

Application of Mandatory Disclosure Rules and Legal Certainty

Aplicação de Regras de Revelação Obrigatória de Planejamento Tributário e Segurança Jurídica

Marcio Henrique Sales Parada

Auditor Fiscal da Receita Federal do Brasil. Bacharel em Direito pela Universidade Federal de Goiás – UFG. Mestre em Direito Tributário pela Universidade de Bolonha/Itália. Doutorando em Tributação de Negócios Internacionais pela Universidade de Economia e Negócios de Viena/Áustria. *E-mail*: marciohsp@yahoo.com.br.

Recebido em: 27-11-2020

Aprovado em: 1º-2-2021

Abstract

This work analyzes mandatory disclosure rules (MDR) on tax planning under different perspectives, in order to find the most efficient solution when applying this kind of measure. One of the problems always raised in the application of mandatory disclosure rules is that the regime could increase the level of uncertainty for taxpayers, when closing gaps and adjusting mismatches to avoid certain planning that are exploiting these deficiencies in the law. The topic analyzes legal certainty searching for a balance among principles, standards and rules, without denying the application of the principle.

Keywords: disclosure, tax planning, legal certainty.

Resumo

Este trabalho analisa as regras de revelação obrigatória (MDR) de planejamento tributário sob diferentes perspectivas, a fim de encontrar a solução mais eficiente na aplicação desse tipo de medida. Um dos problemas sempre levantados na aplicação das regras de revelação obrigatória é que o regime poderia aumentar o nível de incerteza para os contribuintes, ao fechar lacunas e ajustar incompatibilidades na lei tributária para impedir que certos planejamentos que exploram essas deficiências continuem funcionando. O tópico analisa a segurança jurídica buscando um equilíbrio entre princípios, normas e regras, sem negar a aplicação do princípio.

Palavras-chave: revelação, planejamento tributário, segurança jurídica.

Introduction

This work analyzes mandatory disclosure rules (MDR) under different perspectives, in order to find the most efficient solution when applying this kind of measure. This action has become known as Mandatory Disclosure Rules on “aggressive tax planning” from the OECD works (2002 – Forum on Tax Administra-

tions; 2006 – Seoul Declaration; 2008 – The Role of Tax Intermediaries; 2009 – Engaging with High Net Worth Individuals and 2011 – Tackling Aggressive Tax Planning by improving Transparency and Disclosure)¹ and from the idea of creating the obligation to disclose tax planning with focus on the so-called *tax intermediaries* that promote such planning, which led to BEPS² Action 12.

However, based on the premise that it is not efficient to define what *aggressive* means when applying MDR and taking into consideration previous works by the OECD, which are based on risk analysis methodology, this work proposes a new way of applying MDR on *potentially risky tax planning*. Thus, it discusses tax arrangements, which are both *risky* for the taxpayers involved and for the tax administrations because potentially they represent undesirable tax avoidance.

In principle, tax arrangements are within the limits of the law, in its literalness. However, while exploiting weaknesses and mismatches, they force those limits, preventing the objectives of the law from being met. In this case, this work refers to them as “undesirable schemes”, which means *schemes which produce tax advantages not desired by the tax law or schemes which produce tax advantages not in accordance with the spirit of the law*. When analyzing the issue, this work is limited to licit tax planning, which might be seen as a “subjective right of the taxable person and a necessary condition for legal certainty in tax relations”³. Moreover, it might be regarded as a legitimate activity, defined as “a procedure of interpretation of the system of norms used as a technique of preventive business organization”⁴. Thus, illicit acts are not considered, but only those acts developed within the system of laws borders. Furthermore, this work considers tax planning in which the taxpayer takes advantage of disparities between national tax systems or exploits the inadequacy of existing tax rules in the cross-border environment and/or in the domestic law.

One of the problems always raised in the application of mandatory disclosure rules (*hereinafter MDR*) on tax planning is that the regime could increase the level of uncertainty for taxpayers, when closing gaps and adjusting mismatches to avoid certain planning that are exploiting these deficiencies in the law. This means that, when analyzing MDR, it is controversial if the effects they would produce by predicting as one of its outcomes changes in tax laws creates “uncer-

¹ OECD (2008). *Study into the role of tax intermediaries* (“2008 Study”). Paris: OECD Publishing, 2008. OECD (2009). *Engaging with high net worth individuals on tax compliance*. Paris: OECD Publishing, 2009. OECD (2011). *Tackling aggressive tax planning through improved transparency and disclosure*. Paris: OECD Publishing, 2011.

² OCDE (2013). *Action plan on base erosion and profit shifting*. Paris: OECD Publishing, 2013. Published on 19 Jul 2013.

³ SALDANHA SANCHES, José Luís. *Os limites do planeamento fiscal. Substância e forma no direito fiscal português, comunitário e internacional*. Coimbra: Coimbra Editora, 2006, p. 27.

⁴ TÓRRES, Heleno. *Direito tributário internacional: planeamento tributário e operações transnacionais*. São Paulo: RT, 2001, p. 37.

tainty” in the tax system, because such adjustments would affect (legitimate) expectations of the taxpayers and their business.

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

The problem is the risk of creating a vicious cycle of self-fulfilling expectations: tax administrations see taxpayers as aggressively avoiding tax, and increase their efforts to counter this; taxpayers see themselves as pressured by an ineffective and unreasonable administration. The increased focus on maximizing tax advantages may have amplified this cycle. While it reflects legitimate public and political pressure on the side of the authorities for responses and results to tackling avoidance and evasion, at the same time many businesses have expressed concerns over what they perceive as an increasing “aggressiveness” of the tax administration in some jurisdictions, especially those less equipped. The point is that most of the problems are caused by a lack of understanding of the increasingly complex business models. In this context, a more cooperative approach to tax compliance could reduce uncertainty for low risk companies, assist tax administrations to better focus their resources and promote a culture of greater trust⁵.

Zangari, Caiumi and Hemmelgarn⁶ state that part of the literature investigates the relation between tax uncertainty and corporate tax avoidance. It was verified how tax uncertainty arising from intentional tax avoidance may affect a firm’s investment decisions and Blouin and Shackelford⁷ argue that companies may try to use complicated structures in order to mask profit shifting activities and that ultimately this may result in an increased tax uncertainty. Taylor and Richardson⁸ also analyze the association between the reporting of uncertain tax positions and tax avoidance for Australian firms over 2006-2010. They also find that the disclosure of uncertainty regarding the tax positions is positively correlated with tax avoidance. Thus, Zangari, Caiumi and Hemmelgarn conclude

⁵ IMF/OECD (2017). *Tax certainty*. Report for the G20 Finance Ministers, March 2017, p. 21. Available at: <https://www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf>. Accessed on: 31 Mar 2020.

⁶ ZANGARI, Ernesto; CAIUMI, Antonella and HEMMELGARN, Thomas. Tax uncertainty: economic evidence and policy responses. European Commission. *Taxation and Customs Union. Taxation Papers, Working paper* n. 67, 2017, p. 23.

⁷ BLOUIN, Jennifer L. and SHACKELFORD, D. A. *Investment, tax uncertainty and aggressive tax avoidance*. Research Gate, January 2017. Available at: https://www.researchgate.net/publication/267960298_Investment_Tax_Uncertainty_and_Aggressive_Tax_Avoidance. Accessed on: 15 May 2020.

⁸ TAYLOR, Grantley and RICHARDSON, Grant. Incentives for corporate tax planning and reporting: empirical evidence from Australia. *Journal of Contemporary Accounting and Economics* v. 10, issue 1, 2014, p. 1-15.

that policy responses could improve tax certainty. At the domestic level, the key aspects to consider are the simplification of tax rules and tax compliance and of the tax law making process. At the international level, the key strategy to deal with tax uncertainty is better cooperation and more coordination between countries. MDR can be a helpful instrument to achieve these objectives in both levels.

Therefore, a careful analysis of certainty in tax law is necessary, dealing with the meaning of legal certainty, from different perspectives, such as fact, value, principle of norm and finalistic aspects⁹. Moreover, instrumental aspects, in the sense of “means to an end”, are especially important in this work, analyzing the material and personal aspects. Thus, taking the proposal to apply MDR as an instrument to build trust between tax administration and taxpayers into consideration, material and personal aspects will focus on the construction of trust. That is why the legal certainty shall be, in general, guided first by trust in who is entitled with the power to change the system and second in the predictability of whether, when, why and how the changes will occur¹⁰.

In the material scope¹¹ legal certainty is a norm that determines the realization of a state of affairs characterized by the individual’s capacity to plan action strategically in a juridically informed and respected manner. In case, the question is what types of behavior contribute to the promotion of the factual conditions that constitute the ideal states of knowability, reliability and calculability of the law.

In terms of personal aspect¹², a law may be obvious to an expert but not to an ordinary citizen. This seems especially true in the field of taxation where experts on both sides, tax administration and tax law professionals, debate the state’s right to demand taxes and the duty of the citizen to pay them, at a level apparently above the ordinary understanding of that taxpayer. Thus, who serves as a criterion for measuring legal certainty, the ordinary taxpayer or the specialists¹³?

The subject is expanded explaining other views about the existence of static certainty and dynamic certainty. A static dimension, which consists of examining the content of law; and a dynamic dimension, focusing on the investigation of the force of law. Finally, regarding to governments, tax competition between countries can increase tax uncertainty both actively and passively. Actively, countries may try to attract capital, profits and corporations by introducing specific regimes mainly targeted to cross-border investments. These regimes create discontinuities in the tax treatment of investment and they may ultimately generate tax

⁹ ÁVILA, Humberto. *Certainty in law*. Switzerland: Springer International Publishing, 2016. *Passim*,

¹⁰ *Ibid*, p. 199.

¹¹ *Ibid*, p. 112.

¹² ARCOS RAMIREZ, Frederico. *Laseguridad jurídica: una teoria formal*. Madrid: Dykinson, 2000, p. 260.

¹³ ÁVILA (2016). *Op. cit.*, p. 91.

uncertainty. Passively, countries can try to protect their domestic tax revenues in the process of tax competition, complicating the international tax environment further¹⁴.

The intention is to analyze a proposed measure (MDR) in a way it could be applied more efficiently. As this work sees it, the efficient MDR is that which is effective, proportional, reasonable and able to achieve its goals demanding the minimum cost from both the tax administration and the taxpayers.

MDR in tax matters does not mean paying more tax, directly, but it does impose an extra obligation with the purpose to provide knowledge, control and the possibility to react when any undesirable result, from the point of view of the objectives and purposes of taxation, caused by the application of a tax planning, structure or scheme is detected. As the tax administration's inspection power increases, from the taxpayer's perspective this raises issues such as arbitrariness, legal uncertainty and excessive burden.

However, the State (political, legislative and administrative branches) has its own fiscal planning. There is a fiscal state, a tax constitution, principles of equality and ability to pay and the fundamental duty to pay taxes, which would restrict other rights such as entrepreneurial freedom and, consequently, to the free business management, including tax planning¹⁵. If on the one hand, saving tax is a taxpayers' right, which is based on the principle of economic freedom¹⁶; tax planning can, on the other hand, be subject to restrictions by applying other constitutional principles, since "the tax system aims to satisfy the financial needs of the State and the fair distribution of income and wealth"¹⁷.

The question that arises is whether an apparently legal and legitimate proceeding (tax planning) could be controlled or limited by any kind of administrative action. Moreover, whether this administrative action, despite the fact of being legally supported, might work without needing to have precise definitions in the law. For instance, (i) if the law does not define "tax advantage" or "aggressive tax planning", but uses general descriptions as hallmarks, which shall be updated over time, and (ii) if the law establishes penalties that can vary depending on the circumstances and on a case-by-case assessment. Therefore, how to admit this

¹⁴ ZANGARI, Ernesto; CAIUMI, Antonella and HEMMELGARN, Thomas. Tax uncertainty: economic evidence and policy responses. European Commission. *Taxation and Customs Union. Taxation Papers, Working paper n. 67*, 2017, p. 2-3.

¹⁵ SANTOS, Antonio Carlos dos. Planeamento fiscal, evasão fiscal, elisão fiscal: o fiscalista no seu labirinto. *Fiscalidade. Revista de Direito e Gestão Fiscal*. Edição do Instituto Superior de Gestão, n. 38. Apr-Jun, 2009, p. 78.

¹⁶ PORTUGAL (1976). Constituição da República Portuguesa. Diário da República n. 86/1976, Série I of 10 Apr 1976, p. 738-775. "Art. 61 (1) *A iniciativa económica privada exerce-se livremente nos quadros definidos pela Constituição e pela lei e tendo em conta o interesse geral.*"

¹⁷ PORTUGAL (1976). Constituição da República Portuguesa. *Cit.* "Art. 103 (1) *O sistema fiscal visa a satisfação das necessidades financeiras do Estado e outras entidades públicas e uma repartição justa dos rendimentos e da riqueza.*"

kind of action in order to achieve its ends and, at the same time, avoiding administrative excesses?

Vagueness is bearable, and in some cases even desirable, in the law. In other cases, there is a tradeoff and the excess of precision, paradoxically, can generate arbitrariness. In my view, a concept can admit vagueness if it allows borderline cases. Even more difficult is the case of tax planning and avoidance, because there is no precise border. The possibilities to achieve a tax advantage are in a “grey” area, because tax advantage is a vague concept: some tax planning are regarded as avoidance, others are not. Some of them can be regarded as evasion or contain some element of fraud. Good people may disagree on whether to call a tax planning aggressive, avoidance or evasion¹⁸. In *Vagueness in Law*, Endicott¹⁹ argues that the rule of law is an unattainable ideal because no legal system can avoid arbitrariness and unreasonableness in decision-making. Moreover, the author argues that the ideal of the rule of law contains maxims apart from the rule of non-arbitrariness. These maxims are not simultaneously realizable. Nevertheless, they can accommodate the effects of vagueness in a coherent way, for example, accommodating constitutional principles that cannot be realized simultaneously in full, but instead need to be interpreted coherently in each case.

It is possible to think about the taxation’s neutrality, on the idea that a tax should not distort economic behavior²⁰. Specifically, concerning MDR, a given taxpayer should not avoid applying a tax planning because this scheme must be disclosed nor should he avoid seeking professional advice because the advisers must inform on arrangements, which they eventually offer or suggest to the taxpayer.

The term *neutrality* seldom appears in taxation literature. Groves²¹ says that most textbooks on public finance devote a chapter to the canons of good taxation and neutrality is referred to equity²², generally recognizing it as an important qualification of a tax. There is also the mention to *justice*, as mainly synonymous with *equity*. Adam Smith includes *certainty* among his list of canons, embracing in that term the idea that taxes should not be arbitrary, thus not according to the

¹⁸ VAN DEEMTER, Kees. *Not exactly. In praise of vagueness*. Oxford: Oxford University Press, 2010, p. 8.

¹⁹ ENDICOTT, Timothy A. O. *Vagueness in law*. Oxford: Oxford University Press, 2000, p. 31 and 58.

²⁰ KAHN, Douglas A. The two faces of tax neutrality: do they interactor are they mutually exclusive? *University of Michigan Law School Scholarship Repository, Public law and legal theory research paper series, paper* n. 18, 1990, p. 1-19. Available at: <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1318&context=articles>. Accessed on: 03 Mar 2020.

²¹ GROVES. Harold M. Neutrality in taxation. *National Tax Journal* v. 1, n. 1, Mar. 1948, p. 18-24. Published by: National Tax Association. Available at: <https://www.jstor.org/stable/41789749>. Accessed on: 03 Mar 2020.

²² NOTE. Most economists would argue that taxation is inevitably distortionary to some degree, although they might have very different views about the effects of that distortion. Thus, the neutrality I am concerned with is more closely related to equity, as I go on to discuss.

whim of some monarch or his agent. In conclusion, Groves²³ states that taxes should be equitable and they should deviate from neutrality only for an adequate public purpose.

This work is analytical and applied. Analytical because it does not create or constitute information. Thus, unlike descriptive research, which employs surveys and inquiries, basically, the conclusions the work comes to are the result of previous experiences in MDR application and legal analysis within existing concepts and theories. Applied because, differently from fundamental research, it aims to find a solution for an immediate problem, and is, therefore, concerned neither with generalizations nor with the formulation of a theory.

Thus, I am dealing with scholarship of application, which focus on how can we apply our knowledge to solve problems in practice, offering applications, guidelines, advice, etc. It is possible to say that this work establishes connections, seeks for patterns and more comprehensive understandings, not creating new theories but applying existing theories to an observed phenomenon.

1. Starting the discussion from different points of view: EU, France, Germany and Brazil

A remarkable decision involving legislation to avoid abusive planning aimed at obtaining a tax advantage, the business purpose test and economic freedom in the European Union was provided in *Cadbury Schweppes and Cadbury Schweppes Overseas Case*²⁴. In this case, *Cadbury Schweppes*, a resident company in the UK, is the parent company of the Cadbury Schweppes group, which consists of companies established in the United Kingdom, in other Member-States and in third States. The group includes two subsidiaries in Ireland, Cadbury Schweppes Treasury Services (CSTS) and Cadbury Schweppes Treasury International (CSTI).

According to the decision making the reference to the CJEU²⁵, it is common ground that CSTS and CSTI were established in Dublin solely in order that the profits from the internal financing activities of the Cadbury Schweppes group could benefit from the advantageous tax regime. The main question was: in establishing and capitalizing companies in another Member State solely to take advantage of a tax regime that is more favorable than that applicable in the UK, is the company abusing the freedoms introduced by the TFEU?

The CJEU ruled that the fact that an EU national sought to profit from tax advantages in another Member State could not in itself deprive him of the right to rely on the provisions of the TFEU. It is necessary to investigate if it presupposes actual establishment of the company concerned in the host Member State and

²³ GROVES (1948). *Op. cit.*, p. 18.

²⁴ EUROPEAN UNION. Court of Justice. *Cadbury Schweppes and Cadbury Schweppes Overseas Case*. Case C-196/04, Judgment of the Court (Grand Chamber), 12 September 2006.

²⁵ Court of Justice of the European Union (CJEU).

the pursuit of genuine economic activity there. It follows that, in order for a restriction on the freedom of establishment to be justified on the grounds of prevention of abusive practices, the specific objective of such a restriction must be to prevent the creation of wholly artificial arrangements, which do not reflect economic reality, aimed at circumventing the application of the legislation of the Member State.

The question involving the application of legislation that aims to directly deter or prevent the operation of tax planning in which the sole or main objective is obtaining a tax advantage is not the main purpose of MDR. Disclosure rules would only oblige to inform a planning like this in advance, so that the authorities could react with the application of CFC rules, GAAR, or even, when applicable, a proposal for legislative change that would avoid the specific scheme. This is the point that this work has been emphasizing, that the measures of reaction and its evaluation within constitutional principles or meta-principles or, in the case of the EU, supranational rules, cannot be confused with MDR.

The crucial point in the *Cadbury Schweppes Case* for analyzing what this Chapter proposes is established when the CJEU defined some marks to the restricting measures. They ruled that the separate tax treatment under the legislation on controlled foreign companies (CFCs) and the resulting disadvantage, dissuading companies from establishing in another Member State, with a lower level of taxation, constitutes a restriction on freedom of establishment within the meaning of Articles 43 EC and 48 EC. According to the CJEU, such a restriction is permissible only if it “is justified by overriding reasons of public interest”. The Court says that is further necessary, in such a case, that its application be “appropriate to ensuring the attainment of the objective” thus pursued and “not go beyond what is necessary to attain it”.

MDR produces a deterrent or dissuasive effect. The conclusion is that, concerning MDR, any alleged restriction on economic freedom (deterrence to use tax planning) could be applied if it is justified by “overriding reasons of public interest” and is limited to the intended objective and to the means necessary to achieve it. These are, therefore, important limits when introducing the measure.

In France, the disclosure of aggressive tax planning implementation under BEPS Action 12 was considered and analyzed. Majed²⁶ mentions that the French Constitutional Court rejected a proposal of disclosure of tax schemes included in the finance bill for 2014, considering the project unclear and ambiguous, creating excessive legal uncertainty for taxpayers and that there was a risk of arbitrary application of the law by tax administration. In the same decision, that Court also discussed the legality and necessity of a precise description of crimes and penal-

²⁶ MAJED, Leila. *Implementation in France of the disclosure of aggressive tax planning arrangements under action 12 of BEPS*. ABDF – Brazilian association of finance law. Available at: http://www.abdf.com.br/index.php?option=com_content&view=article&id=2175. Accessed on: 9 May 2018.

ties, when analyzing the possible imposition of penalties on tax intermediaries, how it could harm ample defense and an extensive definition of abuse²⁷.

In Germany, taking the OECD recommendations into consideration, since 2014 German Authorities started to analyze the possibility of introducing mandatory disclosure rules to tackle tax avoidance. A study conducted by researchers at Max Planck Institute for Tax Law and Public Finance²⁸, presented a document examining whether a disclosure requirement for tax structuring could be implemented in an admissible and expedient manner in German tax law.

They first state that “the goal of closing illegal loopholes in tax law and ensuring the most coherent and effective application of existing anti-misuse rules and thus counteracting tax avoidance is in principle both constitutionally legitimate and economically sensible”. Second, they find a justification in “if individual taxpayers succeed in minimizing their tax burden by exploiting unpopular gaps in the tax system in contradiction to the legislator’s basic burden decision, then the establishment of equal taxation fails in this respect”. Third, they understand it may be possible to implement a duty of disclosure for tax arrangements in German law, which “meets both constitutional and European requirements”.

However, the German study establishes some limits, advising that “from a constitutional point of view”, MDR “must be taken to ensure the proportionality of the administrative burden on the tax-consulting professionals and taxpayers”. Then, it explains that the system might not cover all undesirable arrangements, from an administrative point of view, because this would cause an overburden, both to taxpayers and to tax administration. In conclusion, constitutionally speaking, “a disclosure system that heavily burdens administration and privates, in a way that their disadvantages would clearly outweigh the benefits” is highly discouraged.

Furthermore, the analysis mentions that, regarding to tax law, the German Federal Constitutional Court has clarified the principle of certainty by stating that “the standard giving rise to tax must be sufficiently well defined and limited in content, object, purpose and extent, so that the tax burden is measurable and, to a certain extent, for the taxpayer Citizen becomes predictable”. In addition, “the right to legal protection under Article 19 (4) of the Basic Law also plays a role, in particular in the right of intervention, since the fullest possible judicial

²⁷ FRANCE (2014). Conseil Constitutionnel. *Decision 2014-707 DC du 29 Decembre 2014*. Available at: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2014707dc/2014707dc_ccc.pdf. Accessed on: 16 May 2020.

²⁸ OSTERLOH-KONRAD, Christine, HEBER, Caroline, BEUCHERT, Tobias. *Abschließende Bewertung: Die Anzeigepflicht als Bestandteil eines fairen Steuersystems*. In: *Anzeigepflichten für Steuergestaltungen in Deutschland. MPI Studies in Tax Law and Public Finance*, v. 7. Berlin: Springer, 2017, p. 145-155. *Notification obligations for tax planning in Germany*. Max Planck Institute for Tax Law and Public Finance, Munich, Germany. On-line: 26 January 2017. Available at: https://link.springer.com/chapter/10.1007/978-3-662-53761-9_5. Accessed on: 26 Jul 2018.

protection against state measures is only guaranteed if the conditions for intervention are sufficiently certain”²⁹.

Therefore, besides the measurement of proportionality, it is possible to identify some points in agreement with the French Court’s decision, calling for certainty in the meaning to allow predictability to the taxpayer, when applying the measure, in order to make the ample defense and the protection against administrative excesses or arbitrariness possible.

Xavier³⁰, studying the positions of the German Constitutional Court, stated that the concept of “protecting certainty” assumed large relevance. He mentions that the Court has proclaimed what was called “the principle of trust in tax law” (*Vertrauengrundsatz bei Steuergesetzen; Verlässlichkeit des Gesetzes*). According to this principle, the tax law must be elaborated in such a way to guarantee to the taxpayers the trust that the law will pose at their disposal a complete understanding of the consequences of their actions or behaviors giving rise to tax obligations. Moreover, the principle of trust in tax law, as an imposition of the constitutional principle of legal certainty, translates practically into the possibility given to the taxpayer to know and compute his tax charges based directly and exclusively on the law.

Nevertheless, as was mentioned in this work, in the reference to the vagueness in law, the German study finally understands that:

“[...] indefinite legal concepts tend to be accepted precisely where it is impossible for the legislature, given the diversity of economic life and its continuous development, to make the facts more precise. Finally, from the point of view of the Federal Constitutional Court, it also speaks in favor of the admissibility of an indeterminate concept of law, if it is intended to serve to realize tax equality.”³¹

Thus, the limits that allow for the use of indefinite concepts are met if the measure is justified by overriding reasons of public interest, if it *is intended to serve to realize tax equality*, and if it is limited to the intended objective and to the means necessary to achieve it.

In Brazil, there was a proposal for introducing MDR, in 2015. The Provisional Measure (*hereinafter the MP*)³², in its part regarding MDR introduction (Articles 7 to 12), was not converted into law. Notwithstanding, it is interesting to

²⁹ Ibid., p. 20.

³⁰ XAVIER, Alberto. *Os princípios da legalidade e da tipicidade da tributação*. São Paulo: RT, 1978, p. 45-46.

³¹ OSTERLOH-KONRAD, HEBER and BEUCHERT (2017). *Op. cit.*, p. 22-23.

³² BRAZIL (2015). Presidency of the Republic. *Provisional Measure n. 685/2015*. In force from 22.07.2015 to 18.11.2015, converted into Law n. 13.202, of 08 Dec. 2015, partially rejected. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13202.htm. Accessed on: 12 Feb 2020.

mention a Direct Action of Unconstitutionality (ADI) n. 5.366/DF³³, arguing against the provisions in that proposal, despite the fact that the Federal Supreme Court decided the case was solved and the ADI extinct, without judgment on the merits (main issues). The interest is on some of the points presented in the ADI Initial Petition, which were based on constitutional principles, stating against the provisions.

Among other issues referring to formalities in the constitutional procedure, which are, therefore, out of the scope of this work, the ADI was proposed considering the following vices of unconstitutionality in the MP: violation of fundamental rights to legal certainty, to freedom of enterprise, to the presumption of innocence and to right of defense, and due process of law. Moreover, the ADI argued that the proposal represented an offense to the principle of strict legality in tax matters.

The main arguments rely on the use of “subjective and generic terms”, such as “relevant non-tax reasons”, “unusual form” and “essential data to understand the business transaction”. Furthermore, the possibility to presume the intention of committing evasion or fraud, in case of non-compliance with the disclosure, allowing the application of a heaviest sanction (150%) plus criminal law consequences.

The Initial Petition quotes several experts’ opinions³⁴ against the proposal. Those opinions mention that the MP was introducing transparency in a one-way route, i.e., the taxpayer must be transparent to the tax administration; however, the other direction was not being improved. Moreover, it was understood that the measure was “criminalizing tax planning”, which in no way could be taken as tax evasion. In the ADI Authors’ words:

“It is understood, therefore, that the attribution of responsibility to the practice of illegal conduct (especially in its willful modality) can only occur

³³ BRAZIL (2015). Federal Supreme Court. ADI n. 5.366/DF, *arguing the unconstitutionality of MP n. 685/2015*. The Initial Petition (*Petição inicial*) and the respective information provided in the Action by the Republic Federal Prosecution Office (*Manifestação da PGR*). Available at: <http://redir.stf.jus.br/estfvisualizadorpub/jsp/consultarprocessoeletronico/ConsultarProcessoEletronico.jsf?seqobjetoincidente=4827786>. Accessed on: 13 Mar 2020.

³⁴ See, for instance: LEITE, Guilherme Cardoso. *MP 685 deve respeitar limites da atividade empresarial e ordenamento normativo*. Available at: <http://www.conjur.com.br/2015-ago-04/guilherme-leitemp-685-respeitar-limites-atividade-empresarial>; SANTIAGO, Igor Mauler. *Governo criminaliza planejamento tributário*. Available at: <http://www1.folha.uol.com.br/opinia-o/2015/08/1666101-governo-criminalizaplanejamento-tributario.shtml>; SCAFF, Fernando Facury. *Querer pagar menos imposto virou crime no Brasil*. Available at: <http://www.conjur.com.br/2015-ago-11/contas-vista-querer-pagar-imposto-virou-crime-brasil>; LODI, Ricardo. *Planejamento tributário, mesmo mal feito, não é o mesmo que sonegar imposto*. Available at: <http://www.conjur.com.br/2015-jul-23/ricardo-lodi-planejamento-tributario-mal-feito-nao-sonegar>; BASTOS, Frederico Silva; SATO, Katherine Borges. *MP 685 prevê transparência de mão única, sem diálogo com o Fisco*. Available at: <http://www.conjur.com.br/2015-jul-31/frederico-bastos-katherine-sato-mp-685-preve-transparencia-mao-unica-dialogo-fisco>; ANDRADE, Leonardo. *Transparência fiscal à força*. Available at: <http://jota.info/transparencia-fiscal-a-forca>, Accessed on: 18 Ago 2015.

through proof. In order to characterize the intention to evade or defraud, it is up to the State to demonstrate its existence, given that ‘dolus’ makes up the subjective element of the conduct, not being objectively appreciated.”³⁵

The ADI Authors also state that the MP conferred on the tax authorities a large margin of discretion, when issuing the competent regulations to define the parameters for disclosure (time, form, conditions and proceedings). Another point raised was on whether the Public Administration has the power to do so, the law must establish clear and objective margins to avoid excessive or illegitimate discretion, keeping the Administration from creating new and autonomous obligations outside of the limits of the law³⁶. This point is related to the principle of strict legality in tax matters, which would be offended in that case.

Based on a Supreme Court’s decision³⁷, the ADI Authors observe that “the principle of legal certainty is a fundamental right and in its subjective perspective, it translates into the protection of trust legitimately built from previous State action”³⁸. Then, the conclusion was that the MP n. 685/2015 does not build a relationship of legitimate trust between the State and taxpayers. On the contrary, it makes private individuals more and more suspicious of the tax authorities’ performance. Therefore, in a clear violation of the fundamental right to legal certainty.

Finally, it is argued that practicing tax planning is a clear expression of the fundamental right to freedom of enterprise, provided for in the Federal Constitution. Therefore, the possibility of State intervention in the economy is recognized, as long as it respects the core of economic agents’ free performance. Thus, according to the Initial Petition, the State is not allowed to take charge of the companies’ activities in an arbitrary, subjective and largely discretionary manner³⁹.

Soon after the European Commission published the proposal of implementing MDR in the European Union, in 2017⁴⁰, the practitioners of tax law raised some issues and worries about the new measure. PwC published a Bulletin⁴¹ high-

³⁵ BRAZIL (2015). *Ação Direta de Inconstitucionalidade n. 5.366 – Distrito Federal. Cit. Initial Petition*, p. 24.

³⁶ *Ibid.*, p. 18.

³⁷ BRAZIL (2015). Federal Supreme Court. *Extraordinary Appeal (RE) n. 608.482/RN*. Rel. Min. Teori Zavaski. Brasília, 07 Aug. 2014. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=7088200>. Accessed on: 13 Mar 2020.

³⁸ BRAZIL (2015). *Ação Direta de Inconstitucionalidade n. 5.366 – Distrito Federal. Cit. Initial Petition*, p. 19.

³⁹ *Ibid.*, p. 21.

⁴⁰ EUROPEAN UNION (2017). European Commission. Proposal for a COUNCIL DIRECTIVE amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. COM/2017/0335 final – 2017/0138 (CNS). Brussels, 21 Jun. 2017.

⁴¹ PwC. Tax Policy Bulletin. Tax Insights from International Tax Services. *EU proposes mandatory disclosure of tax information for reportable cross-border arrangements*. 31 August 2017. Available at:

lighting that EU Member States might argue some elements that potentially contravene EU law, creating restriction on the free movement of capital or being deemed to disproportionately burden intermediaries or taxpayers in relation to the objective. They also argue for further clarity regarding alignment with the EU's general principle of legal certainty.

According to that Bulletin, the Court of Justice of the European Union (CJEU) interprets the principle of legal certainty as requiring that national measures be sufficiently clear and precise and, while the proposed MDR will form part of a Directive, in their view, the analysis should not be any different. Tax certainty could be improved by making it possible to consult a tax administration in advance on the question of whether an arrangement is reportable.

1.1. *Interim conclusion*

These recent experiences, described here, demonstrate the existence of worries involving legal certainty, legality, right of ample defense and proportionality when fighting against undesirable tax practices that, at the end, can harm the achievement of other basic principles such as equality, ability to pay and the support for social rights. Thus, it is necessary to discuss justice, fairness and “good” taxation. Furthermore, legal certainty is regarded as stability, predictability and risk reduction, connected to the protection of trust legitimately built from previous State action. Legality is regarded in order to avoid arbitrariness and thus increasing legal certainty.

Moreover, freedom of enterprise and permissible restrictions “justified by overriding reasons of public interest” are on the scale. However, how to strike the right balance between the necessity of using undetermined concepts, to make MDR efficient, and the need to control arbitrariness?

The implications of legal principles applicable to MDR can even go as far as questioning the validity of constitutional principles and their interpretation. Even if not universally codified, the silent presence of the Rule of Law and the right to legal protection permeates legal interpretation. These dynamics are gaining momentum in the era of global tax law, which shows a growing attitude of the national judiciaries to look beyond the positive boundaries of legal principles and to apply a purposive interpretation⁴².

In this scenario, in order to restore order in tax matters, it would be highly desirable in practice not to privilege one principle, but to make it possible to de-

<https://www.pwc.com/gx/en/tax/newsletters/tax-policy-bulletin/assets/pwc-eu-proposes-mandatory-disclosure-of-tax-information.pdf>. Accessed on: 30 May 2018.

⁴² A “purposive interpretation” means interpreting the law according to the “spirit” of the law and to the Parliamentary intention, consequently, making legislative changes, which really need Parliament intervention, as a result of the disclosure regime, less frequent and less necessary. The role of the Courts was demonstrated to be very important in the British disclosure regime (DOTAS) functioning, for instance when establishing the severity of the penalty for non-compliance and even in defining the main concept in the regime, the “tax advantage”.

fend several, simultaneously, as Gustavo Zagrebelsky⁴³ teaches. Thus, he argues for the “practical agreement” of the diversities (contradictions presented in theory) perhaps existent, in the search for prudent cumulative, combinatory, compensatory solutions to conduct constitutional principles to a joint development and not to a joint decline. Legal science cannot, therefore, be attached to old formalisms when the complexity of the systems and the speed of the changes require moderation, adaptation, and flexibility that are not supported by legal models epistemologically based on dogmatic-authoritarian assertions⁴⁴.

2. The answer to legal certainty

Taxation, as an element to assure real freedom, through the financing of the State activity, has been lost, especially in the context of a “risk society”, in which the (tax) advantages for some imply in disadvantages for the others⁴⁵.

When applying MDR, one should not search for a dichotomy between licit and illicit tax planning, even because this search is irrelevant to the results envisaged by the regime. What should be in focus is that a given tax planning must be known and another not, based on what the tax system understands as *desirable or undesirable*. Moreover, the fact that they do not need to be disclosed at a certain moment or circumstance does not mean they are acceptable or considered valid. Conversely, they are not being included in the disclosure obligation because there is no reasonableness and proportionality in demanding to do so.

Within this logic, what needs to be assured to the taxpayers is a relation based on trust, in the sense that the disclosure will be applied to the ends predicted in the law and that the process of change in the legislation will occur in the way the law prescribes it.

As a conclusion, neither legality, as a form of taxpayer protection, nor equality, as justice and fairness or in its ability to pay corollary, is the answer to investigate in MDR application. Whether *strict legality* does not find an answer nor to properly classify tax planning, much less to limit the application of MDR. As for equality, there would be criticism that planning can be legitimate when its only or main purpose is to achieve the tax advantage.

That is why this work argues that MDR aims at *tax planning* that are *at risk* of producing results that were *not desired* by the legislator. The discussion, then, about the future disqualification or requalification of a planning and the balance between legality, freedom and equality, or ability to pay, does not need to be re-

⁴³ ZAGREBELSKY, Gustavo. *El derecho dúctil: ley, derechos, justicia*. Translated by Marina Gascón. 3. ed. Madrid: Editora Trotta S.A., 1999, p. 16.

⁴⁴ CRUZ FERREIRA, Luis Alexandre e Alexandre Mendes. *Consenso e resistência como horizontes hermenêuticos da participação-cidadã no direito*. Hermenêutica, Cidadania e Direito. Campinas/SP: Millenium Editora, 2005, p. 86-87.

⁴⁵ BECK, Ulrich. *Risk society: towards a new modernity*. Translated by Mark Ritter. London, Newbury Park, New Delhi: SAGE Publications, 1992. *Passim*.

solved in order to apply MDR. What we have to preserve, in short, in the institution of MDR, is the legal certainty. The answer that is necessary, in this work's viewpoint, is about legal certainty and trust.

However, legal certainty does not mean certainty that the law will not be changed, neither for the past nor for the future. Legal certainty means, as I am going to analyze in this topic, that the administration will only act in accordance with the objective and purpose set in the law, which implements the measure. As Rocha⁴⁶ points out, the relevance of this fact is in the recognition that legal certainty cannot be guaranteed by law, but only in the interpretation and application of the law.

Thus, this topic begins with Ávila⁴⁷ pointing out that the problematic involving legal certainty is existent because: (i) the provisions are not oriented to the user, since they fail to predict the information relevant to the behavior that he must adopt. (ii) the rules lack reliability (the citizen does not know for how long the rule will still be valid). (iii) the right is not predictable nor calculable, which results in a lack of reliability for the future. Therefore, he concludes: “the absence or the low intensity of these elements installs uncertainty, disrepute, indecision in the social environment, casting doubt on even traditional principles, such as legal certainty, ability to pay, equality and legality”.

Legal certainty is superficially associated with the ideal of predictability. In tax law, this conception corresponds directly or indirectly to the understanding that the principle of legality requires absolute determinacy of the essential elements of a tax obligation, also known as the principle of perfect typicality. It means that the taxpayer is able to recognize normative meaning in advance by interpreting the tax rule, and the lawmaker's duty is to materialize it comprehensively in the hypothesis of tax incidence. However, analyzing MDR, the point is who are the addressed and the beneficiaries of the principle?

The main question falls on the legitimate expectation, for the future. In this perspective, legal certainty is closer to clarity, in the meaning that those subject to the law must know their rights and obligations and to trust on those who have a duty to enforce the law and those who have a duty to comply with it. Therefore, there are two issues to take into consideration: first, making the measure public, which is not a problem to MDR, and second, the measure should be clear and its application and effects should be foreseeable.

The next step is to define how much the tax advantage produced by tax planning is a *legitimate expectation* or not and for whom, that is, a subjective perspective. It should be noted that this work already acknowledges that the tax planning arrangements in focus here are *licit*, not referring to fraud or criminal

⁴⁶ ROCHA, Sergio André. *Da lei à decisão: a segurança jurídica possível na pós-Modernidade*. Rio de Janeiro: Lumen Juris, 2017, p. 77-80.

⁴⁷ ÁVILA, Humberto. *Teoria da segurança jurídica*. 4. ed. São Paulo: Malheiros, 2016, p. 76-77.

acts. However, thinking about the tax system as a whole, and the objectives and purposes of taxation and social and collective interests, when would a tax advantage be legitimate?

In Brazil, the Supreme Court has ruled that⁴⁸:

“The principle of legal certainty, in an objective perspective, prohibits retroactivity of the law, protecting vested rights, the perfect legal act and *res judicata*. In its subjective perspective, legal certainty protects legitimate expectations, seeking to preserve past facts from possible changes in legal interpretation, as well as safeguarding the legal effects of acts considered invalid for any reason. Ultimately, the principle of legitimate expectation is primarily intended to protect expectations legitimately created in individuals by state acts.”

Analyzing the CJEU role in the construction of the legal certainty principle within the European Union, Ahmetaj⁴⁹ says that:

“Although mentioned together, in substance the legal certainty and the legitimate expectation are two separate principles. While legal certainty require that individuals must be able to ascertain what their rights and obligations are, and is strongly based upon the temporal dimension and retroactivity, the legitimate expectation is rooted in the concept of the good faith meaning that an operator induced to take an action the administration should not withdraw from, so the operator suffers loss.”

According to the CJEU, legal certainty requires that “there be no doubt about the law applicable at a given time in a given area and, consequently, as to the lawful or unlawful nature of certain acts or conduct”⁵⁰. Ahmetaj’s article, quoted above, additionally provides that the most comprehensive definition of the legitimate expectation in the EU law was given by the CJEU in *Branco Case*⁵¹.

In short, Branco was a Portuguese national who developed a contract in training activities with the Portuguese authorities under the European Social Fund program for training young adults. Under the regulation ruling such fund, the national authorities were supposed to certify the trainers who should be awarded and the Commission would make the payment. Branco was certified by

⁴⁸ BRAZIL (2014). Federal Supreme Court. *Extraordinary Appeal n. 608.482*. RE (Recurso Extraordinário) n. 608.482/RN. Rel. Min. Teori Zavaski. Judgment on 07.08.2014. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=7088200>.

⁴⁹ AHMETAJ, Hysni. Legal certainty and legitimate expectation in the EU Law. *Interdisciplinary Journal of Research and Development “Alexander Moisiu” University, Durrës, Albania*, v. I, n. 2, 2014, p. 20-25.

⁵⁰ EUROPEAN UNION (1990). Court of Justice. *Case C-331/88 – The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others*. Judgment of the Court (Fifth Chamber) of 13 November 1990.

⁵¹ EUROPEAN UNION (2005). Court of Justice. *Case T-347/03 – Branco v Commission*. Judgment of the Court of First Instance (Fifth Chamber) of 30 June 2005.

the Portuguese authorities to award the funding and submitted the request for the payment to the Commission. Later on, after an investigation procedure, the Portuguese authorities found that Branco had not fulfilled the duties foreseen in the contracts. Based on these findings, the Commission refused to make the final payment and asked Branco to reimburse the sums already paid. Branco appealed claiming among other things such a request that was contrary to the principle of the legitimate expectation due to the fact that his work had been certified by the Portuguese ministry once and he was entitled to such payment. Among other things, the Court of Justice observed:

“Three conditions must be satisfied in order to claim entitlement of the protection of the legitimate expectation. First, precise, unconditional and consistent assurances originating from authorized and reliable sources must have been given to the person concerned by the community authorities. Secondly, those assurances must be such give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules.”⁵²

The Court found that Branco was not entitled to such protection due to failing to satisfy the first condition. It observed that it was for the Commission to decide whether to authorize or not the payment and not for the Portuguese ministry, and further, the Commission had given no assurances in the case.

Therefore, legal certainty has several approaches. The analysis follows the structure: (i) time aspect; (ii) material scope; (iii) personal scope; (iv) international and domestic perspective, and (v) static and dynamic certainty. The topic, moreover, analyzes legal certainty searching for a balance among principles, standards and rules, in order to achieve an efficient result when applying MDR, without denying the application of the principle.

2.1. Time aspect

Notwithstanding I highlighted that retroactivity is not the main problem in the application of MDR, both the verification of justice and the realization of certainty in law must be done with a reference to time. “Justice in law is a quality which cannot be explained except by reference to some further value, and that value is set by whatever general opinions happen to be current in the society of the moment”, says Wade⁵³.

In 2016, the OECD and IMF prepared a report (hereinafter *2017 Report*) on legal certainty based on “extensive global surveys” conducted in more than 700 businesses and 25 predominantly G20/OECD Tax Administrations. They state that while “retroactivity” is frequently cited as very harmful as it relates to uncer-

⁵² *Ibid.*, Case T-347/03 *Branco v Commission* (2005), paragraph 102.

⁵³ WADE, H. W. R. The concept of legal certainty a preliminary skirmish. *Modern Law Review* v. 4, n. 3, Jan. 1941, p. 185.

tainty, it is critical to distinguish between retroactivity and “tax stabilization”, in such a way as changes in tax rules should only be implemented prospectively, in respect of the next tax period (for instance, for a change in tax rates) or of transactions taking place after the change is announced (for instance, where existing rules are modified), as opposed to applying to tax years before the announced change (true retroactivity)⁵⁴.

It is important to highlight that thinking about stability, temporary measures generate much more apprehension and uncertainty than stable measures that foresee changes. Tax changes could differ regarding the expectation of their reversal during time. In some cases, the uncertainty is such that firms know with certainty that a tax change will be followed in the near future by another change, with a certain probability. There are also tax changes – like a far-reaching reform – which are not expected to be reversed soon after their implementation⁵⁵. The problem then is not to change, but that the changes, their possibilities, their causes and their effects are clear, precise and certain and the consequences are predictable.

According to Ávila⁵⁶, an examination of the temporal aspect can operate as a criterion for testing the extent to which the principle of legal certainty is effectively realized. Application of the law requires an analysis of the temporal dimension from a single perspective encompassing all three periods: certainty today, yesterday and tomorrow. Trust and reliability involve the past as well as the present and the future: the fact of trust situated in the past; the trust that lives in the present and the trust that is projected into the future.

Over time, a country can mitigate time consistency problems by establishing a reputation for credibility in tax matters. This requires minimizing unanticipated policy changes and refraining from opportunistic tax increases once the investor has incurred sunk costs⁵⁷, for instance. Thus, it is possible to think in other two elements: consistency and credibility.

Concerning MDR, credibility is desirable in the meaning to really analyze all disclosed arrangements, providing answers and comments and changing what must be changed in a consistent way with the objectives of the measure. Thus, credibility leads to increasing trust. In this case, considering that the taxable events will only occur in the future and the tax law will not be “retroactive”, in my

⁵⁴ IMF/OECD (2017). *Tax certainty*. Report for the G20 Finance Ministers, March 2017, p. 17. Available at: <https://www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf>. Accessed on: 31 Mar 2020.

⁵⁵ ZANGARI, Ernesto; CAIUMI, Antonella and HEMMELGARN, Thomas. Tax uncertainty: economic evidence and policy responses. European Commission. *Taxation and Customs Union. Taxation Papers, Working paper* n. 67, 2017, p. 18.

⁵⁶ ÁVILA, Humberto. *Certainty in law*. Switzerland: Springer International Publishing, 2016, p. 97-98.

⁵⁷ IMF/OECD (2017). *Cit.*, p. 59.

view, what protects the taxpayer then is a certainty based on future expectations and the awareness of an (in)existence of risk when he implements the planning.

Thus, MDR and its hallmarks can and must be constantly updated; however, the establishment of new characteristics that cause tax arrangements to be included in the disclosure obligation should cover only planning that are implemented or offered as of the date the legislation is modified. If the law is changed to include certain planning, an expectation that the tax administration will meet or seek to know who is using that kind of scheme emerges. Then, there is a “future expectation” that the substantive law or the regulation can be changed. In this case, the legitimate expectation is of risk to the planning and the taxpayer has the option of closing it, modifying it or maintaining it, if he is sure of its legitimacy. He can also make a consultation or wait for the tax administration to manifest itself.

After the 2017 Report, the G20 has asked for an update, which was delivered in 2018⁵⁸. That update elaborates first on developments in the OECD and G20 countries and discusses what has happened since the 2017 Report. Analyzing a series of measures which have been taken in light of the previous report, an important conclusion in line with what this work indicates is that:

“[...] the toolkit on BEPS risk assessment will provide assistance to tax administrations in developing risk flags and risk assessment tools. It will discuss the merits of publishing certain risk flags to enable taxpayers to adjust their behavior in order to ensure they are compliant, and provide examples of self-assessment risk tools, which help to give compliant taxpayers greater certainty that they are unlikely to be audited on a particular issue if they accurately self-assess themselves as low-risk.”

As businesses inevitably operate with many uncertainties, their decisions do not need absolute certainty in tax matters but an environment where they are able to manage the risk associated with tax uncertainty⁵⁹. This is one of the reasons why I propose MDR “on potentially risky tax planning”, focusing on “risky arrangements”. Why are they risky? Because tax administration defines them based on those characteristics that “might” represent abuse, but that are not abuse, there is only “risk”. On the taxpayer’s side, when adopting a tax planning that involves those characteristics, he knows that there is a greater risk of being challenged by the tax administration, because if it involves those characteristics, the planning must be disclosed. He can then adopt a different strategy, which does not involve those characteristics and does not need to be disclosed. Thus, arguments that the MDR “criminalizes” the use of planning or that legality and freedom are being threatened have no substance.

⁵⁸ IMF/OECD (2018). *OECD/IMF report on tax certainty – 2018 update* – IMF/OECD report for the G20 Finance Ministers and Central Bank Governors. Paris, July 2018, p. 31. Available at: www.oecd.org/tax/tax-policy/g20-report-on-tax-certainty.htm.

⁵⁹ IMF/OECD (2017). *Cit.*, p.11.

Therefore, when implementing a planning that is previously defined as risky by the tax administration, the taxpayer knows that the chance of being challenged or that in the future the gap he is exploring in the law been closed is greater, exactly because the tax administration has already warned him. He is free to implement it or not, taking the tax risk into consideration, as in any other part of his business. The important thing in terms of certainty is that hallmarks should be defined only for planning that have been implemented until their setting (of hallmarks). There can be no retroactive hallmarks.

In this reasoning, Muchmore⁶⁰ says that “the manner in which legal uncertainty operates depends in part on the temporal relationship between the legal uncertainty and the time at which a primary actor is making a decision. Legal uncertainty can operate with respect to past, present, or future law”. The author goes on to state that uncertainty with respect to future law involves uncertainty about what changes in the law some future lawmaker will (or will not) make; however, this is a huge source of uncertainty that is always present when contemplating an action beyond the very near future. He punctuates that particularly salient examples involve tax law (where long-term investment decisions may involve tax advantages that could be repealed by a future lawmaker)⁶¹.

In other words, the problem of uncertainty is neither in MDR nor in the tax administration, if the laws are not made by them. The point is that laws that are wrong or circumstantially made can generate uncertainties regarding their stability over time, because they can be modified. By applying MDR, it can serve as an instrument to make the tax system more stable, by providing early information on the weaknesses of the law.

The conclusion is that changes do not cause uncertainty, but unpredictable changes do. Furthermore, if those changes beside being unpredictable do not serve to simplify and rationalize the tax system. The solution in the process of changing, in such a context, is proactive consultation announcing changes in advance and with timely issuance of guidance and information would ideally give enough lead-time to business to adapt to the new environment and, consequently, reduce uncertainty⁶².

A final point I want to discuss is related to transition periods and the amount of changes implemented. The 2017 Report⁶³ states that a central purpose of the G20-OECD BEPS Project is to avoid the uncertainty arising from fragmented or unilateral action by achieving greater cooperation and coordination in international tax matters. The phase during which proposals to do so were developed is

⁶⁰ MUCHMORE, Adam I. Uncertainty, complexity, and regulatory design. Faculty Works at Penn State Law e-Library, *Houston Law Review* v. 53, n. 5, 2016, p. 1321. Available at: http://elibrary.law.psu.edu/fac_works. Accessed on: 01 Apr 2020.

⁶¹ *Ibid.*, p. 1342.

⁶² IMF/OECD (2017). *Cit.*, p. 16.

⁶³ *Ibid.*, p. 10.

naturally one of some uncertainty. As with the implementation of any new legislation or regulation, MDR implementation inevitably involves a transition period.

However, this work's expectation is that the number of changes decrease and the time between them increases, in an efficient MDR, despite the fact that these factors will vary widely from country to country, depending on the technical capacity and legislation of each one. For instance, the OCDE/IMF point out that "the narrative analysis suggests there is considerable variation across advanced countries in both the frequency of corporate tax changes and the lag before implementation".

Thus, intentions to quickly react in a disclosure regime are, in many cases, impractical because the usual legislative procedure takes considerable time and it can increase uncertainty. The conclusion is that in MDR efficiency is important to have the early information in a way tax administration can prepare itself to react, but it is not certain that the reaction will really be implemented in a short period of time (i) because of practical issues (ii) because this possibility can increase uncertainty and so is undesirable.

Actually, the OECD/IMF⁶⁴ registers that there is systematic and wide cross-country variation in the length of implementation periods, which means the average number of days necessary to implement new tax measures announced in any particular year. For instance, on average, the implementation period of measures announced in 1997 was 184 days. Implementation periods have increased in recent years, it is highest in Germany (379 days), followed by Canada and France (232 and 225 days, respectively). For the corporate income tax changes examined, most were implemented at least 150 days after announcement.

Further, the process for implementing the relevant changes is also critical to managing the level of uncertainty produced by the change. For example, taxpayers experience considerable uncertainty when proposed changes to the law are announced but are not legislated in a timely manner⁶⁵. That is why I stress the proposal in the sense that the taxpayer has (relative) "certainty", or a reasonable expectation, that the change as an answer to a disclosure will come, once the characteristics involved in such a tax scheme were previously defined by the tax administration as "risky" and, therefore, subject to disclosure and change.

2.2. *Material scope*

In terms of its material aspect⁶⁶, legal certainty requires the realization of a state of affairs whose gradual promotion depends on certain types of behavior, such as publishing an act or setting transitional rules, which create the necessary means to realize a state of legal certainty. These behaviors or conditions form the

⁶⁴ IMF/OECD (2017). *Cit.*, p. 39-40. Source: Data constructed by IMF staff.

⁶⁵ *Ibid.*

⁶⁶ ÁVILA (2016). *Op. cit.*, p. 112.

structure of the legal certainty principle. Legal certainty is, under this perspective, a norm that determines the realization of a state of affairs characterized by the individual's capacity to plan actions strategically in a juridically informed and respected manner. In the case of legal certainty principle, the question is what types of behavior contribute to the promotion of the factual conditions that constitute the ideal states of knowability, reliability and calculability of the law.

Jurisprudential views of legal uncertainty range over a broad spectrum. At one extreme is Ronald Dworkin's⁶⁷ view that legal uncertainty does not exist, as there is a single right answer even in hard cases. At the other extreme is Anthony D'Amato's⁶⁸ view that legal certainty does not exist, as there is no such thing as an easy case with a single right answer.

Analyzing the role of uncertainty in regulatory design, Muchmore⁶⁹ identifies three different components: legal uncertainty, factual uncertainty and uncertainty about the application of law to fact. Legal uncertainty is uncertainty about the content of the law. Factual uncertainty is uncertainty about facts in the world. According to him, "It may well dwarf legal uncertainty in the calculations of primary actors" and "in sum, factual certainty is tied to three related concepts: time; scientific knowledge and human observational capacity and resources"⁷⁰. Law-fact uncertainty is uncertainty not about the content of the law itself or the facts that exist in the world. It is, instead, uncertainty about how a decision-maker – a judge, jury or agency – will apply law to fact. Even with the law and facts at a given constant, different decision-makers will reach different conclusions on how the law applies to some sets of facts.

This framework highlights the pervasiveness of factual uncertainty and law-fact uncertainty and viewed through this angle, legal uncertainty is less problematic than it is typically thought to be. Muchmore's article suggests that there are fundamental limits to how much legal certainty can be achieved, that legal uncertainty is unavoidable in functioning regulatory systems, but that the amount of legal uncertainty is not constant and that all types of legal uncertainty are not equally good or bad. Furthermore, these limits apply both to legal systems generally and to specific areas within a legal system. It then considers the degree to which making a requirement either more rule-like or more complex can increase legal certainty⁷¹. In some situations, uncertain legal requirements make it easier for predicting the legal consequences of their application than a more certain requirement.

⁶⁷ DWORKIN, Ronald. *Taking rights seriously*. Massachusetts: Harvard University Press, 1977, p. 563.

⁶⁸ D'AMATO, Anthony. Pragmatic indeterminacy. *Northwestern University School of Law, Faculty Working Papers, Paper n. 78*, 1990, p. 167-168. Available at: <http://scholarlycommons.law.northwestern.edu/facultyworkingpapers/7885>.

⁶⁹ MUCHMORE (2016). *Op. cit.*, p. 1338.

⁷⁰ *Ibid.*, p. 1347.

⁷¹ *Ibid.*, p. 1327-1328.

This is one of the points this work discusses, I mean, whether making MDR more specific, defined and precise will increase the system's "certainty". Moreover, it is necessary to think about the measure as a component of the whole tax system. Finally, which are the sources of uncertainty in this tax system and which are those in the whole legal system? In conclusion, there is a strong indication that the problem with MDR is not "legal uncertainty", but it refers to the "application of law to fact" and it is a result of the mistrust existent in the relationship between State and society or, precisely, between tax authorities and taxpayers.

There is another aspect to take into consideration, separating rules and standards. Overall, says Muchmore⁷², a legal requirement tends to be more certain to the extent it is expressed as a rule rather than a standard. Additionally, whether it is associated with a body of jurisprudence treating it as a rule; has in the recent past led to similar outcomes over a wide range of fact situations; and it is not closely associated with other rules that would lead to a different outcome.

Adding descriptions and specifications and consequently complexity to rules can increase legal certainty by specifying predetermined outcomes in a greater range of fact situations. For standards, the type of complexity that is likely to decrease their certainty is the presence of a large number of distinct factors that must be considered in the analysis. The more factors must be considered, the more often they will decrease legal certainty.

MDR are established from patterns of behavior or facts. Thus, schemes that involve the use of low-tax jurisdiction are a pattern that indicates abusive tax planning, but not a rule that establishes that those schemes are abusive or illicit. Contracts that contain confidentiality clauses for non-disclosure of a planning are a pattern that indicates that the planning is innovative and has unknown elements, but not a rule that establishes that this type of clause violates the tax law. Moreover, it is undeniable, as this work mentions several times, the connection of MDR with GAAR, in order to obtain a more effective result. The measures are different, but if they work together, they produce a better result. Thus, MDR needs to deal with a wide range of situations associated with another type of rule that must, by its nature, be general, defined only in terms of a result, focusing on undue tax advantage, regardless of the means that were used to achieve it.

For these reasons, one cannot desire that MDR have the same level of detail as other tax rules or to compare the definitions that are used in it with rules that, after the knowledge of the schemes, by the Administration, should be used or modified to establish tax liability. Moderate levels of legal uncertainty, placed appropriately, can perhaps contribute to overall stability and predictability.

Muchmore⁷³ concludes that factual uncertainty and law-fact uncertainty play a major role in the decision-making of primary actors. Accordingly, even com-

⁷² *Ibid.*, p. 1341.

⁷³ *Ibid.*, p. 1367.

plete legal certainty cannot come close to eliminating the uncertainty faced by primary actors in their interactions with the law. Uncertainty about the content of future legal requirements is qualitatively different from uncertainty about the application of existing legal requirements.

In the OECD/IMF *2017 Report*⁷⁴, the OECD conducted a business survey on tax certainty in late 2016. A large number of businesses participated in the exercise: 724 companies headquartered in 62 different countries/jurisdictions submitted a response. Additionally, in conjunction with the Forum on Tax Administration (FTA), the OECD also conducted a survey of FTA member tax administrations on tax certainty in January 2017. Tax administrations from 25 of the 47 FTA administrations responded. *2017 Report* first reviews theory and evidence on the nature and impact of tax uncertainty, and then identifies and discusses its main drivers. Then, narrative evidence bearing on key aspects of tax uncertainty are presented, before a range of practical measures and tools to enhance tax certainty are outlined. The report concludes with thoughts on taking forward this agenda.

In its *2017 Report*, the OCDE says it “explores the nature of tax uncertainty and the importance of providing greater tax certainty to taxpayers to support trade, investment and economic growth has become a shared priority of governments and businesses”⁷⁵. Several general aspects of tax uncertainty involving tax law, administrative and legislative actions and taxpayers’ behaviors are common to different areas of law and bring important information for the application of MDR. Specifically, the report deals with MDR very briefly, saying only:

“Mandatory Disclosure Regimes can help to reduce the uncertainties, for both taxpayers and tax administrations, associated with aggressive tax planning. By requiring taxpayers to disclose aggressive tax schemes and by enabling tax authorities to quickly access information on such aggressive tax planning strategies (e.g. Action 12 of the BEPS Package), it is likely that some taxpayers will become more averse to taking an aggressive stance. Committing to the spontaneous exchange between tax administrations of certain tax rulings can reduce potential harmful tax practices that often facilitate tax avoidance (e.g., Action 5 of the BEPS Package).”⁷⁶

Notwithstanding, the interesting thing about the *2017 Report* is that it heard businesses and tax administrations and tried to cross the problems pointed out by one with the solutions and actions that the other party can take, including “cross” issues. Thus, it is stated that there was strong agreement between businesses and tax administrations on the most effective tools to help reduce tax uncertainty. Both assigned high importance to addressing perceived weaknesses in tax policy design and legislation. The highest scores were given to detailed guidance in tax

⁷⁴ IMF/OECD (2017). *Cit.*, p. 25.

⁷⁵ *Ibid.*, p. 5.

⁷⁶ *Ibid.*, p. 52.

regulations; announcement of changes to tax legislation in advance; reduced frequency of changes to tax legislation; bringing domestic tax legislation into line with international tax standards; and effective withholding tax relief and reclaim systems⁷⁷.

Therefore, certainty, in the respondents' view, does not mean immutability and perfect stability, which would be unattainable in tax matters, because no tax law can specify tax outcomes without ambiguity in all possible circumstances, no administration can enforce the law without error and no tax policy can be defined irrespective of the circumstances. Therefore, changes both on the part of taxpayers, who change their business models, and on the part of tax administrations, which, as branches of the government, have people and policies modified, are expected and inevitable. However, what is the limit of these changes? How will they be done in a way that does not create uncertainty?

The *2017 Report* outlines the following practical tools to enhance tax certainty: Reducing complexity and improving the clarity; Increasing predictability and consistency by tax administrations. Therefore, this does not mean an immutable system, regarding to MDR, but a system that changes steadily, as announced and planned, from the information collected. The certainty that "risky" planning could be known and assessed by tax administration would lead to greater transparency among taxpayers when doing business. For example, the price of a transaction that is adjusted based on costs, including tax costs, would be presented transparently to the other party, since it involves the risk of future change. And the contractors would accept or not the risk that the price could change due to the tax cost, since this involves risk planning.

Having a methodical and consultative tax design process can help to improve the clarity of tax laws. This raises two related but distinct issues, both of which are critical to improving tax certainty: the transparency of the tax law and the ease of taxpayer compliance with the law.

The behavior of taxpayers in terms of aggressive tax planning and taking risky positions can also play a critical role in reducing tax uncertainties. As this work has supported, *2017 Report*⁷⁸ confirms that a desire for greater certainty can, if not properly managed, lead to more detailed and complex laws that are ultimately less simple to apply and comply with. A desire for simplicity may lead to laws that are incomplete or vague, which would ultimately make the law harder to comply with and administer, and increase uncertainty. In finding the balance, detailed provisions in support of the core legal provisions should then be left to subsidiary legislation (such as regulations) or taxpayer guidelines, as appropriate. However, it is also necessary to be careful about discretionary powers, which cannot be inappropriately expanded by including key rules in regulations rather than the law itself.

⁷⁷ *Ibid.*, p. 37.

⁷⁸ *Ibid.*, p. 45.

The main issue, thus, is not the existence of vagueness in law; but where it is exactly. In the MDR under analysis here, the intention of the law, the consequences and the relations resulting from it seem clear. Thus, what is claimed is a formal uncertainty, whether or not a special situation fits into the situation provided for in the hallmark and if a particular person who participated in a tax planning process fits as an intermediary with a disclosure obligation. My opinion is that these uncertainties are raised only as a way of creating difficulties for the system to work. Tax Administration must maintain an open channel to answer this type of “doubt”. The point is that the person, when submitting her question, is already, in a way, disclosing the arrangement. Two principles that are mentioned in the *2017 Report* and that I agree that should be applied here as a solution are transparency and effectiveness, to circumvent this alleged “uncertainty”.

Therefore, the successful application of MDR ultimately depends on: (i) the design and drafting of the particular hallmarks, which are often less rules-based and therefore more discretionary in its application; and (ii) the capacity of the tax authority to appropriately apply MDR in a measured, even-handed and predictable way. Both aspects are critical to achieving greater tax certainty.

In the previous topic, when presenting some cases that were submitted to judicial or technical analysis, the issue regarding the claiming for “bright-line rules” and the refusal of “vague standards” was highlighted. The general assumption is that the first are framed in clear and determinate language, therefore producing certainty and avoiding arbitrariness, and the second, which employs indeterminate terms like *relevant non-tax reasons*, *unusual form*, *essential data to understand the business transaction*, or based on principles full of subjectivity such as reasonableness and fairness, should be rejected. Raban⁷⁹, analyzing the issue under different points of view, first points out some advantages in both positions: “It is generally believed that legal rules provide the virtues of certainty and predictability, while legal standards afford flexibility, accommodate equitable solutions, and allow for a more informed development of the law”. His arguments start with a series of quotations, defending the preference for using the Rule of Law, as clear and definite rules, in order to allow predictability, instead Standards that allows flexibility, for regulating human behavior, because the former are “more certain”. I will mention Cass Sunstein⁸⁰, who identified different characteristics in “untrammelled discretion”, “rules,” “rules with excuses,” “presumptions,” “factors,” “standards,” “guidelines,” “principles,” and “analogies”⁸¹:

“A system committed to the rule of law is [...] not committed to the unrealistic goal of making every decision according to judgments fully specified in ad-

⁷⁹ RABAN, Ofer. The fallacy of legal certainty: why vague legal standards may be better for capitalism and liberalism. *Boston University Public Interest Law Journal* v. 19, n. 2, 2010, p. 175-192.

⁸⁰ SUNSTEIN, Cass R. Problems with rules. *California Law Review* v. 84, n. 4, 1995, p. 956.

⁸¹ *Ibid.*, p. 959-68.

vance. Nonetheless, [...] frequently a lawmaker adopts rules because rules narrow or even eliminate the [...] uncertainty faced by people attempting to follow [...] the law. This step has enormous virtues in terms of promoting predictability and planning [...]"

Then, Raban⁸² states the intention to “refute the idea that bright-line rules are superior to vague standards in regard to certainty and predictability”. According to him, in fact, clear rules are bound to produce less certainty and predictability than vague standards in many areas of the law, and “the fallacy” in contrary “consists in identifying people’s ability to predict the consequences of their actions with lawyers’ ability to predict the consequences of applying the law”. This is in line with what Ávila says about “predictability” for whom, which I will address in the next topic (personal scope).

In Max Weber’s⁸³ view, “An economy where private parties freely own, produce, exchange, and consume articles of value must provide private actors with clear and certain delimitations of their economic rights and duties; and these delimitations necessitate clear and determinate legal rules”. Friedrich Hayek⁸⁴ also “strongly condemned the use of vague legal standards like reasonableness or fairness”.

“The claims that strictly construed clear and determinate legal rules are essential for capitalism and liberalism are intuitive and widespread”, says Raban. He explains that, however, they are based on a confusion between the predictability of applying a legal rule and the predictability that a rule generates for those that it governs. Indeed, capitalism and liberalism require the latter, not the former: “what we want is a certain and predictable regulative environment (a predictable economic sphere, a predictable social sphere), not merely clear and determinate rules generating certain and predictable outcomes”⁸⁵. His text divides the analysis about legal certainty showing examples and considerations in three topics: “capitalism”, “liberalism” – and their contractual relations among privates – and “legal interpretation”, what is really interesting for this work.

As an example⁸⁶, he quotes statutes that penalize unfair competition, understood as commercial practices that deceive consumers, in California. In 1962, criminal defendants challenged the statute as unconstitutional because of its “uncertainty and vagueness”, but a Californian Court rejected the challenge by maintaining that California simply could not draft a more determinate statute. In fact, any alternative statute would substantially reduce the certainty and predictability

⁸² RABAN (2010). *Op. cit.*, p. 176-177.

⁸³ WEBER, Max. *Economy and society: an outline of interpretive sociology*. Berkeley and Los Angeles: University of California Press, 1978, p. 847.

⁸⁴ HAYEK, Friedrich A. *The road to selfdom with the intellectuals and socialism*. Combined edition first published in Great Britain, London: The Institute of Economic Affairs, 2005, p. 78.

⁸⁵ RABAN (2010). *Op. cit.*, p. 179.

⁸⁶ *Ibid.*, p. 184-185.

that facilitate economic transactions. Allowing consumer deception to go unpunished would make for a far more uncertain economic environment for sellers and consumers alike. Therefore, the level of uncertainty was compared to the intended outcome of the measure and not to its literalness.

If one of MDR's intentions is to avoid unfair competition, providing precise legal definitions leads to an unnecessary extension of the law, complexity and inefficiency, which will be used to circumvent the effects of the rule, by those required to comply with it. In addition, of course, to various administrative and judicial disputes. Since it is not necessary to define what "fairness" would be in terms of the application of the measure, the solution is to seek "certainty" in the result and not in the premises. On the other hand, vagueness is preventing the need to make an extremely long law, which will foresee each case, and consequently so complex to comply with. Therefore, allowing, due to its precision and in the paradox that I have already explained, that it is not, exactly because of its details, effectively observed.

The point is that MDR cannot work, because the changing behaviors of the taxpayers in a dynamic social and economic environment and because of the constant need for adaptation, with precise definitions. It needs a certain dose of "vagueness". As this work demonstrates, vagueness is not incompatible with or contrary to certainty. Coexistence within the interpretation and application of the law is possible. The dose of vagueness existent in MDR must be controlled based on the objective application one tax administration is making of the regime and the taxpayer can (and must) argue it before the competent Courts, in order to have some excess corrected.

2.3. *Personal scope*

The lawmaker must be aware of the significance of legal certainty, says Popelier⁸⁷. She stresses it is an important element of a citizen's personal freedom, as a clear legal framework that enables personal choices and action. Additionally, it is important for economic reasons, as legal certainty is one of the elements on which enterprises base their decision to invest in a certain country. Finally, it is important for public confidence in a legal system and thus for the system's legitimacy. The creation of objective certainty is the lawmaker's primary concern, as according to the paradox that "objective uncertainty (accessibility) leads to justified subjective uncertainty (respect for legitimate expectations)"⁸⁸. This is decisive for maintaining subjective certainty. Therefore, the lawmaker must, moreover, be well aware of the fact that accessibility of laws is not merely a question of legal terminology and publication in the official gazette.

⁸⁷ POPELIER, Patricia. Five paradoxes on legal certainty and the lawmaker. *Legisprudence* v. 2, n. 1, 2008, p. 47-66. Published on-line: 01 May 2015. Available at: <https://doi.org/10.1080/17521467.2008.11424673>. Accessed on: 31 Mar 2020.

⁸⁸ *Ibid.*, p. 49. *The fourth paradox*.

In terms of personal aspect, a law may be obvious to an expert but not to an ordinary citizen⁸⁹. This seems especially true in the field of taxation where experts on both sides, tax administration and tax law professionals, debate the state's right to demand taxes and the duty of the citizen to pay them, at a level apparently above the ordinary understanding of that taxpayer. The point is that not only the "ordinary" taxpayer is exploring the imperfections of the tax legislation, which is "naturally imperfect" since it is extensive and complex, but essentially experts, whose expertise is exactly to find and explore imperfections in the law⁹⁰.

Ávila⁹¹ analyses who will benefit from legal certainty, presenting a citizen (legal certainty can take on a strictly individual dimension when its use aims to protect an individual's private interest); the entire collectivity and the State. Moreover, he points out the perspective of who serves as a criterion for measuring legal certainty.

In legal certainty for a collective dimension, he identifies the powers of judicial review and constitutional control, for instance in "diffuse control of constitutionality, when a general consequence is acknowledged at the appeal level". In this work's point of view, regarding MDR, this kind of control should not work to refuse the measure, under the justification of general threat to certainty, exactly because it is necessary to take into consideration the subjective aspect. On the other hand, MDR should presumably be admitted in general to protect the collective right to fair taxation and to fair competition in the economy.

Furthermore, Ávila⁹² raises the question of whether the State can benefit from legal certainty. In his view, if legal certainty is taken as an objective principle, its elements (*knowability, reliability and calculability*) are indispensable to the State. However, in a subjective sense, "as the reflexive application of the principle of legal certainty relative to some subject, there are serious normative obstacles to its consideration in favor of the State". Specifically concerning to tax law, he understands that the principle becomes protective of citizens, because "its foundations relating to taxation (legality, non-retroactivity, protection of trust, equality) are designed not to further but to limit State action".

This topic will present a different point of view, demonstrating that uncertainty has origins from both the tax administration (as a branch of the State power) and taxpayers' behavior, and how MDR could be applicable in favor of both parties. Consequently, if the relationship between taxpayers and tax administration searching for fairness in taxation in a given contextual social environment increase in certainty, all of society benefits.

⁸⁹ ÁVILA (2016). *Op. cit.*, p. 90.

⁹⁰ OECD (2008). *Study into the role of tax intermediaries ("2008 Study")*. Paris: OECD Publishing, 2008.

⁹¹ ÁVILA (2016). *Op. cit.*, p. 91.

⁹² *Ibid.*, p. 92.

The IMF/OECD *2017 Report*⁹³ registers that according to *the businesses*, the main sources of uncertainty are related to tax administration and include bureaucracy to comply with the tax legislation, although this may also reflect concern over compliance costs, and inconsistent treatment. Unpredictable or inconsistent treatment by the tax authority was ranked as one of the two most important sources of tax uncertainty. According to respondents, the most effective tools or measures that could enhance certainty include: reducing the frequency of changes in the tax legislation and the bureaucracy to comply with it; providing detailed guidance in tax regulations; announcing changes in statutory tax system in advance; reducing the length and complexity of the tax legislation; keeping domestic legislation in line with international standards and offering timely consultation with taxpayers when changes are introduced. Moreover, “increased transparency from tax administrations in relation to their risk assessment protocols” was rated very important by close to half of respondents.

On the other hand, *tax administrations* identified taxpayer’s behavior as an important source of uncertainty, in particular as a result of aggressive tax planning and of lack of cooperation. A key area of agreement in both surveys was that legislative and tax policy design issues are a major source of tax uncertainty, mainly through complex and poorly drafted tax legislation and the frequency of legislative changes⁹⁴.

It is possible to note that uncertainty is generated by some friction in the relationship between tax authorities and taxpayers, concerning to the lack of trust on the expected behavior from both sides. However, a stable and simple legislation is a key point. From the businesses survey, while uncertainty is perceived as coming from interaction with the tax administration, some solutions could be primarily found in measures in the tax law.

The solution, then, calls for clearer, consistent, simpler legislation and, above all, that allows the predictability of behavior of those who are obliged to comply with it, both the taxpayer and the Administration. Complex laws and inconsistent tax policies lead to a reduced ability to predict the behavior of the other party. Thus, beyond seeking clarity and simplicity in tax legislation, and consistency in implementation, it is necessary to adopt a variety of measures serving to limit the discretion not only of the administration but also of the taxpayers.

What I mean is that the more freedom the taxpayer has to adopt varied and unpredictable methods of reducing the tax burden, exploring complex and circumstantial legislation, the more the tax administration feels insecure and refrains from adopting a transparent and helpful behavior. Governments set the tax rules, but the outcome is determined by the hard-to-predict behavioral responses of businesses, including, perhaps, in identifying unanticipated opportunities for avoidance.

⁹³ IMF/OECD (2017). *Cit.*, p. 31-33.

⁹⁴ *Ibid.*, p. 6.

Thus, Governments may face a trade-off between maintaining flexibility in designing and implementing tax policy in order to achieve their economic and social policy objectives, providing full clarity and certainty to guide investors and taxpayers and restricting its own discretion and constraining the taxpayers' freedom to adopt a large set of tax schemes in order to obtain particular advantages.

This "restriction of freedom" reduces the possibilities of seeking equality, not allowing each particular case to find or build a structure, within the law, to pay taxes according to its particular business and transactions. On the other hand, as explained, the degree of certainty increases.

Thus, taxpayers demand more freedom to organize their businesses in order to pay lower taxes, and base their arguments on the search for equality, in order to treat each case according to their particularities. The point is that at the same time they complain of uncertainty, because of the treatment they receive from tax administration. Nevertheless, what is shown here is that the more particular cases and freedom there are, the less certainty there can be in the taxation relationship, if we think about both sides. Replacing a system in which tax payments are uncertain by one in which they are certain, may then be mutually beneficial.

The *2017 Report* does not explore the possibility of using MDR as an instrument in this process. They present only the suggestion for improving the relationship between taxpayers and tax authority, consequently promoting tax certainty, with the co-operative compliance framework, as a "voluntary relationship between a tax administration and business taxpayers based upon mutual increased transparency, cooperation and collaboration". In their view, taxpayers can pro-actively notify the administration of any issues with a possible or significant tax risk and disclose all facts and circumstances to speed up the audit process and resolve uncertain positions quicker.

However, in this process, taxpayers' participation is voluntary. Therefore, they disclose only what, from their point of view, represents risk, searching for some advantages associated to the participation in the co-operative compliance regime, such as "a shortened ruling procedure, reduced need for large reserves for tax risks in the financial statement, reduced compliance cost by reducing the need for revenue bodies to conduct frequent audits, reduced administrative fines if the taxpayer did not follow the solution as agreed with the tax administration"⁹⁵.

Zangari, Caiumi and Hemmelgarn⁹⁶ state that the tax administration also gains from increased compliance and reduced auditing costs, as regards tax uncertainty. Since the idea behind the co-operative compliance regime is moving from an *ex-post* to an *ex-ante* assessment, this regime is expected to eliminate *de*

⁹⁵ IMF/OECD (2017). *Cit.*, p. 14.

⁹⁶ ZANGARI; CAIUMI and HEMMELGARN (2017). *Op. cit.*, p. 25-26.

facto the uncertainty regarding the tax treatment of specific transactions before the submission of the tax return.

This idea, however, is incomplete. Since the taxpayers' behavior is a source of uncertainty that reaches both sides, a mandatory regime with all the advantages cited here can put both sides in equal footing when including the risks, which produce concerns and, consequently, uncertainty, from the tax administration's point of view. That is why this work defends that a co-operative compliance program is important, nevertheless, some mandatory rules are essential in the search for transparency and certainty.

2.4. The spatial aspect. International and domestic perspective

Observing the results of the IMF/OCDE 2017 *Report*, Zangari, Caiumi and Hemmelgarn register that the analysis is separated by certainty in domestic level and international level, which means that there are different expectations for each context. Moreover, it is important to bear in mind that companies in different sizes – small, medium and big – operate and have their main interests from an exclusively domestic context to a mainly international one. For instance, simplicity is an important factor of certainty to small companies: “designing a simpler tax system, in terms of tax rules and tax compliance, may improve substantially tax certainty. This is especially the case for smaller businesses that have fewer resources to deal with increased tax uncertainty”. On the other hand, for big companies operating in an international environment, “the best policy answer is boosting broadly the cooperation on tax matters, which means not only more exchange of information, but also common approaches in fighting aggressive tax planning, agreement on a fair distribution of the tax revenues for cross-border investment, as well as agreeing on a transparent and fair tax competition game”⁹⁷.

They point out, then, that “at the domestic level”, simplification and rationalization might increase as a result of improving the drafting of the legislation, making and monitoring processes of compliance, increasing the predictability and consistency of tax administration's actions, and, consequently, enhancing the relationship between taxpayers and tax authority⁹⁸. Therefore, the sources of and solutions for uncertainty at the domestic level involve rather the role of tax administration and less the role of macro tax policies.

In this scenario, MDR serve especially as a monitoring tool and to control the dissemination of marketable tax schemes for tax administration. The level of certainty and trust in the tax law system increases if it receives a large number of disclosures with repeated schemes. If tax administration responds quickly by closing specific gaps, considerable results shall be observed mainly in the reduction/

⁹⁷ *Ibid.*, p. 3.

⁹⁸ *Ibid.*, p. 29.

elimination of tax boutiques⁹⁹. On the other hand, it is necessary to increase the quality and access to its services, so that the small taxpayer feels more confident and becomes more compliant, because for this type of taxpayer it will be important to verify that the disclosure observes the proportionality between the obligation to do and the advantages it promotes.

The “macro level” refers to the overall structure of the revenue system. At this macro level, tax uncertainty is related to overall taxation policy and the different tax rules applied internationally in cross-border situations. Note that the first source of tax uncertainty would exist even if the national tax systems were completely harmonized. While governments need to have enough scope and flexibility for adapting the tax system to achieve different policy objectives, such as addressing redistributive issues or negative externalities, the process of change can increase uncertainty as a side effect¹⁰⁰.

For these reasons, at the international context, the *2017 Report* concentrates the most significant proposals on “cooperation and coordination on the development of coherent international standards and guidance”, on effective dispute resolution mechanisms and on a multilateral instrument which will allow for the amendment of treaties to be made rapidly and consistently, thereby enhancing certainty¹⁰¹. The role of tax administration is quite limited in this scenario and proposals. It can act as a technical advisor but not as an implementer, which is in a political level.

The main purpose of BEPS Action 12 was to work at an international level, in cross-border situations¹⁰². However, what one can see is that the application of MDR as a tool for building certainty at this level is much more complex and time-consuming than at the domestic level. That is why I stress that the results and observations that were made in the BEPS Action 12 Final Report¹⁰³, based on the example and situations presented by the experience in the British DOTAS, will not be similarly reachable.

For big companies, operating at an international level and using tax schemes that simultaneously explore different tax law systems, MDR does not produce certainty in the foreground. A first step would be taken when, after the application of MDR, particular favorable domestic policies were revealed, making

⁹⁹ In practice, tax planning promoters are accountants, solicitors, banks and financial institutions and small firms of specialist promoters known as “tax boutiques”. DEVEREUX, Michael; FREEDMAN, Judith and VELLA, John. Review of DOTAS and the tax avoidance landscape (2012). Monograph. Oxford University Centre for Business Taxation. Deposited on 18 Mar 2013. *Paper 2 – The Disclosure of Tax Avoidance Schemes Regime*, p. 4.

¹⁰⁰ ZANGARI; CAIUMI and HEMMELGARN (2017). *Op. cit.*, p. 6.

¹⁰¹ IMF/OECD (2017). *Cit.*, p. 7.

¹⁰² OCDE (2013). *Action Plan on Base Erosion and Profit Shifting*. Paris: OECD Publishing, 2013. Published on 19 Jul 2013.

¹⁰³ OECD (2015). *Mandatory disclosure rules, Action 12 – 2015 Final Report*, OECD/G20 Base Erosion and Profit Shifting Project. Paris: OECD Publishing, 2015. Published on: 05 Oct 2015.

schemes like the one explored by Apple in Ireland not spend so much time out of the eyes of the international community¹⁰⁴. Thereafter, pressures on the international community make the scheme unfeasible and, as was the case mentioned, the avoided tax is collected. Certainty then comes from a process of standardization of international tax policies, which is very difficult to achieve due to the sovereignty and the particular needs of each country. Notwithstanding, sometimes, longer implementation periods are preferred, and Governments may wish to use the expectation of future changes to influence current behavior and a factor to bear in mind is that longer implementation periods increases taxpayers' certainty in the short and medium terms. Thus, the recommendation is that upon discovering an undesirable scheme, the tax administration announces that it is undesirable and creates the expectation that in the future changes will occur. Thus, the taxpayer can prepare and decide, himself, to stop using that scheme or, trusting in its legitimacy, to continue to use it. But the issue becomes more of a risk analysis than an uncertainty.

The IMF/OECD reports place several differences between developed and developing countries in terms of certainty/uncertainty. Thus, another point that needs to be addressed is about the promotion of certainty in different countries and the administrative capacity of each one. The *2017 Report* recognizes that developing countries can face particular challenges of capacity and in combining the need to maintain sustainable revenues to support budgetary expenses with ensuring the tax certainty necessary to create an attractive business environment¹⁰⁵. Therefore, this concern is yet another demonstration that uncertainty is not limited to the legal issue. This is their conclusion when they mention situations in African countries several times, where the uncertainty is caused by a reduced capacity of the tax administration to deal, for example, with complicated international planning. In an attempt to curb and in the difficulty of understanding them, there are excesses when considering the illegitimacy of this kind of schemes. MDR, with the early disclosure of the arrangements, can serve to increase the tax administration's understanding about them and then avoid or reduce the excesses in the counteraction.

2.5. *Static and dynamic certainty*

Static dimension¹⁰⁶ (certainty of law) concerns the problem of knowledge of law or the problem of communication in law and reveals what qualities it must have in order to be considered "certain" and hence serve as a guide to citizens in general and taxpayers in particular. In this sense, a law must be understandable

¹⁰⁴ BARRERA, Rita and BUSTAMANTE, Jessica. The rotten apple: tax avoidance in Ireland. *The International Trade Journal* v. 32, n. 1, p. 150-161. Published on-line 02 Aug 2017. *The broad repercussion on the case involving the US's giant tech company Apple, Ireland and tax avoidance.*

¹⁰⁵ IMF/OECD (2017). *Cit.*, p. 5.

¹⁰⁶ ÁVILA (2016). *Op. cit.*, p. 207.

and effective. The concept of “understandable” means as clarity and accessibility (publication). Effectiveness, as explained in this work’s Introduction, is an issue regarding the acceptance in practice of the norm by the people who must comply with it.

A model in which a State is ruled by laws that should be able to regulate every activity with the highest amount of precision and perfection springs from a nineteenth century concept, which describes the legal order as a transparent, predictable and static system, says Popelier¹⁰⁷. In this ideal, positive law is rational law, which contains the entire normative reality. In this model, legal certainty is a conservative principle, composed of transparency, predictability and stability and aimed at maintenance and accumulation of property and other “vested rights”. Thus, there is a presumed rationality of the legislators, so that their Acts are assumed to be perfect, inviolable. Consequently, the principle of legal certainty, in this view, is focused on the execution and application of laws by the administration and the courts, based on methods of interpretation and the principle of legality.

Reading Hayek¹⁰⁸, Popelier says that it was what “Hayek has named taxis: a perfect order, which works according to a Cartesian rationality presupposing complete knowledge of all relevant facts”. The contemporary, complex and dynamic society, however, calls for a new, more dynamic concept of legal certainty and the transformation of the principle of legal certainty into a legal tool may lead to unrealistic expectations.

This work focuses on demonstrating that first, legal certainty cannot be placed as an instrument and second, the exigence for “legal certainty” in the sense of protecting an alleged economic freedom (freedom of enterprise) is mistaken. Therefore, it aims to deconstruct the arguments that place MDR as an “instrument that compromises the instrument” of legal certainty, because it is seen “as a structural requirement law must have in order to serve as a guiding instrument”¹⁰⁹ if considering only its static dimension. Moreover, because such “freedom” specifically exploits those “uncertainties” caused by imperfections in the law, whether they are natural (involuntary) or due to circumstantial policies (voluntary).

Legal certainty, therefore, does not imply that persons have a right to absolute security. Instead, it helps people to deal with inevitable uncertainty. This indicates the relativity of the principle of legal certainty and the balance of interests, which are central in the process of judicial review to this principle. As a legal

¹⁰⁷ POPELIER, Patricia. Five paradoxes on legal certainty and the lawmaker. *Legisprudence* v. 2, n. 1, 2008, p. 47-66. Published on-line: 01 May 2015. Available at: <https://doi.org/10.1080/17521467.2008.11424673>.

¹⁰⁸ HAYEK, Friedrich A. *Law, legislation and liberty*. V. I, *Rules and Order*. London: Routledge & Kegan Paul Ltd, 1973, p. 12 and 37.

¹⁰⁹ ÁVILA (2016). *Op. cit.*, p. 207.

principle and not as legal rule, legal certainty does not contain definitive deontological propositions and is not intended to yield definitive answers, it only points to a direction and, ultimately, requires a weighing of interests. In this sense, the principle of legal certainty serves merely as an argument in legal reasoning, along with a plethora of other principles, rules, facts and values¹¹⁰.

That is why this work defends that it is not possible to abstractly control MDR's constitutionality under the argument of causing uncertainty, and a concrete framework can be drawn up from an analysis of specific facts. This framework provides for arguments to direct legal reasoning towards a certain outcome and to predict to a certain degree, whether the decision to push the limits of a law (in the tax system) is a legitimate option. The legitimacy of individual expectations depends a great deal on the existence of some objective certainty of the law. In other words, individual expectations are less protected in the absence of objective certainty.

However, whichever perspective (objective or subjective) is adopted, the static (or structural or systemic) dimension cannot be separated from the dynamic (or functional or operative) dimension of legal certainty. Dynamic dimension¹¹¹ (certainty through the law), concerns the problem of action over time and prescribes which ideals must be assured if the law is to "guarantee" citizens' rights and thus serve them as an instrument of protection. In this sense, the law must be reliable and calculable. Reliable in the sense of enabling citizens to know which changes can be made and which cannot, thus preventing frustration of their rights. This reliability exists only if citizens see that the effects guaranteed by law yesterday are assured today. Calculable, in the sense of enabling citizens to know how changes can be made and when they will be affected, so they are not surprised. Thus, legal certainty principle aims in its dynamic dimension to guarantee a respectful transition from the past to present and from the present to future, through knowledge of law. In this perspective, the main point is how the process of change will happen (transition) and not whether a change will take place or not.

This dynamic approach introduces the ideas of "risk" and "confidence" in the concept of legal certainty. According to Luhmann¹¹², it is possible to understand law and risk in terms of dealing with time. Legal rules project certain expectations in the future. However, legal rules incorporate political decisions, which are taken without full knowledge of future events and consequences. Therefore, although legal rules diminish the risk of legal actions by anticipating future legal consequences, they are unable to fully eliminate the risk. What they do is orient collective decision making within a legal framework, which tries to deal with risk in a responsible way.

¹¹⁰ POPELIER (2015). *Op. cit.*, p. 53 and 61.

¹¹¹ ÁVILA (2016). *Op. cit.*, p. 241.

¹¹² LUHMANN, Niklas. Law as a social system. *Northwestern University Law Review* v. 83, n. 1 and 2, 1989, p. 136.

Identifying the existence of transnational constitutional problems that States cannot face individually, Appignanesi¹¹³ says “the factors of globalization challenge not only the constitutions but also their fundamental pillars”. Within a sociological approach, she starts from classical theories on pluralism and moves into functionalism, by a systemic perspective. Based on Luhmann’s theories, she concludes that the Constitution is a “structural coupling” between the legal system and the political system. At this point, she stresses that Luhmann emphasizes the seemingly paradoxical character of the coexistence of rigidity and adaptability, closure and openness.

The author¹¹⁴ goes on to clarify that Teubner applies the tools of Luhmann’s general theory and tries to contribute to the sociology of law by combining the formal normative approach with that of reasoning (*cognition*). A more advanced model in Teubner’s work is represented by the “policontextual” law, which is based on the relativization of the various criteria of rationality and its balance. Finally, Teubner arrived at the “autopoietic” model based on the paradox of the potentially open but fundamentally closed legal system. According to Teubner¹¹⁵, the more the legal system gains in operational closure and autonomy, the more it gains in openness toward social facts, political demands, social science theories and human needs.

Therefore, combining the static and dynamic perspectives of legal certainty with the need to have constitutional principles that cannot be interpreted and applied exclusively within a legal perspective, but that need to be relativized to other social realities, we arrive at a view of legal certainty built on the pillars of confidence (trust), coherence and consistency.

Confidence, says Popellier¹¹⁶:

“Confidence, based on sufficient albeit incomplete information and on experiences in the past, thus orients human behavior. In terms of law, this means that legal rules do not hinder a person’s autonomy but reduce options for human behavior and includes risk: the possibility that future events turn out differently in the end. Confidence implies the calculation of possible disappointment. For a system like the legal order what matters is that people are not disappointed on a regular basis so that public confidence in the system as such is undermined.”

Coherence, Ávila¹¹⁷ explains, from the static point of view, means the gradual relationship of support a given alternative receives from the legal order as a

¹¹³ APPIGNANESI, Laura. *Il mercato globale del diritto costituzionale: dal diritto frammentato al diritto liquido*. Sociologia del Diritto, Issue 1, 2019, p. 7-21.

¹¹⁴ *Ibid.*

¹¹⁵ TEUBNER, Gunther. Introduction to autopoietic law. In: TEUBNER, Gunther. *Autopoietic law: a new approach to law and society*. Berlin, New York: de Gruyter, v. 1, 1987, p. 1-11.

¹¹⁶ POPELLIER (2015). *Op. cit.*, p. 60.

¹¹⁷ ÁVILA (2016). *Op. cit.*, p. 235.

whole and, from the dynamic point of view, the requirement of uniform application of norms. The static dimension helps to reduce uncertainty as to which alternative interpretation is correct, indicating which of the alternatives compatible with the provision being interpreted is most strongly supported by the legal order, especially its fundamental principles. The dynamic dimension helps to reduce uncertainty as to which normative consequence is most likely to be imposed in the future, since the duty of uniform application allows citizens, knowing the normative consequences assigned to analogous acts or facts, to foresee the imposition of the same consequences to similar acts they may perform.

The duty of consistency has different approaches: constitutional, statutory and case law dimensions¹¹⁸. In addition, within this work's line of reasoning, there must be consistency both in the behavior of the tax administration and in the behavior of taxpayers, in order to improve the relationship and, as a result, promote certainty in tax law. Thus, it first needs non-contradiction in the systemic interpretation of constitutional principles, so that every principle can coexist and point in the same direction. Second, the legal rules cannot conflict with one another, because "the application of these norms cannot contradict the solutions given previously ... Hence, the level of congruence and harmony among normative propositions is clearly part of the legal certainty principle"¹¹⁹. Third, consistency means the requirement of non-contradiction between norms in both stage of enactment by the legislative and stage of enforcement by the administrative branch¹²⁰.

Regarding to MDR, what happens is that the regime does not prevent the taxpayer's autonomy to apply tax planning; nevertheless, in fact, it reduces the possibilities to do so. It also includes or increases the risk of using tax planning. However, this increase in risk for the individual choice must represent a reduction in the risk of frustrating the taxation objectives, in the collective interest. In addition, by reducing the possibilities of exploiting loopholes and mismatches in the tax system, it makes it possible, both from the point of view of tax administration and from the collective point of view, to increase certainty. Therefore, "the court must make a balance of interests. On one hand the interest of the individual in legal certainty, either as accessibility to laws or as respect of his legitimate expectations. On the other hand the public interest and the feasibility of government to keep its legislation accessible and reliable"¹²¹.

¹¹⁸ JOHNSON, Steve R. An IRS duty of consistency: the failure of common law making and a proposed statutory solution. *Florida State University College of Law v.* 77, 2010, p. 563.

¹¹⁹ CARVALHO, Paulo de Barros. Segurança jurídica e modulação dos efeitos. *Revista da Fundação Escola Superior de Direito Tributário v.* 1, 2008, p. 206.

¹²⁰ VALEMBOIS, Anne-Laure. *La constitutionalisation de l'exigence de securite juridique en Droit Français*. Paris: LGDY, 2005, p. 198, *Apud* ÁVILA (2016). *Op. cit.*, p. 236.

¹²¹ POPELIER (2015). *Op. cit.*, p. 60.

Conclusion

A legal principle that causes many concerns and discussions regarding the application of MDR is the principle of legal certainty. This work provides examples and considerations to demonstrate this. This topic addresses the principle of legal certainty from different perspectives, to investigate the issue, its truths and myths. It, moreover, analyzes legal certainty searching for a balance among principles, standards and rules, in order to achieve an efficient result when applying MDR, without denying the application of the principle.

The work concludes, for instance, that the main question falls on the legitimate expectation, for the future, and not in the non-retroactivity issue, to the past. In this time perspective, legal certainty is closer to clarity, in the meaning that those subject to the law must know their rights and obligations and to trust between those who have a duty to enforce the law and those who have a duty to comply with it. A crucial point, therefore, is that the measure should be clear and its application and effects should be foreseeable. Furthermore, it is arguable how much the tax advantage produced by a tax planning is a “legitimate expectation” and for whom, that is, a subjective perspective. The conclusion is that changes do not cause uncertainty, but unpredictable changes do.

Moreover, there is a relativization to the environment analyzed, because tax uncertainty may derive from several sources, at the domestic and international level, and it is mainly related to weaknesses of the institutional framework of tax policy. At the domestic level, the lack of precision of the tax law, conflicting tax provisions and interpretations over time and frequent changes of the tax rules are the main sources of tax uncertainty. At the international level, the lack of tax coordination/cooperation between countries, as well as the globalization and the emergence of new business models, are the main reasons of increased tax uncertainty regarding the tax treatment of cross-border investment¹²².

MDR are established from patterns of behavior or facts. The behavior of taxpayers in terms of aggressive tax planning and taking risky positions can also play a critical role in reducing tax uncertainties. What I mean is that the more freedom the taxpayer has to adopt varied and unpredictable methods of reducing the tax burden, exploring complex and circumstantial legislation, the more the tax administration feels insecure and refrains from adopting a transparent and helpful behavior. Thus, MDR need to deal with a wide range of situations associated with another type of rule (GAAR) that must, by its nature, be general, defined only in terms of a result, focusing on undue tax advantage, regardless of the means that were used to achieve it.

Three broad types of uncertainty affect regulation of conduct by the legal system: legal uncertainty; factual uncertainty and law-fact uncertainty. Examining the broad range of fact and law-fact uncertainty, however, it appears that the

¹²² IMF/OECD (2017). *Cit.*, p. 10.

concern frequently focused on legal uncertainty may be overstated. Legal certainty is often desirable, but it is insufficient to give primary actors a solid background against which to plan¹²³.

Thus, it is possible to think of other elements beyond the legal interpretation and legality. The solution, then, calls for clearer, consistent, simpler legislation and, above all, one that allows the predictability of behavior of those who are obliged to comply with it, both the taxpayer and the Administration, producing credibility and stability. Moreover, combining the static and dynamic perspectives of legal certainty with the need to have constitutional principles that cannot be interpreted and applied exclusively within a legal perspective, but that need to be relativized to other social sciences, we arrive at a view of legal certainty built on the pillars of confidence (trust), coherence and consistency.

The conclusion is that perfect legal certainty in law is unattainable. There are limits on how much certainty can be increased by moving from standards to rules, or from simple to complex legal requirements. After a given point is reached, further movement in these directions can decrease, rather than increase, legal certainty¹²⁴. Furthermore, attempts to reach or exceed these limits undermine the efficient use of the law, in a practical way, so that other objectives cannot be achieved and other principles cannot be valued, especially in matters of taxation. What should be sought, then, is a certainty / uncertainty that is reasonable and proportional, also guaranteeing the effective application of the tax law (practicality / effectiveness), the preservation of the collective interest and the objectives and purposes of taxation.

Analyzing MDR application and the complaints of a possible “uncertainty”, this work supports that the issue is closer to the principle of protection of trust¹²⁵, which is distinguished from the principle of legal certainty principle by the following criteria: (i) it relates to a normative aspect of the legal order, focusing on a micro legal view. (ii) it protects the interest of a specific person and presupposes a concrete level of application. (iii) it serves as a means of protection of individual interests. (iv) it is used only to protect the interests of those who consider themselves harmed by the past exercise of legally oriented freedom. Therefore, there is no abstract or collective incompatibility between MDR and the principle of legal certainty.

Bibliography

AHMETAJ, Hysni. Legal certainty and legitimate expectation in the EU Law. *Interdisciplinary Journal of Research and Development 'Alexander Moisiu' University*, Durrës, Albania, v. I, n. 2, 2014.

¹²³ MUCHMORE (2016). *Op. cit.*, p. 1351.

¹²⁴ *Ibid.*, p. 1352.

¹²⁵ ÁVILA (2016). *Op. cit.*, p. 260.

- Available at: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2014707dc/2014707dc_ccc.pdf. Accessed on: 16 Ma 2020.
- APPIGNANESI, Laura. *Il mercato globale del diritto costituzionale: dal diritto frammentato al diritto liquido*. Sociologia del Diritto, Issue 1, 2019.
- ARCOS RAMIREZ, Frederico. *Laseguridad jurídica: una teoria formal*. Madrid: Dykinson, 2000.
- ÁVILA, Humberto. *Certainty in Law*. Switzerland: Springer International Publishing, 2016.
- ÁVILA, Humberto. *Teoria da segurança jurídica*. 4. ed. São Paulo: Malheiros, 2016.
- BARRERA, Rita and BUSTAMANTE, Jessica. The Rotten Apple: tax avoidance in Ireland. *The International Trade Journal*, v. 32, n. 1. Published online 02 Aug 2017.
- BECK, Ulrich. *Risk society: towards a new modernity*. Translated by Mark Ritter. London, Newbury Park, New Delhi: SAGE Publications, 1992.
- BLOUIN, Jennifer L. and SHACKELFORD, D. A. *Investment, tax uncertainty and aggressive tax avoidance*. Research Gate, January 2017. Available at: https://www.researchgate.net/publication/267960298_Investment_Tax_Uncertainty_and_Aggressive_Tax_Avoidance. Accessed on: 15 May 2020.
- BRAZIL (2014). Federal Supreme Court. *Extraordinary Appeal n. 608.482*. RE (Recurso Extraordinário) 608.482/RN. Rel. Min. Teori Zavaski. Judgment on 07.08.2014. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=7088200>.
- BRAZIL (2015). Federal Supreme Court. *ADI n. 5.366/DF, arguing the unconstitutionality of MP n. 685/2015 (Ação Direta de Inconstitucionalidade n. 5.366 – Distrito Federal)*. Available at: <http://redir.stf.jus.br/estfvisualizadorpub/jsp/consultar-processoeletronico/ConsultarProcessoEletronico.jsp?seqobjetoincidente=4827786>. Accessed on 13 Mar. 2020.
- BRAZIL (2015). Federal Supreme Court. *Extraordinary Appeal (RE) n. 608.482/RN*. Rel. Min. Teori Zavaski. Brasília, 07 Aug. 2014. Available at: <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=7088200>. Accessed on 13 Mar 2020.
- BRAZIL (2015). Presidency of the Republic. *Provisional Measure n. 685/2015*. In force from 22.07.2015 to 18.11.2015, converted into Law n. 13.202, of 08 Dec. 2015, partially rejected. Available at: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13202.htm. Accessed on: 12 Feb. 2020.
- CARVALHO, Paulo de Barros. Segurança jurídica e modulação dos efeitos. *Revista da Fundação Escola Superior de Direito Tributário*, v. 1, 2008.
- CRUZ FERREIRA, Luis Alexandre e Alexandre Mendes. Consenso e resistência como horizontes hermenêuticos da participação-cidadã no direito. *Hermenêutica, cidadania e direito*. Campinas/SP: Millenium Editora, 2005.
- DÁMATO, Anthony. *Pragmatic Indeterminacy*. Northwestern University School of Law, Faculty Working Papers, Paper n. 78, 1990.

- DWORKIN, Ronald. *Taking rights seriously*. Massachusetts: Harvard University Press, 1977.
- ENDICOTT, Timothy A. O. *Vagueness in Law*. Oxford: Oxford University Press, 2000.
- EUROPEAN UNION (1990). Court of Justice. *Case C-331/88 – The Queen v Ministry of Agriculture, Fisheries and Food, ex parte FEDESA and Others*. Judgment of the Court (Fifth Chamber) of 13 November 1990.
- EUROPEAN UNION (2005). Court of Justice. *Case T-347/03 – Branco v Commission*. Judgment of the Court of First Instance (Fifth Chamber) of 30 June 2005.
- EUROPEAN UNION (2017). European Commission. Proposal for a Council Directive amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation in relation to reportable cross-border arrangements. COM/2017/0335 final – 2017/0138 (CNS). Brussels, 21 Jun. 2017.
- EUROPEAN UNION. Court of Justice. *Cadbury Schweppes and Cadbury Schweppes Overseas Case*. Case C-196/04, Judgment of the Court (Grand Chamber), 12 September 2006.
- FRANCE (2014). Conseil Constitutionnel. *Decision 2014-707 DC du 29 Decembre 2014*. Available at: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/decisions/2014707dc/2014707dc_ccc.pdf. Accessed on: 16 Ma 2020.
- GROVES, Harold M. Neutrality in taxation. *National Tax Journal*, v. 1, n. 1, Mar. 1948. Published by: National Tax Association. Available at: <https://www.jstor.org/stable/41789749>. Accessed on 03 Mar 2020.
- HAYEK, Friedrich A. *Law, legislation and liberty*. V. I, *Rules and Order*. London: Routledge & Kegan Paul Ltd, 1973.
- HAYEK, Friedrich A. *The road to serfdom with the intellectuals and socialism*. Combined edition first published in Great Britain, London: The Institute of Economic Affairs, 2005.
- IMF/OECD (2017). *Tax certainty*. Report for the G20 Finance Ministers, March 2017. Available at: <https://www.oecd.org/tax/tax-policy/tax-certainty-report-oecd-imf-report-g20-finance-ministers-march-2017.pdf>. Accessed on 31 Mar. 2020.
- IMF/OECD (2018). *OECD/IMF Report on Tax Certainty – 2018 Update – IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors*. Paris, July 2018. Available at: www.oecd.org/tax/tax-policy/g20-report-on-tax-certainty.htm.
- JOHNSON, Steve R. An IRS duty of consistency: the failure of common law making and a proposed statutory solution. *Florida State University College of Law*, v. 77, 2010.
- KAHN, Douglas A. The two faces of tax neutrality: do they interactor are they mutually exclusive? *University of Michigan Law School Scholarship Repository*,

- Public law and legal theory research paper series, paper n. 18, 1990. Available at: <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1318&context=articles>. Accessed on: 03 Mar. 2020.*
- LUHMANN, Niklas. Law as a social system. *Northwestern University Law Review*, v. 83, n. 1 and 2, 1989.
- MAJED, Leila. *Implementation in France of the disclosure of aggressive tax planning arrangements under action 12 of BEPS*. ABDF – Brazilian association of finance law. Available at: http://www.abdf.com.br/index.php?option=com_content&view=article&id=2175. Accessed on 9 May 2018.
- MUCHMORE, Adam I. Uncertainty, complexity, and regulatory design. *Faculty Works at Penn State Law e-Library, Houston Law Review*, v. 53, n. 5, 2016. Available at: http://elibrary.law.psu.edu/fac_works. Accessed on 01 Apr. 2020.
- OECD (2008). *Study into the role of tax intermediaries (“2008 Study”)*. Paris: OECD Publishing, 2008.
- OECD (2009). *Engaging with high net worth individuals on tax compliance*. Paris: OECD Publishing, 2009.
- OECD (2011). *Tackling aggressive tax planning through improved transparency and disclosure*. Paris: OECD Publishing, 2011.
- OCDE (2013). *Action plan on base erosion and profit shifting*. Paris: OECD Publishing, 2013. Published on 19 Jul 2013.
- OECD (2015). *Mandatory Disclosure Rules, Action 12 – 2015 Final Report, OECD/G20 Base Erosion and Profit Shifting Project*. Paris: OECD Publishing, 2015. Published on 05 Oct 2015.
- OSTERLOH-KONRAD, Christine; HEBER, Caroline; BEUCHERT, Tobias. Abschließende Bewertung: Die Anzeigepflicht als Bestandteil eines fairen Steuersystems. In: *Anzeigepflichten für Steuergestaltungen in Deutschland*. MPI Studies in Tax Law and Public Finance, v. 7. Berlin: Springer, 2017. *Notification obligations for tax planning in Germany*. Max Planck Institute for Tax Law and Public Finance, Munich, Germany. Online: 26 January 2017. Available at: https://link.springer.com/chapter/10.1007/978-3-662-53761-9_5. Accessed on: 26 Jul 2018.
- POPELIER, Patricia. Five paradoxes on legal certainty and the lawmaker. *Legisprudence*, v. 2, n. 1, 2008. Published online: 01 May 2015. Available at: <https://doi.org/10.1080/17521467.2008.11424673>. Accessed on 31 Mar 2020.
- PORTUGAL (1976). *Constituição da República Portuguesa*. Diário da República n. 86/1976, Série I of 10 Apr 1976.
- PWC. Tax Policy Bulletin. Tax Insights from International Tax Services. *EU proposes mandatory disclosure of tax information for reportable crossborder arrangements*. 31 August 2017. Available At: RABAN, Ofer. The fallacy of legal certainty: why vague legal standards may be better for capitalism and liberalism. *Boston University Public Interest Law Journal*, v. 19, n. 2, 2010.
- ROCHA, Sergio André. *Da lei à decisão: a segurança jurídica possível na pós-Modernidade*. Rio de Janeiro: Lumen Juris, 2017.

- SALDANHA SANCHES, José Luís. *Os limites do planeamento fiscal. Substância e forma no direito fiscal português, comunitário e internacional*. Coimbra: Coimbra Editora, 2006.
- SANTOS, Antonio Carlos dos. Planeamento fiscal, evasão fiscal, elisão fiscal: o fiscalista no seu labirinto. *Fiscalidade. Revista de Direito e Gestão Fiscal*. Edição do Instituto Superior de Gestão, n. 38. Apr.-Jun., 2009, p. 78.
- SUNSTEIN, Cass R. Problems with rules. *California Law Review*, v. 84, n. 4, 1995.
- TAYLOR, Grantley and RICHARDSON, Grant. Incentives for corporate tax planning and reporting: empirical evidence from Australia. *Journal of Contemporary Accounting and Economics*, v. 10, issue 1, 2014.
- TEUBNER, Gunther. Introduction to autopoietic law. In: TEUBNER, Gunther. *Autopoietic law: a new approach to law and society*. Berlin, New York: de Gruyter, v. 1, 1987.
- TÔRRES, Heleno. *Direito tributário internacional: planejamento tributário e operações transnacionais*. São Paulo: RT, 2001.
- VALEMBOIS, Anne-Laure. *La constitutionalisation de l'exigence de securite juridique en Droit Français*. Paris: LGDY, 2005.
- VAN DEEMTER, Kees. *Not exactly. In praise of vagueness*. Oxford: Oxford University Press, 2010.
- WADE, H. W. R. The concept of legal certainty a preliminary skirmish. *Modern Law Review*, v. 4, n. 3, Jan. 1941, p. 185.
- WEBER, Max. *Economy and society: an outline of interpretive sociology*. Berkeley and Los Angeles: University of California Press, 1978.
- XAVIER, Alberto. *Os princípios da legalidade e da tipicidade da tributação*. São Paulo: RT, 1978.
- ZAGREBELSKY, Gustavo. *El derecho dúctil: ley, derechos, justicia*. Translated by Marina Gascón. 3. ed. Madrid: Editora Trotta S.A., 1999.
- ZANGARI, Ernesto; CAIUMI, Antonella and HEMMELGARN, Thomas. Tax uncertainty: economic evidence and policy responses. European Commission. *Taxation and Customs Union. Taxation Papers, Working paper n. 67*, 2017.