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Multinational transfer pricing – a new documentation paradigm

A dissertation submitted for the degree of Master in Tax Law, under the orientation of Professor Tomás Cantista Tavares, PhD

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To my parents and my sister.

To my tutor, Professor Tomás Cantista Tavares, for everything I learned with him, some about Tax Law.

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List of abbreviations

APA Advance pricing agreement

BEPS Base Erosion and Profit Shifting

CbCR Country by Country Reporting

CCCTB Common Consolidated Corporate Tax Base

CIRC "Código do Imposto sobre o Rendimento das Pessoas Colectivas"

EU European Union

EUTPD European Union Transfer Pricing Documentation

G20 Group of twenty

ICC International Chamber of Commerce

MNE Multinational enterprise

OECD Organisation for Economic Co-operation and Development

PATA Pacific Association of Tax Administrators

R&D Research and development

TFUE Treaty on the Functioning of the European Union

I. Action Plan on Base Erosion and Profit Shifting – A brief description

1. Introduction

On June 2012, G20[1] [2] Leaders convened in Mexico and explicitly referred to the need to prevent base erosion and profit shifting.

In fact, the international tax rules developed in 1920 have become outdated because: 1) of the phenomenon of globalization; 2) of advancements in communications; and 3) of the financial crisis of 2008, which "has created a renewed interest in people paying their fair share of tax"[3].

The OECD[4] [5] was undertaking some work in preventing base erosion and profit shifting and G20 requested a report about its progress for their February 2013 meeting.

Pursuant to this, on February 2013 the OECD released a report on "Addressing Base Erosion and Profit Shifting"[6].

As we know, each country has its own rules. When they were preparing them they didn't take into account the effect of other countries' rules, which created situations of potential double taxation for MNE.

To counteract this, "countries have long worked and [were] strongly committed to eliminate such double taxation in order to minimize trade distortions and impediments to sustainable economic growth, while affirming their sovereign right to establish their own tax rules."[7], by elaborating bilateral tax treaties.

It happened that these rules were not strong enough to prevent the base erosion and profit shifting phenomenon – gaps remain and "opened up opportunities for multinationals (…) minimize their tax burden by migrating or moving their effective

[1] Its aims are: 1) to promote international trade; 2) to integrate the principle of an expanded dialogue; and 3) to take into account the growing economic weight of some countries. G20 members represent around 85% of global gross domestic product, over 75% of global trade and two-thirds of the world's population.
[2] The members of the G20 are: Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, United Kingdom, United States, and European Union.
[3] "Tax Notes International", November 2013, "BEPS Takes Center Stage at London Tax Conference", p. 489.
[4] "The mission of the Organization for Economic Co-operation and Development (OECD) is to promote policies that will improve the economic and social well-being of people around the world." In http://www.oecd.org/about/
[5] The members of the OECD are: Australia, Austria, Belgium, Canada, Chile, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israël, Italy, Japan, Korea, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.
[6] "(…) certainly it is one of the more ambitious OECD projects in recent times." - "International Transfer Pricing Journal", November/December 2013 – "A Call to Rewrite the Fundamentals of International Taxation: The OECD BEPS Action Plan", p. 369.
[7] OECD (2013) Action Plan on Base Erosion and Profit Shifting, OECD Publishing, p. 9.

place of management/central management control to a tax climate of a country which suites their interest in double non taxation of profits (…)"[8].

Google, Starbucks and Amazon are three examples of MNE that haven't paid their fair share.[9]

The base erosion and profit shifting phenomenon resulted in Governments losing their right to tax "because profits [were] being shifted to jurisdictions that afford more favorable tax treatment"[10].

But, first, let's understand what do "base erosion" and "profit shifting" mean:

2. Some definitions

"Base erosion" corresponds to the reduction in the number of enterprises and of the amount of profits that a country can tax. This can happen in two situations: 1) the company moves its residence to a different country; or 2) causes its profit to appear in a different country.

"Profit shifting" corresponds to "aggressive tax planning so that profits are not taxed"[11]. For that, MNE shift profits away from the jurisdictions where the activities creating those profits take place, from a higher tax country to a lower tax country.

However, it should be noted that, no or low taxation is not the main cause of concern – "what creates tax policy concerns is that, due to gaps in the interaction of different tax systems, and in some cases because of the application of bilateral tax treaties, income from cross-border activities may go untaxed anywhere, or be only unduly lowly taxed."[12]

3. BEPS – general ideas

The Report, published by the OECD, on February 2013, clarifies that the main concern of Governments is the massive loss of revenue to countries due to the use of aggressive tax planning by MNE in order to occur base erosion and profit shifting.

[8] GOUTAM, Swapneshwar, "Critical account of the OECD's Action Plan on Base Erosion and Profit Shifting, p. 1.
[9] Available at http://www.internationaltaxreview.com/Article/3288266/Starbucks-Amazon-and-Google.html
[10] "International Transfer Pricing Journal", July/August 2013 – "OECD Report on Base Erosion and Profit Shifting: Search for a New Paradigm or Is the Proposed Tax Order a Distant Galaxy Many Light Years Away?", p. 238.
[11] GOUTAM, Swapneshwar, "Critical account of the OECD's Action Plan on Base Erosion and Profit Shifting", p. 2.
[12] OECD (2013) Action Plan on Base Erosion and Profit Shifting, OECD Publishing, p. 10.

In fact, base erosion constitutes a risk not only to tax revenues, but also to "to tax sovereignty and tax fairness for OECD member countries and non-members alike"[13].

Nevertheless, this Report concluded that nothing in the public domain confirmed the existence of BEPS or how BEPS affected the tax yield of any country. The only conclusion was that "there is abundant circumstantial evidence that BEPS behaviors are widespread"[14].

Hereupon, through this Report, no concrete solutions were proposed, but the development of an action plan was.[15]

Assuredly, there was felt to be a need for a holistic response and that response came with the "Action Plan on Base Erosion and Profit Shifting", released on July 2013, which applies "fundamental changes (…) to effectively prevent double non-taxation [and] cases of no or low taxation associated with practices that artificially segregate taxable income from the activities that generate it."[16]

In the words of Pascal Saint-Amans[17], this action plan "represents a unique opportunity that comes along once in a century to rewrite the principles of international taxation (…) [and he wants to create] a set of principles that will last for the next 100 years".

Through this plan there are 15 Actions (explained by 13 Reports, already published),– which are shown in tabular format below – plus an Explanatory Statement[18]:

Action Point	Description	Report
1	Address the tax challenges of the digital economy	"Addressing the Tax Challenges of the Digital Economy"
2	Neutralize the effects of hybrid mismatch arrangements	"Neutralizing the Effects of Hybrid Mismatch Arrangements"
3	Strengthen CFC rules	"Designing Effective Controlled Foreign Company Rules"
4	Limit base erosion via interest deductions and other financial payments	"Limiting Base Erosion Involving Interest Deductions and Other Financial Payments"
5	Counter harmful tax practices more effectively, taking into account transparency and substance	"Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance"
6	Prevent treaty abuse	"Preventing the Granting of Treaty Benefits in Inappropriate Circumstances"
7	Prevent the artificial avoidance of PE status	"Preventing the Artificial Avoidance of Permanent Establishment Status"

[13] OECD (2013) Addressing Base Erosion and Profit Shifting, OECD Publishing, p. 5.
[14] OECD (2013) Addressing Base Erosion and Profit Shifting, OECD Publishing, p. 15.
[15] "In order to address base erosion and profit shifting (...) a comprehensive action plan should be developed quickly." - OECD (2013) Addressing Base Erosion and Profit Shifting, OECD Publishing, p. 51.
[16] OECD (2013) Action Plan on Base Erosion and Profit Shifting, OECD Publishing, p. 13.
[17] Director of the Center for Tax Policy and Administration at the OECD.
[18] "It represents the results of a major and unparalleled effort by OECD and G20 countries working together on an equal footing with the participation of an increasing number of developing countries." – OECD (2015), *Explanatory Statement*, OECD/G20 Base Erosion and Profit Shifting Project, OECD, p. 4.

8	Assure that transfer pricing outcomes are in line with value creation: intangibles	"Aligning Transfer Pricing Outcomes with Value Creation"
9	Assure that transfer pricing outcomes are in line with value creation: risks and capital	
10	Assure that transfer pricing outcomes are in line with value creation: other high-risk transactions	
11	Establish methodologies to collect and analyses data on BEPS and the actions to address it	"Measuring and Monitoring BEPS"
12	Require taxpayers to disclose their aggressive tax planning arrangements	"Mandatory Disclosure Rules"
13	Re-examine transfer pricing documentation	"Transfer Pricing Documentation and Country-by-Country Reporting"
14	Make dispute resolution mechanisms more effective	"Making Dispute Resolution Mechanisms More Effective"
15	Develop a multilateral instrument	"Developing a Multilateral Instrument to Modify Bilateral Tax Treaties"
Explanatory Statement		

By analysing the tabular *supra*, we can affirm that there are four core areas in this Plan:

1) Transfer Pricing – actions 8, 9, 10 and 13;
2) Treaty matters – actions 6, 7, 14 and 15;
3) Back-stop matters – actions 1, 2, 3, 4 and 5; and
4) Information exchange and documentation – actions 5, 11 and 12.

It is notable that the Plan has been developed and agreed in just two years. The reasons for this are: 1) the need to restore the trust of ordinary people; 2) to level the playing field for businesses; and 3) to give governments efficient tools to ensure the effectiveness of their tax policies.

Plus, there were more than sixty two countries involved in the elaboration of the Plan[19] and "many more participating in shaping the outcomes through regional structured dialogues"[20].

And this is the first achievement of the BEPS Project – "For the first time all OECD, [developing countries] and G20 countries have worked (…) to design common responses to international tax challenges."[21] [22]

[19] Albania, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, People's Republic of China, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Jamaica, Japan, Kenya, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Nigeria, Norway, Peru, Philippines, Poland, Portugal, Russian Federation, Saudi Arabia, Senegal, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, United States and Vietnam.

[20] OECD (2015), Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, OECD, p. 4.

[21] OECD (2015), Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, OECD, p. 5.

Secondly, we have a political commitment[23], thus:

The rules that make up the Plan can be divided into three types:

1. Minimum standards – those rules that all the countries will implement quickly in the exact same terms that are prescribed in the Plan[24];
2. Standards – those rules that the countries may implement if they want to (if they want to protect their tax base);
3. Common approaches – those rules that represent a general tax policy direction, towards greater coordination/convergence.

Well, all the rules of the package were accepted by all the countries, which means that the minimum standard rules will be implemented as fast as possible. Due to this strong political support we can say that we have a very strong agreement[25] – all the countries agreed that they must protect their tax base and, therefore, they will implement these measures.

- **European Union special note**

On January 2016, European Commission presented the Anti Tax Avoidance Package, following the global standards developed by BEPS Action Plan.[26]

One of the EU's top priorities is, precisely, to fight against corporate tax avoidance. This is a phenomenon that affects all EU citizens and companies, who have to pay more than if each company pays its fair share – they pay more to compensate lost revenue.

The Anti Tax Avoidance Package represents a new set of measures to combat tax avoidance. Many of them follow on from what the BEPS Action Plan prescribes.

This Package was developed based on three core pillars:

1. All companies, big or small, must pay tax where they make their profits.
   For this, the European Commission proposed the "Council Directive laying down rules against tax avoidance practices that directly affect the functioning of the internal market"[27], with legally-binding measures to tackle some of the most

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[22] "With the adoption of the BEPS package, OECD and G20 countries, as well as all developing countries that have participated in its development, will lay the foundations of a modern international tax framework under which profits are taxed where economic activity and value creation occurs." - OECD (2015), Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, OECD, p. 9.

[23] "Countries are committed to this comprehensive package and to its consistent implementation." - OECD (2015), Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, OECD, p. 6.

[24] "(...) no action by some counties [can create] negative spill overs (...) on other countries." - OECD (2015), Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, OECD, p. 6.

[25] "What does make the action plan arguably unique (…) is the apparent political will behind it." - "A Call to Rewrite the Fundamentals of International Taxation: The OECD BEPS Action Plan", p. 371.

[26] The aim is "to align the tax laws in all 28 EU countries in order to fight aggressive tax practices by large companies efficiently and effectively." – available at http://europa.eu/rapid/press-release_IP-16-159_en.htm

[27] Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0026&from=EN

prevalent tax avoidance schemes and presented a "Commission Recommendation of 28.1.2016 on the implementation of measures against tax treaty abuse"[28].

2. To increase tax transparency, through a revision of the Administrative Cooperation Directive – "national authorities will exchange tax-related information on multinational companies' activities, on a country-by-country basis".

3. To secure a level playing field. For that, the European Commission presents a Communication on an External Strategy for Effective Taxation[29] - "Its aim is to strengthen cooperation with international partners in fighting tax avoidance."

The Anti Tax Avoidance Package also contains:

- The Chapeau Communication and the Staff Working Paper, which outlines the political, economic and international context of the Package[30]; and
- A Study in Aggressive Tax Planning, in which the Member States' corporate tax rules that can facilitate aggressive tax planning structures used by companies to avoid taxation were studied[31].

In this Package there is great news for the BEPS Action Plan creators' – a possible Directive laying down rules against tax avoidance practices that directly affects the functioning of the internal market.

In fact, as we know, directives are a secondary source of European legislation. They have binding force and they are addressed to EU Member States. They fix the result to be achieved by the states and leave them freedom related to the form and how those objectives will be achieved[32], whence there is a harmonization on the legislations of the different countries but the solutions are not the same.

As it happens, when one EU Member State doesn't transpose a directive the Treaty on the Functioning of the European Union establishes that the Commission initiates an infringement procedure and "If the Court of Justice of the European Union finds that a

[28] Available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/company_tax/anti_tax_avoidance/c_2016_271_en.pdf

[29] Available at http://eur-lex.europa.eu/resource.html?uri=cellar:b5aef3db-c5a7-11e5-a4b5-01aa75ed71a1.0018.02/DOC_1&format=PDF

[30] Available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016DC0023&from=EN and at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016SC0006&from=EN

[31] Available at http://ec.europa.eu/taxation_customs/resources/documents/taxation/gen_info/economic_analysis/tax_papers/taxation_paper_61.pdf

[32] "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." – Art. 288th, T.F.E.U.

Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court."[33]

This is, certainly, good news – the Directive will standardize rules and concepts for the whole European Union.

On the other hand, if with this Directive the European Union really intends to tackle the base erosion and profit shifting phenomenon, we consider that this is the moment to introduce the Common Consolidated Corporate Tax Base Directive.

The CCCTB was proposed by the Commission in 2011. It includes a set of rules that cross-border companies could use to calculate their taxable profits in the EU, instead of having to deal with different national systems – "it would enable them to file a single tax return for all their activities in the EU through one tax authority, rather than having to file a tax return in every country where they operate (…) [and] allows companies to offset losses in one Member State against profits in another."[34]

Furthermore, certain of these rules are anti-avoidance measures, which were, also, discussed as part of the BEPS project, such as to update rules on Permanent Establishment and to improve Controlled Foreign Corporation rules.

The benefits of re-launching CCCTB Directive is that it permits the provision of a holistic solution to the tax avoidance problems that we are facing today:

- A company only has to comply with just one EU system for computing its taxable income, rather than different rules in each Member State in which they operate.
- All Member States will apply the same rules for calculating the taxable profits of cross-border companies, which eliminates mismatches and loopholes between national systems.

That is, from a global perspective the CCCTB Directive implements in EU many of the international standards established in BEPS Action Plan.

A new CCCTB proposal will be presented by the European Commission in 2016.

Ahead,

The first challenge of BEPS Plan is "monitoring the implementation and effectiveness of the measures adopted (…) as well as the impact on both compliance by taxpayers and proper implementation by tax administrations."[35]

Further to this we can say that the second challenge of BEPS Plan is inclusiveness – OECD, G20 and developing countries "will work together to design and propose a more

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[33] Art. 260th, no. 1. T.F.E.U.

[34] http://europa.eu/rapid/press-release_IP-11-319_en.htm

[35] OECD (2015), Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, OECD, p. 10.

inclusive framework to support and monitor the implementation of the BEPS package, with countries and jurisdictions participating on an equal footing."[36]

[36] OECD (2015), Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, OECD, p. 11.

II. Action 13 – Re-examine transfer pricing documentation

1. Transfer pricing documentation background

Transfer pricing documentation requirements were first introduced by the United States, in 1994. The International Revenue Code (§482), with the purpose of ensuring "that taxpayers clearly reflect income attributable to controlled transactions, and to prevent the avoidance of taxes with respect to such transactions."[37], conditioned the avoidance of penalties upon the development and maintenance of contemporaneous documentation showing how pricing methods had been applied. [38]

Then, in 1995, the OECD Transfer Pricing Guidelines included a chapter on transfer pricing documentation. It provides "general guidance for tax administrations to take into account in developing rules and/or procedures on documentations to be obtained from taxpayers (…)"[39] and it "provides guidance to assist taxpayers in identifying documentation that would be most helpful in showing that their controlled transactions satisfy the arm's length principle and hence in resolving transfer pricing issues and facilitating tax examinations."[40]

Since then, transfer pricing documentation requirements "have rapidly spread around the world"[41]. This means that the number of countries with transfer pricing documentation rules has increased and, because those rules are governed by domestic legislation with a strong domestic tax enforcement point of view, these requirements vary widely among countries.

This proliferation, the dramatic increase in the volume and complexity of international intra-group trade together with the profound scrutiny of transfer pricing issues by tax authorities, has made "transfer pricing documentation one of the top tax compliance priorities on the agendas of both tax authorities and businesses" [42].

In response to the difficulties that a MNE faces, international attempts were made to achieve coordinated approaches "(…) in order to minimize potential adverse consequences for taxpayers (…)".[43]

In 2003, the Pacific Association of Tax Administrators[44] – P.A.T.A. – released the "P.A.T.A. transfer pricing documentation package".

The aim of this documentation package was "to allow taxpayers in PATA member countries (…) to create one set of transfer pricing documentation for a multinational enterprise (MNE) that will satisfy the documentary requirements of each respective

[37] Reg. §1.482-1T(a)(l)
[38] Available online at https://www.pwc.com/gx/en/international-transfer-pricing/assets/united-states.pdf p. 817.
[39] OECD (1995), Transfer Pricing Guidelines.
[40] OECD (1995), Transfer Pricing Guidelines.
[41] OECD (2013), White Paper on Transfer Pricing Documentation, OECD Publishing, p. 1.
[42] OECD (2013), White Paper on Transfer Pricing Documentation, OECD Publishing. p. 1.
[43] OECD (2013), White Paper on Transfer Pricing Documentation, OECD Publishing, p. 7.
[44] The members were: Australia, Canada, Japan and the United States.

jurisdiction thus avoiding the imposition of penalties on the taxpayer for having insufficient transfer pricing documentation."[45]

The use of this package by a taxpayer is voluntary and is compatible with the main ideas determined by the OECD Transfer Pricing Guidelines.

Here, three principles were at work: 1) "MNEs need to make reasonable efforts, as determined by each PATA member tax administration, to establish transfer prices in compliance with the arm's length principle"; 2) "MNEs need to maintain contemporaneous documentation of their efforts to comply with the arm's length principle."; and 3) "MNEs need to produce, in a timely manner, that documentation upon request by a PATA member tax administrator"[46].

The P.A.T.A. documentation package provides for an exhaustive list of documents – organised under ten headings and covering forty eight specific document areas.

Also in 2003, the International Chamber of Commerce produced the "Transfer Pricing Documentation: A case for international cooperation".

"A global set of rules allowing multinational companies to prepare a single set of documentation considered as reasonable by all involved tax authorities should be developed"[47] was the aim of this policy statement.

Although, "these ICC recommendations have not developed into a widely recognized standard."[48]

In 2006, a Resolution of the Council and of the Representatives of the Governments of the Member States established a Code of Conduct on Transfer Pricing Documentation for Associated Enterprises in the European Union – EUTPD, which consisted of two main elements:

a) Masterfile; and
b) Country specific documentation.

The resolution was intended to be consistent with the general principles outlined in OECD Transfer Pricing Guidelines and had two main purposes: 1) the "implementation of standardized and partially centralized transfer pricing documentation for associated enterprises in the European Union"[49]; and 2)"achieving a balance between the tax' administrations' right to obtain from a taxpayer the information necessary (…)"[50].

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[45] ANDERSON, Philip, "PATA Transfer Pricing Documentation Package", in "ASIA-PACIFIC TAX BULLETIN", July 2003, p. 199.
[46] Pacific Association of Tax Administrators (PATA) Transfer Pricing Documentation Package.
[47] Transfer Pricing Documentation: A case for international cooperation, p. 2.
[48] OECD (2013), White Paper on Transfer Pricing Documentation, OECD Publishing. p. 12.
[49] Resolution of the Council and of the representatives of the governments of the Member States, meeting within the Council, of 27 June 2006 on a code of conduct on transfer pricing documentation for associated enterprises in the European Union (EU TPD) (2006/C 176/01)
[50] OECD (2013), White Paper on Transfer Pricing Documentation, OECD Publishing, p. 8.

It happens that the Resolution is merely a political commitment, whereby EU Member States' are not obliged to implement EUTPD.

Therefore, EUTPD was not able to standardize the documentation required.

In fact, the Guidelines established by the OCDE in 1995, "put an emphasis on the need for reasonableness in the documentation process from the perspective of both taxpayers and tax administrations (…), on the desire for a greater level of cooperation between taxpayers and tax administrations in order to avoid excessive documentation compliance burdens while at the same time providing for adequate information to apply the arm's length principle reliably."[51]

Thus, the adoption, by many countries, of the transfer pricing documentation rules and its proliferation ("fact that makes difficult for business to consolidate and streamline compliance practices since documentation in each country must be tailored to the specific requirements of local country law"[52]), as well as the phenomenon of globalization, resulted in two principal consequences:

a) A significant increase in compliance costs for taxpayers;
b) Tax administrations find transfer pricing documentation to be less than fully informative and not adequate for their tax enforcement and risk assessment needs[53] - "it [is] difficult for tax authorities to easily get a "big picture" view of the MNE group's transfer pricing practices and results".[54]

Therefore, the question is: are the documentation rules performing their intended function in the most efficient possible manner?

2. Action 13 - a new paradigm

On February 2013, the OECD released a report that said "in order to address base erosion and profit shifting, which is fundamentally due to a large number of interacting factors, comprehensive action should be developed quickly."[55]

This report didn't say anything about transfer pricing documentation.

Despite this, the afore mentioned problems were known and the International Tax Review advanced that there was room for transfer pricing documentation – "One page: a spreadsheet dividing an MNE into its global value chain functions, identifying the

[51] OECD (2015), Transfer Pricing Documentation and Country-by-Country Reporting, Action 13-2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p. 11.
[52] "Public Consultation – White Paper on Transfer Pricing Documentation", 30th July 2013, OECD, p. 12.
[53] Because of this, it question, on April 2013, was: "Is there no room for more TP documentation?" and its answer was "Yes, there is. One page: A spreadsheet dividing a MNE into its global value chain functions, identifying the companies, employees, assets and risks per function, together with their TP policy." in "International Tax Review", April 2013, "BEPS case study", p. 35.
[54] "Public Consultation – White Paper on Transfer Pricing Documentation", 30th July 2013, OECD, p. 12.
[55] OECD (2013), *Addressing Base Erosion and Profit Shifting*, OECD Publishing, p. 8.

companies, their employees, aspects and risks per function, together with their TP policy."[56]

Knowing that we had these problems, on July 2013, the Action Plan on Base Erosion and Profit Shifting, published by the OECD, stated that the OECD would "develop rules regarding transfer pricing documentation to enhance transparency for tax administration, taking into consideration the compliance costs for business (…) [and] (…) the rules to be developed will include a requirement that MNE's provide all governments with needed information on their global allocation of the income, economic activity and taxes paid among countries according to a common template."[57] – this corresponds to the Action 13 – "Re-examine transfer pricing documentation", whose deadline was September 2014.

Also in July 2013, the White Paper on Transfer Pricing Documentation was published, which invited public comments "in order to launch a global conversation on how transfer pricing documentation rules can be improved, standardized and simplified."[58]

The White Paper recommended a two-tiered documentation approach:

1. A master file;
2. A local file.

Furthermore, the possibility was highlighted that businesses could provide individual country data based on management accounts, consolidated incomes statements and balance sheets and/or tax returns that would provide tax administrators with a general sense of how their global income is allocated

In January 2014, the OECD released the "Discussion Draft on Transfer Pricing Documentation and CbC Reporting".

Here, in addition to a master and a local file, we have a country-by-country report of:

- the multinational group's revenue;
- earnings before taxes;
- cash basis income tax paid to the country of organization;
- cash basis income tax paid to all other countries;
- total withholding taxes paid;
- stated capital and accumulated earnings;
- number of employees;
- total employee expense;
- book value of tangible assets other than cash and cash equivalents;
- a list of all group entities by country and the business activity codes for their major activities.[59] [60]

[56] In "BEPS case study", p. 35.
[57] OECD (2013), *Action Plan on Base Erosion and Profit Shifting*, OECD Publishing, p. 23.
[58] "Public Consultation – White Paper on Transfer Pricing Documentation", 30th July 2013, OECD, p. 2.

3. “Transfer Pricing Documentation and Country-by-Country Reporting”

In September 2014, the OECD released its final deliverable on Action 13 - “Transfer Pricing Documentation and Country-by-Country Reporting” and in October 2015, the “Transfer Pricing Documentation and Country-by-Country Reporting, Action 13 - 2015 Final Report” was published.

Three objectives have been determined in this Action in order to fight the problem of base erosion and profit shifting:

I. Allowing tax authorities to properly assess transfer risk:
Tax administrations don’t have infinite resources. Thus, they have to meticulously evaluate, at the beginning of a possible audit, “whether a taxpayer’s transfer pricing arrangements warrant in-depth review and a commitment of significant tax enforcement resources.”[61]

II. Allowing taxpayers to assess their compliance with the arm’s length principle:
For this, taxpayer’s should have well-prepared documentation and contemporaneous documentation requirements.

III. Affording tax administrations with useful information for transfer pricing audits[62].

In order to execute the afore mentioned objectives, “countries should adopt a standardized approach to transfer pricing documentation”[63].

Now, we have a three-tiered structure, to be submitted annually:

1. a **master file** containing standardized information on a company’s (or multinational group members’) global transfer pricing policies and positions;

[59] This last point was added in April 2014.

[60] According to Vikram Chand and Sagar Wagh, “The draft template provided for reporting of entity-by-entity information, rather than country-by-country information. [But] In April 2014, the OECD announced in a webcast that the country-by-country template will be modified to require reporting of aggregated information by country, rather than requiring entity-based reporting.” In “International Transfer Pricing Journal”, November/December 2014 – “The Profit Split Method: Status Quo and Outlook in Light of the BEPS Action Plan”, p. 407.

[61] OECD (2014), Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 15.

[62] “It is also important that tax administrations be able to access the information they need to conduct a transfer pricing risk assessment to make an informed decision about whether to perform an audit [and] (…) to access or demand, on a timely basis, all additional information necessary to conduct a comprehensive audit once the decision to conduct such an audit is made.” - OECD (2014), Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 14.

[63] OECD (2014), Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 17.

2. a **local file** that supports material controlled party transactions and analyses whether a specific country's tax base was determined in line with the arm's length principle; and
3. a **country-by-country report** that provides worldwide details of the location of employees, assets and taxes paid by multinational groups and their affiliates by specific countries and business lines.

To go further,

a) Master file (to be shared between all tax authorities of the countries where the economic group has a presence**):**

This file is intended two achieve two things: "(…) a clear overview of an entire group (…) [and] for the taxpayer, an opportunity, to prepare a document which is acceptable in every country (…)"[64].

The information required provides a "blueprint" of the MNE group, which can be grouped in five categories:

i. the global organizational structure
(here, taxpayers must prepare a "chart illustrating the MNE's legal and ownership structure and geographical location of operating entities"[65]);

ii. a description of the business of the MNE (general written description of the MNE's business(es)), including:
   a. important profit drivers;
   b. supply chains for the group's five largest products and/or service offerings by turnover and for any other products and/or services amounting to more than 5% of group turnover – this description can take the form of a chart/diagram – plus a description of their main geographic markets;
   c. a list and brief description of important service arrangements between members of the MNE group (except R&D services), "including a description of the capabilities of the principal locations providing important services and transfer pricing policies for allocating services costs and determining prices to be paid for intra-group services"[66];
   d. brief functional description of the principal contributions to value creation by individual entities within the group[67]; and
   e. any restructuring of the business or parts thereof.

iii. an analysis of the intangibles of the MNE. This includes:

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[64] "International Transfer Pricing Journal", January/February 2015 – "The OECD's New Transfer Pricing Documentation Standard: An Overview and Possible UK Implementation", p. 4.
[65] OECD (2014), Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 27.
[66] OECD (2014), Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 27.
[67] That is: key functions performed, important risks assumed and important assets used.

a. its overall intangibles strategy and policy – "a general description of the MNE's overall strategy for the development, ownership and exploitation of intangibles, including location of principal R&D facilities and location of R&D management."[68];
b. a list of (groups of) intangibles of the MNE group that are important for transfer pricing purposes;
c. a list of important agreements among identified associated enterprises related to intangibles[69];
d. a general description of the group's transfer pricing policies related to R&D and intangibles;
e. identification of any intangible transfers, including entities, countries and compensation involved.

iv. a description of the intercompany financing of the MNE:
a. a description of how the group is financed, which includes "important financing arrangements with unrelated lenders"[70];
b. identification of members of the MNE that provide a central financing for the group. Here, taxpayers must include "the country under whose laws the entity is organised and the place of [its] effective management (…)"[71];
c. general description of the MNE's transfer pricing policies in financing arrangements between associated enterprises.

v. the annual consolidated financial statement of the MNE and a list of any unilateral APAs and relevant tax rulings relating to the allocation of income among countries.

b) Local file (locally delivered):

In contrast to the master file, which provides a high-level overview "the local file provide[s] more detailed information relating to specific intercompany transaction of individual group companies."[72]

The information required, for each material category of controlled transactions in which the entity is involved, is:

i. related to the local entity:
a. a description of its management structure;

[68] OECD (2014), Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 28.
[69] This includes: "cost contribution arrangements, principal research service agreements and license agreements." - OECD (2014), Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 28.
[70] OECD (2014), Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 28.
[71] OECD (2014), Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 28.
[72] "The OECD's New Transfer Pricing Documentation Standard: An Overview and Possible UK Implementation", p. 6.

b. a chart reflecting its organizational structure;
c. a description of the individuals to whom local management reports and the countries where they maintain their principal offices;
d. a description of its local businesses and its strategy ("including an indication whether the local entity has been involved in or affected by business restructurings or intangibles transfers in the present or immediately past year and [plus how these transactions affect the local entity]"[73]); and
e. to list its key competitors.

ii. <u>related to controlled transactions:</u>

a. a description of material controlled transactions[74] and the context in which the transactions take place;
b. the amount of intra-group payments and receipts for each category of controlled transactions involving the local entity, broken down by the tax jurisdiction of the foreign payer or recipient;
c. to identify the associated enterprises involved and the relationship between them;
d. detailed analysis of material related-party transactions, which includes copies of material intercompany agreements, functional and comparability analyses, selection and application of the most appropriate transfer pricing methodology (and the reasons for selecting that method) and copies of any APAs or relevant rulings to which the local jurisdiction is not a party but which are related to the related-party transactions;
e. in the case of being applicable, indication of which associated enterprise is selected as the tested party and the reason why it was the chosen party;
f. summary of the important assumptions made in applying the transfer pricing methodology;
g. to explain the reasons for performing a multi-year analysis;
h. if applicable, a list and respective description of selected comparable uncontrolled transactions plus information on relevant financial indicators for independent enterprises relied on in the transfer pricing analyses;
i. description of any comparability adjustments performed;
j. description of the reasons for concluding that relevant transactions were priced on an arm's length basis based on the application of the selected transfer pricing method; and
k. a summary of financial information used in applying the transfer pricing methodology.

[73] OECD (2014), Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 31.
[74] "e.g. procurement of manufacturing services, purchases of goods, provision of services, loans, financial and performance guarantees, licenses of intangibles, etc." - OECD (2014), Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 31.

iii. related to financial information:
   a. information and allocation schedules showing how the financial data used in applying the transfer pricing method may be tied to the annual financial statements;
   b. annual local entity financial accounts for the fiscal year concerned;[75] and
   c. summary schedules of relevant financial data for comparables used in the analysis and the sources from which that data was obtained.

c) Country-by-country reporting:

For the ultimate parent entity of a MNE with consolidated earnings, in the previous fiscal year, of at least 750.000.000,00€.

This "has been the most controversial element of the package and represents the most high-profile change to transfer pricing documentation requirements".[76]

This report provides a summary of a MNE's:

- global allocation of income;
- global allocation of the taxes paid; and
- certain broad indicators of the allocation of economic activity among tax jurisdictions in which the MNE group operates.

CbCR is intended to be used by tax authorities for transfer pricing risk assessment purposes. However, "the information in the country-by-country report should not be used as a substitute for a detailed transfer pricing analysis of individual transactions and prices (…). That information "does not constitute conclusive evidence that transfer prices are or are not appropriate. It should not be used by tax administrations to propose transfer pricing adjustments based on a global formulary apportionment of income."[77] [78]

There are two principal tables required by CbCR:

i. aggregated financial data by tax jurisdiction:
   a. revenues (split between related and third-party revenue);
   b. profit before tax;
   c. tax paid and accrued;
   d. capital;

[75] "if audited statements exist they should be supplied and if not, existing unaudited statements should be supplied" - OECD (2014), Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 33.

[76] "The OECD's New Transfer Pricing Documentation Standard: An Overview and Possible UK Implementation", p. 7.

[77] OECD (2014), Guidance on Transfer Pricing Documentation and Country-by-Country Reporting, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, p. 20.

[78] Andrew Casley, Kevin Norton and Michael Krhoda say: "It remains to be seen how well tax auditors can resist the temptation to draw what will be wholly inappropriate conclusions about the relative division of profits." In "The OECD's New Transfer Pricing Documentation Standard: An Overview and Possible UK Implementation", p. 7.

e. accumulated earnings;
f. number of employees; and
g. tangible assets.

ii. list of each constituent entity[79] resident in each tax jurisdiction[80] and the identification of the main business activities of each entity

Twelve common activities and the option "dormant" were preselected.

Details of related-party interest payments, royalties and service fees have not been included in the final version. Nevertheless, in 2020, the OECD will decide if this information should be added.

[79] "Constituent entity" is "(…) (i) any separate business unit of an MNE Group that is included in the consolidated financial statements for financial reporting purposes, or would be so included if equity interests in such business unit of an MNE Group were traded on a public securities exchange (ii) any separate business unit that is excluded from the MNE Group's consolidated financial statements solely on size or materiality grounds and (iii) any permanent establishment of any separate business unit of the MNE Group included in (i) or (ii) above provided the business unit prepares a separate financial statement for such permanent establishment for financial reporting, regulatory, tax reporting or internal management control purposes;" – OECD (2015) Action 13: Country-by-Country Reporting Implementation Package, p. 9.

[80] Andrew Casley, Kevin Norton and Michael Krhoda say: "Entities in a group that are not resident in any jurisdiction for tax purposes must be added as a separate line, with a view to identifying any so-called stateless entities (…)." In "The OECD's New Transfer Pricing Documentation Standard: An Overview and Possible UK Implementation", p. 7.

III. New transfer pricing documentation - implementation

1. Brief introduction

Taxpayers must determine their transfer pricings in accordance with the arm's length principle. [81] [82] [83].

Article 9, no. 1, of Model Convention with respect to Taxes on Income and on Capital establishes that:

> "Where a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State, and in either case conditions are made or imposed between the two enterprises in their commercial or financial relations which differ from those which would be made between independent enterprises (…)."

Thus, we can say that the arm's length principle "(…) states that the amount charged by one related party to another for a given product [, right or service] must be the same as if the parties were not related. An arm's-length price for a transaction is therefore what the price of that transaction would be on the open market."[84]

However, formal obligations related to transfer pricing documentation vary from country to country, depending on the burden of proof. That is:

1) if the burden of proof belongs to tax administrations, the taxpayers don't have to prove that, when they fixed their transfer pricing, they respected the arm's length principle. Instead, the tax administrations must demonstrate that the arm's length principle was violated; on the other hand,

2) if the burden of proof belongs to taxpayers, the situation is completely opposite to the *supra* described.

It is here that the importance of transfer pricing documentation is demonstrated – the application of this principle implies to the taxpayers the preparation of documentation evidence which proves their efforts to respect the arm's length principle.

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[81] A draft convention on the allocation of business profits was presented to the League Council (…). This draft convention contained an explicit reference to "arm's length. (…) The 1935 draft model convention on the allocation of business profits contained the articles that were the basis for article 7 and article 9 of the current OECD Model." - "International Transfer Pricing Journal", May/June 2015 – "Transfer Pricing in a BEPS Era: Rethinking the Arm's Length Principle – Parte I", p. 142.

[82] "The United States was the first nation to introduce to introduce the arm's length in 1934." - "Transfer Pricing in a BEPS Era: Rethinking the Arm's Length Principle – Parte I", p. 142.

[83] The United nations Manual [- Practical Manual on Transfer Pricing for Developing Countries -] acknowledges the arm's length principal as the international standard (…) [and contemplated] profit split or formulary apportionment as a (last resort) solution (…)."- "Transfer Pricing in a BEPS Era: Rethinking the Arm's Length Principle – Parte I", p. 144.

[84] Available at http://www.ustransferpricing.com/arms_length_principle.html

On the one hand, tax administrations want taxpayers to pay their fair share – "well-prepared documentation will give tax administrations some assurance that the taxpayer has analysed the positions it reports on tax returns, has considered the available comparable data, and has reached consistent transfer pricing positions."[85], which means that the information there subscribed will satisfy tax administrations and convince them that the tax paid or to be paid is in accordance with what is legally due.

On the other hand, MNE want to develop their activities with high levels of predictability – transfer pricing documentation is an opportunity "to articulate a well thought-out basis for their transfer pricing policies"[86], which means that a well-prepared transfer pricing documentation, fulfilling all the requirements made by tax administrations, will prevent, namely, further penalties.

- **The BEPS legal force**

All BEPS Action Plan has an implementation problem. Notwithstanding the above-mentioned "very-strong agreement" that we have, it is the case that, the sources of international tax law are: 1) the international conventions – treaties and tax arrangements for avoiding double taxation and combating tax evasion and fraud; 2) customs; and 3) general principles recognized by civilized nations.

Article 5 of Convention on the Organization for Economic Co-Operation and Development establishes that:

"In order to achieve its aims, the Organization may: (a) take decisions which, except as otherwise provided, shall be binding on all the Members; (b) make recommendations to Members; and (c) enter into agreements with Members, non-member States and international organizations."

Hereupon, we conclude that, as well as OECD Commentaries, interpretation and the various guidelines approved by committees or institutions, the BEPS Plan is a soft law instrument[87] [88] (it isn't binding upon the members).

To better understand the legal force of the BEPS Plan – just because is considered a soft-law instrument "does not make it without every legal effect"[89] – we can import the

[85] OECD (2015), Transfer Pricing Documentation and Country-by-Country Reporting, Action 13-2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p. 12.
[86] OECD (2015), Transfer Pricing Documentation and Country-by-Country Reporting, Action 13-2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p. 13.
[87] "(…) the rules of soft law do not appear in formal legal sources recognized by international law, and in legal terms they are not obligatory [but] (…) soft law can contain classic normative rules of conduct (…) and may have a great impact on the conduct and activities of international actors, including States." – "In the Trap of Legal Metaphor: International Soft Law", BLUTMAN, LÁZLÓ, p. 608.
[88] "OECD discussions fall under the concept of soft law and are not binding on OECD member countries" "International Transfer Pricing Journal", January/February 2015 – "Turkish Perspective on OECD Action Plan on Base Erosion and Profit Shifting", p. 52.
[89] Also because there is "(…) absence of state responsibility when a state fails to comply (…)" – "The Power of Persuasion: The Legal Effects of the OECD Commentary as a Non-Binding Recommendation", p. 236 available online at http://www.dfdl.com/images/stories/The_Legal_Effects_of_the_OECD_Commentary_as_a_Non-Binding_Recommendation_Intertax_2003.pdf

doctrinal understanding applied to evaluate the legal force of OECD Commentaries on the Articles of the Model Tax Convention.

Some authors consider that the Commentaries elaborated before the implementation of a double tax convention are an interpretative guide[90]; similarly, Alberto Xavier considers that it "constitutes a serious interpretative reference (…) [and its legal force] can't go beyond [the legal force] recognized to the best doctrine". So, "the fact that one party doesn't adopt the interpretation offered by the Commentaries doesn't permit the other party to claim unlawful infringement of the treaty".[91]

Thus, "(…) that mere soft law, best practices guidance with no implementation mechanisms is insufficient."[92] – "Unfortunately, the OECD can only offer guidance. Much will depend on how countries will implement these proposals".[93]

This is the third challenge of the BEPS Plan – its implementation:

Countries are sovereign – the changes prescribed in the Plan will be implemented via tax treaties or domestic law changes – "it is therefore up to them to implement these changes (…)"[94]. Hence, there is the risk of "Every country [reflecting] a different impact of the BEPS Action Plan in its laws (…)"[95].

The hope is that, as afore mentioned, all countries agreed on the indispensability of giving a coordinated response[96], which means that upon the implementation of the Action Plan measures' we expect them to take into account their international legal commitments.

Fortunately, within Action 13, in some countries, this is no more a problem. Portugal, Spain and France are some of the countries that have implemented the changes established in the Final Report "Transfer Pricing Documentation and Country-by-Country Reporting", which means that the new rules are now in force in their legal systems and the Action Plan is, in this part, fully mandatory.

Therefore, let's analyse how the three countries mentioned transposed the new transfer pricing documentation and country-by-country reporting.

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[90] "The interpretation of income tax treaties with particular reference to the commentaries on the OECD Model", WARD, David A., JONES, John F. Avery, BROE, Luc De, ELLIS, Maarten J., GOLDBERG, Sanford H., KILLIUS, Juergen , GALL, Jean-Pierre Le, MAISTO Guglielmo, MIYATAKE, Toshio, TORRIONE, Henri, RAAD, Kees van and WIMAN, Bertil

[91] (Our translation) "Direito Tributário Internacional", XAVIER, Alberto, Almedina (2014), p. 152-154.

[92] "World Tax Journal", February 2014 – "BEPS: An Interim Evaluation", p. 13.

[93] "The OECD's New Transfer Pricing Documentation Standard: An Overview and Possible UK Implementation", p. 3.

[94] OECD (2015), Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, OECD, p. 9.

[95] "OECD discussions fall under the concept of soft law and are not binding on OECD member countries" - "Turkish Perspective on OECD Action Plan on Base Erosion and Profit Shifting", p. 52.

[96] "Governments recognise these challenges and that consistent implementation and application are key (...)." - OECD (2015), Explanatory Statement, OECD/G20 Base Erosion and Profit Shifting Project, OECD, p. 10.

2. Portugal

In Portugal, the legislation on transfer pricing documentation is included in "Código do Imposto sobre o Rendimento das Pessoas Colectivas – C.I.R.C." and "Portaria 1446-C/2001, de 21 de Dezembro".

Art. 63rd, no. 6, C.I.R.C., establishes that the taxpayer must keep, for ten years[97], the transfer pricing documentation organised[98], including:

- guidelines or instructions relating to its application;
- contracts and other legal transactions concluded with related entities (plus further modifications and information about their performance);
- documentation and information about those related enterprises and about entities, goods or services used as a comparison;
- functional, financial analyses and sectoral data; and
- Other information and elements taken into consideration to determine the terms and conditions agreed up on and to select the method used.

Furthermore, art. 63rd, no. 7, C.I.R.C. establishes that the taxpayer in its annual statement must say if there are operations with related enterprises. If so, the taxpayer must 1) identify those entities, as well as 2) declare the amount of transactions with each one and 3) if organised and keep the documentation related to the transfer pricing practiced.

"Portaria 1446-C/2001", "whereas the effective application of the rules on transfer pricing requires a high degree of collaboration between taxpayers, particular emphasis is given to the obligations relating to information and documentation that the taxpayer must obtain , produce and maintain to justify the adopted policy transfer pricing (…)"[99], establishes the following:

The taxpayer – that in the previous year has reached a value of sales higher than 3.000.000,00€ - must provide the information and documentation related to the policy adopted when determining transfer pricing and keep organised documentation that prove:

- market parity; and
- the selection of the method(s) more appropriate to that determination.[100]

Thereunto, the taxpayer must obtain, produce and keep the following documentation:

a) description and characterization of the related relationships of which it is part;
b) characterization of its and their activity, as well as information related to the materialized operations and their value for the previous 3 years.

[97] Art. 120th, no. 1, C.I.R.C.
[98] The documentation should be centralized in the Portuguese establishment or should be with the tax representant – art. 120th, no. 2, C.I.R.C.
[99] Our translation. In preamble of "Portaria 1446-C/2001".
[100] Art. 13th, no. 1 e 3, "Portaria 1446-C/2001".

c) detailed identification of the good, services and rights transmitted, plus terms and conditions set forth;
d) description of its functions, assets used and assumed risks;
e) technical studies focusing on key areas of the business;
f) guidelines on the application of the policy adopted on determining the transfer prices;
g) contracts and other legal acts signed with related and unrelated entities;
h) explanation about the method utilized;
i) information about comparable data;
j) details about the analyses made to evaluate the degree of comparability;
k) strategies and business policies; and
l) any other relevant elements.[101] [102]

In addition to the afore mentioned documentation, and in consequence of the "Transfer Pricing Documentation and Country-by-Country Reporting", Country-by-Country Reporting ("Informação financeira e fiscal por país") – art. 121st-A, C.I.R.C. – is incorporated into the Portuguese legal system.

Accordingly, a resident entity must present[103] a Country-by-Country Report, if the following conditions are verified:

1. It draws up consolidated accounts;
2. It controls, direct or indirectly, one or more entities/permanent establishments resident in different jurisdictions;
3. The MNE group has had an annual consolidated group revenue in the immediately preceding fiscal year of more than 750.000.000,00€; and

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[101] Art. 14th, "Portaria 1446-C/2001".

[102] Arts. 16th and 17th, "Portaria 1446-C/2001" establish special documentation, to be detained by the taxpayer, related to Cost Contribution Agreements and Intra-Group Service Agreements between members of the MNE group.
In consequence, the signing of a Cost Contribution Agreement implies for the taxpayer:
- to identify who participates in the agreement;
- to mention the nature and type of activities developed because of the agreement;
- to identify and evaluate the advantages and benefits the each entity will obtain;
- to mention the method utilized for distributing the costs between the entities involved;
- to describe the method utilized to, if necessary, make adjustments;
- term of the agreement;
- to mention the responsibilities related to the activity;
- to mention the procedures applying if one entity wants to adhere or to abandon the agreement, as well as the mechanisms to break it up and respective consequences; and
- to mention rules applies in case of compensatory adjustments.
The signing of Intra-Group Service Agreements between members of the MNE group implies for the taxpayer:
- to keep a copy of the contract;
- to describe the services accorded;
- to identify the entities which will receive the services;
- to identify the costs related to the services and the mechanisms utilized to establish which entities pay what.

[103] The presentation must be sent to the Tax Administration by the end of the twelfth mouth after the ending of the fiscal year which the approach corresponds to, by electronic means. – art. 121st-A, no. 3, C.I.R.C.

4. It isn't a constituent entity of one or more resident entities or non-resident entities that must present identical country-by-country reporting with which an automatic exchange of information agreement was signed[104].

Also, a resident entity must present a Country-by-Country Report, if the following conditions are verified:

1. It is a constituent entity[105] of an MNE group whose ultimate parent entity doesn't have to present a Country-by-Country Report or is resident in a country that didn't sign an automatic exchange of information agreement;
2. The entities which detained the resident entity, if they were residents in Portugal, would have to present the Country-by-Country Report; and
3. Doesn't demonstrate that another constituent entity, resident in Portugal or in a country which signed an automatic exchange of information agreement, was designated to present the Country-by-Country Report.

Art. 121st-A, no. 4, C.I.R.C., states that a resident entity or permanent establishment in Portugal, which joins a group in which some entities must present a country-by-country report, must communicate, by electronic means, by the end of the fiscal year, the identification and the country of the reporting entity of the group.

The new Portuguese law also introduces elements of the country-by-country report. They are:

a) Revenues, distinguishing those obtained from unrelated parties and from related parties;
b) Profit before Income Tax;
c) Income Tax paid;
d) Stated Capital;
e) Accumulated Earnings;
f) Number of Employees;
g) Tangible Assets, other than Cash and Cash equivalents;
h) Constituent Entities Resident in each Jurisdiction, including permanent establishments and indication of the principal activities developed for each one; and
i) Other important elements.

[104] There aren't considered the Automatic Exchange of Information Agreements which are repeatedly violated, notified by the Tax Administrations to any entity of the group – art. 121st-A, no. 7, C.I.R.C.

[105] Constituent entity: a) any entity that is included in the Consolidated Financial Statements of the MNE group, or with be so included if equity interests in such business unit of the MNE group were traded on a public securities exchange; b) any entity that was excluded from the MNE group's Consolidates Financial Statements solely on size or materiality grounds; or c) any permanent establishment of any entity of the MNE group included in a) or b) above provided the business unit prepares a separate financial state for such permanent establishment for financial reporting, regulatory, tax reporting, or internal management control purposes. - art. 121st A, no. 6, C.I.R.C.

No distinct penalties, of those ones already enacted, here established to be applied in case of non fulfilment of the documents required, so the rules prescribed in "Regime Geral das Infracções Tributárias" will be applied.

3. Spain

In Spain, the art. 93rd, "Ley 58/2003, de 17 de diciembre, General Tributaria", enshrines the obligation of entities to provide to the Tax Administration all the information legally required.

Thus, from all entities whose revenue in the immediately preceding fiscal year was more than 8.000.000,00€, provided that the total of transactions in that period with persons or entities not exceed 100.000,00€, the following documentation was required:

j) Documentation related to the group of the resident entity[106] [107]; and
k) The taxpayer documentation [108].

Furthermore, all the transactions made with related parties resident in a low-tax jurisdiction must be documented.

In consequence of the "Transfer Pricing Documentation and Country-by-Country Reporting", system the modifications introduced by Action 13 of BEPS Action Plan were incorporated into the Spanish legal.[109]

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[106] The ultimate parent entity could choose to prepare and keep the documentation related to the entire group. Although, if the ultimate parent entity was resident in other country, it should designate a resident entity to keep that documentation.
[107] That is:
- Overview of the organizational, legal and operational structure of the group, as well as any relevant change in it.
- Identification of the various entities that form part of the group and concretized operations;
- General description of the nature and amounts of transactions;
- Overview of the functions performed and risks assumed by the different entities of the group;
- A statement of the ownership of patents, trademarks, trade names and other intangible assets;
- A description of the group's policy on transfer pricing that includes the method of pricing adopted by the group;
- Ratio of cost contribution agreements and contracts of services between group entities; and
- List of advanced pricing agreements;
[108] That is:
- Name or business name or full name, legal address and tax identification number of the taxpayer and persons or entities with which the operation is conducted, as well as detailed description of the nature, characteristics and amount. Also, in the case of transactions carried out with persons or entities resident in countries or territories considered as tax havens, taxpayer must identify people who, on behalf of such persons or entities have been involved in the operation and, if concerned transactions with entities, identifying them managers;
- Comparability analysis;
- An explanation regarding why that was the chosen method, including a description of the reasons justifying the choice and how it works;
- Cost contribution agreements; and
- Any other relevant information that is provided by the taxpayer to determine the valuation of its related operations, as well as any shareholders' agreement signed.

Consequently, the "Reglamento del Impuesto sobre Sociedades" now establishes that there are three documents to be presented[110]:

1. "Documentación específica del grupo al que pertenezca el contribuyente".
   Similar to master file, with the following differences:
   a) it requires a general description of the operational structure of the group, as well as any relevant change;
   b) to identify different entities that constitute the group; and
   c) to describe the supply chain for products and/or services amounting to more than 10% of group turnover.
   d) this document is only required for entities of a group with an annual consolidated revenue in the immediately preceding fiscal year of more than 45.000.000,00€.

2. "Documentación específica del contribuyente".
   Similar to local file, with the following differences:
   a) the "Spanish local file" doesn't require:
      - where applicable, indication of which associated enterprise is selected as the tested party and the reason why it was the chosen party;
      - summary of the important assumptions made in applying the transfer pricing methodology;
      - to explain the reasons for performing a multi-year analysis;
      - where applicable, a list and respective description of selected comparable uncontrolled transactions plus information on relevant financial indicators for independent enterprises relied on in the transfer pricing analyses;
      - description of any comparability adjustments performed;
      - description of the reasons for concluding that relevant transactions were priced on an arm's length basis based on the application of the selected transfer pricing method; and
      - a summary of financial information used in applying the transfer pricing methodology.
   b) the entities of a group with an annual consolidated revenue in the immediately preceding fiscal year of less than 45.000.000,00€, are only required to provide a "simplified local file", which includes[111]:

[109] "Se intoduce como novedad la información país por país (...). Por otra parte, se modifica la documentación específica de operaciones vinculadas (...) completando, por un lado, la necessaria simplificación de este tipo de documentación para entidades con un importe neto de la cifra de negocios inferior a 45 millones de euros y adaptándose, por otro lado, al contenido de la documentación para entidades que se estabelece en la OCDE (...)." In preamble of "Real Decreto 634/2015, de 10 de julio, por el que se aprueba el Reglamento del Impuesto sobre Sociedades".

[110] The Spanish legislator didn't establish any penalizing regime in case of the documentation required not be fulfilled, so it will be applied art. 18th, no. 13, "Ley 27/2014, de 27 de noviembre, del Impuesto sobre Sociedades."

[111] Although, if the case refers to operations involving intangible assets, this exemption isn't applied.

- a description of the material controlled transactions and the context in which the transactions take place;
- the identification of the associated enterprises involved and the relationship between them;
- the identification of the selected transfer pricing method; and
- the comparable achieved and the intervals of values derived from the method used.

3. "Información país por país" (= country-by-country reporting)[112]

A resident entity[113] must present[114] a country-by-country report if the following conditions are verified:

1. It is the ultimate parent entity of an MNE group; and
2. It isn't a constituent entity of one or more resident entities or non-resident entities.

Also, a resident entity must present a Country-by-Country Report, if one of the following conditions is verified:

1. It is a constituent entity, direct or indirectly, of a non-resident entity which, at the same time, isn't a constituent entity of another non-resident entity or non-resident permanent establishments; or
2. It was designated, by the ultimate parent entity, to present the Country-by-Country Reporting; or
3. It is a constituent entity of an MNE group whose ultimate parent entity doesn't have to present the CbCR; or
4. The ultimate parent entity is resident in a country that didn't sign an automatic exchange of information agreement; or
5. Notwithstanding the Automatic Exchange of Information Agreement, it is repeatedly violated, and this fact was notified by the Tax Administrations to any entity of the group.

The elements of the CbCR are exactly the same as those introduced in Portugal.

Furthermore, any resident entity in Spain which joins a group in which some entities must present a CbCR, must communicate, by the end of the fiscal year, the identification and the country of the reporting entity of the group.

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[112] "It is expected that in Spain, this requirement will affect only 300 enterprises." - "International Transfer Pricing Journal", May/June 2015 – "Proposal for Country-by-Country Reporting", p. 207.
[113] If the group to which it belongs has had an annual consolidated group revenue in the immediately preceding fiscal year of more than 750.000.000,00€.
[114] The presentation must be sent to the Tax Administration by the end of the twelfth month after the ending of the fiscal year to which the approach corresponds to.

4. France

In France, art. L13 AA, “Livre des procédures fiscales”, establishes that resident entities, which

- Have total net sales (before taxes), or total gross assets, equal to or greater than €400 million; or
- Hold, directly or indirectly, at the closing date of the fiscal year, more than 50% of the capital or voting rights in a legal person having such turnover or gross assets; or
- Are, on the closing date of the fiscal year, more than 50% held, directly or indirectly, by such legal person; or
- Belong to a French tax consolidated group that includes at least a legal person that meets one or more of the aforementioned criteria.

must provide their transfer pricing documentation within 30 days upon first request made by the tax inspector in the course of a tax audit.[115] [116]

The transfer pricing documentation consists of two sections:

1. “Des informations générales sur le groupe d'entreprises associées” (similar to master file), that contains:

- A general description of all business activities, including changes occurring during each audited tax year;
- A general description of the legal and operational structures of the group of associated companies, including an identification of the associated entities involved in audited transactions;
- A general description of the functions undertaken and risks assumed by each of the associated entities insofar as these affect the audited company;
- A list of the main intangible assets held, including patents, trademarks, trade names and know-how; and
- A general description of the group's transfer pricing policy;

2. “Des informations spécifiques concernant l'entreprise vérifiée” (similar to local file), that contains:

[115] In a situation where the companies don’t fall into that scope, according to art. L13 B, “Livre des procédures fiscales” lays down the obligation for these companies to prepare information to justify the transfer pricing policy.

[116] In the case of those documents not to be presented – art. 1735th, “Code Géneral des Impôts” – “Le défaut de réponse ou la réponse partielle à la mise en demeure mentionnée au III de l'article L. 13 AA et au second alinéa de l'article L. 13 AB du livre des procédures fiscales entraîne l'application, pour chaque exercice vérifié, d'une amende pouvant atteindre, compte tenu de la gravité des manquements, le plus élevé des deux montants suivants :
1° 0,5 % du montant des transactions concernées par les documents ou compléments qui n'ont pas été mis à disposition de l'administration après mise en demeure ;
2° 5 % des rectifications du résultat fondées sur l'article 57 du présent code et afférentes aux transactions mentionnées au 1° du présent article.
Le montant de l'amende ne peut être inférieur à 10 000 €.”

- A description of the activity developed;
- A description of the related transactions undertaken, including the nature and total of flows, including fees;
- A list of cost contribution arrangements and a copy of the advanced pricing agreements signed;
- A presentation of the methods for determining transfer prices in compliance with the arm's length principle, including an analysis of functions performed, risks assumed and used assets and an explanation of the selection and application of the chosen methods; and
- If the chosen method so requires, an analysis of comparative elements considered relevant by the resident entity;

Furthermore, "LOI n° 2013-1117 du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière" introduced additional transfer pricing documentation, spontaneously produced[117] [118].

In fact, that addition consists of two transfer pricing requirements:

1. "Des informations générales sur le groupe d'entreprises associées"[119], which includes:
   - A general description of all business activities, including changes occurring during the last fiscal year;
   - A list of the main intangible assets held, notably patents, brands, trading names and expertise, in relation with the French entity; and
   - A general description of the transfer price policy of the group.

2. "Des informations spécifiques concernant l'entreprise" [120], which comprehends:
   - A description of all business activities, including changes that occurred during the last fiscal year;
   - A summary of the transactions undertaken with related companies, presented by transaction type and by amount, when the total amount per transaction exceeds 100.000,00€; and
   - A presentation of the method(s) used to determine the transfer pricing policy in respect of the arm's-length principle indicating the main method used, and including changes occurring during the last fiscal year.

It is worth noting that in the case of tax integration the ultimate parent company is requested to submit this report for the whole group.

[117] To be filed to the Tax Administration within six months following the deadline for filing their annual income tax return and delivered by electronic transmission - art. 223rd "quinquies" B and art. 223rd, no. 1, "Code Général des Impôts"

[118] If an entity doesn't fulfil these documents – art. 1729th B, "Code Général des Impôts" – it will be applied a penalty of 150,00€.

[119] [120] Art. 223rd "quinquies" B, "Code Général des Impôts", recently amended by "LOI n° 2015-1785 du 29 décembre 2015 - art. 86 (V)".

In addition to the afore mentioned requirements, the new French Finance Law for 2016 adopted the new OECD CbCR[121] obligations – art. 223rd"quinquies" C, "Code Général des Impôts".

Thus, a resident entitiy which:

1. Draws up consolidated accounts;
2. Owns foreign branches or control, direct or indirectly, one or more foreign-subsidiaries;
3. Generates annual consolidated excluding-tax turnover of more than 750.000.000,00€; and
4. Is not held by one or several entities established in France and already subject to the present the CbCR, or by legal entities established abroad that are subject to similar CbCR requirements pursuant to foreign legislation

must present the French CbCR [122] [123].

Furthermore, an entity established in France must also present the CbCR if:

1. It is held, direct or indirectly, by an entity established in a foreign State or territory not included in the list *supra*; and
2. That would have been subject to the CbCR if established in France in the following situations:

2.1. The resident entity has been appointed by the group to submit the CbCR.

2.2 The resident entity cannot demonstrate that another entity, based in France or in another State or territory was appointed to do so.

Although CbCR requirement will be subject to development by decree, we already know that it must contain the following elements:

- A breakdown, by country, of the group's earnings; and
- Aggregate economic accounting and information on the location and activities of the different members and entities of the group.

5. Multilateral Competent Authority Agreement on the Exchange of Country by-Country Reports

[121] In case of not presenting the Country-by-Country reporting required – art. 1729 F, "Code Général des Impôts" – "Le défaut de production, dans le délai prescrit, de la déclaration (…) entraîne l'application d'une amende qui ne peut excéder 100 000 €."

[122] The statement referred to in art. 223rd "quinquies" C, no. 1, "Code Général des Impôts" may be, subject to reciprocity, to an automatic exchange with the states or territories that have concluded an agreement with France to that effect. Plus, the list of states or territories that have adopted legislation mandating the purchase of a country by country reporting similar, which concluded with France an agreement to automatically exchange the country by country reporting and comply with the obligations of this agreement is determined by a decree - in art. 223rd "quinquies" C, II, "Code Général des Impôts".

[123] The presentation must be sent to the Tax Administration by the end of the twelfth mouth after the ending of the fiscal year which corresponds to the approach.

This instrument is part of the "Country-by-Country Implementation Package"[124]. The OECD has developed the Multilateral Competent Authority Agreement on the exchange of Country-by-Country Reports[125].

In its package, OECD also included two additional model competent authority agreements for the exchange of CbCR (as annexes) – the "Competent Authority Agreement on the exchange of Country-by-Country Reports on the basis of a Double Tax Convention" and the "Competent Authority Agreement on the basis of a Tax Information Exchange Agreement".

Many countries have already signed the Multilateral Competent Authority Agreement on the Exchange of CbCR[126], which represents "an important milestone towards implementation" of the BEPS Action Plan, as well as a "significant increase in cross-border cooperation on tax matters".[127]

In fact, before its adoption there was a huge gap, which significantly contributed to the base erosion and profit shifting phenomenon.

MNEs' structure corresponds to a worldwide basis. However, the power of each country's tax administration is limited to that country. This is an aspect which clearly influenced the tax administration's work – it was impossible for them to have a global perspective of the group and, consequently, to properly analyse transfer pricing practices.

Doubtless the asymmetry of information acquired reflected in the solutions adopted by the different tax administrations.

Thus, by implementing this agreement, MNEs comply with country-by-country reporting, the tax administrations where company operates will get the aggregate information already explained, which information will be collected by the country of residence of the MNE group, and will then be exchanged through the Multilateral Competent Authority Agreement on the Exchange of CbCR.

This automatic exchange of annual country-by-country reports means that international tax transparency has increased and it "(…) improve[s the tax authorities information]

[124] Available at https://www.oecd.org/ctp/transfer-pricing/beps-action-13-country-by-country-reporting-implementation-package.pdf

[125] It is based on the Multilateral Competent Authority Agreement.

[126] On 27th January 2016, 31 countries that signed it: Australia, Austria, Belgium, Chile, Costa Rica, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Malaysia, Mexico, Netherlands, Nigeria, Norway, Poland, Portugal, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland and United Kingdom - https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/a-boost-to-transparency-in-international-tax-matters-31-countries-sign-tax-co-operation-agreement.htm

[127] https://www.oecd.org/tax/automatic-exchange/about-automatic-exchange/a-boost-to-transparency-in-international-tax-matters-31-countries-sign-tax-co-operation-agreement.htm

regarding to the global allocation of the income, the taxes paid, and certain indicators of the location of economic activity among tax jurisdictions in which MNE groups operate (…)".[128]

Beyond the fact that tax administrations have the complete figure of MNE's operations, this instrument guarantees that the information received remains confidential.[129]

This certainly is a great step towards enhancing transparency of MNE's operations.

- **European Union special note**

On 3rd March 2016, the Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation[130] was released, which inserts the next article:

"Article 8aa
Scope and conditions of mandatory automatic exchange of information on country-by-country report

1. Each Member State shall take the necessary measures to require the Ultimate Parent Entity of an MNE Group that is resident for tax purposes in its territory, or any other Reporting Entity in accordance with Section II of Annex III, to file a country-by-country report with respect to its Reporting Fiscal Year within 12 months after the last day of the Reporting Fiscal Year of the MNE Group in accordance with Section II of Annex III.
2. The competent authority of a Member State where the Country-by-Country Report was received pursuant to paragraph 1 shall, by means of automatic exchange, communicate the report to any other Member State in which, on the basis of the information in the country-by-country report, one or more Constituent Entities of the MNE Group of the Reporting Entity are either resident for tax purposes, or are subject to tax with respect to the business carried out through a permanent establishment within the deadline laid down in paragraph 4.
3. The country-by-country report shall contain the following information with respect to the MNE Group:
(a) aggregate information relating to the amount of revenue, profit (loss) before income tax, income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees, and tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the MNE Group operates;
(b) an identification of each Constituent Entity of the MNE Group setting out the jurisdiction of tax residence of such Constituent Entity, and where different from such jurisdiction of tax residence, the jurisdiction under the laws of which such Constituent Entity is organised, and the nature of the main business activity or activities of such Constituent Entity.
4. The communication shall take place within 15 months after the last day of the fiscal year of the MNE Group to which the country-by-country report relates. The first country-by-country report shall be communicated for the fiscal year of the MNE Group commencing on or after 1 January 2016, which shall take place within 18 months after the last day of that fiscal year.
(…)"

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[128] Preamble, "Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports".
[129] Section 5 of the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports.
[130] Available at http://data.consilium.europa.eu/doc/document/ST-6672-2016-INIT/en/pdf

This article, not only enshrines the automatic exchange of information but also establishes the elements of the CbCR, which means that, if approved, this rule will take force in the whole EU, and, therefore, the CbCR will be a mandatory document in all EU Member States'.

IV. Conclusions

We had a global problem[131] which required a global solution; the BEPS Action Plan emerged as this global solution. For the first time, the G20, OECD countries', non-G20, non-OECD jurisdictions and some developing countries had worked together to create this ambitious project.

All 15 actions developed under this Plan, have the same aim – for MNEs to pay their fair share. If every MNE starts to pay its fair share of tax, eventually, in the future, we will have a reduction of tax rates, for both business and citizens.

The BEPS Action Plan wants MNEs to see tax planning as a support system and not as "a machine that makes profit".

Regarding Action 13 – "Re-examine transfer pricing documentation" – in the first place, is a fact that it is impressive how quickly the OECD has moved to achieve an agreement.

On July 2013, the BEPS Action Plan stated that the OECD will develop rules regarding transfer pricing documentation; on September 2014 – after giving the opportunity to make public comments –, the OECD released its final deliverable on Action 13 and in October 2015, the Final Report was published; at present, many jurisdictions have transposed, totally or partially, the new transfer pricing documents there prescribed or are preparing its/their adoption.[132]

There is no doubt that both tax authorities and taxpayers are witnessing an opportunity[133] - we have new guidance whose execution depends on how countries implement these proposals. On the one hand, more transparency has long been a desire of tax authorities; on the other hand, taxpayers have complained of the compliance burden imposed by differing transfer pricing documentation and want predictability when developing their activity, in order not to pay unexpected penalties.

Furthermore, as we analysed when talking about the Multilateral Competent Authority Agreement on the exchange of Country-by-Country Reports, this Plan will count on the help of the tax administrations – which is a paradigm shift.

For all the above, all related parties seem to be willing to collaborate for a holistic response to implement the new transfer pricing documentation.

Consequently, in the legal systems of each country, except those where no change has occurred, we can see two different situations:

[131] "Estimates conservatively indicate annual losses of anywhere from 4 - 10% of global corporate income tax (CIT) revenues, i.e. USD 100 to 240 billion annually.", available at http://www.oecd.org/ctp/beps-about.htm

[132] Portugal, Spain, France, Italy, Turkey, Canada, United Kingdom, Ireland, Japan and United States.

[133] "The new approach offers a chance to introduce more consistency and potentially to limit the seemingly ever increasing compliance burden." - "The OECD's New Transfer Pricing Documentation Standard: An Overview and Possible UK Implementation", p. 3.

1. The three-tiered structure enshrined in the BEPS Action Plan (for example, Spain) is applied and any national law about transfer pricing documentation is revoked;
2. Part of the documentation enshrined in the BEPS Action Plan (for example, Portugal and France) is applied, although the documentation already obligatory by the national law is kept in force.

That said, let's exemplify the new MNE obligations, taking into account what in chapter III of the present master thesis was said.

As established in the picture below, we will suppose that there exists a MNE, whose ultimate parent entity (A) is in Spain and whose two constituent entities (B and C) are situated in Portugal and France, respectively.

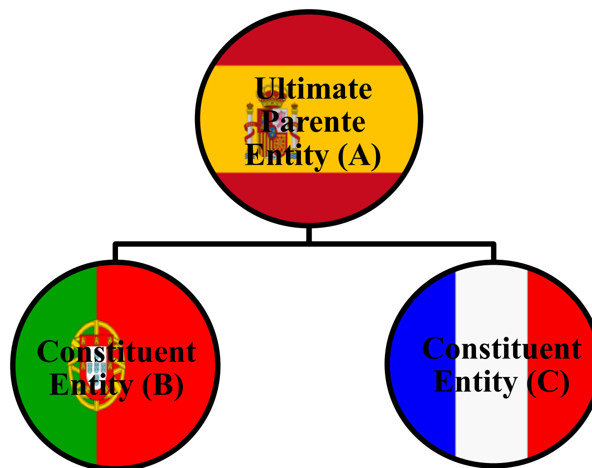

Fig. 1 MNE Structure (example)

In this case, taking into account the national laws that at this moment are in force, we can conclude that the entities of this group have the following transfer pricing documentation obligations:

A: must present the CbCR;

B: has to keep its transfer pricing documentation organised for 10 years, also has to present all the elements prescribed in "C.I.R.C." and "Portaria 1446-C/2001", which are totally different from the local and master files;

C: must present general and specific information related to it, as well as, if requested, two documents more or less similar to local and master files.

Because these three countries signed the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports, the CbCR submitted in Spain, by A, will be exchanged between Spain, Portugal and France, so all tax administrations can have a global view of the group.

This example permits us to make some important conclusions.

In the first place, it is notable how much effort is being made by many countries to adhere to the BEPS Action Plan – Action 13, mainly to implement the CbCR. Although, it will be very difficult not to have different national rules.

The fact that the transfer pricing documentation rules differ from one country to another country leads to some important consequences. There will be different regimes applied depending on the country in which the entity is situated.

Consequently, namely, the assumptions, deadlines and elements related to the information that must be provided will vary.

This means that the success of this Action Plan, mainly of Action 13, depends on how the things are played out at a local level.

Secondly, the information provided to tax administrations is certainly detailed. Some of it "non-comparable", related to the entity (for example, referring to the key competitors of the group). So much information can lead to the opposite objective of Action13 – transparency.

This issue is related to another two conclusions: 1) there is no doubt that the new obligations "represent a very substantial increase in the compliance obligations for multinational groups"[134], some of them apparently unnecessary. There will be an extra effort from transfer pricing departments to fulfill all the elements required by the three documents and "to do so in a way that will make the volume of information manageable"[135].

2) there will be so much information provided to tax administrations that each one can have a different interpretation from the same data. In this case, there will be divergent opinions which need to be concerted.

Thirdly, the master file requires the disclosure of unilateral advance pricing agreements. In our opinion, we can't figure out what is the purpose of requiring such an element. Paraphrasing Andrew Casley, Kevin Norton and Michael Khroda[136], "this element (…) indicates a lack of trust between some tax authorities and others".

However, the aim of CbCR is for tax authorities to evaluate the transfer pricing risk assessment and in the Final Report it is clearly established that "jurisdictions should not

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[134] "The OECD's New Transfer Pricing Documentation Standard: An Overview and Possible UK Implementation", p. 9.

[135] "The OECD's New Transfer Pricing Documentation Standard: An Overview and Possible UK Implementation", p. 4.

[136] "The OECD's New Transfer Pricing Documentation Standard: An Overview and Possible UK Implementation", p. 5.

propose adjustments to the income of any taxpayer on the basis of an income allocation formula based on the data from the Country-by-Country Reporting."[137]

Although, "it remains to be seen how well tax auditors can resist the temptation to draw what will be wholly inappropriate conclusions about the relative division of profits"[138].

Lastly, the OECD failed to reach agreement of the language in which transfer pricing documentation should be submitted, the penalties applied in order to ensure efficient operation of transfer pricing documentation requirements and related to the local file it was left to each country to decide about the appropriate levels of materiality.

In conclusion, the big question, at present, is if, with all these changes, we are moving towards the application of the formulary apportionment method. This question makes sense. If we analyse the elements required by the CbCR we conclude that they are totally off of an analysis of the transfer pricings practiced.

Assuredly that we are certainly in the middle of a big global change – there is news about this theme everyday; it is in constant development. A lot, until now, has been done and there is much more work to do. The future and consistency will decide the success of this ambitious project and where it leads us.

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[137] OECD (2015), Transfer Pricing Documentation and Country-by-Country Reporting, Action 13-2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project, OECD Publishing, Paris, p. 22.

[138] The OECD's New Transfer Pricing Documentation Standard: An Overview and Possible UK Implementation", p. 7.

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