different, as Marjaana Helminen explains: "For example, taxation based on so unclear legislation that it lacks the quality of law breaches the right to enjoyment of property. The requirement of the rule of law is satisfied only if the law is accessible, precise and foreseeable in its application."[21]

For the mandatory disclosure rules to be valid in a Member State, the rules should be made clear and the taxpayer should be able to tell what the consequences of the disclosure and the consequences of the non-disclosure are. The way the rules are set in Action 12, in theory, there should not be a problem with compatibility with the principle of foreseeability – as long as the rules set by the Member State provide as much information as possible and be clear regarding the types of transactions and the consequences they will have.

In addition, the rules should not rely on broad concepts which will ultimately give unwanted powers to the tax administration.

## FREEDOM TO CONDUCT A BUSINESS

Freedom to conduct a business, prescribed in Article 16 of the CFR, aims to provide an environment that encourages business to develop their innovation, limiting the restrictions imposed by the Member States when establishing a new business. The

20 DOURADO, Ana Paula and DIAS, Augusto Silva. Information duties, aggressive tax planning and nemo tenetur se ipsum accusare in the light of art. 6(1) of ECHR. Human rights and taxation in Europe and the world. Amsterdam: IBFD, 2011, p. 137.
21 HELMINEN, Marjaana. EU tax law – direct taxation. Amsterdam: IBFD, 2015.

Report from the European Union Agency for Fundamental Rights states that "Article 16 is one of the less traditional rights contained in the Charter. Nonetheless, it introduces a concept crucial to modern society."[22]

This freedom is closely connected to the Freedom of Establishment, being commonly used together on case laws. For example, it is correct to say that one is part of the other, first there can be no restrictions for persons of another Member State to establish in a country (freedom of establishment) and then, they shall enjoy the freedom to conduct their business in the way they judge fit (freedom to conduct a business).

Although Freedom of Establishment is well known within the law community, the freedom to conduct a business is fairly less used or remembered. According to the previously mentioned report, this principle was invoked only twice in 2011, then 9 times in 2013, reaching 12 cases in 2014[23]. Upon such little use, to this day it is difficult to state with precision the reach that this freedom might have.

However, it is possible to begin to trace a guideline and its scope of application based on the few reports and studies available. As provided in the report, the right to conduct a business includes the freedom to exercise an economic or commercial activity; the freedom of contract and free competition[24].

As previously stated, tax planning is not illegal and is a mechanism to achieve the purpose of a business. In the EU, the understanding is not different, as explained by Ana Paula Dourado:

> "Tax planning has not only been considered legal in international tax law, but also compatible with the fundamental freedoms in EU law and even if aimed at reducing the tax burden, it complies both with the purpose of the legislation (main objective test), and the complementary business purpose test (under international tax law) or the genuine economic activity test (under EU law)."[25]

## FREEDOM OF ESTABLISHMENT

Freedom of establishment is one of the four freedoms assured by the TFEU. This freedom is what assures the citizens and companies the right to establish their business in another Member State, despite not being a national. It is important to remember that this freedom is only applicable within the EU and it is not applicable to third countries.

Freedom of establishment is one of the main freedoms affected by tax legislation, being responsible for changes in domestic tax law system of the Member States, as pointed out by Ben J. M. Terra and Peter J. Wattel:

22 Freedom lo conduct a business (European Union Agency for Fundamental Rights 2015).
23 Idem, p. 22.
24 Idem, p. 21.
25 DOURADO, Ana Paula. Aggressive tax planning in EU law and in the light of BEPS: the EC recommendation on aggressive tax planning and BEPS Actions 2 and 6. INTERTAX v. 43, n. 1, 2015, p. 42-57.

> "The freedom of movement of workers and of establishment of undertakings has had a huge impact on the design of national tax law [...] A very large number of national tax provisions, which (international) tax law specialists used to consider perfectly normal, have been found incompatible with the requirements of the free movement of persons. Especially the usual distinctions between [...] domestic payments and cross border payments in traditional (inter)national tax law had to be rewritten after coming face to face with the EU Treaty Freedoms."[26]

Looking closely, the mandatory disclosure rules is potentially in breach of the freedom of establishment. Potentially, because it will depend on an analysis case by case of the domestic legislation implementing the measure. Considering a scenario where companies are obliged to inform and be subject to penalties when dealing with determined cross border operation (e.g. related companies). The consequence would be different treatment across similar situations: the company dealing with related companies in the same Member State would not have to inform and therefore would not be subject to the consequent penalty whereas the company who dealt with a related company, only this time in a cross-border operation, will be subject to inform and the consequent penalties.

Although it is easy to see where the problem would lie, it is hard to say if this argument would hold in a court of law. For a law to be considered in breach of a freedom, it has to pass a "justification test". Katja Cejie and Martin Berglund explain:

> "Grounds for justification can be found either in the TFEU, or by the use of the so called rule of reason test. [...] the ECJ stated that a national measure liable to hinder or make less attractive the exercise of fundamental freedoms must fulfill four conditions. The discriminatory national rules must: – be applied in a non-discriminatory manner, – be justified by imperative requirements in the general interest, – be suitable for securing the attainment of the objective which they pursue, and –not go beyond what is necessary in order to attain it."[27]

The most important item of the justification test in this study would be the second one, i.e. general interest. Countries are quick to justify their measures claiming it is an anti-abuse measure. Martin Poulsen when writing about these claims says, "these justifications are almost never accepted by the Court – particularly not when 'prevention of abuse' in reality is a mere excuse for 'preservation of tax revenue'"[28]. However, "[...] the Court seems to have accepted at least two justification grounds that Member States can successfully invoke to uphold restrictive tax measures, namely the need to preserve a balanced allocation of tax jurisdiction and the need to prevent abusive practice"[29].

26 TERRA, Ben and WATTEL, Peter. European tax law. Boston: Kluwer Law International, 2012, p. 50.
27 BERGLUND, Martin and CEJIE, Katia. Basics of international taxation. Uppsala: IustusFörlag, 2014, p. 107.
28 POULSEN, Martin. Freedom of establishment and the balanced allocation of tax jurisdiction. INTERTAX v. 40, n. 3, 2012, p. 200-211.
29 Ibidem.

It is difficult to predict whether the ECJ would understand the mandatory disclosure rules justifiable in order to prevent abusive practice. The measure can be in line with domestic definitions of abuse, but still be not in line with community law and the internal market. This issue was considered by the ECJ, as demonstrated in Cadbury Schweppes[30] (which followed the reasoning used in Centros[31]) case where "The Court noted that the separate tax treatment is such as to hinder the exercise of freedom of establishment, dissuading a resident company from establishing, acquiring or maintaining a subsidiary in a Member State with a lower tax rate."[32] and decided against the country's justification of preventing tax abuse where it was merely a case of protecting its revenue.

Although concerning another issue of international taxation, a parallel can be made with the issue object of this thesis with the Imperial Chemical Industries plc case, where the Court analysed the argument of prevention of revenue loss stating that:

> "In answer to the argument that revenue lost through the granting of tax relief on losses incurred by resident subsidiaries cannot be offset by taxing the profits of non-resident subsidiaries, it must be pointed out that diminution of tax revenue occurring in this way is not one of the grounds listed in Article 56 of the Treaty and cannot be regarded as a matter of overriding general interest which may be relied upon in order to justify unequal treatment that is, in principle, incompatible with Article 52 of the Treaty."[33]

Analysing the ECJ pattern when anti-abuse/avoidance rules were involved, Servaas van Thiel concludes:

> "[...] the ECJ applies a lenient approach towards private sector access to Community law, and it has been very reluctant to deny the private sector access to Community law, whether on the basis that a part of national law would be a priori excluded from the scope of Community law (sovereignty exception), that the private sector would abuse Community law or that the activities in which the private sector engaged lacked sufficient economic substance to allow access to Community rights. In reality, any activity that seeks to earn income is considered economic and the Court has clearly refused to decide that legal constructions used for tax planning and avoidance fall outside the scope of Community law for lack of economic substance or for reasons of abuse of Community law."[34]

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30 Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue [2006] European Court of Justice, C-196/04 (European Court of Justice).

31 Centros Ltd v Erhvervs-og Selskabsstyrelsen [1999] European Court of Justice, C-212/97 (European Court of Justice).

32 European Commission Legal Service. C-196/04 - Cadbury Schweppes Plc, Cadbury Schweppes Overseas Ltd V Commissioners of Inland Revenue, Judgment of 12.9.2006 Taxation – Freedom of Establishment – Legislation on Controlled Foreign Companies – Inclusion of the Profits of Controlled Foreign Companies in the Tax Base of a Parent Company (2006). In: <http://ec.europa.eu/dgs/legal_service/arrets/04c196_en.pdf>. Accessed: 20 March 2016.

33 Imperial Chemical Industries plc v Kenneth Hall Colmer (Her Majesty's Inspector of Taxes) [1998] European Court of Justice, C-264/96 (European Court of Justice).

34 VAN THIEL, Servaas. Justifications in community law for income tax restrictions on free movement: acte clair rules that can be

Still, even if the ECJ maintains its understanding and finds that the mandatory disclosure regime would be in breach of the freedom of establishment, it can still analyse whether the measure is proportional. This is an even harder exercise. As the mandatory disclosure regime is not a tax per se and only an additional obligation (even though penalties might apply), it is possible that the Court would be willing to accept the measure.

## CONCLUSION

Mandatory disclosure rules were designed to provide the tax authorities with more information on the taxpayer's transactions and dealings. It requires almost a fully and unilateral transparency about business decisions, whether tax motivated or not. In a country where the relationship between the taxpayer and the tax administration is damaged or non-existent, it can be harmful and face much resistance of implementation from the taxpayer.

It is understandable that in a globalized market, countries realized that their tax base is suffering with an increasingly flexible market and opportunities. The goal to tackle base erosion and profit shifting is commendable, but the rules must follow the rule of law and be in line with fundamental rights and freedoms.

Mandatory disclosure rules might not be in line with some crucial rights and freedoms, such as the freedom to conduct a business, the principle of foreseeability, freedom of establishment and when involving punishment, the freedom against self-incrimination.

As analysed in the Brazilian situation, the measure did not last long after being the subject of several assessments by scholars and decisions by the Federal Courts for not being in line with the constitutional guarantee assured to the taxpayer.

Depending on the approach of a Member State of the EU, this scenario might repeat itself. Either by not being in line with the guidelines and principles of the Treaties, as analysed in this article or by designing the rules in such a way as to secure their revenue, with little connection to an actual abuse of law.

The comparison between the Brazilian model and the BEPS model is valid. Although some would say that the Brazilian model is more aggressive when dealing with the rules, it is also in line with the suggestion made by the BEPS report. The measure can be in line with the suggested BEPS model and still not be in line with the much more important matter, the freedoms and guarantees provided in the Treaties.

In countries where the rule of law exists, one cannot overcome it by the simple need to assure a tax base. Taxpayers have the right to do tax planning, the same way countries have the right to levy taxes, within the framework of the rule of law.

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readily applied by National Courts. The Acte Clair in EC Direct Tax Law. Amsterdam: IBFD, 2008.

The need that the countries have to secure their tax base is not solely the result of actions perpetuated by the taxpayer with their tax planning. It is a result of both action and inaction of sovereign countries which hold the power to structure their tax system the way they want to assure their interests.

The BEPS project brings new guidelines and concepts, some much needed and expected in the international tax community, but it also deserves some hard criticism regarding the approach to the taxpayer's responsibility and role.

The project can only and will only be effective when there is a joint effort from the Countries themselves in providing the world with a better international tax environment. The project resulted and was made as a response to the 2008 world economic crisis, however, to overcome a crisis and to provide an investment and business friendly environment by creating more obstacles to the taxpayer is the opposite of what one would aim to achieve.

The possible solution to this specific case would be to have transparency, as stated on the BEPS report, but from both sides of the relationship – taxpayer and tax authority. In order to avoid tax evasion a country must provide clear rules and enforce the already existing anti abuse/avoidance mechanism, always respecting the taxpayer's right.

The clearer and more understandable the tax system of a country is (foreseeable) the less litigation cases will arise. The more approachable the tax authorities, the more confidence and reliance will grow on the exchange of information from the taxpayer's side.

In the battle against base erosion and profit shifting countries must do a critical review and study of their own set of rules and behaviour, for they are the ones creating tax havens and hells. When nations overcome the hypocrisy of their own systems and put less blame on the taxpayers that act within the law, then we will achieve a fair international tax system with no need to compromise the rule of law.

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