

The Improper Use of Country-by-Country Reports: Some Concerns on the Brazilian Approach to BEPS Action 13*

O uso impróprio da Declaração País-a-País: Algumas reflexões sobre a aproximação brasileira à Ação 13 do Projeto BEPS

Alexandre Siciliano Borges

LL.M in International Taxation, University of Leiden. Specialist in Finance and International Business, New York University. Specialist in Business Administration, EAESP-FGV-CEAG. Coordinator of the Summer Course of the International Tax Center in Brazil. Lawyer in São Paulo. E-mail: alexandre.siciliano@loboderizzo.com.br.

Caio Augusto Takano

PhD Candidate in Economic, Financial and Tax Law, University of São Paulo – USP. MSc in Economic, Financial and Tax Law, University of São Paulo – USP. Specialist in Tax Law, Brazilian Institute for Tax Studies – IBET. Member, Brazilian Antenna, DeSTaT Project. Lawyer, São Paulo. E-mail: takano@tpa.adv.br.

The authors would like to acknowledge the valuable support of Túlio Venturini de Souza, LL.B in connection with this article.

Abstract

Common among several “aggressive” tax planning schemes used by MNEs is the fact that the negotiating structures undertaken by taxpayers relied, to some extent, on the unique features of the transfer pricing rules of the countries involved. In this context, BEPS Action 13 proposes the development of rules that may enhance transparency for tax administrations through the improvement and standardization of transfer pricing documentation. However, a tax administration is not free to use information obtained through the exchange or implementation of country-by-country reports in order to pursue its own means and goals, according to its tax policy. The authors suggest that the use of this information remains bound to the concept of “appropriate use” and that an improper use of the information may lead to improper results with regard to domestic tax assessments or the evaluation of the relevant aspects of legal facts.

Keywords: base erosion and profit shifting (BEPS), transfer pricing, country-by-country report, Action 13, improper use, international tax law.

* This article was originally published in *Intertax* vol. 45. Kluwer Law International, issue 12, 2017.

Resumo

Comum entre vários esquemas de planejamento tributário “agressivo” usado pelas empresas multinacionais é o fato de que as estruturas empresariais empreendidas pelos contribuintes se basearam, em alguma medida, nas características únicas das regras de preços de transferência dos países envolvidos. Neste contexto, o BEPS Action 13 propõe o desenvolvimento de regras que possam aumentar a transparência para as administrações fiscais através da melhoria e padronização da documentação de preços de transferência. No entanto, a administração tributária não é livre para usar informações obtidas através do intercâmbio ou implementação da declaração país-a-país, para perseguir seus próprios objetivos de acordo com sua política fiscal. Os autores sugerem que o uso desta informação permanece vinculado ao conceito de “uso apropriado” e que um uso impróprio da informação pode levar a resultados impróprios em relação às avaliações fiscais nacionais ou à avaliação dos aspectos relevantes dos fatos jurídicos tributários.

Palavras-chave: Erosão da base tributável e transferência de lucros (BEPS), preços de transferência, declaração país-a-país, Ação 13, uso impróprio, tributação internacional.

1. Introduction: transfer pricing in the post-BEPS era

What role have transfer pricing rules played on the international stage in the last few years? At first glance, the question leads to the intense debate about whether transfer pricing rules were conceived to be an anti-avoidance mechanism to prevent profit shifting strategies or whether the main scope of such rules would fundamentally allow the allocation of taxable profits from activities carried out by a multinational enterprise (MNE) among its different entities in various countries¹. Yet, the question also has another possible – but troubling – answer from the perspective of tax administrations: despite having originally been created as an anti-avoidance mechanism, transfer pricing rules have often been used by taxpayers precisely as one of the main tools for so-called aggressive tax planning²⁻³, in the sense that MNEs are able to bene-

¹ Regarding this topic, see L. E. Schoueri. Arm's length: beyond the guidelines of the OECD. *69 Bull. Intl. Tax* n. 12, 2015, at 690.

² The translation of the term “aggressive tax planning” as “planejamento tributário agressivo” has merited fair criticism in literature, insofar as the term “agressivo” carries a negative connotation that is not necessarily found in the term “aggressive” (L. E. Schoueri. O Projeto BEPS: ainda uma estratégia militar. *A tributação internacional na era pós-BEPS: soluções globais e peculiaridades de países em desenvolvimento*. M. L. Gomes & L. E. Schoueri (ed.). Lumen Juris, 2016. vol. I, at 31).

³ Sometimes the concept of “aggressive tax planning” approaches the concept of “tax avoidance”. The approach is rather didactic, inasmuch as “fiscal elusion”, in turn, would be in the middle of the path between legitimate tax savings and fraud, not to be confused with the latter, as their acts are not concealed, hidden (dissimulation) or non-existent (absolute simulation); and not to be confused with the former, as the tax saving would be achieved by circumventing the normative

fit from a substantial decrease in their effective tax burden by seizing opportunities that arise from strict compliance with transfer pricing rules with regard to a particular international transaction (i.e., transacting at an arm's length price)⁴.

Common among several “aggressive” tax planning schemes used by MNEs – and which was very heavily reported by the international media⁵, giving rise to the phenomenon of “tax shaming”⁶ – is the fact that the negotiating structures undertaken by taxpayers relied, to some extent, on the unique features of the transfer pricing rules of the countries involved, or on the assignment of rights to intangible assets to be exploited in a low-tax jurisdiction, either because they relied on the legal effects of US cost sharing rules, or because of tax rulings granted by the tax administrations of certain countries. For this reason, Brauner asserts that reform of the international transfer pricing regime is not simply one among several challenges faced by the BEPS Project, but is rather the main one⁷.

Given the close relationship between transfer pricing rules (strongly based on the arm's length standard) and the phenomenon of base erosion and profit shifting (BEPS), it was up to OECD member countries and other participating countries in the BEPS Project to decide whether the ideal solution in this scenario would be to insist on the current transfer pricing regime based on the arm's length standard, or to move towards a break from of the current paradigm a shift towards one based on formulary apportionment⁸.

nature of the taxation rule, by an “indirect violation” of the tax law (L. F. M. Castro. *Planejamento tributário internacional: conceito de beneficiário efetivo nos acordos contra a bitributação*. São Paulo: Quartier Latin, 2015, at 251).

⁴ Y. Brauner. Transfer pricing in BEPS: first round – business interests win (but, not in knock-out). *43 Intertax 1*, 2015, at 72.

⁵ Andrei Cracea mentions, for example, some headlines from leading international newspapers in this regard: *The great corporate tax dodge* (Bloomberg); *But nobody pays that* (New York Times); *Secrets of tax avoiders* (The Times) and *Tax Gap* (The Guardian). A. Cracea. OECD actions to counter tax evasion and tax avoidance (2013): base erosion and profit shifting and the proposed action plan, aggressive tax planning based on after-tax hedging and automatic exchange of information as the new standard. *53 Eur. Tax n. 11*, 2013, at 565.

⁶ “Tax shaming” is the term used to describe the fervent social response and boycotts of certain companies by consumers, who viewed the international tax evasion as an immoral and unethical attempt by such companies not to pay their “fair share” of state costs, which in turn caused companies to invest in their image as “good payers of taxes” (C. A. Takano. *Erosão da base tributável e transferência de resultados: o caminho para o multilateralismo e novas perspectivas à soberania fiscal*. *Revista Direito Tributário Atual* vol. 32, 2014, at 64-65).

⁷ Brauner. Transfer pricing in BEPS, *supra* n. 4, at 72.

⁸ There has been intense debate in the international community about the feasibility of abandoning a transfer pricing regime based on the arm's length standard in favour of the adoption of a formula-based regime. Faced with the realization that there is a conceptual flaw in the current regime, several authors have argued that a formula-based regime would be more appropriate to assess the profits of transnational corporations. In this sense, *see e.g.* Y. Brauner. O valor segundo

Although one of the pillars of the OECD/G20 BEPS Project is the preference for a holistic and innovative approach to problems that have not been adequately addressed by current international tax rules and legal concepts⁹, the OECD has maintained its firm position to reject – at least at first glance¹⁰ – the adoption of formulary apportionment, once again affirming the arm's length standard as the cornerstone of the transfer pricing regime¹¹. Only a few recommendations were made to improve the current transfer pricing regime, aiming to align the result of the application of transfer pricing rules with the value creation principle (for example, an alignment between taxation and substance)¹² and, mainly, the development of rules that would prevent BEPS that arises as the result of moving intangibles among group members (Action 8), transferring risks among, or allocating excessive capital to group members (Action 9) and engaging in transactions which would not, or would only very rarely, occur between third parties (Action 10)¹³.

The reform proposals were nonetheless not limited to the application criteria of the transfer pricing rules, but also sought to cover the means of obtaining relevant information to be used for the scrutiny of transnational companies by the tax administrations. This approach is consistent with the very insight of the BEPS Project that unilateral measures – however substantial they may be – are insufficient to effectively prevent BEPS issues, and which calls for cooperation among the different countries¹⁴ and a shift towards a

o espectador: a avaliação de intangíveis para fins de preços de transferência. *Tributos e preços de transferência*. L. E. Schoueri (ed.). São Paulo: Dialética, 2009. vol. III, at 267-303; R. S. Avi-Yonah & I. Benschalom. Formulary apportionment: myths and prospects. *Public Law and Legal Theory Working Paper Series*, 221. Michigan Law, Oct. 2010; R. S. Avi-Yonah & K. A. Clausing. *Reforming corporate taxation in a global economy: a proposal to adopt formulary apportionment*. The Brookings Institution, June 2007. On the other hand, by questioning the arbitrariness in the identification of the criteria of the formulas, as well as their inability to measure with some precision the contributive capacity manifested by each one of the companies that make up the economic group, other authors have defended the maintenance of the current regime, already well-known and adopted in several countries, proposing not its abandonment, but rather its improvement. In this sense, see Schoueri. Arm's length, *supra* n. 1, at 690.

⁹ Y. Brauner. BEPS: an interim evaluation. *6 World Tax J.* 1, 2014, at 13-14.

¹⁰ Some authors see in the BEPS Project an opening for the future introduction of a formula-based transfer pricing scheme. For a critical approach to this openness, see R. Robillard. BEPS: is the OECD now at the gates of Global Formulary Apportionment? *43 Intertax* 6/7, 2015, at 447.

¹¹ This choice by OECD member countries to maintain a regime based on the arm's length standard was severely criticized by Yariv Brauner because of the inconsistency of the solutions proposed in the BEPS Project with its fundamental principles (Y. Brauner. What the BEPS? *16 Florida Tax Rev.* 2, 2014, at 96).

¹² G. Kofler. The BEPS Action Plan and transfer pricing: the arm's length standard under pressure? *Brit. Tax Rev.* 5, 2013, at 664.

¹³ A more in-depth analysis of all BEPS actions related to transfer pricing is beyond the scope of this article. On the subject, see Kofler, *supra* n. 12, n. 5, at 646.

¹⁴ Brauner. BEPS: an interim evaluation, *supra* n. 9, at 1-4.

complex international tax regime based on multilateralism¹⁵. As Brauner suggests, this involves “a shift of paradigm towards a more collaborative regime based on cooperation and coordination of tax policies”¹⁶.

In this context, BEPS Action 13 proposes the development of rules that may enhance transparency for tax administrations through the improvement and standardization of transfer pricing documentation. It also paves the way for the implementation of an effective and multilateral exchange of information in tax matters between various jurisdictions in order to monitor transfer pricing issues, allowing each country to fully ascertain the global allocation of income, economic activity and taxes paid by transnational corporations¹⁷.

Section 2 of this article analyses the typical features of the model country-by-country report suggested in BEPS Action 13 in order to identify the main concerns of the OECD in the coordinated implementation of this measure among the various countries involved. If, on the one hand, the requirement to provide sensitive information about the activity and global activities of transnational corporations represents an essential need for tax administrations in order to prevent BEPS issues and to suggest proposals for a change in the current international transfer pricing regime based on the arm’s length standard, on the other hand, it has also raised concerns for taxpayers, especially in countries, such as Brazil, where there is not a tradition of an open relationship between taxpayers and the tax administration, with a view to developing mutual trust and promoting legal certainty (enhanced relationship)¹⁸. Taxpayer concerns are related not only to the compliance costs associated with this new ancillary tax obligation, but fundamentally to the potential for improper use and failure to protect such information – information that is sometimes particularly sensitive in the business activities of an MNE.

This concern has not gone unnoticed by the OECD, which emphasized in the BEPS 13 Reports that tax administrations should not only take into account the compliance costs arising from the implementation of country-by-country reporting, but should also ensure that obtained information will be used specifically for the purpose of examining transfer pricing risks and other BEPS-related risks¹⁹. However, the OECD does not offer any con-

¹⁵ P. Pistone. Coordinating the action of regional and global players during the shift from bilateralism to multilateralism in international tax law. *6 World Tax J.*, 2014, at 3.

¹⁶ Brauner. What the BEPS?, *supra* n. 11, at 59.

¹⁷ OECD. *Action plan on base erosion and profit shifting*. OECD, 2013.

¹⁸ Regarding the concept of “enhanced relationship” and the challenges for its implementation, see J. P. Owens. The “enhanced relationship”: a challenge for revenue bodies and taxpayers. *48 Eur. Tax n.7*, 2008, at 351.

¹⁹ OECD. Transfer pricing documentation and country-by-country reporting – Action 13: 2015 final report. *OECD/G20 Base Erosion and Profit Shifting Project*. OECD Publishing, 5 Oct. 2015, at 22-23.

crete proposal to deal effectively with the situation where a country uses country-by-country reports for purposes that go beyond its own risk assessment purpose. It is therefore reasonable to expect tax administrations to use the information obtained from the exchange of country-by-country reports for a variety of purposes, including to improve their tax inspection capacity in relation to other tax matters (i.e., related to neither transfer pricing nor BEPS), regardless of what the OECD recommends²⁰.

Section 3 of this article considers what constitutes an “improper use” of country-by-country reports and the consequences thereof. In the authors’ opinion, a tax administration is not free to use information obtained through the exchange or implementation of country-by-country reports in order to pursue its own means and goals, according to its tax policy. The use of this information remains bound to the concept of “appropriate use”, which is already embodied in the model legislation and the model competent authority agreements that are to be used to facilitate implementation of the exchange of country-by-country reports, both of which a reset forth in the Country-by-Country Reporting Implementation Package²¹ under Action 13.

Thus, the improper use of information (i.e., that which exceeds the limits imposed by the OECD) implies relevant legal consequences. The authors assert that the “improper use” of country-by-country reports (i.e., use beyond assessing high-level transfer pricing risks or BEPS-related risks, and, where appropriate, for economic and statistical analysis) leads to the delegitimization of the use of those reports and weakens the coherence and transparency envisaged by the BEPS Project. Furthermore, an improper use of the information may lead to improper results with regard to domestic tax assessments or the evaluation of the relevant aspects of legal facts.

Section 4 analyses the implementation of country-by-country reporting in Brazil. The Brazilian case offers a practical yet academically noteworthy example of rules that were implemented inconsistently with the OECD recommendations. The Brazilian approach to transfer pricing law is unique and diverges from the OECD Transfer Pricing Guidelines, yet the Brazilian tax administration is committed to adhering to the BEPS Action 13 recommendations, even though the information provided by taxpayers in country-by-country reports is of little use for transfer pricing assessment under Brazilian rules. According to the restrictions set forth in the OECD recommendations, technically the Brazilian authorities could “appropriately” use the information gathered from country-by-country reports only to assess BEPS-related risks and

²⁰ Brauner. Transfer pricing in BEPS, *supra* n. 4, at 83.

²¹ OECD. Action 13: country-by-country reporting – implementation package. *OECD/G20 Base Erosion and Profit Shifting Project*. OECD Publishing, 8 June 2015.

for economic and statistical analysis. Thus, one could expect that the main use of country-by-country reports would be to provide means to foster the exchange of information with the tax administrations of other countries. This perspective is nonetheless utopian.

In addition, it is particularly worrisome that Brazilian authorities have implemented country-by-country reporting in compliance with all recommended clauses of the model legislation, save one: article 6, which provides guidelines for the use and confidentiality of information contained in country-by-country reports. This approach has raised some concerns, especially for taxpayers, with regard to the confidentiality of information and legal certainty.

2. The recommendations of BEPS Action 13 in the context of international exchange of information in tax matters

The asymmetry of information on international transactions or structures available to tax administrations and taxpayers is closely related to the BEPS phenomenon. In this scenario, the exchange of information for tax purposes among tax administrations has been regarded as a valuable tool against “aggressive” tax planning and evasive taxpayer practices²². There is a consensus that tax administrations should actively cooperate with each other to build institutions and an international network that will allow them to efficiently execute their tax laws, especially in a context of intense mobility of capital and the means of production²³. Not surprisingly, several measures taken in the last decades with regard to international taxation have denounced an intense movement toward a new world paradigm of fiscal transparency²⁴.

A greater standard of transparency is also relevant for the application of transfer pricing rules. As specific anti-tax avoidance rules, they seek to prevent transnational corporations from taking advantage of this asymmetry of information which guarantees them a privileged position vis-à-vis tax administrations and other taxpayers to artificially shift their profits to other (low-tax) jurisdictions and, thereby, reduce the amount of tax due in a given jurisdiction.

Traditionally, transfer pricing law has been built around the arm’s length standard (or rule of non-favouritism)²⁵, which allows a comparison of two

²² S. A. Rocha. *Troca internacional de informações para fins fiscais*. São Paulo: Quartier Latin, 2015, at 77-82.

²³ M. Stewart. Transnational tax information exchange networks: steps towards a globalized, legitimate tax administration. *4 World Tax J.* 2, 2012, at 152.

²⁴ J. P. Owens. Moving towards better transparency and exchange of information on tax matters. *63 Bull. Intl. Tax* n. 11, 2009, at 662-663.

²⁵ P. A. Barreto. *Imposto sobre a renda e preços de transferência*. São Paulo: Dialética, 2001, at 102-104.

transactions which, although performed under different circumstances, should be taxed in a similar way²⁶. In this sense, the arm's length standard is "an immediate consequence of the principle of equality and ability to pay principle"²⁷. Transfer pricing law intends to prevent MNE from mispricing transactions, thereby "re-establishing equality among taxpayers by allocating income according to their ability to pay, irrespective of their power to influence the prices of controlled transactions"²⁸.

As Schoueri asserts, such rules entail a legal fiction and a legal presumption: (i) a legal fiction, as it requires that related parties be taxed in the same way that independent parties would be taxed in comparable transactions, i.e., transfer pricing law treats members of an MNE as separate entities and (ii) a legal presumption, as it assumes that independent parties would – in an arm's length situation – negotiate according to the methods prescribed (e.g., cost-plus method, resale price method, comparable uncontrolled price method)²⁹. Nevertheless, the use of the presumption in transfer pricing law does not eliminate the need to collect relevant information for the identification of the arm's length price, especially for those methods based on comparability.

This is precisely the relevance of "transfer pricing documentation" in the systematic rules suggested by the OECD. Transnational companies are given the possibility to use the most varied evidence to demonstrate that the criteria used to determine their price (risks assumed, functions performed and assets used, according to the OECD Guidelines, or even characteristics of the consumer market in which the transactions took place)³⁰ are consistent with those that would be used in a similar transaction between independent parties. In this sense, transfer pricing documentation is more useful and relevant for jurisdictions adopting a transfer pricing scheme closest to the model suggested by the OECD³¹.

Yet, due to the international nature of transactions subject to transfer pricing oversight, tax administrations find it difficult – by means of the ancillary duties set forth in the domestic law of their countries – to obtain relevant

²⁶ Regarding this specific topic, see A. S. Borges. *Comparability in the pharmaceutical industry for transfer pricing purposes*. Leiden University School of Law Working Paper (Aug. 2002), available at <<http://ssrn.com/abstract=400281> or <http://dx.doi.org/10.2139/ssrn.400281>>.

²⁷ L. E. Schoueri. *Preços de transferência: no direito tributário brasileiro*. 3. ed. São Paulo: Dialética, 2013, at 17 (authors' translation).

²⁸ Schoueri. Arm's length, *supra* n. 1, at 695 ("It is better to be roughly right than precisely wrong" (John Maynard Keynes)).

²⁹ Schoueri. Arm's length, *supra* n. 1, at 697-698.

³⁰ Regarding this topic, see Schoueri. *Preços de transferência*, *supra* n. 27.

³¹ V. Bentolila & F. L. Moreira. O Plano de Ação 13 do BEPS: reflexões sobre o seu conteúdo e aplicação à realidade brasileira. *A tributação internacional na era pós-BEPS*, *supra* n. 2, vol. III, at 150-151.

information that provides a global view of the realized transaction and the means to accurately verify the consistency of the price agreed and the documentation submitted by the taxpayer, or even to identify BEPS situations.

In this context, BEPS Action 13 recommends the introduction of tax documentation (master file, local file and country-by-country report) that allow jurisdictions to ascertain the economic activity of MNEs beyond each country's own territorial limits, by allowing access to information supplied in a standardized and consistent manner for transfer pricing assessment purposes, regardless of each country's individual political power³². Such measures intend to increase the level of global tax transparency and create conditions in which tax administrations can carry out more effective income tax-related inspection procedures. The idea is that information related to high-level transfer pricing risks collected by one jurisdiction could be used to alert other tax administrations about, for example, the fact that some taxpayers are engaging in a substantial volume of activities in their territory, with significant profit margin but subject to a very low tax burden³³.

Strictly speaking, the requirement that taxpayers file a type of international tax return which would then be exchanged among tax administrations is not new, and some international standards for country-by-country reporting have already been developed for various economic sectors (mainly the extractive sector) within the European Union, albeit with a narrower scope (i.e., domestic law) or content (i.e., reporting payments to government entities related to particular countries and projects)³⁴. However, the BEPS Project has the merit of proposing the introduction of a consistent and much broader reporting system, intertwined with the information exchange network that has been built in recent years from the joint efforts of G20 countries and the OECD³⁵, allowing several tax administration to have access to relevant information to assess transfer pricing risks, far beyond what would have been achieved solely under their domestic law.

The OECD recommends a standardized three-tiered approach to transfer pricing documentation: (i) a *master file* containing standardized information relevant for all MNE group members (i.e., an overview of the MNE group operations, including the nature of its global business operations, its overall transfer pricing policies and its global allocation of income and economic activity), (ii) a *local file* referring specifically to material transactions of the local

³² Brauner. Transfer pricing in BEPS, *supra* n. 4, at 80.

³³ Brauner. Transfer pricing in BEPS, *supra* n. 4, at 82.

³⁴ M. A. Grau Ruiz. Country-by-country reporting: the primary concerns raised by a dynamic approach. *68 Bull. Intl. Tax* n.10, 2014, at. 557-558.

³⁵ Regarding this topic, see J. P. Owens. Tax transparency: the full Monty. *68 Bull. Intl. Tax* n. 9, 2014, at 512-514.

taxpayer (i.e., detailed information relating to specific intercompany transactions) and (iii) a *country-by-country report* containing certain information relating to the global allocation of the MNE's income and taxes paid, together with certain indicators of the location of economic activity within the MNE group³⁶.

Although the three documents are equally relevant in the OECD proposal, the country-by-country report has been assigned greater importance within the international community, especially due to its innovative proposal for the sharing of sensitive information related to the transfer pricing assessment between different jurisdictions. It consists of an annual report, in which MNEs must provide the tax administration in the residence jurisdiction of their final controller with information regarding the location of their activities, overall income allocation and taxes paid and due, and also to identify in which jurisdictions the group companies operate, which entities within the group operate in those jurisdictions and the economic activities they perform³⁷. Obviously, in the model country-by-country report, a series of different information (for example, the number of employees, tangible assets, intellectual property) is required, however an in depth analysis and examination of which are beyond the scope of this article.

Nonetheless, two considerations about the material content of the information required in the model country-by-country report proposed in the BEPS Project seem relevant. First, the level of detail required in the final model country-by-country report is substantially lower than that presented in the BEPS Action 13 Discussion Draft³⁸, which is a very positive aspect, especially in light of concerns over compliance costs. Second, while the OECD's discourse has been to reaffirm, once again, the supremacy of the arm's length standard (and the denial of all other methods clearly incompatible with it), it is not clear whether the adoption in future of other models of transfer pricing, as a possible means to prevent erosion of the international tax base, are discarded. As Brauner argues, the content of the recommended tax documentation under BEPS Action 13 (especially the country-by-country report) is inconsistent with the OECD's own discourse: transfer pricing rules based on the arm's length standard compare transactions, yet the country-by-country report does not provide any information about the individual transactions carried out by related companies³⁹.

³⁶ OECD. Action 13 final report, *supra* n. 19, at 14-16.

³⁷ See Tables 1 and 2 of Model template for the Country-by-Country Report. OECD. Action 13 final report, *supra* n. 19, at 29-30.

³⁸ Brauner. Transfer pricing in BEPS, *supra* n. 4, at 82.

³⁹ In the view of Yariv Brauner, this inconsistency would undermine the OECD's true intention in establishing country-by-country reporting to prepare the conditions for a future plan to introduce formulary apportionment. Brauner. Transfer pricing in BEPS, *supra* n. 4, at 83.

One possible explanation would be that the OECD itself limits the use of the information from country-by-country reports to purely ancillary purposes, suggesting the use of such information for risk and/or economic analysis related to transfer pricing assessment or for evaluating others BEPS-related risks. According to the Action 13 Final Report, such information may not, however, take the place of a detailed transfer pricing analysis of individual transactions and prices based on a full functional analysis and a full comparability analysis, nor be used as conclusive evidence that transfer prices are or are not appropriate⁴⁰. Thus, one could argue that it is not necessary that taxpayers provide a tax administration with specific information related to each transaction in the country-by-country report. On the other hand, while it is not possible to predict the future of transfer pricing law in the international arena, the OECD has sought to dispel speculation about the possible use of such information for the implementation of a method based on *formulary apportionment*.

The use of information provided in country-by-country reports is restricted to specific purposes (so-called “appropriate use”): jurisdictions are supposed to use the country-by-country reports merely to assess high-level transfer pricing risk and other BEPS-related risks. In this endeavour, the OECD has recommended the implementation of several measures to restrict the use of information, in both (i) the model domestic legislation for the implementation of country-by-country reporting and (ii) its models for the exchange of such declarations in multilateral agreements (the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports), bilateral agreements (the Competent Authority Agreement on the Exchange of Country-by-Country Reports on the Basis of a Double Tax Convention) or agreements for the exchange of tax information (the Competent Authority Agreement on the Exchange of Country-by-Country Reports on the Basis of a Tax Information Exchange Agreement).

Yet, in the absence of concrete proposals by the OECD to deal effectively with those jurisdictions that use information obtained for other than the envisaged appropriate use, it is reasonable to expect tax administrations to use the information obtained from the exchange of country-by-country reports for various purposes, regardless of what the OECD recommends⁴¹, including in order to improve its tax inspection capacity. As will be seen below, this possibility is not merely theoretical. Indeed, it is precisely the Brazilian case, which – at least normatively – has no express limitation on the use of the information obtained.

⁴⁰ OECD. Action 13 final report, *supra* n. 19, at 16.

⁴¹ Brauner. Transfer pricing in BEPS, *supra* n. 4, at 83.

Another concern that is also strongly present in the BEPS Action 13 documents concerns the compliance costs involved. If, on the one hand, the success of the BEPS Project depends on the highest possible level of adherence by both tax administrations and taxpayers in order to provide for a more comprehensive network of tax information available to the different jurisdictions, on the other hand it is also necessary that the cost of spontaneous taxpayer cooperation be as low as possible.

Indeed, the idea of minimizing costs of taxation as a means of encouraging taxpayers to fulfil their tax obligations and thereby increase economic efficiency, can be found in the thought of Adam Smith, embodied in his fourth maxim: “Every tax ought to be so contrived as both to take out and to keep out of the pockets of the people as little as possible, over and above what it brings into the public treasury of the state”⁴². If this is the case, once there is an overlapping relationship between compliance costs and voluntary compliance with taxpayer obligations, it is justified to balance the information needs of the tax administration against the compliance costs and the tax burden imposed on taxpayers’ business activities⁴³. Thus, the OECD was correct (i) to decide to impose country-by-country reporting obligations only on members of economic groups with annual gross revenue of at least EUR 750 million (or equivalent in the currency of the country) and (ii) to reduce the complexity of such reporting vis-à-vis the Action 13 Discussion Draft.

There is also a concern – common to any measure inserted in the context of the international exchange of information for tax purposes – regarding the protection of data obtained⁴⁴. In this context, the protection of the confidentiality information contained in country-by-country reports should be at least at the same level as if such information were obtained through an information exchange agreement (bilateral or multilateral) that complies with the internationally accepted standard of exchange of information, reviewed by the Global Forum on Transparency and Exchange of Information for Tax Purposes, especially as regards, for example, the use of information, persons to whom the information will be disclosed and access conditions⁴⁵.

In addition, in the context of automatic exchange of information of country-by-country reports, it seems relevant to raise the issue of sovereignty in the exchange of information among tax administrations. According to Schoueri and Barbosa, “if one accepts the reasoning that a taxpayer may not oppose a

⁴² A. Smith. *A riqueza das nações*, at 1047-1048, translation by A. A. Rodrigues & E. Ostrensky. Wmf Martins Fontes, 2013. vol. 7, sec. II.

⁴³ OECD. Action 13 final report, *supra* n. 19, at 10.

⁴⁴ Regarding this topic, see T. Schenk-Geers. *International exchange of information and the protection of taxpayers*. Wolters Kluwer, 2009, at 159-178; Rocha, *supra* n. 22, at 169-231.

⁴⁵ OECD. Action 13 final report, *supra* n. 19, at 22.

requirement made by the state to whose jurisdiction it is subject, this does not immediately imply that such submission will extend to similar requirements made by the other state⁴⁶. Thus, it “does not seem to be appropriate that a state may give away to another state the information it has obtained by virtue of the exercise of its jurisdictional power, without the consent and participation of the citizen-taxpayer concerned⁴⁷”.

In summary, there are a few challenges that circumscribe the implementation of BEPS Action 13. The adoption of a new transfer pricing documentation paradigm that enables improvements in the current standard of exchange of information between the states undoubtedly reduces the space for fiscal structures that take advantage of transfer pricing laws. Nonetheless, the legitimacy and effective adherence by the international community to such new paradigm depends to a large extent on mechanisms for ensuring (i) the appropriate use of information, (ii) the confidentiality of information and (iii) the compliance costs involved. The success of the measures proposed in BEPS Action 13 relies exclusively on the establishment of an enhanced relationship between the tax administration and the taxpayer, a core aspect of all BEPS Actions that intend to foster voluntary fulfilment of tax obligations and a reduction of aggressive tax planning opportunities⁴⁸.

3. The improper use of country-by-country reports

In international tax law, the meaning of the term “improper use” is often connected to the concept of “abuse”. Traditionally, the discussion is related to the question as to what constitutes an “improper⁴⁹ use of income tax treaties⁵⁰ – especially with regard to *treaty shopping*⁵¹ – and what are the legal consequences thereof. In this context, the concept of “improper use” is relevant, as in such cases a particular state may deny to the taxpayer (for example, a non-resident party in any of the contracting states) a given benefit of a tax

⁴⁶ L. E. Schoueri & M. C. Barbosa. Transparency: from tax secrecy to the simplicity and reliability of the tax system. *Brit. Tax Rev.* 5, 2013, at 673-674.

⁴⁷ Schoueri & Barbosa, *supra* n. 46, at 674.

⁴⁸ R. T. Santos. A critical evaluation of the OECD's BEPS Project. *79 Tax Notes Intl.* 3, 2015, at 245.

⁴⁹ The concept of “improper use” can be found in OECD BEPS Action 6 reports. OECD. Preventing the granting of treaty benefits in inappropriate circumstances – Action 6: 2014 deliverable. *OECD/G20 Base Erosion and Profit Shifting Project*. OECD Publishing, 16 Sept. 2014.

⁵⁰ The purposes of tax treaties that have been traditionally recognized by the OECD are avoiding double taxation and preventing tax evasion by the promotion of international cooperation in tax matters. R. L. Reinhold. What is tax treaty abuse? (is treaty shopping an outdated concept?). *53 Tax Lawyer* 3, 2000, at 663, 673-675.

⁵¹ For a comprehensive study of treaty shopping, see L. E. Schoueri. *Planejamento fiscal através de acordos de bitributação: treaty shopping*. São Paulo: RT, 1995.

treaty if the clauses of that treaty are being “improperly” or “abusively” used⁵². Although an in-depth analysis of this topic is beyond the scope of this article, it should be emphasized that the OECD has suggested that an “improper use” (i.e., beyond its purposes) entails the possibility that a contracting state could deny the benefits of an applicable tax treaty.

This idea seems relevant also to the discussion of the suggested measures in BEPS Action 13. As the OECD set forth an “appropriate use” of information obtained from country-by-country reports – which consists in the analysis of risks related to transfer pricing and other BEPS – related risks, the question arises as to whether the detection of an “improper use” of such information would also imply legal consequences and, if so, what they would be. Accordingly, by reasoning in parallel with the discussion in BEPS Action 6, the question arises as to whether an “improper use” of a particular instrument (country-by-country report) could deny its beneficiary (the tax administration) from using that information obtained from such reports which would not otherwise be available to that tax administration.

The OECD provides no straight answer to this question. Nonetheless, a clear concern can be found in the Action 13 Final Report regarding the prevention of the use of information obtained from country-by-country reports for a purpose other than those established by the OECD:

“Jurisdictions should use appropriately the information in the Country-by-Country Report template in accordance with paragraph 25. In particular, jurisdictions will commit to use the Country-by-Country Report for assessing high-level transfer pricing risk. Jurisdictions may also use the Country-by-Country Report for assessing other BEPS related risks. Jurisdictions should not propose adjustments to the income of any taxpayer on the basis of an income allocation formula based on the data from the Country-by-Country Report. They will further commit that if such adjustments based on Country-by-Country Report data are made by the local tax administration of the jurisdiction, the jurisdiction’s competent authority will promptly concede the adjustment in any relevant competent authority proceeding. This does not imply, however, that jurisdictions would be prevented from using the Country-by-Country Report data as a basis for making further enquiries into the MNE’s transfer pricing arrangements or into other tax matters in the course of a tax audit.”⁵³

This concern had a direct impact on the models domestic legislation, as well as the competent authority agreement set forth in the BEPS Action 13

⁵² Regarding this topic, see P. A. Barreto & C. A. Takano. The prevention of tax treaty abuse in the BEPS Action 6: a Brazilian perspective. *43 Intertax* 12, 2015, at 825.

⁵³ OECD. Action 13 final report, *supra* n. 19, at 22, para. 59.

Final Report, for example, in article 6 of the model legislation related to country-by-country reporting (for its implementation in domestic tax law) and in section 5 of the models for the exchange of country-by-country reports on a multilateral basis (the Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports) or bilateral basis (the Competent Authority Agreement on the Exchange of Country-by-Country Reports on the Basis of a Double Tax Convention or the Competent Authority Agreement on the Exchange of Country-by-Country Reports on the Basis of a Tax Information Exchange Agreement).

Accordingly, in all the models suggested by the OECD in the Action 13 Final Report, the legitimate purpose of obtaining the information in the country-by-country reports – which was considered by the OECD to be an appropriate use – is limited to the use of the obtained information for purposes of a high-level transfer pricing risk assessment and other BEPS-related risk assessment, as well as for economic or statistical analyses that could assist tax inspections.

On the other hand, the OECD expressly regards it as improper to use the information as a substitute for a detailed transfer pricing analysis of individual transactions based on the arm's length standard; as conclusive proof that the prices charged by related parties are appropriate or not; or as justification for transfer pricing adjustments based on formulaic methods. In the authors' opinion, any use of the information obtained in the country-by-country report that goes beyond the purposes that justified the creation of such reports should be regarded as inappropriate, thus not being restricted to those situations specified in the OECD report itself. Therefore, the use of information for primarily local tax enforcement purposes, i.e., focusing on the domestic law of a particular state, also falls under the concept of improper use.

This reasoning does not infringe the OECD assertion that jurisdictions should also not be prevented from using the country-by-country report data as a basis for making further enquiries “into the MNE's transfer pricing arrangements or into other tax matters in the course of a tax audit”. Although the meaning of the expression “in other tax matters in the course of a tax audit” can be quite broad, a narrower construction is necessary in its interpretation – otherwise the exception provided in the rule will undermine the rule itself. In other words, if the appropriate use of information is restricted to its use in the case of risk analysis related to transfer pricing and other BEPS-related issues (i.e., cross-border situations), the meaning of the expression “other tax matters” should necessarily refer to cross-border situations. It would be inconsistent to imagine that the OECD would have, first, restricted the use of the information to cross-border transactions or structures, only then to allow its unrestricted use in “any other tax issue”, including for domestic tax purposes. Therefore, the concept of improper use of information from coun-

try-by-country reports covers not only those situation made explicit by the OECD, but all uses of the information obtained from such reports that do not relate to transfer pricing risks or cross-border situations that imply base erosion and profit shifting.

Notably, information obtained from country-by-country reports, whilst adequate for statistical and comparative purposes, may be inadequate or inaccurate for use in domestic tax inspections, for example, to verify any inconsistencies in the information provided by the taxpayer through other ancillary tax obligations levied solely for domestic tax law purposes. Two examples from the Brazilian perspective illustrate why one should avoid the temptation to use information obtained from country-by-country reports for purposes other than those considered as appropriate by the OECD.

Taxpayers in Brazil are required to file a tax return titled the Declaration of Federal Tax Debt Credits (*Declaração de Débitos e Créditos Tributários Federais*, hereinafter “the Declaration”), in which the taxpayer is supposed to declare its amounts of revenue each year for tax purposes. Even though both the Declaration and the country-by-country report seek information regarding the annual amount of revenue, it is expected that different values will be identified in each one of them. Yet, such differences should not necessarily be deemed to indicate any inconsistency in the information provided in each tax return, rather such differences are natural outcomes of the use of different methods to determine the “annual revenue”. While the taxpayer must take into account only taxable revenue (excluding, for example, export revenue) for purposes of the Declaration, all revenue is to be included in country-by-country report according to the IFRS rules, as recently stated in the OECD Guidance on the Implementation of Country-by-Country Reporting: BEPS Action 13⁵⁴. Differences could also occur, for example, due to the timing of the recognition of revenue: for purposes of the Declaration, revenue is considered earned upon the issuance of the invoice, whereas for accounting purposes – and for the country-by-country report – revenue is recognized only upon delivery of the goods or services.

These examples lead to a significant conclusion: an improper use of the information obtained from country-by-country reports also leads to improper results with regard to the assessment of domestic tax. This seems nevertheless natural and obvious, as the information provided in the country-by-country

⁵⁴ “All revenue, gains, income, or other inflows shown in the financial statement prepared in accordance with the applicable accounting rules relating to profit and loss, such as the income statement or profit and loss statement, should be reported as Revenues in Table 1. [...] Comprehensive income/earnings, revaluations, and/or unrealized gains reflected in net assets and the equity section of the balance sheet should not be reported as Revenues in Table 1.” (OECD. *Guidance on the implementation of country-by-country reporting*: BEPS Action 13. OECD Publishing, Set. 2017, at 5.

reports is not adequate – or even envisaged – to measure the legal aspects of a taxable event. Thus, it is reasonable to conclude that an improper use of country-by-country reports (“normative instrument”) should be sufficient to deny the beneficiary there from (the tax administration) from using the information obtained (the “benefit”) from such reports for such purposes.

In any case, despite OECD suggestions to limit the use of information to certain situations and purposes, there are no effective proposals by the OECD to effectively restrain countries from inappropriately using country-by-country report information in either the model legislation or the model competent authority agreements.

In addition, the legitimacy of a notification of an improper use of country-by-country report information is not from the taxpayers that are actually affected by such improper use, but from the tax administrations of the contracting states, either to the other contracting state or to a coordinating body secretariat (in the case of a multilateral agreement). Although the clauses in section 5 of the model competent authority agreement recommended by the OECD suggest that either the state that fails to comply with them or the other contracting states may notify the improper use of the information, this solution is rather disappointing. Why would the non-compliant state be interested in spontaneously disclosing non-compliance, thus undermining its own tax inspection procedures? On the other hand, how will the other contracting states be able to prove that the tax administration of the other state is using the information for inappropriate purposes? Even assuming that such identification is possible, only in a few cases would the notification be noteworthy, as domestic tax enforcement practices rarely imply any harm to the domestic tax policy of other states.

However, despite the difficulty in effectively imposing sanctions on, or demanding remedial actions from the state that acts in disregard of the OECD guidance – as in the case of almost all international relations, the fact that country-by-country reporting was created to achieve a particular purpose is not negligible. It indicates that, in order to comply with the BEPS Project, countries should avoid improper uses of the information. This means that the legitimacy of the implementation of country-by-country reporting in each country is closely interrelated to an appropriate use of the information obtained from such tax reporting.

4. The Brazilian approach to BEPS Action 13

The concept of “appropriate use” of country-by-country reports (i.e., for transfer pricing or BEPS-related risks analysis) is a core requirement for the use of the information obtained through the implementation of country-by-country reporting in its own domestic law or through the exchange of country-by-country reports with other states. This conclusion is simply

straightforward in the OECD recommendations under the BEPS Project. However, as the OECD recommendations do not have binding normative force, the question arises as to whether such a limitation would still apply to countries which, although implementing country-by-country reporting, do not establish in their domestic law something equivalent to article 6 of the model legislation related to country-by-country reporting, ensuring that the obtained information will be used for purposes recognized as appropriate by the OECD.

This question is not a merely hypothetical one, but rather reflects the Brazilian case. Although it is still too early to categorically state how the Brazilian Internal Revenue Service will use the information obtained from country-by-country reports⁵⁵, the deliberate choice not to adopt a clause that permits only the appropriate use of the information, has been giving rise to some concerns about the possible improper use of information in disregard of the OECD guidance in BEPS Action 13.

Country-by-country reporting was established in Brazilian law through Normative Instruction 1.681/16, under the justification that it was necessary in order to accomplish “one of the commitments assumed by Brazil in the BEPS Project”. According to the explanatory memorandum of Public Consultation 11/2016, which preceded the afore-mentioned Normative Instruction, the introduction of country-by-country reporting was justified as providing a mechanism to tackle “aggressive” tax planning and tax evasion practices, and also as defending “the interests of its society” and protecting “the national economy, promoting respect for free competition and the just and equal application of the rules of taxation”⁵⁶.

Brazilian law on country-by-country reporting faithfully reflects the recommendations and model legislation suggested by the OECD in BEPS Action 13, albeit with a single, but extremely relevant difference: there is no legal provision with the same content as article 6 of the OECD model domestic legislation. Thus, there are no references to “confidentiality”, “data safeguards” or “appropriate use” in Brazilian law on country-by-country reporting. Does this mean that the Brazilian tax administration could use the information for any purpose, including purposes other than those agreed upon as legitimate and appropriate by the OECD within the scope of the BEPS Project? In the authors’ opinion, even if no provision were enacted that expressly limits the use of information obtained from country-by-country reports, there is no ab-

⁵⁵ The declaration becomes mandatory only on 31 December 2017, yet refers to the 2016 calendar year.

⁵⁶ See <<https://idg.receita.fazenda.gov.br/sobre/consultas-publicas-e-editoriais/consulta-publica/arquivos-e-imagens/consulta-publica-rfb-no-11-2016.pdf>>.

solite freedom for the tax administration to use the information. As stated above, the legitimacy of the implementation of country-by-country reporting in line with the BEPS Project is closely related to the appropriate use of the obtained information.

Nonetheless, one could question why the Brazilian authorities would adopt a model that envisages obtaining information to identify the arm's length price in an international transaction (providing the basis for analysis of functions and risks), if Brazilian transfer pricing law deviates from OECD guidance (and arguably the rest of the world) and is based heavily on the use of pre-determined margins instead of an in-depth analysis of comparable transactions.

Accordingly, transfer pricing documentation plays a less important role in Brazil than in jurisdictions that have built their transfer pricing law around the arm's length standard. Brazilian transfer pricing law is based on not only a legal fiction that related parties would act as independent parties in similar situations and a legal presumption that independent parties would negotiate in accordance with the established methods, but also a second legal presumption that the parties have negotiated based on legal profit percentages (fixed margins)⁵⁷.

Therefore, it is not immediate that the information provided in country-by-country reports will be necessary or even useful for the application of the transfer pricing rules, nor for evaluating transfer pricing risks under Brazilian law. Considering the requested information (jurisdiction, income from unrelated parties and related parties, total income, profit or loss before income tax, income tax paid and due, capital stock, retained earnings, tangible assets – except cash and cash equivalents – and number of employees), it is difficult to imagine how it could be useful for transfer pricing assessment within the current configuration of Brazilian transfer pricing law.

One possible reading would be that country-by-country reporting foresees an approach by Brazilian transfer pricing rules to the OECD guidelines. Whilst one should not expect a complete rupture from the current transfer pricing methods established in Brazil, an improvement to the fixed margins calibration mechanisms is something feasible, in order to better conform to the arm's length standard. In this sense, the information obtained from the country-by-country reports could provide the basis for the Minister of Finance to revise the fixed margins, avoiding the inherent difficulties imposed by Ordinance MF222/08⁵⁸, which simply hinders the revision procedure set forth by law.

⁵⁷ Schoueri. Arm's length, *supra* n. 1, at 690-716.

⁵⁸ Regarding the criticisms of the procedure established in Order MF 222/08 for the revision of the fixed margins, *see* Schoueri. *Preços de transferência*, *supra* n. 27, at 154-155.

Another possible reading would be to accept country-by-country reports as complementary evidence, under the concept of research carried out by a company or institution of notorious technical knowledge or technical publications, specifying the sector, period, the companies surveyed and the margin found, as well as identify, per company, the data collected and worked, under Article 21, II of Law 9.430. In fact, research carried out under the responsibility of an body of worldwide recognition, such as the OECD, would be unquestionably adequate as complementary evidence, and thus the information obtained from the master file, local file and country-by-country report could, in principle, be used for this purpose⁵⁹.

However, the information provided by the taxpayer in the country-by-country report does not refer to individual transactions, and therefore could hardly demonstrate that in a given transaction the arm's length price would be any different. In addition, the OECD decision to keep confidential the information provided in country-by-country reports prevents other taxpayers from having access to information regarding transactions between related parties, the amounts involved and the analysis undertaken to determine the arm's length price in such transactions, which could be relevant to determine an arm's length value for the controlled transactions. If this is the case, there seems to be no room to use the information from country-by-country reports in the consistent application of the current Brazilian transfer pricing regime, nor to assess high transfer pricing risks, as the OECD indicates as one of its appropriate uses.

In any case, the space to use the information obtained through country-by-country reports in transfer pricing assessment seems very limited. This is nonetheless very concerning, as it is very unlikely that the Brazilian tax administration will use the information obtained or exchanged solely for the remaining uses suggested by the OECD (analysis of other BEPS-related risks and for economic or statistical analysis), including the exchange of obtained information obtained with other jurisdictions, enhancing the tax enforcement capability of such states.

However, in the authors' opinion, Brazilian authorities are not allowed to improperly use the information provided by taxpayers in country-by-country reports, for two reasons in particular. First, this would negate any commitment assumed under the BEPS Project, because improper use of the information is expressly rejected by the OECD, and thus it would be illogical to set forth in domestic law country-by-country reporting as "one of the commit-

⁵⁹ Bentolila & Moreira, *supra* n. 31, at 154-156.

ments assumed by Brazil in the BEPS Project” and, at the same time, negate the OECD recommended limitations on the use of information. Indeed, the commitment should be not only to obtain and exchange the obtained information through the country-by-country report, but also to use it in accordance with the guidance regarding appropriate use. Furthermore, the use of the country-by-country report for other purposes – not permitted by the OECD – would be to the detriment of Brazil in the OECD’s analysis of Brazil’s membership application, which was submitted on 29 May 2017⁶⁰.

Moreover, Brazil concluded a multilateral agreement on the exchange of country-by-country reports (Multilateral Competent Authority Agreement on the Exchange of Country-by-Country Reports) on 21 October 2016. This means that the Brazilian tax administration will also be subject to the limitations of section 5 of this multilateral convention, which expressly prohibits the improper use of the information obtained.

Although commonly used when referring to income tax treaties, Klaus Vogel’s “mask” metaphor could also offer an interesting tool to understand how international treaties act on domestic law, including information exchange agreements. According to this theory, international treaties would act as a mask that is placed over domestic law, blocking parts of it. Only the remaining domestic law is applicable, but should be read in accordance with tax treaty provisions⁶¹. Along this line of reasoning, even if Brazilian domestic law (i.e., Normative Instruction RFB 1.681/16) had conferred broad powers on the tax administration to use the information obtained from country-by-country reports (which would be nonetheless debatable), Brazil’s commitment in the multilateral agreement on the exchange country-by-country reports implies that such broad power should – in this case – be interpreted in accordance with the rules of the international treaty, thus restricting its original scope and prohibiting the improper use of the information obtained.

Notably, the same conclusion could be reached from another premise which has been embraced by Brazilian courts (especially the Superior Court of Justice), namely that the provisions of international tax treaties prevail over domestic law, given their specificity⁶². Along this line of reasoning, the provision in the multilateral agreement for the exchange of country-by-country reports limiting the use of information to an “appropriate use”, would act as a special rule, applicable in spite of the absence of a specific limitation provision under domestic law.

⁶⁰ See <<http://www.fazenda.gov.br/noticias/2017/junho/governo-brasileiro-solicita-ingresso-a-ocde-como-pais-membro>>.

⁶¹ Regarding this topic, see L. E. Schoueri. Tax treaty override: a jurisdictional approach. *42 Intertax* 11, 2014, at 693.

⁶² REsp 1.272.897/PE, 1ª Turma, Rel. Min. Napoleão Nunes Maia Filho, j. 19.11.2015, *DJe* 09.12.2015.

5. Conclusion

The recommendations under BEPS Action 13 envisage the effective and consistent implementation of a new transfer pricing documentation standard, and thus an increase in the level of transparency of the activities of MNEs vis-à-vis tax administrations, and aim to ensure that taxpayers act in accordance with the arm's length standard in transfer pricing matters. This standard would create for the tax administration more effective conditions to carry out tax inspection procedures and prevent base erosion and profit shifting.

Like all proposals based on the idea of cooperation – whether among a tax administration and taxpayers, or among the tax administrations of different countries, the success of the measures suggested by the OECD depends to a large extent on a substantial level of adherence by the international community to the development of a consistent network of information available to the tax administration. This also requires mechanisms to ensure taxpayer participation in this process, in order to obtain a high level of voluntary compliance with tax obligations, and thus it is critical that the implementation of country-by-country reporting also be accompanied by legal provisions in each jurisdiction to guarantee (i) the appropriate use of the information, (ii) the confidentiality of information and (iii) a reduction of tax compliance costs.

In this context, it is essential that tax administrations, when implementing the OECD recommendations in BEPS Action 13, commit to use the information obtained in an appropriate manner, thus avoiding the improper use of information, i.e. beyond the purposes of assessing high-level transfer pricing risks and other base erosion and profit shifting-related risks, or of carrying out economic or statistical analysis. The improper use of the information often leads to improper results in the application of domestic law, as the information provided in country-by-country reports is not adequate – or even envisaged – to measure the legal components of a taxable event.

In the authors' opinion, there is no absolute freedom for tax administrations to use this information, whether due to legal provisions or the very nature of country-by-country reports. Even if there is no provision that expressly limits the use of the information obtained from country-by-country reports (as in the Brazilian case), tax administrations are still bound by the concept of appropriate use of the information.